

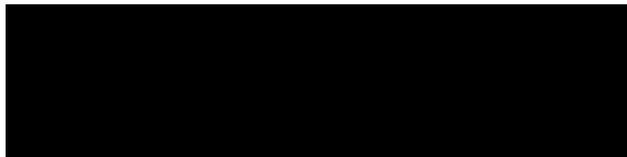
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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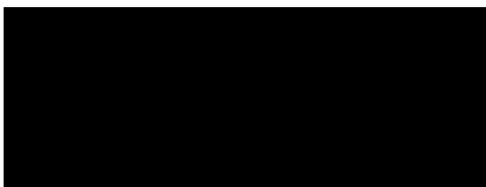
Applicant:



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.

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 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: 1) had been convicted of an aggravated felony; 2) was inadmissible under section 212(a)(A)(i)(I) of the Act; 3) failed to establish she had continuously resided in the United States since February 13, 2001; and 4) failed to establish she been continuously physically present in the United States since March 9, 2001.

On appeal, the applicant asserts that her offense is not an aggravated felony or a crime of moral turpitude because the sentenced imposed was modified to 175 days, and that the offense is a single petty offense.

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.

The term *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 term *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.

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

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 March 9, 2009, upon the applicant's re-registration during the requisite time period.

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 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 first issues to be addressed are whether the applicant has established continuous residence since February 13, 2001, and continuous physical presence since March 9, 2001.

On May 13, 2009, the applicant was requested to submit evidence establishing her continuous residence since February 13, 2001, and continuous physical presence since March 9, 2001. The applicant, in response, provided the following photocopied evidence:

- Employment authorization cards issued under category 08 (asylum) from April 26, 1999 through October 26, 2009.
- A driver license issued on December 16, 2002.
- Forms I-765, Application for Employment Authorization, signed February 25, 2001, February 10, 2002, and January 17, 2003.
- A receipt dated February 10, 2002.
- A Form 1040A, U.S. Individual Tax Return, and a Form W-2, Wage and Tax Statement for 2001.
- Wage and tax statements for 2005 and 2007.
- Medical records from Columbia Valley Community Health dated in 2004, 2005, 2006, 2007 and 2008.
- A letter dated August 29, 2008, from a representative of [REDACTED] in Quincy, Washington, who indicates that the applicant has been employed since June 15, 2005.

- A letter dated August 26, 2008, from a representative of [REDACTED] in Quincy, Washington, who indicated that the applicant has been employed since May 16, 2008. The representative indicated that the applicant works every Friday.
- A letter dated August 26 2008, from [REDACTED] who indicated that the applicant has been in her employ as a part-time housekeeper since July 2007.
- A letter dated August 29, 2008, from a representative of [REDACTED] who indicated that the applicant was employed from September 23, 2004 to February 4, 2005.
- Letters dated August 7, 2008 from pastors [REDACTED] and [REDACTED] who indicated they have known the applicant since 1993, and attested to the applicant's moral character.
- An undated letter from [REDACTED] who indicated that she had known the applicant for nine years and attested to the applicant's moral character.
- A letter dated October 21, 2008, from [REDACTED] who indicated that he has known the applicant for approximately 14 years. The affiant indicated that every Monday the applicant attends prayer meetings and the applicant supports her church in different activities.

The applicant also submitted several receipts issued in 2001 and 2002 and an unsigned letter from [REDACTED]. However, these documents have no probative value as the applicant's name was not listed on the receipts and [REDACTED] did not sign the letter.

The director determined that the applicant had failed to submit sufficient evidence to establish her eligibility for TPS as no evidence was submitted to establish her continuous residence and physical presence in the United States during 2003.

On appeal, counsel asserts that evidence of the applicant's residence and physical presence in 2003 had been previously provided. Counsel lists: a) the applicant's 2003 tax return; b) employment authorization cards issued from April 25, 2002 to April 25, 2003 and April 26, 2003 to April 25, 2004; and c) copies of Forms I-765 dated January 17, 2003 as evidence that was provided to establish the applicant's residence and physical presence in 2003.

