



U.S. Citizenship
and Immigration
Services

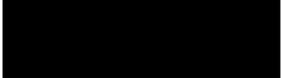
PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

M 1



FILE:



OFFICE: VERMONT SERVICE CENTER

DATE: JAN 09 2008

[EAC 01 188 54020]

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 sustained and the application will be approved.

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 had failed to: (1) submit final court documentations relating to his criminal record; and (2) establish that he had continuously resided in the United States since February 13, 2001.

On appeal, counsel 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 alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS 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.

The first issue in this proceeding is whether the applicant has been convicted of a felony or two or more misdemeanors.

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).

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.

Based on the Federal Bureau of Investigation (FBI) fingerprint results report, contained in the record of proceeding, the applicant was requested on September 22, 2004, to submit the final court dispositions of the arrests listed on the report, including final dispositions of every charge against him. The applicant failed to respond; therefore, the director denied the application on December 8, 2004.

On appeal, counsel submits the following court documents:

- (1) On December 12, 1996, the applicant was arrested for domestic assault. On April 25, 1997, under Docket No. [REDACTED] the Arlington, Juvenile and Domestic Relations District Court, Virginia, entered a "nolle prosequere" on the case.
- (2) On May 27, 1999, in the Falls Church General District Court, Case No. [REDACTED] the applicant was charged with failure to appear (contempt of court), Virginia Code § 18.2-456. On August 25, 1999, the court dismissed the case.
- (3) On August 25, 1999, in the Falls Church General District Court, Case No. [REDACTED] the applicant was convicted of disorderly conduct, Virginia Code § 22-43, a misdemeanor. He was placed on

probation for a period of 12 months and ordered to pay \$50 in fines and costs. On August 23, 2000, the case was dismissed.

The court record (No. 3 above) indicates that on August 23, 2000, approximately one year after the applicant's conviction, the case was dismissed. 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, the applicant remains convicted, for immigration purposes, of the misdemeanor offense despite the dismissal of the conviction.

The record in this case, however, shows that the applicant was convicted of only one misdemeanor offense. Therefore, he is not ineligible for TPS based on this conviction, pursuant to section 244(c)(2)(B)(i) of the Act. The applicant has overcome this finding of the director.

The next issue in this proceeding is whether the applicant has established continuous residence in the United States since February 13, 2001.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

Persons applying for TPS offered to El Salvadorans must demonstrate that they have continuously resided in the United States since February 13, 2001, and that they have been continuously physically present in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until March 9, 2009, upon the applicant's re-registration during the requisite time period.

The record shows that the applicant filed his TPS application on April 24, 2001. The director determined that the record did not indicate that the applicant had continuously resided in the United States since February 13, 2001, and denied the application.

On appeal, counsel asserts that the applicant has been residing and been physically present in the United States since 1992. He submits:

1. A letter dated December 28, 2004, from Wachovia Bank indicating that the applicant had a checking account that was opened on June 15, 1999 and closed on November 23, 2001, and a savings account that was opened on July 18, 2001 and closed on April 30, 2002.
2. A copy of a statement from First Union Bank "Express Checking" indicating transactions made by the applicant during the period from January 25, 2001 to February 21, 2001.

3. A copy of Form 1040, Income Tax Return, for 2001.
4. A copy of the applicant's Immunization Record for vaccinations received in 1992 and 1999 at the Fairfax County Health Department.
5. Copies of Fairfax County Public Schools and Arlington Public Schools showing the applicant's attendance and withdrawals during 1992 through 1997.
6. A copy of his marriage certificate dated September 21, 1995; and a copy of his daughter's Commonwealth of Virginia birth certificate dated June 2, 1995.

The evidence furnished by the applicant on appeal, in conjunction with other evidence included in the record of proceeding, is sufficient to establish that the applicant has met the continuous residence requirements described in 8 C.F.R. § 244.2(c). Additionally, the applicant has also met the continuous physical presence requirements described in 8 C.F.R. § 244.2(b). Therefore, the director's decision will be withdrawn and the application will be approved.

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 met this burden.

ORDER: The appeal is sustained and the application is approved.