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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

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: JUL 06 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 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 he had: 1) continuously resided in the United States since February 13, 2001; and 2) been continuously physically present in the United States since March 9, 2001. The director also determined that the applicant had failed to establish his nationality and was also ineligible for TPS because of a felony conviction. The director, therefore, denied the application.

On appeal, counsel for the applicant states that the applicant's felony was reduced to a misdemeanor and then expunged. The applicant also submits evidence in an attempt to establish his nationality and continuous residence and continuous physical presence.

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 Secretary, Department of Homeland Security (Secretary), is eligible for TPS 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 Secretary 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.

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.

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 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.

An alien shall not be eligible for temporary protected status under this section if the Secretary 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. 8 C.F.R. § 244.1.

The record reveals the following offenses:

- (1) On October 17, 1996, the applicant was arrested by the Los Angeles, California Police Department for "Sell/Furnish/etc. marijuana/hashish over one ounce, a violation of section 11360 H&S." On January 2, 1997, the charge of section 11366 H&S, "Keep Place to Sell Controlled Substance" was added. On the same date, the applicant pled nolo contendere to the charge of violating section 11366 H&S, a felony. The charge of violating section 11360 H&S was dismissed. (Docket # [REDACTED])

The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. The applicant filed his initial TPS application [REDACTED] on April 5, 2002. That application was denied on June 17, 2004 because of the above felony conviction. The applicant filed the current application on October 15, 2008.

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 and second issues in this proceeding are whether the applicant has established his continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001.

The director determined that the applicant had failed to establish continuous residence and continuous physical presence in the United States during the requisite periods. Therefore, the director denied the application. On appeal, the applicant submits:

1. A copy of an El Salvadoran passport issued in Los Angeles, California on October 16, 2002.
2. Copies of a statement from [REDACTED] a Personal Retirement Performance Report for the period April 1, 2005 through June 30, 2005; an Achievement Award dated June 23, 2003; a Certificate of Live Birth indicating the birth of his daughter on April 22, 2005; a Buyers/Borrowers Closing Statement dated May 27, 2005; and 2001 - 2007 tax documents.

[REDACTED] stated that his company has employed the applicant since January 11, 1999. However, this statement has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, the affiant does not provide the address where the applicant resided during the period of his employment. It is further noted that [REDACTED] did not indicate the applicant's duties of employment. The tax documents indicate the applicant was employed at some point during those years, however, these documents alone cannot establish the applicant maintained continuous residence since February 13, 2001 and continuous physical presence from March 9, 2001 to the filing date of the TPS application. The remaining evidence only serves to establish the applicant's continuous residence and continuous physical presence since October 2002.

The applicant has not submitted sufficient evidence to establish his qualifying residence since February 13, 2001, and his continuous physical presence in the United States from March 9, 2001 to the date the application was filed. He has, therefore, failed to establish that he has met the criteria described in 8 C.F.R. § 244.2(b) and (c). Consequently, the director's decision to deny the application for TPS on these grounds will be affirmed.

The third issue in this proceeding is whether the applicant has established his nationality. As stated above, the applicant submitted a copy of his passport on appeal. The passport establishes the applicant's nationality and identity. Therefore, this basis for the director's decision will be withdrawn.

The fourth issue in this proceeding is whether the applicant is ineligible for TPS because of a felony conviction. USCIS records indicate that the applicant was convicted of violating Section 11366 H&S, a felony. As stated above, the director denied in part the applicant's initial TPS application because of this felony conviction. On December 18, 2007, more than ten years after the applicant's felony conviction, the court amended the charge as a misdemeanor pursuant to section 17(b)(5) PC, the conviction was set aside, a plea of not guilty was entered and the case was dismissed pursuant to 1203.4 PC. The director determined that the expungement was a state rehabilitative expungement and, for immigration purposes, remained a felony conviction.

On appeal, the applicant states that prior to the expungement, the conviction was reduced to a misdemeanor. However, in this applicant's case, the final court disposition states that the applicant pled *nolo contendere* to violating section 11366 HS. If the reduction was a result of a rehabilitative action by the court based on the applicant's completion of the terms of his sentencing and probation, the court's action is generally not recognized in immigration proceedings.

The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999). In this case, there is no evidence in the record to suggest that the applicant's drug conviction was expunged because of an underlying procedural defect in the merits of the case and, thus, the felony conviction remains valid for immigration purposes.

The applicant is ineligible for TPS due to his felony conviction. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the TPS application on this ground will be affirmed.

The applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug conviction. There is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of thirty grams or less of marijuana. *See* section 244(c)(2)(A)(iii)(II) of the Act.

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 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 this burden.

ORDER: The appeal is dismissed.