



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

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FILE:

[REDACTED]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: JAN 30 2007

[WAC 05 228 89571]

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California 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 record reveals that the applicant filed a TPS application during the initial registration period on May 7, 2001, under Citizenship and Immigration Services (CIS) receipt number WAC 01 265 52240. The director denied that application on March 2, 2004, because the applicant was convicted of two or more misdemeanors. On May 5, 2004, the applicant filed an appeal from the denial decision. The director rejected the appeal on June 8, 2004, because the appeal was untimely filed, and the appeal did not meet the requirements of a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5(a)(2) and (3). On May 21, 2004, the applicant again filed an appeal from the director's initial denial decision. The director rejected that appeal also on June 8, 2004, because the appeal was untimely filed, and the appeal did not meet the requirements of a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5(a)(2) and (3).

The applicant filed the current Form I-821, Application for Temporary Protected Status, on May 16, 2005, and indicated that she was re-registering for TPS.

The director denied the re-registration application on March 16, 2006, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

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 indicates that on January 29, 2002, in the Superior Court of California, County of Los Angeles, Case No. [REDACTED] (arrest date January 1, 2002), the applicant (name used: [REDACTED]) was indicted for Count 1, driving under the influence of alcohol/drug, 23152(a) VC, a misdemeanor; Count 2, driving with .08 percent blood alcohol level or more, 23152(b) VC, a misdemeanor; Count 3, unlicensed driver, 12500(a) VC, a misdemeanor; and Count 4, no proof of car insurance, 16028(a) VC, an infraction. On May 15, 2002,

the applicant entered a plea of *nolo contendere* as to each Count 1, 2, 3, and 4. She was placed on probation for a period of 3 years, ordered to pay \$1,154 in fines and costs, to enroll and successfully complete a 3-month licensed first-offender alcohol and other drug education and counseling program, and driving was restricted for 90 days, as to Count 1. The court ordered sentence on Count 2 identical as to Count 1. She was ordered to pay a fine of \$100 as to Count 3. She was ordered to pay a fine of \$200 as to Count 4. The record further indicates that based on a motion filed by the applicant, on March 21, 2005, the court ordered the complaint deemed amended to allege Count 3 as an infraction, and the court dismissed Count 2.

On appeal, counsel asserts that the applicant satisfies the requirements for a Motion to Reopen and merits a favorable decision because a certified minute order demonstrating that the applicant stands convicted of only one misdemeanor, rather than three, was not available in 2004 and could not have been presented with the application for TPS in 2004 because the applicant did not seek post-conviction relief, and such relief was not granted until March 2005; therefore, the new evidence and the applicant's changed circumstances should be considered in making a favorable decision on the present motion. Counsel states that the applicant stood convicted of three misdemeanors and was rendered ineligible for TPS; however, since that date, the applicant has cleared her criminal convictions, all arising out of the same event, and now stands convicted of only one misdemeanor.

The record shows that on March 21, 2005, approximately 3 years after the applicant's misdemeanor convictions, the court amended Count 3 [unlicensed driver, 12500(a) VC] as an infraction, and Count 2 [driving with .08 percent blood alcohol level or more, 23152(b) VC] was dismissed. However, the Board of Immigration Appeals (BIA), in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Therefore, the applicant remains convicted, for immigration purposes, of three misdemeanor offenses (Counts 1, 2, and 3 above).

Furthermore, counsel's assertion that the convictions arose from a single criminal act, is not persuasive. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with four separate counts, she pled *nolo contendere* to four separate offenses, and the court issued four separate sentences. *Black's Law Dictionary*, 314 (5th Ed., 1979), defines the term "count" to mean a separate and independent claim. It also indicates that the term "count" is used to signify the several parts of an indictment, each charging a distinct offense; therefore, the applicant has been convicted of four separate and distinct offenses. Moreover, Congress did not make any special allowances for TPS applicants who had been convicted of multiple counts under the same criminal case.

The applicant was convicted of three misdemeanors and his convictions continue to preclude a favorable finding of eligibility for TPS. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available for this ground of ineligibility. Therefore, the application must be denied for this reason.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.