



U.S. Citizenship
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FILE:



OFFICE: CALIFORNIA SERVICE CENTER DATE: NOV 16 2005

[WAC 02 205 53685]

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied, reopened, and denied again by the Director, California 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 initially denied the application on February 5, 2004, after determining that the applicant had abandoned her application by failing to appear for her fingerprint appointment or to request that her appointment be rescheduled.

On March 11, 2004, the applicant filed a motion to reopen and reconsider the denial decision. On motion, the applicant stated that she failed to appear for her fingerprint appointment or request that it be rescheduled because she never received the fingerprint appointment notice.

On May 17, 2004, the director reopened the matter and provided the applicant an opportunity to be fingerprinted. The Federal Bureau of Investigation (FBI) fingerprint report revealed that the applicant had been arrested on two separate occasions.

The director subsequently denied the application again on August 5, 2004, because he found the applicant had been convicted of two misdemeanors.

On appeal, the applicant submits a statement 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 April 13, 1988, the applicant was arrested in Culver City, California, and charged with petty theft in violation of section 484(a) PC, a misdemeanor. The FBI fingerprint report indicates that she was convicted of this charge in the Municipal Court of Culver City, California, and ordered to pay a fine.
2. On November 12, 1996, the applicant was arrested in Culver City, California, and charged with shoplifting. The FBI fingerprint report indicates that the applicant was convicted in the Municipal Court, Culver City, California, of theft in violation of section 484(a) PC, a misdemeanor, and also of

possession of a false government identification or driver's license in violation of section 529.5(c) PC, also a misdemeanor.

On the basis of the information contained in the FBI fingerprint report, the director found that the applicant was ineligible for TPS because she has been convicted of two or more misdemeanors.

On appeal, the applicant asserts that she was not found guilty of the arrest detailed in No. 1 above. She contends that "[t]his case was dismissed by the judge." The applicant submits a document from the Superior Court of California, County of Los Angeles, stating that no record is available regarding the applicant's arrest detailed in No. 1 above because the record had been destroyed.

However, the fact that the applicant's record relating to No. 1 above has been destroyed does not mean that the applicant was not convicted of this charge. Further, the fact that a record has been purged does not mean that the charge was dismissed or that a conviction was vacated. The burden is on the applicant to provide affirmative evidence that the charge has been dismissed. As of this date, the applicant has failed to the final court disposition for No. 1 above.

The applicant further states that, with regard to her arrest on November 12, 1996, "[a]gain I was not found guilty of any misdemeanor[s] and also the case was dismissed." She submits the final court disposition of the charges detailed in No. 2 above. According to this document, the applicant was arrested on November 12, 1996, and charged with one count of theft of property in violation of section 484(a) PC, a misdemeanor, and one count of "PURPORT GOV ISSUED DRIVERS LIC." in violation of section 529.5(c) PC, also a misdemeanor. On December 24, 1996, the applicant was found guilty of both charges in the Municipal Court of Culver Judicial District, County of Los Angeles, State of California. The applicant also presented a document from the Superior Court of California, County of Los Angeles, vacating judgment nunc pro tunc and dismissing the charges on August 13, 2004.

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). In this case, there is no indication in this court document that the judgments were vacated, and the charges dismissed, based on the merits of the case.

The record confirms that the applicant is ineligible for TPS due to her record of two misdemeanor convictions, detailed above. 8 C.F.R. § 244.4(a). There is no waiver available for this ground of inadmissibility. 8 C.F.R. § 244.3(c)(1). Consequently, the director's decision to deny the application for this reason 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.