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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
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[REDACTED]

FILE:

[REDACTED]

OFFICE: VERMONT SERVICE CENTER

DATE: MAR 05 2010

[EAC 09 150 70291]

[REDACTED] [consolidated therein]

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 office that originally decided your case. 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 or reopen, 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 case will be remanded for further consideration and action.

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 establish he was eligible for late registration.

On appeal, the applicant asserts that he is eligible for late registration as he had filed a Form I-485 application that was pending during the initial registration period.

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 designated by the Attorney General 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.
- (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 continuous residence in the United States since February 13, 2001, and continuous physical presence since March 9, 2001. The initial registration period for Salvadorans was from March 9, 2001, through September 9, 2002. Subsequent extensions of the TPS designation have been granted, with the latest extension granted until September 10, 2010, upon the applicant's re-registration during the requisite period.

To qualify for late registration, the applicant must provide evidence that during the initial registration period he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above.

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 U.S. 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 record reflects that the applicant filed a Form I-485, Application for Permanent Resident Status, under the Legal Immigration Family Equity (LIFE) Act on May 24, 2002. On November 20, 2006, the Director, Los Angeles, California, denied the application due to the applicant's felony drug conviction. The applicant's appeal from the denial of this application was dismissed by the AAO on February 4, 2009.

The record reveals that the applicant filed the current TPS application on February 25, 2009.¹

¹ The applicant had previously filed a TPS application (WAC0522876630) on May 16, 2005. On May 12, 2006, the Director, California Service Center, denied the application because the applicant failed to establish he was eligible for late registration and he failed to submit the court disposition for his drug arrest on August 25, 2000. No appeal was filed from the denial of this application.

The applicant has met the criteria for late registration under 8 C.F.R. § 244.2(f)(2)(ii) as he had a Form I-485 pending during the initial registration period and subsequent to the dismissal of the appeal, the applicant filed his TPS application within the 60-day period. As such, the director's decision to deny the application for failure to establish late registration eligibility will be withdrawn.

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 issues of whether the applicant has met his burden of establishing continuous residence and physical presence in the United States during the requisite periods as well as his admissibility will be addressed below.

"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.

The record contains court documentation from the Los Angeles County Superior Court of California, which reflects that on August 23, 2000, the applicant was arrested and subsequently charged with violating section 11350(a) H&S, possession of a narcotic controlled substance, a felony. On March 21, 2006, the applicant pled guilty to the offense. The entry of judgment was deferred and the applicant was placed on probation for 18 months. On September 21, 2007, the guilty plea was expunged in accordance with section 1000.3 PC. Case no. VA058391.

Under the relevant provisions of the Federal First Offender Act (FFOA), a criminal defendant will not be considered to have a "conviction" for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if he/she has no prior drug offense convictions, and has not previously been the subject of a disposition under FFOA, and was placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique, id.*

In the instant case, the applicant's conviction of simple possession of a controlled substance was a first time offense. The record does not reflect that the applicant had previously been the subject of a disposition under the FFOA, and he was sentenced to a term of probation. The entry of judgment was deferred, and the applicant was placed on probation for a period of 18 months. Subsequently, the court granted the applicant's motion to set aside the guilty plea, pursuant to section 1000.3 PC. Had the applicant been prosecuted under federal law, 21 U.S.C. section 844, the applicant would have qualified for treatment under the FFOA had he been charged with federal offenses. Therefore, the applicant's expungement under California state law is the equivalent of treatment under the FFOA, and is not a valid felony conviction for immigration purposes.

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 September 9, 2010, upon the applicant's re-registration during the requisite time period.

In this instance, the applicant submitted sufficient evidence, including contemporaneous documents, which tends to corroborate his claim of continuous residence and physical presence in the United States during the requisite periods. The applicant has, thereby, credibly established that he has met the criteria described in 8 C.F.R. §§ 244.2(b) and (c).

Nevertheless, the record reflects that on June 1, 1988, an immigration judge ordered the applicant deported from the United States to El Salvador. On February 22, 1990, a Form I-205, Warrant of Deportation, was issued. Therefore, the applicant is inadmissible under section 212(a)(9)(A)(i) of the Act. However, such ground of inadmissibility may be waived. The record does not reflect that a Form I-601, Application for Waiver of Grounds of Inadmissibility, has been filed. The case will be remanded so that the director shall provide the applicant the opportunity to file a Form I-601, pursuant to section 244(c)(2)(A)(ii) of the Act; 8 C.F.R. § 244.3(b). An adverse decision on the waiver application may be appealed to the AAO.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.