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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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FILE:  OFFICE: Vermont Service Center DATE: JUL 11 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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application 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 denied the application because he determined that the applicant was ineligible for TPS because the applicant had been convicted of three misdemeanor offenses committed in the United States.

On appeal, counsel, on behalf of the applicant, asserts the applicant's eligibility for TPS.

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

- (a) Is a national of a 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 Temporary Protected Status 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.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

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 misdemeanor.
8 C.F.R. § 244.1.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. Section 212(a)(2)(B) of the Act.

An alien is inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act.

The record reveals the that the applicant was arrested by the Mineola County Police for the following offenses:

- (1) On October 21, 2001, the applicant was arrested for NYS PL 220.03 Criminal Possession Controlled Substance 7th; and,
- (2) On October 21, 2001, the applicant was arrested for NYS PL 1192.2 Driving While Intoxicated (Auto) WM.

Pursuant to a letter dated April 28, 2003, the applicant was requested to submit the final court disposition for the charges as detailed above. In addition, if convicted, the applicant was requested to provide evidence showing whether the charge was classified as a felony or misdemeanor. The applicant was also requested to submit evidence establishing his continuous residence in the United States since February 13, 2001.

The applicant responded to the director's request and submitted the following documents: a certified record from the District Court of Nassau County, New York reflecting that the applicant plead guilty to VTL 509.1, VTL 1192.1, and 240.20; and some evidence in an attempt to establish his continuous residence in the United States during the requisite time period. The director determined that the applicant was ineligible for TPS because the applicant plead guilty to and was convicted of three misdemeanor offenses committed in the United States. Therefore, the director denied the application on July 8, 2003.

On appeal, counsel, on behalf of the applicant, argues that the applicant was not convicted of any misdemeanors or crimes. Counsel further argues that none of the applicant's convictions under New York State Law or Vehicle and Traffic Law were declared to be a misdemeanor or felony; however, are "traffic infractions." Counsel also states that "traffic infractions" are not crimes or misdemeanors under New York State Law or Vehicle and Traffic Law.

A review of the case court disposition (Number [REDACTED] regarding NYSID Number [REDACTED] reflects that the applicant plead guilty to and was charged with the following on August 13, 2002: (1) Operating a Motor Vehicle without a license (VTL 509.1); (2) Operating a Motor Vehicle While Under the Influence of Drug or Alcohol (VTL 1192.2); and (3) Disorderly Conduct (PL 240.20).

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 and "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.)

Disorderly conduct, 240.20 PL, is classified a "violation" by the State of New York. According to section 10.00(3) of the New York State Penal Law, "violation" means an offense that can carry a possible sentence of

imprisonment for up to fifteen days. Consequently, for immigration purposes, these offenses are considered “misdemeanors” as defined by 8 C.F.R. § 244.1.

The applicant is not eligible for temporary protected status because he has been convicted of two or more misdemeanors committed in the United States. 8 C.F.R. § 244.4(a). Therefore, the director’s decision to deny the application for TPS on this ground is affirmed.

Beyond the decision of the director, it also is noted that the applicant has provided insufficient evidence to establish his qualifying continuous physical presence and his continuous residence in the United States during the requisite time periods. 8 C.F.R. § 244.2(b) and (c). Therefore, the application will also be denied for these reasons.

An alien applying for temporary protected status has the burden of proving that he or 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.

ORDER: The appeal is dismissed.