



U.S. Citizenship
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Services

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FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE:

MAR 05 2007

[WAC 05 233 70080]

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) 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 June 15, 2001, under Citizenship and Immigration Services (CIS) receipt number WAC 01 242 56368. The director denied that application on March 8, 2004, because the applicant had been convicted of two misdemeanors. On March 18, 2004, counsel appealed the director's decision to the AAO. The AAO reviewed the record of proceeding and noted that the Federal Bureau of Investigation (FBI) fingerprint results report indicates that the applicant was convicted of two misdemeanors; namely, force-assault with a deadly weapon not firearm, great bodily injury likely, 245(a) PC, and carrying a concealed weapon on person, 12025(a) PC; however, the applicant had failed to comply with the director's request to submit the final court disposition of his arrest from the court where the hearing took place. Therefore, the AAO dismissed the appeal on December 15, 2004.

An alien shall not be eligible for temporary protected status 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 8 C.F.R. § 244.4(a).

The applicant filed the current Form I-821, Application for Temporary Protected Status, on May 21, 2005, and indicated that he was re-registering for TPS. The director denied the re-registration application on May 23, 2006, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

On appeal, counsel contends that the applicant disagrees with the director's contention that he is precluded from receiving TPS benefits during the current registration period because the applicant was previously denied TPS benefits. He asserts that the denial of a prior TPS application does not preclude an alien from receiving TPS benefits during a subsequent registration period. He further asserts that if an applicant timely applied for TPS during the initial registration period, and timely re-registered during each re-registration period, an applicant is eligible to receive TPS benefits during any subsequent re-registration period; therefore, the applicant is not precluded from receiving TPS benefits solely because his prior TPS application was not granted.

Counsel's assertions are not persuasive. Based upon the initial filing of Form I-821 on June 15, 2001, the applicant was afforded temporary treatment benefits and was issued Employment Authorization upon establishing *prima facie* eligibility¹ for TPS pursuant to 8 C.F.R. § 244.5(b). The director denied the initial TPS application on March 8, 2004, and a subsequent appeal was dismissed by the AAO on December 15, 2004, based on the applicant's failure to submit the actual final court dispositions of his convictions listed on the FBI report. As provided in 8 C.F.R. § 244.13(a), temporary treatment benefits terminate upon a final determination with respect to the alien's eligibility for TPS. Counsel cites "the Attorney General's January 7, 2005 re-designation of El Salvador for TPS." That notice was an extension of TPS, not a re-designation of TPS, and El Salvadorans previously granted TPS who wish to maintain such status and those whose applications remain pending but wish to renew their benefits must re-register. In addition, the applicant must continue to maintain the conditions of eligibility. 8 C.F.R. § 244.17.

¹ Pursuant to 8 C.F.R. § 244.1, *prima facie* means eligibility established with the filing of a completed application for TPS containing factual information that if un rebutted will establish a claim of eligibility under section 244 of the Act.

In this case, the applicant has not previously been granted TPS. Rather, a final determination was made on the applicant's eligibility for TPS on December 15, 2004; therefore, temporary treatment benefits terminated on that date. 8 C.F.R. § 244.13(a). As determined by the director, the applicant was not eligible to re-register for TPS.

Subsequent to the appeal, counsel submits additional evidence and states that the applicant "has since retained counsel to represent him in the criminal action. The record was located. My client was convicted of a misdemeanor offense, and the conviction now vacated." He submits a copy of a certificate of search from the Superior Court of California, County of Fresno, Criminal Department, Firebaugh Division, under Case No. [REDACTED] (Category: Criminal, Felony), indicating that on March 5, 1996, the applicant was indicted for Count 1, assault with a deadly weapon/great bodily injury/force: not firearm; Count 2, carrying a loaded firearm in public; Count 3, carrying a concealed firearm on person; and Count 4, disturbing the peace. On March 21, 2006, a "Notice of motion and motion filed; to vacate conviction points & authorities." In a hearing held on May 2, 2006, the motion to vacate conviction was granted, and the "Court orders order dated 03/12/1996 set aside and vacated conviction (See minute order for details)."

The record indicates that 10 years after the applicant was convicted on March 12, 1996, his conviction(s) was vacated or expunged. Counsel, however, failed to submit the actual court disposition of the applicant's conviction and/or convictions of March 12, 1996, nor did he submit the "minute order for details." While the court record indicates that the applicant was charged with a felony, it is not known whether the applicant was ultimately convicted of a felony and/or a misdemeanor(s).

Nevertheless, the Board of Immigration Appeals, 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, despite the dismissal or expungement, the applicant remains convicted for immigration purposes.

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his convictions of either a felony or two or more misdemeanors. There is no waiver available for this ground of ineligibility. Therefore, the application must be denied for this reason.

The record indicates that on April 10, 1998, in San Francisco, California, the Immigration Judge denied the application for asylum and application for withholding of deportation and granted the applicant voluntary departure until May 11, 1998, with an alternate order of deportation to El Salvador. On June 26, 2001, the Board of Immigration Appeals administratively closed removal proceedings to give the applicant the opportunity to apply for TPS.

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.