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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent the release of unwarranted
information of personal privacy

[Redacted]

MAR 08 2004

FILE:

[Redacted]

Office: SAN FRANCISCO Date:

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]

PUBLIC COPY

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.

Cindy M. Honey for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the San Francisco District Office for further consideration and action.

The applicant is a native and citizen of El Salvador who indicated on his application that he entered the United States without a lawful admission or parole in October 2000. The District Director determined that the applicant had been deported on June 9, 1999, and had reentered the United States within five years without prior Service authorization. The District Director concluded that the applicant was ineligible under section 241(a)(5) of the Act and denied the application for Temporary Protected Status (TPS).

The provisions of the TPS program do not prevent eligibility if an individual was previously removed (deported) from the United States under section 241(a)(1)(B) [now section 237] of the Act. It does appear that the applicant is inadmissible under section 212(a)(9) of the Act; however, under 8 C.F.R. § 244.3(b), a waiver may be available to the applicant if he submits the proper Form I-601, Application for Waiver of Grounds of Excludability, and if that waiver is granted. The record does not contain an approved Form I-601.

It is noted that on July 18, 2001, the applicant pled guilty in the Superior Court of California, Southern Branch, in and for the County of San Mateo, to one count of trespassing upon railroad property, a misdemeanor, in violation of section 369i of the California Penal Code. (Case #SM307996A). Imposition of sentence was suspended and the applicant was placed on probation for a period of 18 months. However, since the record of proceedings reflects just one misdemeanor conviction, the evidence does not support a finding of ineligibility under section 244(c)(2)(B)(i) of the Act. Furthermore, while trespassing can, in some cases, be considered a crime involving moral turpitude, in this case, such a determination cannot be made since neither the circumstances of the applicant's offense nor the applicant's intent are clear from the evidence of record. See Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979). Therefore, the evidence also does not support a finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The case will be remanded and the director shall fully adjudicate the application. The District Director shall allow the applicant the opportunity to submit the Form I-601 for his inadmissibility under section 212(a)(9) of the Act and shall also allow the applicant to submit sufficient evidence to otherwise establish eligibility. The District Director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS offered to Salvadorans. 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 director's decision is withdrawn. The case is remanded to the District Director for further action in accordance with the foregoing and for entry of a new decision, which, if adverse to the applicant, is to be certified to the Director of the Administrative Appeals Office for review.