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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAY 29 2007

[WAC 06 097 70099]

IN RE:

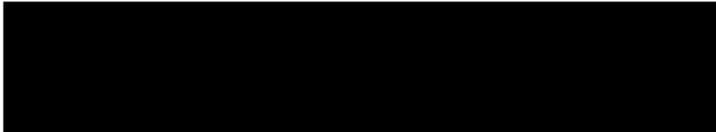
Applicant:



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.

for Robert P. Wiemann, Director
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 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 an initial TPS application on March 27, 2001, under CIS receipt number WAC 01 172 53832. The director denied that application, on November 17, 2003, because the applicant had been convicted, on August 22, 2001, of two misdemeanors, and therefore, was not eligible for TPS. The director noted, specifically, that the applicant was convicted in the Municipal Court of Los Angeles County, State of California, of violating: 1) Section 11357(B) H&S – Possession of Marijuana, a misdemeanor; and, 2) Section 13.18.010 LAO – Drinking alcoholic beverage in public, a misdemeanor. The director further noted that the applicant failed to disclose on his TPS application that statements 2a and 2d were applicable. The record does not reflect that the applicant filed a motion to reopen

The applicant filed a subsequent Form I-821, Application for Temporary Protected Status, on April 30, 2005, under CIS receipt number WAC 05 212 74786, and indicated that he was re-registering for TPS. The director denied that application on December 2, 2005, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS. The record does not reflect that the applicant appealed the director's decision.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on January 3, 2006, under CIS receipt number WAC 06 097 70099, and indicated that he was filing an initial TPS application. The director categorized the application as a re-registration application for TPS, and denied that application on February 21, 2005, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS. As in the initial denial decision, the director also found that the applicant had been convicted, on August 22, 2001, of two misdemeanors, and therefore, was not eligible for TPS. The director also determined that the applicant was not eligible for late initial registration.

If the applicant is filing an application as a re-registration, a previous grant of TPS must have been afforded the applicant, as only those individuals who are granted TPS must register annually. In addition, the applicant must continue to maintain the conditions of eligibility. 8 C.F.R. § 244.17.

In this case, the applicant has not previously been granted TPS. Therefore, he is not eligible to re-register for TPS. Consequently, the director's decision to deny the application will be affirmed.

Although the applicant indicated that he was attempting to file a late initial application for TPS instead of an annual re-registration, there is no evidence in the file to suggest that the applicant is eligible for late registration for TPS under 8 C.F.R. § 244.2(f)(2). The director's decision to deny the application for this reason is also affirmed.

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.

On appeal, counsel asserts that the applicant’s marijuana conviction falls under the Federal First Offenders Act, 18 U.S.C. Section 3607 (“FFOA”), and therefore, the conviction may no longer affect the applicant’s eligibility for TPS. Counsel further asserts that the applicant is eligible for expungement, and cites the 9th Circuit decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) in which the court said that first offense simple possession drug convictions that have been expunged under the Federal First Offender Act or state rehabilitative statute do not constitute convictions for immigration purposes.

However, there is no evidence of record to indicate that the applicant’s drug conviction has been expunged. The court record clearly shows that the applicant was convicted of two misdemeanors, described above. Citizenship and Immigration Services (CIS) is required to rely on the court record as it stands, and cannot make determinations of guilt or innocence based on other than that record. Furthermore, CIS may only look to the judicial records to determine whether the person has been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); and *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

As noted by the director, the court disposition record reveals that on August 22, 2001, the applicant was convicted of two misdemeanors. The applicant is ineligible for TPS due to his record of two misdemeanor convictions, detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Therefore, the application will also be denied for this reason.

It is also noted that the record reveals that the applicant’s California Department of Motor Vehicles Driver License/Identification Card Information Request results report reflects that, on July 29, 1998, the applicant was convicted of violating Section 12500A VC (Docket/No. EJ70437); and Section 16028A VC. The report

reflects misdemeanor convictions. The AAO notes that the final court dispositions are not in the record of proceeding. CIS must address these convictions in any future proceedings.

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.

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ORDER: The appeal is dismissed.