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

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[REDACTED]

FILE:

[REDACTED]

OFFICE: CALIFORNIA SERVICE CENTER DATE: MAY 06 2008

[WAC 01 186 50237]

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:

[REDACTED]

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 that the applicant had been convicted of two or more misdemeanor offenses.

On appeal, counsel submits a brief and additional evidence.

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 August 24, 2003, the applicant was arrested in San Bernardino, California, and charged with driving under the influence of alcohol or drugs with prior DUI arrests in violation of section 23152(a) VC, a misdemeanor. On October 29, 2003, the applicant pled guilty to this charge in the Superior Court of California, County of San Bernardino. (Case Number [REDACTED])
- (2) In connection with the same arrest, the applicant was also charged with driving under the influence of alcohol with a blood alcohol content of 0.08% or higher in violation of section 23152(b) VC, a misdemeanor. On October 29, 2003, he pled guilty to this charge in the Superior Court of California, County of San Bernardino. (Case Number [REDACTED])

On appeal, counsel contends that the applicant’s conviction of two misdemeanors arose out of a single scheme of criminal misconduct, and, therefore, the applicant has been convicted of only one misdemeanor violation of section 23152 of the Vehicle Code.

While the determination of whether the applicant's crimes arose "out of a single scheme of criminal misconduct" may be relevant to the issue of his *removability* under section 237 of the Act, this determination has no bearing on his *eligibility* for TPS. The applicant was charged with two separate counts and he pled guilty to two separate offenses. Therefore, the applicant has been convicted of two separate and distinct offenses.

Counsel states that the applicant was not sentenced to any jail time and points that "8 C.F.R. § 244.1 states that "any crime punishable by imprisonment for a maximum of five days or less constitute[s] neither a felony nor a misdemeanor." Therefore, counsel contends that the applicant's convictions cannot be considered misdemeanors for immigration purposes.

Pursuant to 8 C.F.R. § 244.1, a *misdemeanor* is a crime committed in the United States that is punishable by imprisonment for a term of one year or less, *regardless of the term such alien actually served*. (Emphasis added.) Furthermore, the regulation cited by counsel does not state that an alien will not be considered to have been convicted of a misdemeanor if he is sentenced to five days or less. Rather, it states that a crime *punishable* by a sentence of five days or less will not be considered a misdemeanor. The two misdemeanor offenses of which the applicant has been convicted, driving under the influence of alcohol and driving with a blood alcohol content of 0.08% or higher are both *punishable* by more than five days of imprisonment. Therefore, counsel's assertion is without merit.

The applicant is ineligible for TPS due to his record of at least two 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 record reveals that the applicant, under penalty of perjury, fraudulently indicated on Part 4, Line 2.a., and d., of his application for TPS that he had not been convicted of two misdemeanors and that he had never been arrested. This misrepresentation of a material fact in an application for immigration benefits would also render the applicant inadmissible under section 212(a)(6)(C) of the Act.

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.