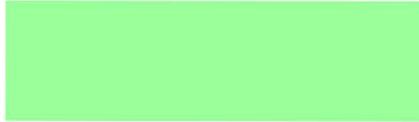


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE:

Office: VERMONT SERVICE CENTER

FILE:

OCT 15 2013

IN RE:

Applicant:

APPLICATION:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 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. The director also denied the application because the applicant had been convicted of two misdemeanors in the United States.

On appeal, citing 8 C.F.R. § 244.2(f)(2)(ii), counsel asserts that the applicant is eligible to file as a late initial registrant. Counsel states that the applicant's initial TPS application was not denied until November 9, 2001, therefore the applicant was "within the enumerated classes of people eligible for TPS as a late initial registrant because he had the TPS application pending adjudication during El Salvador's initial designation period." Counsel asserts that the state of Washington has two different possible misdemeanors under which a defendant may be convicted and that whether an offense is a misdemeanor or a gross misdemeanor hinges upon whether the statute at issue imposes a possible penalty.

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 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.

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 El 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 March 9, 2015, 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. 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).

An alien shall not be eligible for TPS 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).

“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 term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of

punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

Section 101(a)(48)(B) of the Act provides, "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

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 conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The applicant filed a Form I-589, Application for Asylum and Withholding of Deportation, on November 28, 1995. On October 2, 1997, a hearing was held and the alien was granted voluntary departure from the United States on or before November 30, 1997. The applicant appealed the decision to the Board of Immigration Appeals (BIA). On October 29, 1999, the BIA dismissed the appeal.

The first issue in this proceeding is whether the applicant is eligible for late registration.

The record reflects that the applicant filed his initial TPS application (LIN0115750145) on April 2, 2001. On November 9, 2001, the Director, Nebraska Service Center, denied the application due to the applicant's failure to appear for fingerprinting. The director advised the applicant that, while the decision could not be appealed, the applicant could file another TPS application with fee provided he was otherwise eligible to file.

The applicant filed a current TPS application on October 11, 2011.

On January 18, 2012, the applicant was requested to submit evidence establishing his eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). Counsel, in response, asserted that the applicant was eligible for TPS because he filed an application during the initial registration period and was granted employment authorization.

On May 9, 2012, the director denied this application because it was filed outside of the initial registration period and because the applicant had failed to establish his eligibility for filing under the provisions of late registration. The director indicated that a TPS application that had been denied did not confer eligibility for late initial filing and that the employment authorization received under "C-19" is a temporary benefit given while a TPS application is pending.

Counsel's statements on appeal have been considered. A previous application for TPS, however, does not equate to "relief from removal" under 8 C.F.R. § 244.2(f)(2). In the instant case, there is no evidence that the applicant had applied for relief from removal or had sought a *de novo* review of his eligibility for TPS before an immigration judge. Further, TPS does not lead to permanent resident status, nor is it an adjustment of status. As noted above, the applicant's asylum application was no longer pending as of October 29, 1999.

The provisions for late registration were not created to allow applicants who had abandoned their initial applications to circumvent the normal application and adjudication process. Rather, the provisions were created in order to ensure that TPS benefits were made available to individuals who did not register during the initial registration period for the various circumstances specifically identified in the regulations. Pending and previous filed TPS applications do not render an individual eligible for late registration under 8 C.F.R. § 244.2(f)(2). The applicant has not submitted evidence that he has met one of the provisions outlined in 8 C.F.R. § 244.2(f)(2). Consequently, the director's decision to deny the application on this ground will be affirmed.

The second issue to be addressed is the applicant's criminal history.

The Federal Bureau of Investigation report reflects the applicant's criminal history as follows.

1. On February 7, 2003, the applicant was arrested by the Sheriff's Office in [REDACTED] Washington for driving under the influence.
2. On or about October 17, 2006, the applicant was arrested in El Salvador.

On January 18, 2012, the applicant was also requested to submit certified judgment and conviction documents from the courts for all arrests. The applicant was advised that he must provide an explanation for his absence from the United States in 2006. Counsel, in response, submitted a Criminal History Information from the Washington State Patrol Identification and Criminal History Section, which indicated that the applicant had three misdemeanor convictions of negligent driving in the first degree. Specifically:

- Court documentation in Case no. [REDACTED] from the [REDACTED] District Court, Washington, which indicates that on September 12, 2000, the applicant was found guilty of violating RCW 46.61.5249, negligent driving in the first degree. The applicant was sentenced to serve 90 days in jail (87 days were suspended), ordered to pay a \$1900 fine (\$1340 was suspended) and placed on supervision for 24 months.
- Court documentation in Case no. [REDACTED] from the [REDACTED] Municipal Court, which indicates that on March 1, 2005, the applicant was found guilty of violating RCW 46.61.5249, negligent driving in the first degree. The applicant was also found guilty of "RCW: 46.61.5249(1)(c)." The applicant was sentenced to

serve 90 days in jail (89 days were suspended), ordered to pay a \$1900 fine (\$1273 was suspended) and placed on supervision for 24 months.

Negligent driving in the first degree is a misdemeanor. RCW 46.61.5249(1)(c).

Counsel also submitted court dispositions with English translations of the applicant's arrests in El Salvador for tenancy, porting or illegal or irresponsible conduction of firearms and for contraband of goods, which were dismissed on May 13, 2006 and May 29, 2006, respectively.

On appeal, counsel asserts that the statute (RCW 46.61.5249(c)(1)) under which the applicant was convicted does not set forth any specific penalty other than to require a defendant with prior similar convictions to install an ignition device on all vehicles operated by the person. Counsel states that as the applicant was not ordered to install an ignition device, his conviction does not render him ineligible for TPS. Counsel states, in pertinent part:

Additionally, the fact that the State of Washington distinguishes a misdemeanor from a gross misdemeanor, and whereas a gross misdemeanor is penalized by a specific term of imprisonment, illustrates that the Washington statutes do not comport to the definition of a misdemeanor set forth in 8 C.F.R. § 244.1(3) because there is no requirement of any sentence imposed for a misdemeanor as defined by the Revised Code of Washington.

The fact that Washington's legal taxonomy classifies the applicant's offense as a "misdemeanor" rather than a "gross misdemeanor," is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. As cited above, for immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any. Counsel cites to no provision of the statute that a misdemeanor carries no actual term of sentence. In fact, Washington law at RCW 9A.20.021(3) provides that every person convicted of a "misdemeanor" shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine. The applicant is applying for benefits under the federal law. Therefore, the applicant's convictions listed above qualify as "misdemeanors" as defined by the federal definition in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his misdemeanor convictions. 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 application on this ground will be affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145.

The director, in his decision, indicated that the applicant's explanation for his exit from the United States in 2006 was acceptable.

The AAO, however, disagree with the director's finding. The applicant, in his statement, stated that he departed the United States to visit his ailing mother. Except for his own statement, the applicant does not provide any independent, corroborative, contemporaneous evidence to support his statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the AAO does not consider an absence of over four months¹ to be brief, casual and innocent. A review of the evidence in the record does not contain any credible corroborative evidence to support a claim that the applicant was residing in the United States during 2006.

The applicant has not submitted sufficient credible evidence to establish his qualifying continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001. The applicant has, therefore, failed to establish that he has met the criteria described in 8 C.F.R. § 244.2(b) and (c). Therefore, the application must also be denied on these grounds.

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.

¹ The court documentation from El Salvador indicates that the applicant committed the offense of tenancy, porting or illegal or irresponsible conduction of firearms on January 13, 2006.