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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: OCT 01 2009

[consolidated therein]
[consolidated therein]

[EAC 07 012 70081]

IN RE:

Applicant:

[REDACTED]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the Vermont Service Center. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont 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 director determined that the applicant failed to establish that he was eligible for filing his TPS application after the initial registration period from March 9, 2001 through September 9, 2002. In addition, the director found that the applicant had been convicted of at least one felony in the United States. The director, therefore, denied the application.

On appeal, counsel for the applicant claims that the order to vacate the guilty plea was granted and that the applicant qualifies for late initial registration because he had a pending Form I-687, Application for Status as a Temporary Resident.

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 as 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 section 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.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of 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 granted until September 9, 2010, upon the applicant's re-registration during the requisite period.

The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. The record shows that the applicant filed this application on October 5, 2006. The applicant's initial TPS application was filed on September 6, 2002 under receipt number EAC 02 285 51364. However, that application was denied on June 23, 2004, because of the applicant's felony conviction. The applicant appealed the director's decision on August 10, 2004, and the appeal was rejected as untimely on September 14, 2004. The applicant filed a motion to reopen on December 21, 2004, which was dismissed as untimely by the Director, Vermont Service Center, on January 24, 2005. The applicant submitted a subsequent initial TPS application on March 4, 2004 under EAC 04 125 53791. That application was denied on June 23, 2004, because the applicant failed to establish his eligibility for late initial registration and because of his felony conviction.

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 United States Citizenship and Immigration Services (USCIS). 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).

The first issue is the whether the applicant has establish eligibility for late registration.

The record of proceeding confirms that the applicant filed this application after the initial registration period had closed. To qualify for late registration, the applicant must provide evidence that during the initial registration period from March 9, 2001 through September 9, 2002, he fell within the provisions described in 8 C.F.R. § 244.2(f)(2) (listed above). If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for the late initial registration. 8 C.F.R. § 244.2(g).

In denying the instant application on April 3, 2007, the director informed the applicant that he had failed to establish his eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2).

On appeal, counsel states in pertinent part:

In addition, please note that the Applicant can qualify for late initial registration for Temporary Protective (sic) status since the applicant has had pending, since 1991. Specifically, the applicant can qualify under the late initial filing procedure because his Application for Temporary Residency (sic) was pending as of the initial filing period for Temporary Protected status of March 9, 2001 and September 9, 2002.

The record reflects that the applicant filed a Form I-687, Application for Status as a Temporary Resident, on February 12, 1991. The VSC director denied the Form I-687 application on January 24, 2005 due to the applicant's felony convictions. The applicant filed an appeal which was terminated by the VSC director because the applicant had not filed the appeal on the correct form. The AAO rejected the applicant's subsequent appeal as untimely on October 18, 2006. While the applicant's Form I-687 was pending during the initial registration period; in order to qualify for late TPS registration, an applicant must file the Form I-821 within 60 days of the termination of the condition stated in 8 C.F.R. 244.2(g) above. This application was not filed until October 5, 2006. Consequently, the applicant is not eligible for late registration on this basis.

Furthermore, a TPS application is not a change of status application. Change of status, by regulation, is limited to a change of one nonimmigrant classification to another. TPS does not render nonimmigrant status to the applicant. Consequently, it does not qualify as a change of status application. Having an application for TPS during the initial registration period does not render an alien eligible for late registration under 8 C.F.R. § 244.2(f)(2).

The applicant has not submitted any evidence to establish that he has met any of the criteria for late registration described in 8 C.F.R. § 244.2(f)(2). Consequently, the director's decision to deny the application for TPS will be affirmed.

The second issue in this proceeding is whether the applicant is ineligible for TPS because of his felony conviction.

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.

The FBI report reflects that on December 10, 1994, the applicant was arrested by the Metro-Dade, Florida Police Department and subsequently charged with battery on a firefighter, disorderly intoxicated, and resisting an officer with violence. The court documentation reflects that on June 4, 1997, the applicant was convicted of one count of battery on a firefighter, a violation of Florida statute 784.07, a 3rd degree felony and resisting an officer with violence, a violation of Florida statute 843.01, a 3rd degree felony. The remaining charge was dismissed.

In denying the application, on April 3, 2007, the applicant was informed that he was ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act because of his felony conviction.

On appeal, counsel states that the order to vacate the guilty plea was granted and a new trial was set for October 1, 2007, and submits a copy of the order dated May 25, 2007, issued by the court in this matter. Consequently, the felony convictions are no longer valid. However, more than two years later, no further evidence has been submitted by the applicant, including the final disposition of the arrest on December 10, 1994. The applicant is ineligible for TPS because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The record reflects the following additional offenses in the state of Florida:

- (1) On February 16, 1995, the applicant was arrested by the Metro-Dade, Police Department for driving under the influence. On March 31, 1995, the applicant was convicted of this misdemeanor offense, a violation of Florida statute 316.93. [REDACTED]
- (2) On May 30, 1995, the applicant was arrested by the Metro-Dade, Police Department for obstructing by disguised. The charge was dismissed the same day. [REDACTED]
- (3) On June 2, 1995, the applicant was arrested by the Metro-Dade, Florida Department for disorderly intoxication. On June 5, 1997, the applicant was convicted of this misdemeanor offense, a violation of Florida statute 856.011. [REDACTED]
- (4) On or about June 2, 1997, the applicant was arrested and subsequently charged with disorderly intoxication. On June 5, 1997, the applicant was convicted of this misdemeanor charge, a violation of Florida statute 856.011. [REDACTED]
- (5) On January 30, 2000, the applicant was arrested by the Hialeah Police Department for driving under the influence, a violation of Florida statute 316.93. On July 17, 2000, the applicant was convicted of this misdemeanor offense and sentenced to serve ten days in the Dade County Jail. On July 1, 2003, the applicant was arrested under bench warrant [REDACTED] On July 31, 2003, the applicant surrendered to the Dade County Jail. [REDACTED]

The applicant is ineligible for TPS due to his misdemeanor convictions detailed above. Section 244(c)(2)(B)(i) of the Act; 8 C.F.R. § 244.4(a).

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.

ORDER: The appeal is dismissed.