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FILE:



[EAC 01 145 50932]

Office: VERMONT SERVICE CENTER

Date:

FEB 03 2005

IN RE:

Applicant:



APPLICATION:

Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director determined that the applicant had been convicted of a felony and two misdemeanors committed in the United States. He further determined that the applicant failed to establish that he had continuously resided in the United States since February 13, 2001, and had been continuously physically present from March 9, 2001, to the date of filing the application. The director, therefore, denied the application.

On appeal, the applicant requests that his case be reconsidered. He states that he has been sober for more than 40 months.

Although a Form G-28, Notice of Entry of Appearance as Attorney or Representative, has been submitted, the individual named is not authorized under 8 C.F.R. § 292.1 or § 292.2 to represent the applicant. Therefore, the applicant shall be considered as self-represented and the decision will be furnished only to the applicant.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

Felony means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the State as a misdemeanor, and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either:

(1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or

(2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.

The record reflects the following:

1. On June 13, 1997, in New York, the applicant was arrested and charged with Count 1, VTL 1192.3, operating a motor vehicle while under the influence of drug or alcohol; Count 2, VTL 1163.B, illegal signal: less than 100 feet; Count 3, VTL 509.1, operating a motor vehicle by unlicensed driver; and Count 4, VTL 1128.A, failure to stay in single lane. On September 16, 1997, in the District Court of the County of Suffolk, New York, Docket No. [REDACTED], the applicant was convicted of the reduced charge of VTL 1192.1, driving while ability impaired (Count 1), and VTL 509.1 (Count 3). He was sentenced to one-year conditional discharge, fined \$500, and driver's license suspended for 90 days as to Count 1, and fined \$50 as to Count 3. Counts 2 and 4 were dismissed.

2. On September 15, 1999, in the District Court of the County of Suffolk, New York, Docket No. [REDACTED] (arrest date April 9, 1999), the applicant was convicted of VTL 1192.3, operating a motor

vehicle while under the influence of drug or alcohol, a misdemeanor. He was placed on probation for a period of 3 years, and his driver's license was revoked for 6 months.

3. On May 2, 2000, in the District Court of Nassau County, New York, Docket No. [REDACTED] (arrest date July 20, 1998), the applicant was convicted of VTL 1192.3, operating a motor vehicle while under the influence of drug or alcohol, a misdemeanor. He was sentenced to one-year conditional discharge, ordered to pay \$750 fine or spend 15 days in jail, and his driver's license was revoked.

4. The records of the Department of Homeland Security (DHS) database shows that on May 2, 2000, in New York, Docket No. [REDACTED] (arrest date November 18, 1999), the applicant was convicted of PL 215.55, bail jumping in the third degree, a misdemeanor. While the record shows that the applicant was convicted of this offense, the court disposition of this case is not contained in the record.

New York VTL 509 states that a violation of any provision of this section (this includes VTL 509.1) "shall be punishable by a fine of not less than fifty nor more than two hundred dollars, or by **imprisonment for not more than fifteen days**, or by both such fine and imprisonment..." Likewise, VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction, it "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.) Consequently, VTL 509.1 and VTL 1192.1 (No. 1 above) are misdemeanors as defined in 8 C.F.R. § 244.1.

The director noted that the applicant was convicted on September 15, 1999 of violating VTL 1192.3 (driving while intoxicated), and he was again convicted of a second DWI on May 2, 2000. Therefore, the director concluded that this second offense was a felony.

New York Vehicle & Traffic Law, section 1193(c), states that a person who operates a vehicle in violation of 1192.2, 1192.3, or 1192.4, after having been convicted of a violation of 1192.2, 1192.3, or 1192.4, within the preceding ten years, shall be guilty of a class E felony, and shall be punished by a fine of not less than \$1000 nor more than \$5000 or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment.

The record in this case shows that the applicant was twice convicted of PL 1192.3 (Nos. 2 and 3 above). However, the court did not convict the applicant of a felony offense on May 2, 2000 (No. 3 above) pursuant to PL 1193(c), nor was he punished pursuant to PL 1193(c). Furthermore, DHS database shows that the applicant was convicted on September 15, 1999 (No. 2 above) of "DWI: 1st offense," and on May 2, 2000 (No. 3 above) of "DWI: 1st offense." Therefore, this finding of the director is withdrawn, and the convictions in Nos. 2 and 3 above will be considered misdemeanors.

However, the applicant remains ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his record of at least five misdemeanor convictions. There is no waiver available to an alien convicted of a felony or two or more misdemeanors committed in the United States. Therefore, the director's decision to deny the application due to the applicant's criminal record will be affirmed.

The next issue in this proceeding is whether the applicant has establish his continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous

residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

Persons applying for TPS offered to El Salvadorans must demonstrate entry on or prior to February 13, 2001, continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. A subsequent extension of the TPS designation has been granted by the Secretary of the Department of Homeland Security, with validity until March 9, 2005, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The record reflects that the applicant filed his TPS application on March 12, 2001. On January 29, 2002, the applicant was provided the opportunity to submit evidence establishing his continuous residence in the United States since February 13, 2001, and his continuous physical presence from March 9, 2001, to the date of filing the TPS application. He was also requested to submit the final court disposition of each of the reported charges against him. The applicant, in response, provided court documents of his arrests. Accordingly, the director denied the application after determining that the applicant had been convicted of one felony and two misdemeanor offenses, and that the applicant had failed to establish continuous residence and continuous physical presence during the qualifying period.

On appeal, the applicant provides a copy of an employment verification letter from [REDACTED] president of [REDACTED] [REDACTED]. According to [REDACTED] the applicant has been continuously employed by the company from February 1997 to the present. This employment letter, however, has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, [REDACTED] does not provide the address where the applicant resided during the period of his employment or the applicant's duties with the company. Further, the letter is not in affidavit form and is not attested to by the employer under penalty or perjury.

Furthermore, the evidence furnished by the applicant in an attempt to establish his qualifying residence and physical presence in the United States described in 8 C.F.R. § 244.2(b) and (c), does not mitigate the fact that the applicant is statutorily ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his record of at least five misdemeanor convictions. Accordingly, the director's decision to deny the application will be affirmed.

The burden of proof is upon the applicant to establish that she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden. The appeal will be dismissed.

ORDER: The appeal is dismissed.