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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED]  
[EAC 07 362 72306]

Office: VERMONT SERVICE CENTER

Date: JAN 30 2009

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 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, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center. The application 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 denied the application because he found that the applicant had failed to submit requested court documentation relating to his criminal record. The director also determined that the applicant was ineligible for TPS because the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, the applicant states that he is attempting to clean out his criminal record and has enclosed a copy of an order to expunge his criminal record.

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.

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). In addition, an alien described in section 208(b)(2)(A) of the Act shall be ineligible.

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.

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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. Section 212(a)(2)(B) of the Act.

An alien is inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act.

Section 208(b)(2)(A)(i) of the Act states in pertinent part:

- (A) In general – Paragraph (1) shall not apply to an alien if the Attorney General determines that that – (i) the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

The record reveals the following offenses:

- (1) On May 27, 2001, the applicant was arrested by the Los Angeles, California Police Department for three counts of “DUI Alcohol 8/100 of one percent.

Pursuant to a letter dated February 22, 2008, the applicant was requested to submit the final court disposition for each of the charges detailed above. In response, the applicant submitted a copy of the requested final disposition which indicates that the applicant was convicted of one misdemeanor. The other two charges were dismissed.

The director determined that the applicant had failed to submit evidence necessary for the proper adjudication of the application and denied the application on June 27, 2008. As discussed above, the applicant did submit the requested court disposition. Therefore, this basis for the director’s decision will be withdrawn. However, on appeal, the applicant submitted final court dispositions indicating that on August 9, 1994, he was convicted of “.08% More Wght Alchl Drive Veh”, a misdemeanor; on May 14, 1998, he was convicted of “.08% More Wght Alchl Drive Veh”, a misdemeanor; and on November 25, 1998, he was convicted of “Drive W/Suspended-Revoke Licen”, a misdemeanor. The applicant is ineligible for temporary protected status because of his misdemeanor convictions. 8 C.F.R. § 244.4(a).

The director also denied the application because he determined that the applicant had participated in the persecution of a person or a group.

The applicant testified to an Asylum Officer on March 29, 2007, that he had voluntarily served in the El Salvadoran military as a marine for seven years. Religious Issue Committee (RIC) databases indicate a number of human rights violations were committed by the Marina Nacional during the years 1985 – 1987. The applicant testified that he served in the Marina Nacional from 1985 – 1992 and was stationed in the places these violations occurred. The applicant further stated that his unit engaged in combat against the guerillas three to four times a month, that the unit had regularly set-up ambushes for the guerillas, that his unit “captured and killed the guerillas,” and that the captured guerillas were considered to be prisoners of war and turned over to the Naval Central Intelligence (NCI). The director found the applicant’s testimony contradictory in that he stated that his unit had

set-up numerous ambushes on the guerillas, that he had fired his weapon but had never shot anyone, that the captured guerillas were considered prisoners of war and he had no idea what happened to the ones his unit turned over to NCI; yet he also stated that some of the prisoners were tortured and killed. According to the director, no evidence was provided by the applicant that could establish that he did not persecute or assist in the persecution of others. Therefore, the applicant was determined to be ineligible for TPS.

On appeal, the applicant submits a statement in Spanish, with an English translation in which he states that captured prisoners were treated as prisoners of war and that he never said that they killed them. However, the applicant has not provided any evidence to refute the director's findings in the record. Consequently, this basis for the director's decision to deny the application is affirmed.

The applicant also states that he is attempting to clear out his criminal record. According to the applicant, he has enclosed a copy of an expungement order that should expunge his record within three to six months. The applicant has provided a copy of the Application for Expungement of Criminal Record. However, there is nothing in the record to indicate that his criminal record has been expunged.

However, as discussed by the Director, AAO, the Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 110(a)(48)(A), no effect is to be given the immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative stature. Additionally, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. 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*. **As a result, the applicant remains convicted, for immigration purposes, of the misdemeanor offenses.**

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 temporary protected status 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.