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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:

[EAC 01 156 55472]

Office: VERMONT SERVICE CENTER

Date: NOV 01 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, 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 denied the application because the applicant was convicted of two misdemeanors committed in the United States.

On appeal, counsel submits a statement.

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS if the 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 that 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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define "felony" and "misdemeanor" as:

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 reflects the following offenses:

1. The applicant was charged (Docket [REDACTED] under Section 140.35 of the New York Penal Law (NYPL) in the First District Court of the State of New York for the possession of burglar's tools. On September 22, 1997, a Judge of the First District Court of Suffolk County found him guilty of a reduced charge of disorderly conduct (a violation) under Section 240.20 of the NYPL. The maximum penalty that the applicant faced for this violation was imprisonment not in excess of fifteen days and a fine.
2. The applicant was charged (Docket [REDACTED] under Section 140.10 of the NYPL in the First District Court of the State of New York for criminal trespass. On July 30, 1999, a Judge of the First District Court of Suffolk County found him guilty of a reduced charge of disorderly conduct (a violation) under Section 240.20 of the NYPL. The maximum penalty that the applicant faced for this violation was imprisonment not in excess of fifteen days.

3. The applicant was convicted (Docket #: [REDACTED]) a Judge of the First District Court of Nassau County for operating a motor vehicle without a license (a violation) under Section VTL 509.1 of the NYPL. The maximum penalty that the applicant faced for this violation was imprisonment not in excess of fifteen days.
4. The applicant was arraigned (Docket #: [REDACTED]) under section 140.05 of the NYPL in the First district Court of the State of New York for trespass. On May 20, 1997, a Judge of the First District Court of Suffolk County dismissed the charge.

Counsel argues that when an individual decides to plead guilty to an offense, that person has a reasonable expectation that the offense they plead to is the offense that governs for all circumstances. Counsel states that [REDACTED] pled guilty to a violation, not to a misdemeanor, and would not have pled guilty to a misdemeanor. Counsel further states that to now say he is guilty of a misdemeanor to which he did not plead amounts to a denial of due process. Counsel concludes that under our criminal justice system he is guilty of 2 violations of disorderly conduct and that he was not charged nor convicted nor sentenced under the Federal Regulations.

Disorderly conduct convictions (Numbers 1 and 2 above) are classified as violations by the State of New York. According to section 10.00(3) of the New York State Penal Law, such a violation means an offense that can carry a possible sentence of imprisonment for up to fifteen days. Operating a motor vehicle without a license (Number 3 above) is also classified as a violation by the State of New York. According to section 509(11) of the New York State Vehicle and Traffic Law, such a violation means an offense that can carry a possible sentence of imprisonment for up to fifteen days. Consequently, for immigration purposes, this offense is considered a misdemeanor as defined by 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his record of the three misdemeanor convictions listed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application is 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.