

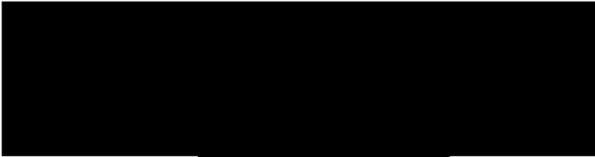
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FILE:

Office: VERMONT SERVICE CENTER

Date: JAN 30 2008

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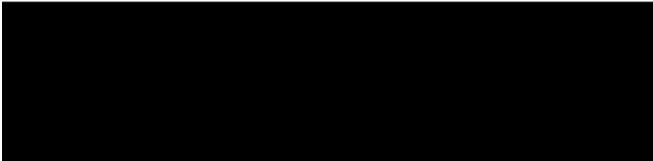
IN RE:

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, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn. The appeal will be sustained.

The applicant claims to be 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 director denied the application because the applicant failed to: 1) establish he had continuously resided in the United States since February 13, 2001; 2) establish he had been continuously physically present in the United States since March 9, 2001; and 3) provide the final court dispositions regarding his criminal history.

The applicant's appeal from the denial of his application was dismissed by the AAO on October 2, 2006, as the AAO concurred with the director's findings. On motion to reopen, counsel reasserts the applicant's claim of eligibility for TPS and submits court documentation as well as evidence to establish the applicant's residence and physical presence in the United States during the requisite periods.

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.

The phrase *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.

The phrase *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.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The designation of TPS for El Salvadorans has been extended several times, with the latest extension valid until March 9, 2009, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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. 8 C.F.R. § 244.1.

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The first issue the AAO will review is the applicant's criminal history.

The FBI record dated November 19, 2003, indicates that the applicant was arrested by the Fairfax County Police in Fairfax, Virginia for grand larceny, a felony, and on May 12, 2003, by the Manassas Police Department in Prince William County, Virginia for assault and battery upon a family member, a misdemeanor.

On motion, counsel submits the court documentation for the applicant's arrest on May 10, 1997, which reflects on June 16, 1997, the applicant pled guilty to a Class 1 misdemeanor charge of petit larceny, a violation of Virginia Code Section 18.2-96. The applicant was sentenced to serve 180 days in jail of which 170 days were suspended. Case no. [REDACTED]

On motion, counsel also submits the court disposition for the applicant's arrest on May 12, 2003, which reflects on July 1, 2003, the prosecutor entered a *nolle prosequi* for the charge of assault and battery upon a family member, a violation of Virginia Code Section 18.2-57.2. Case no. [REDACTED]

The applicant's failure to submit the requested final court dispositions has been overcome on motion. The applicant stands convicted of one misdemeanor. This single misdemeanor conviction does not render the applicant ineligible or inadmissible for TPS pursuant to 8 C.F.R. §§ 244.3(a)(c)(1) and 244.4(a). Accordingly, the director's finding in this matter will be withdrawn.

The second issue the AAO will review is the applicant's failure to establish continuous residence and physical presence in the United States during the requisite period.

On motion, counsel submits the following documents to establish the applicant's continuous residence in the United States since February 13, 2001, and his physical presence in the United States since March 9, 2001.

1. A court receipt from the Arlington General District Court in Virginia dated February 21, 2001.
2. Several earnings statements from employer, [REDACTED], for the periods ending April 28, 2001, December 1, 2001, January 5, 2002, December 14, 2002, January 25, 2003, December 27, 2003, and January 10, 2004.
3. Wage and tax statements from [REDACTED] c. for 2001 through 2004.
4. Individual Income Tax Returns for 2001 through 2004.
5. An additional copy of the applicant's marriage certificate issued on May 29, 2001.
6. A lease agreement entered into on September 1, 2001, between the applicant and [REDACTED] Apartments in Virginia. The lease agreement was signed by the applicant on August 10, 2001.
7. A lease agreement entered into on July 26, 2003, between the applicant and the lessor.
8. A Settlement Statement from Great Alliance dated February 25, 2005.

On motion, counsel has provided sufficient evidence to establish the applicant's continuous residence and physical presence in the United States during the requisite period. The applicant has, thereby, established that he has met the criteria described in 8 C.F.R. §§ 244.2(b) and (c).

The final issue is the discrepancy pertaining to the use of a social security number in 1998. At the time of filing his TPS application, the applicant indicated that he had not used a social security number. However, he provided an earnings statement for the period ending October 17, 1998, from [REDACTED], in [REDACTED], in

Elmwood Park, New Jersey, which listed a social security number. Counsel, on motion has not addressed this inconsistency.

A further review of the TPS application reflects the applicant did not *deny* that he never used a social security, rather he left the section blank and this could have been a simple error. In addition, the applicant submitted a Virginia driver's license issued on August 11, 1998, and in obtaining said license, the applicant had to provide a social security number. When something is to be established by a preponderance of evidence, the applicant only has to establish that the asserted claim is probably true. Under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989),

The record does not reflect any grounds that would bar the applicant from receiving TPS. Therefore, the director's decision will be withdrawn and the application will be approved. The applicant is eligible for employment authorization under 8 C.F.R. § 274a.12(a)(12).

An alien applying for TPS 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 order of October 2, 2006, dismissing the appeal is withdrawn. The appeal is sustained. The application is reopened and the director's denial of the TPS application is withdrawn. The application is approved.