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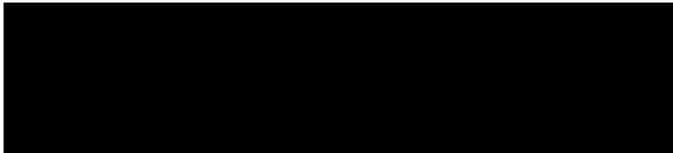
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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

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FILE:

[EAC 02 057 51450]

OFFICE: VERMONT SERVICE CENTER

DATE: APR 12 2010

IN RE:

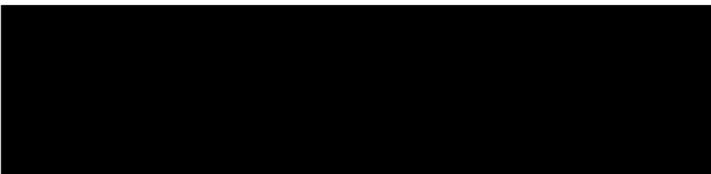
Applicant:



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 Vermont Service Center. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The case was remanded by the Chief, Administrative Appeals Office (AAO). The case was subsequently denied again by the director. It is now on appeal again before the AAO. The appeal will be dismissed.

The applicant claims to be 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 he found the applicant had been convicted of two or more misdemeanors committed in the United States.

On appeal, counsel contends that the applicant has been convicted of just one misdemeanor and that his other convictions were only violations under New York State law.

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 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.

El Salvadoran nationals applying for TPS 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 initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. The record shows that the applicant filed his initial Form I-821, Application for Temporary Protected Status, on December 3, 2001.

The burden of proof is upon the applicant to establish that he or she meets the requirements for TPS. Applicants shall submit all documentation as required in the instructions or requested by USCIS. *See* 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. *See* 8 C.F.R. § 244.9(b).

The initial issue on appeal is whether the following New York State offenses should constitute disqualifying “misdemeanor” convictions in determining TPS eligibility under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a):

- “Traffic infractions” as defined at N.Y. PENAL LAW § 10.00(2) (referencing N.Y. VEH. & TRAF. LAW § 155), and
- “Violations,” as defined at N.Y. PENAL LAW § 10.00(3).¹

On April 10, 2008, the director denied the application on the ground that the applicant had been convicted of three misdemeanors in the State of New York, including:

- January 17, 1992 – “driving while intoxicated” in violation of Vehicle and Traffic Law (VTL) section 1192.3.
- October 16, 2002 – “driving while ability impaired” in violation of VTL section 1192.1.
- November 30, 2005 – “disorderly conduct” in violation of Penal Law (PL) section 240.20.7.

The director determined that the applicant had been convicted of two or more misdemeanors committed in the United States and was therefore ineligible for TPS under section 244(c)(2)(B)(i) of the Act.

On appeal counsel asserts that the applicant has only been convicted of one misdemeanor – driving while intoxicated – that his other convictions were for “violations” under state law, not misdemeanors, and thus do constitute crimes for TPS purposes. In counsel’s view, therefore, the applicant is not ineligible for TPS.

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).

Pursuant to the Memorandum for Service Center Operations and Administrative Appeals Office Leadership dated January 17, 2010, for purposes of the TPS statute and regulations, United States Citizenship and Immigration Services (USCIS) determines that only one of the applicant’s New York State convictions – for driving while intoxicated – constitutes a misdemeanor. Accordingly, the AAO agrees with counsel that the applicant is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

¹ Pursuant to section 10.00(3) of the New York State Penal Law, traffic infractions committed in the State of New York are not considered “crimes” under state law, do not constitute misdemeanors or felonies, and may not be punished by more than 15 days of imprisonment. *See* N.Y. PENAL LAW, § 10.00(2)-(4) and (60); N.Y. VEH. & TRAF. LAW §§ 155, 1800(b).

However, the applicant must also establish his continuous physical presence and continuous residence in the United States since the dates indicated in section 244(c)(1)(A)(i) and (ii) of the Act, and 8 C.F.R. § 244.2(b) and (c).

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.

In a letter to the applicant and counsel dated December 17, 2007, the director advised that the evidence of record did not show the applicant to have been continuously physically present in the United States from March 9, 2001 to the date the TPS application was filed (December 3, 2001) and continuously resident in the United States since February 13, 2001. In response counsel submitted the following documentation:

- An affidavit by [REDACTED] a resident of Spring Valley, New York, dated February 4, 2008, stating that she and the applicant have been living together since 1989, that she paid all the rental bills since she had legal status, and that the applicant paid his share to her.
- A series of photocopied rental receipt statements dated in 2000 and 2001, some on a standard form and others written in longhand, identifying [REDACTED] as the payor.
- An affidavit by [REDACTED] who identifies himself as the general manager of [REDACTED] in Brooklyn, New York, dated January 23, 2008, stating that the applicant was employed by the company from January 2000 to February 2001.
- An affidavit by [REDACTED] who identifies himself as [REDACTED] in Chestnut Ridge, New York, dated January 28, 2008, stating that the applicant has been employed by the company since April 15, 2002.
- A series of photocopied Western Union money transfer receipts – dated October 22, 2000; January 26, 2001; February 3, 2001; March 26, 2001; and November 9, 2001 – identifying the applicant as the sender to a recipient in El Salvador.
- A photocopied merchandise receipt on the letterhead of [REDACTED] in New York City, identifying the applicant as the purchaser of some electronic equipment.

The foregoing documentation does not establish the applicant's continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States from March 9, 2001 until the date of filing, as required for El Salvadoran nationals applying for TPS.

The affidavit by [REDACTED] (or [REDACTED]) is not accompanied by any documentary evidence – such as photographs, letters, or records of any kind – showing that the applicant had a live-in arrangement with the affiant, or even knew her, from the time period of early 2001 to the present. The photocopied rental receipts do not identify any residential address, and they do not identify the applicant as either a payor of rent or a resident of the premises.

As for the affidavits by [REDACTED] and [REDACTED], the regulation at 8 C.F.R. § 244a.9(a)(2)(i) states that letters from employers attesting to an applicant's employment must: (A) provide the applicant's address(es) at the time of employment; (B) identify the exact period(s) of employment; (C) indicate periods of layoff; and (D) identify the applicant's duties. The [REDACTED] and [REDACTED] affidavits do not comply with requirements (A) and (D) because they do not provide the applicant's address at the time of employment and do not identify the applicant's duties. Nor do the letters cover the time period of February 2001 to April 2002.

With regard to the Western Union receipts, it is difficult to judge their authenticity since no originals have been submitted. The photocopies in the record appear to contain scattered notations in longhand, but no other official markings. None of the receipts bears a signature by the applicant in the designated space on the form, and some of the receipts also lack a signature from a Western Union agent in the designated space.

Finally, the merchandise receipt from [REDACTED] identifying the applicant as the purchaser of some electronic equipment, contains only longhand entries and the date appears to have been altered to reflect issuance on May 8, 2001. It bears no signature of a store representative, or any date stamp or official marking of the store. In short, there is no way to verify that the receipt was actually prepared by a store employee and that it dates from May 8, 2001.

For the reasons discussed above, the AAO determines that the documentation of record is not persuasive evidence that the applicant was continuously physically present in the United States from March 9, 2001, and continuously resident in the United States from February 13, 2001, as required for TPS applicants from El Salvador under 8 C.F.R. § 244.2(b) and (c). Accordingly, the application will be denied on those grounds.

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 failed to meet that burden.

ORDER: The appeal is dismissed.