

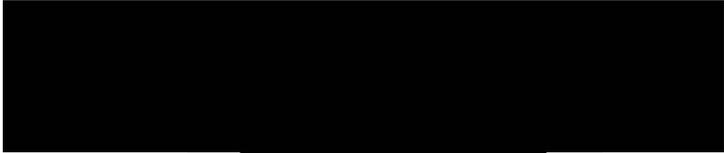
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U.S. Department of Homeland Security
20 Mass. Avenue, N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: VERMONT SERVICE CENTER

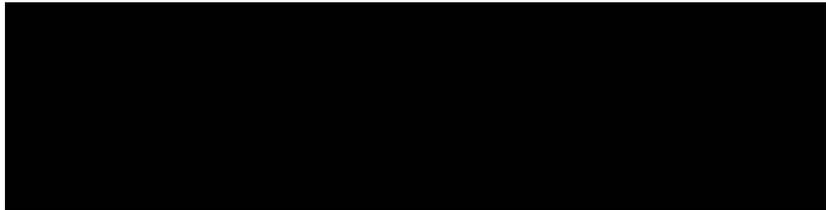
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INRE:

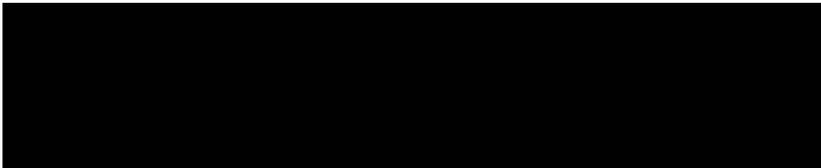
Applicant:



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.

A handwritten signature in black ink, appearing to read "R. P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Yermont Service Center (YSC) approved and subsequently withdrew the approval of the initial application. The Administrative Appeals Office (AAO) dismissed the applicant's appeal and a subsequent motion to reopen. The AAO will reopen the application *sua sponte* and sustain the appeal.

The applicant is a native and citizen of El Salvador who seeks Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.c. §1254.

The director withdrew the approval of the application, finding that the applicant had been convicted of a felony in the United States. The AAO dismissed the applicant's appeal of that withdrawal.

On motion, counsel for the applicant submits an amended disposition of the applicant's criminal conviction. Counsel asserts that, since the applicant was only convicted of a disorderly persons offense, the applicant is eligible for TPS.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

If the applicant has satisfied the other requirements for TPS, the initial application can be reopened *sua sponte*, in accordance with 8 C.F.R. 103.5(a)(5).

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.

An alien shall not be eligible for TPS 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 reflects that on September 30, 2002, in Irvington Municipal Court, in Irvington, New Jersey, the applicant was charged with the following:

1. 2C:12-IB(3), aggravated assault;
2. 2C:39-5D, unlawful possession of a weapon;
3. 2C:39-4D, possession of a weapon for unlawful purposes; and
4. 2C:29-2A, resisting arrest.

New Jersey state law does not label offenses as felonies or misdemeanors. In New Jersey, what is generally referred to as a felony in other jurisdictions is called a crime, and what is generally referred to as a misdemeanor in other jurisdictions is called a disorderly persons offense. A disorderly persons offense is punishable by no more than six months imprisonment. A disorderly persons offense is a misdemeanor for immigration purposes, since it is punishable by imprisonment for a term of less than one year, regardless of the term such alien actually served. See 8 C.F.R. § 244.1.

In response to the director's intent to withdraw approval of the applicant's application, the applicant submitted a final court disposition of these charges that stated that the judge found the applicant guilty of 2C:29-5D, Unlawful Possession of a Weapon. In New Jersey, this conviction is classified as a fourth degree crime and is punishable by up to 18 months imprisonment. Under 8 C.F.R. § 244.1, this crime would be classified as a felony and would make the applicant ineligible for TPS. Therefore, the director withdrew approval of the applicant's initial TPS application.

On appeal, counsel for the applicant asserted that the applicant had not been convicted of a felony, but of a misdemeanor. Counsel submitted a hearing transcript that suggested that the prosecutor had lowered the charge of Unlawful Possession of a Weapon to a disorderly persons offense. The AAO concluded that the court disposition showed a felony conviction and that the hearing transcript did not contradict the disposition.

On motion, counsel submitted an amended court disposition demonstrating that the Unlawful Possession of a Weapon charge was lowered to a disorderly persons offense and that the municipal court judge found the applicant guilty of one disorderly persons offense.

The AAO dismissed the motion in error and withdraws its previous decision. The application will be reopened *sua sponte*, in accordance with 8 C.F.R. 103.5(a)(5). The record reflects that the applicant has one conviction for an offense that is the equivalent of a misdemeanor for immigration purposes. Therefore, under the regulations, the applicant's criminal record does not make him ineligible for TPS.

The applicant has submitted sufficient evidence to establish that he has not been convicted of a felony or two misdemeanors. He, therefore, is not precluded from TPS eligibility pursuant to Section § 244(c)(2)(B)(i) of the Act and 8 C.P.R. § 244.4(a).

An alien applying for TPS has the burden of proving that he or she meets the requirements listed 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. The initial application is reopened, *sua sponte*, and the application is approved.