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FILE:



[WAC 01 240 59003]

OFFICE: CALIFORNIA SERVICE CENTER DATE: JUN 29 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, California Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 found the applicant had been convicted of two or more misdemeanors.

On appeal, counsel for the applicant submits a brief.

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.

The record reveals the following offenses:

- (1) On February 9, 1987, the applicant was arrested in Los Angeles, California, and charged with inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC, a misdemeanor. (Case [REDACTED] According to the Federal Bureau of Investigations (FBI) identification record contained in the record, the applicant was subsequently convicted of a reduced charge of battery in violation of section 242 PC, also a misdemeanor. In response to the director's request for additional evidence, the applicant submitted a court document from the Municipal Court of San Fernando Courthouse Judicial District, County of Los Angeles, State of California, indicating that the finding of guilt in this case was vacated, a plea of "Not Guilty" was entered, and the charge was dismissed on April 4, 2002.
- (2) On April 14, 1989, the applicant was arrested in Los Angeles, California, and charged with one count of inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC, a misdemeanor, and two counts of battery in violation of section 242 PC, both misdemeanors. (Case [REDACTED] On May 2, 1989, the applicant was convicted in the Municipal Court of San Fernando Courthouse Judicial District, County of Los Angeles, State of California, of Count 1, inflicting a corporal injury on a spouse or cohabitant. Counts 2 and 3 were

dismissed in the furtherance of justice. On December 11, 2001, the finding of guilt on Count 1 was vacated and applicant's conviction was dismissed because he had fulfilled the conditions of his probation.

- (3) On May 23, 1989, the applicant was arrested in Los Angeles, California, and charged with one count of assault in violation of section 240 PC, a misdemeanor; one count of willful cruelty to a child in violation of section 273(a)(2) PC, a misdemeanor; one count of threatening a witness in violation of section 140 PC, a misdemeanor; and, one count of making a terrorist threat in violation of section 422 PC, a misdemeanor. ([REDACTED]) On June 14, 1989, the complaint was amended to include another charge, disturbing the peace in violation of section 415 PC, a misdemeanor, as Count 5, and the applicant was convicted of Count 5. Counts 1 through 4 were dismissed in the furtherance of justice. On December 22, 2003, the finding of guilt was vacated and the charge was dismissed in the Superior Court of California, County of Los Angeles, because the applicant had fulfilled the conditions of his probation.
- (4) On September 29, 1995, the applicant was arrested in Los Angeles, California, and charged with "LICENSE VOL: AUTO REP DEALER" in violation of section 9844.6 B&P, a misdemeanor. On December 6, 1995, the applicant was convicted of this charge in the Municipal Court of Los Angeles, Central Arraignment Judicial District, County of Los Angeles, State of California. (Case [REDACTED])

On appeal, counsel states that the applicant has married his former "live-in girlfriend" since he was convicted of the criminal charges discussed above, and she has since recanted her allegations. Counsel asserts that a misdemeanor is a "petty offense," and that a waiver should be available for TPS applicants who have been convicted of two or more misdemeanors, just as a waiver is available to applicants for lawful permanent residence who have been convicted of two or more misdemeanors.

Nevertheless, the statute and the regulation make no provision for waiver of ineligibility for aliens who have been convicted of two or more misdemeanors. See section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The record indicates that the applicant's misdemeanor convictions were subsequently vacated, and the charges dismissed, because he had fulfilled the conditions of his probation. Nevertheless, for immigration purposes, the fact remains that the applicant has been convicted of three misdemeanors. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the *merits* are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999).

Counsel asserts, at length, that it is irrational "to allow a petty offense waiver for legal permanent residency, but not for temporary protected status." However, it appears that counsel has confused the "petty offense exception" (found at section 212(a)(2)(A)(ii)(II) of the Act) for a "waiver."

Contrary to counsel's characterization of the provision, the "petty offense exception" is not a general amnesty for anyone convicted of misdemeanors; rather, it simply prevents findings of inadmissibility based on one convictions meeting several criteria. Counsel failed to explain how an exception which is available to "an alien who committed only one crime" would apply to the applicant's four misdemeanor convictions.

Moreover, counsel has failed to recognize that the applicant has, in fact, benefited from the petty offense exception that counsel laments is not available to TPS applicants. The applicant was convicted of inflicting corporal injury on his cohabitant (No. 2 above). This offense is a crime involving moral turpitude which would render the applicant inadmissible to the United States under section 212(a)(2)(A)(i)(1) of the Act. However, since the applicant was convicted of a single crime involving moral turpitude and was not sentenced to more than six months incarceration, he is eligible for the "petty offense exception" and was not found inadmissible.

The applicant is ineligible for TPS due to his record of four misdemeanor convictions, detailed above. 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

Beyond the decision of the director, the applicant has not provided evidence of identity. He has also failed to provide sufficient evidence to establish continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. Therefore, the application also must 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.