A review of documents submitted in response to the Notice of Intent to Deny does not include a 2003 U.S. Individual Tax Return. Furthermore, the issuance of the employment authorization cards and Form I-765 alone are not persuasive evidence of *continuous* residence and physical presence in the United States. If the applicant was working during 2003, it is unclear why pay stubs, a wage and tax statement or employment letter were not submitted.

On appeal, counsel also submits medical records from Columbia Valley Community Health dated in April, February, September, October and December of 2003.

The applicant has now submitted sufficient evidence on appeal to establish her qualifying continuous residence or continuous physical presence in the United States during the requisite periods. The applicant has, thereby, established that she has met the criteria described in 8 C.F.R.

§§ 244.2(b) and (c). Consequently, the director's decision to deny the application on this issue will be withdrawn.

The next issues to be addressed are the applicant's ineligibility and inadmissibility due to her criminal record.

The record contains certified court documents from the Chelan County District Court of Washington, which reflects that on May 13, 1998, the applicant was arrested for theft in the 3rd degree, a violation of RCW section 9A.56.050. On May 27, 1998, the applicant pled guilty to this gross misdemeanor offense, and was ordered to pay a \$250.00 fine and was sentenced to a term of 365 days with 362 days suspended. On October 7, 2008, an order was issued, which amended the judgment and sentence to a maximum penalty imposed of 175 days with 172 days suspended.

In the state of Washington theft in the 3rd degree can be an aggravated felony if the sentence imposed is for one year or more. 8 USC 1101(a)(43) and Section 101(a)(43)(G) of the Act provide a "theft" offense for which the term of imprisonment is at least one year, is an aggravated felony.

The director, in denying the application, noted that regardless of the modification of the applicant's sentence, she was convicted of an aggravated felony.

On appeal, counsel cites *Matter of Song*, 23 I&N Dec. 173, 174 (BIA 2001),¹ and asserts that based on the modification of the sentence, the applicant's conviction cannot be considered an aggravated felony for immigration purposes.

In view of the holding in *Song*, the AAO will give full faith and credit to the trial court's designation of the applicant's sentence modification to 175 days. The applicant's conviction offense is now a misdemeanor. As such, the director's decision to deny the application on this issue will be withdrawn.

Section 212(a)(2)(A)(ii) of the Act provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude, where the maximum penalty possible for the crime did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

¹ In *Matter of Song*, the respondent had a 1992 conviction of a theft offense for which he was sentenced to one year in prison, making it an aggravated felony; in 1999, the criminal court reduced his sentence *nunc pro tunc* to 360 days. The issue for the BIA was whether the original criminal sentence or the reduced sentence determined whether he had been convicted of an aggravated felony. The BIA found that the reduced sentence was effective and his theft offense could no longer be considered an aggravated felony because he was no longer sentenced to a one-year term of imprisonment

As the applicant has been found to have been convicted of only one crime involving moral turpitude she is eligible for the petty offense exception and the crime qualifies under the petty offense exception of inadmissibility. As such, the director's decision to deny the application on this on this issue will be withdrawn.

Finally, the record contains a defendant case history report from the Grant County District Court of Washington, which reveals that on May 5, 1999, the applicant was arrested for no valid operator license without identification in [REDACTED]. The applicant pled guilty to this offense. However, without the actual certified court documents, it cannot be determined whether the applicant was convicted of an infraction under RCW section 42.20.015 or a misdemeanor under RCW section 42.20.005.

A conviction of a this offense would render the applicant ineligible for TPS based on two misdemeanor convictions. The record, however, does not contain the final court disposition of this arrest, and the director did not request the court documentation in his notice of May 13, 2009.

Accordingly, the case will be remanded to the director to accord the applicant an opportunity to submit the final court disposition of her arrest on May 5, 1999. If the director ultimately finds that the applicant is ineligible for TPS, the director shall issue a new decision to the applicant.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: *The case is remanded for appropriate action consistent with the above.*