



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 19 2013**

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:  
[REDACTED]

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.

Thank you,

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 sustained.

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 and because the applicant had failed to submit requested court documentation relating to his 2010 arrest.

On appeal, the applicant asserted that the denial of TPS was made in error as a matter of fact and law. The applicant asserted that the director's "concession of timely initial registration of TPS makes the date of dismissal of asylum application in 2001 a moot point." The applicant stated that his TPS application was denied on June 2, 2004 based on two or more misdemeanor convictions. The applicant stated that he had provided evidence that he had not been convicted of two misdemeanors hence, he "is prima facie eligible for TPS." Subsequently, counsel supplemented the appeal with a brief which included the requested court disposition for the applicant's 2010 arrest.

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.

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 record reflects the following:

- The applicant filed his initial TPS application [REDACTED] on June 25, 2001. On June 2, 2004, the Director, California Service Center, denied the application due to abandonment after determining that the applicant had failed to respond to a Request for Evidence (RFE) dated April 13, 2004.<sup>1</sup> No motion was filed from the denial of that application.<sup>2</sup>
- The applicant filed a TPS application [REDACTED] on March 11, 2005 and indicated that he was re-registering for TPS. On January 19, 2006, the Director, California Service Center, denied that application as the applicant was not eligible to file for re-registration as his initial application had not been approved.<sup>3</sup> The applicant filed a Form I-290B, Notice of Appeal, which was received on February 23, 2006. On March 23, 2006, the Director, California Service Center, rejected the appeal as untimely filed and determined that the appeal did not meet the requirements of a motion.<sup>4</sup> The director concluded that the previous decision of January 19, 2006 would remain unchanged. On June 13, 2006, the applicant attempted to file a motion; however, it was rejected on June 14, 2006 due to incorrect or no fee.

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<sup>1</sup> The RFE was sent to the applicant's address of record, and there is no evidence that it was returned as undeliverable.

<sup>2</sup> A denial due to abandonment may not be appealed, but an applicant may file a motion to reopen. 8 C.F.R. § 103.2(b)(15).

<sup>3</sup> The Notice of Intent to Withdraw TPS issued on August 30, 2005, was in error as the applicant was never granted TPS. 8 C.F.R. § 244.14(a).

<sup>4</sup> The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

- The applicant filed a TPS application [REDACTED] on September 12, 2010 and indicated he was filing for re-registration. On February 4, 2011, the director denied the application because the applicant's initial TPS application had been denied on June 2, 2004, and the applicant was not eligible to apply for re-registration for TPS. No motion was filed from the denial of that application.<sup>5</sup>
- The applicant submitted a TPS application [REDACTED] on March 1, 2012; however, it was rejected on March 3, 2012 due to incorrect or no fee.
- The applicant filed the current TPS application on March 15, 2012.

On August 21, 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). The applicant was also requested to submit evidence establishing his nationality, identity, continuous residence in the United States since February 13, 2001, continuous physical presence in the United States since March 9, 2001, and judgment and conviction documents from the courts for his arrests in California on December 25, 2000 [REDACTED], October 23, 2005 [REDACTED] and August 28, 2010 [REDACTED].

The director noted that the record contained court documentation indicating that the applicant's conviction on June 18, 2001 for driving with a suspended license (section 14601.5(a) VC) and his arrest on November 30, 2008 for willful cruelty to child (section 273a(b) PC) had been dismissed pursuant to sections 1382 PC and 1385PC, respectively. Citing *Matter of Pickering*, 23 I&N Dec. at 624, the director informed the applicant that he had failed to submit evidence from the court of the reason for each dismissal.

The applicant responded to the notice which was received on September 25, 2012. The director determined that the applicant had submitted sufficient evidence to establish his nationality, continuous residence since February 13, 2001 and his continuous physical presence since March 9, 2001 to the date of filing. Regarding late registration eligibility, the director noted, in pertinent part:

It appears that you were claiming prima facie eligibility based on your previous applications. However, your asylum application was dismissed on September 6, 2001. Since you did not file a late initial Form I-821 within 60 days of the termination of these applications you have not met prima facie eligibility based on this criteria.

