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**U.S. Citizenship
and Immigration
Services**

MI

FILE:

[REDACTED]
[EAC 01 237 53650]

OFFICE: VERMONT SERVICE CENTER

DATE: **JUL 29 2005**

IN RE:

Applicant: [REDACTED]

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 (AAO) 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 the applicant failed to establish that he had continuously resided in the United States since February 13, 2001, and had been continuously physically present in the United States since March 9, 2001. The director also determined that the applicant had failed to submit requested court documentation relating to his criminal record.

On appeal, the applicant submits additional documentation.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant is eligible for TPS 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 § 244.3;
- (e) Is not ineligible under § 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.

- (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 conditions described in paragraph (f)(2) of this section.

The phrase 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.

The phrase 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 phrase brief, casual, and innocent absence, as defined in 8 C.F.R. § 244.1, means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. Subsequent extensions of the TPS designation have been granted, the latest extension valid until September 9, 2006, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he 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 burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his own statements. 8 C.F.R. § 244.9(b).

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.

The applicant filed his initial Form I-821, Application for Temporary Protected Status, with the Immigration and Naturalization Service (INS), now CIS, on July 30, 2001. In support of the application, the applicant submitted the following documentation:

1. A photocopy of his El Salvadoran birth certificate, with English translation;
2. A photocopy of his El Salvadoran personal identification card (*cédula*); and,
3. Photocopies of earnings statements from [REDACTED] Inc, Bohemia, New York, for the one-week pay periods ending November 2, 2000, and November 10, 2000. The applicant’s social security number on the statements is noted as [REDACTED] and his “hire date” is noted as April 24, 2000.

In connection with his application, the applicant was required to appear for fingerprinting. As a result of being fingerprinted, CIS received a report indicating that the applicant had been arrested on October 20, 2002, by the Mineola, New York, County Police and charged with Driving While Intoxicated (Auto), in violation of NYS VTL [REDACTED]

On July 22, 2003, the director requested the applicant to submit evidence establishing his qualifying continuous residence and continuous physical presence in the United States. The applicant was also requested to submit a final court disposition of his arrest, detailed above, and any other charges against him. In response, the applicant provided the following:

4. A document from the Police Department, County of Nassau, New York, indicating that the applicant had been arrested on October 20, 2002 for DWI and Unlicensed Operator;
5. Photocopies of his 2000 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, showing wages of \$1,621.39 from Ocean Avenue Restaurant, Inc., Island Park, New York; and,
6. A photocopy of a letter, dated June 27, 2003, to the applicant from the Long Island Power Authority (LIPA).

The director determined that the applicant had failed to submit sufficient evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite time periods. The director also determined that the applicant had failed to provide the final court disposition of the charges against him. The director denied the application on September 25, 2003.

On appeal, the applicant submits a court record from the First District Court of Nassau County indicating that he pled guilty to violations of VTL [REDACTED] and VTL [REDACTED] on March 10, 2003.

According to the applicable New York State law, violations under [REDACTED] section [REDACTED] and 509.1 are each punishable by jail terms of up to fifteen days. Therefore, each of the applicant's convictions are considered "misdemeanors," pursuant to the definition of that term in 8 C.F.R. § 244.1; consequently, the applicant is ineligible for TPS due to his record of two misdemeanor offenses.

Furthermore, the applicant has not submitted sufficient evidence to establish his qualifying continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001, through the date of filing his Form I-821 on July 23, 2001. No. 5, above is prior to the required dates and No. 6 is beyond the required dates.

It is further noted that there are discrepancies encountered in the evidence presented pertaining to the applicant's use of a Social Security number. On his initial Form I-821, the applicant indicated that he had never used a Social Security number. However, the documentation contained in Nos. 3 and 5 indicates that the applicant used Social Security number [REDACTED] in 2000. These discrepancies have not been explained and call into question the applicant's ability to document the requirements under the statute and regulations. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

It is concluded that the applicant has failed to establish that he has met the criteria described in 8 C.F.R. § 244.2(b) and (c). It is further concluded that the applicant is ineligible for temporary protected status due to his having been convicted of two misdemeanor offenses. Consequently, the director's decision to deny the application for temporary protected status will be affirmed.

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.