The director concluded that the applicant had failed to establish he was eligible for late registration and denied the application on December 31, 2012.

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<sup>5</sup> The director advised the applicant that, while the decision could not be appealed, he could file a motion to reopen or a motion to reconsider.

It must be noted that it was not necessary for the applicant to file a Form I-821 (Application for Temporary Protected Status) under the late initial provisions within 60 days from the Board of Immigration Appeals' decision dismissing his appeal<sup>6</sup> as a timely filed application for TPS was still pending at that time.

On appeal, counsel asserts that the applicant is eligible for late registration because during the initial registration period, he was a child of an alien currently eligible to be a TPS registrant. Counsel provides a copy of the employment authorization card (A12) of the applicant's mother.

In *Matter of N-C-M-*, 25 I&N Dec. 535 (BIA 2011), it was held that in order to qualify for late initial registration for TPS, an applicant filing as the "child of an alien currently eligible to be a TPS registrant" must establish that he or she was a "child" only "at the time of the initial registration period," not at the time when the application for late initial registration is filed.

In the instant case, during the initial registration period, the applicant was a child and his parent was a TPS registrant, and USCIS records reflect that his parent is currently eligible to be a TPS registrant. The applicant has therefore established late registration eligibility. *Id.* Accordingly, the director's finding that the applicant has not established late registration eligibility will be withdrawn.

Regarding his criminal record, the applicant provided the following:

1. Court documentation in Case no. [REDACTED] from the Superior Court of Los Angeles County, which indicates that on March 23, 2011, the court granted a motion to vacate an unnamed conviction pursuant to section 1016.5 PC. The case was dismissed pursuant to section 1385 PC. The court proceedings appear to relate to the willful cruelty to child offense committed on or about November 30, 2008.
2. Court documentation in Case no. [REDACTED] from the Superior Court of Los Angeles County, which indicates that on June 18, 2001, the applicant pled *nolo contendere* to violating section 14601.5(a) VC, driving while license is suspended/revoked for refusing a chemical test or driving with excessive blood alcohol, a misdemeanor. Imposition of sentence was suspended. The applicant was placed on summary probation for two years on condition he pay a fine and court cost. On September 23, 2011, the applicant's motion to vacate his plea and conviction was granted by the court pursuant to section 1016.5(b) PC and was dismissed pursuant to section 1382 PC.
3. Court documentation dated September 7, 2012, from the Clerk of the Court of Orange County Superior Court, which indicates that a search was conducted from 2000 through 2012 and no record was found under the applicant's name and date of birth. It is noted that the Federal Bureau of Investigation report indicates that

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<sup>6</sup> The applicant filed an appeal from the decision of the Immigration Judge denying his asylum application. The Board of Immigration Appeals dismissed the appeal on September 6, 2001.

on October 23, 2005, the applicant was detained only and was released due to insufficient evidence.

4. Court documentation dated September 17, 2012, from the Superior Court of [REDACTED] which indicates that no criminal record appears to exist for the violation of hit and run/property damage occurring on December 25, 2000.

The director determined that the applicant had provided a sufficient explanation regarding the dismissals of his 2001 and 2008 violations. The director, however, concluded that the applicant had failed to submit the requested court disposition for his arrest on August 28, 2010.

On appeal, counsel submits court documentation in Case no. [REDACTED] from the Superior Court of [REDACTED], which indicates that on April 18, 2011, the applicant pled *nolo contendere* to violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. The applicant was placed on probation for 36 months on condition he pay a fine and court cost, and enrolls in a first offender alcohol counseling program. The remaining charge, driving under the influence, was dismissed.

Counsel has provided sufficient documentation from the court indicating that the convictions of sections 14601.5(a) VC and 273a(b) PC have been vacated for underlying procedural or constitutional defect having to do with the merits of the case. Therefore, these convictions no longer affect immigration consequences. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

The applicant has one misdemeanor conviction and it does not render the applicant ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). There are no other known grounds of ineligibility; therefore, the director's decision to deny the application will be withdrawn.

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 met this burden.

**ORDER:** The appeal is sustained.