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U.S. Citizenship  
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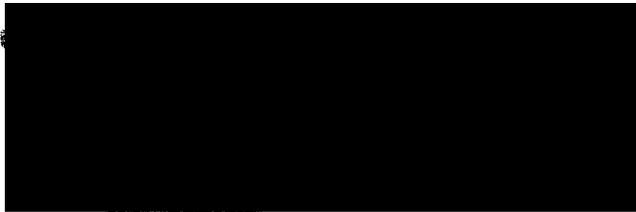


FILE: [REDACTED]  
[WAC 01 242 58197]

OFFICE: SAN FRANCISCO

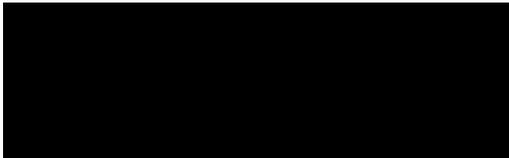
DATE: DEC 20 2005

IN RE: 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 office that originally decided your case. Any further inquiry must be made to that office.

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 on appeal. The case will be remanded to the director for further action.

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 district director denied the application on June 26, 2003, because the applicant had failed to establish that he is a national of El Salvador.

The applicant filed Form I-290B, Notice of Appeal to the Administrative Appeals Unit, on July 18, 2003. The district director rejected the appeal on August 24, 2004, after noting that the appeal was untimely filed on July 18, 2004, and stated that the appeal would not be treated as a motion since it did not meet the requirements of a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5(a)(2) and (3).

On November 3, 2004, counsel filed a motion to reopen the applicant's case, asserting that the appeal was erroneously rejected as being untimely filed. Counsel states that the California Service Center issued a receipt (Form I-797, Notice of Action) indicating that Form I-290B was received on July 18, 2004 instead of the year 2003. Counsel submits a copy of a receipt of payment dated July 18, 2003, for the filing of Form I-290B.

A review of the record shows that the district director did erroneously reject the appeal as untimely filed on July 18, 2004. In fact, the Form I-290B was stamped received at the San Francisco district office on July 18, 2003. Therefore, the district director's December 24, 2004, decision rejecting the appeal will be withdrawn.

8 C.F.R. § 244.9(a)(1) states, in part:

Each application must be accompanied by evidence of the applicant's identity and nationality, if available. If these documents are unavailable, the applicant shall file an affidavit showing proof of unsuccessful efforts to obtain such identity documents, explaining why the consular process is unavailable, and affirming that he or she is a national of the designated foreign state....Acceptable evidence in descending order of preference may consist of:

- (i) Passport;
- (ii) Birth certificate accompanied by photo identification; and/or
- (iii) Any national identity document from the alien's country of origin bearing photo and/or fingerprint.

The district director noted that on September 28, 1999, the applicant stated to a peace officer that his name is [REDACTED] that he was born in Guatemala; he also stated to a Service agent that he is a native and citizen of Guatemala. The district director also noted that on April 2, 2003, the applicant stated to a Service officer that he claimed to be a citizen of Guatemala because he thought that he would not be deported if he claimed to be Guatemalan. The district director stated that although the applicant now provided a copy of a birth certificate and passport from El Salvador, CIS is unable to determine his nationality, due to inconsistency of his testimony.

On appeal, counsel asserts that the conclusion reached by the district director after an interview with the applicant, in which he freely admitted that on one occasion he informed a Service officer that he was a citizen

of Guatemala, fearful of being deported back to El Salvador, apparently carries more weight in establishing nationality than the documents previously submitted:

- (1) Salvadoran birth certificate showing that the applicant was born on October 1, 1975, in El Salvador.
- (2) Salvadoran passport issued by the Salvadoran consulate on August 11, 1999, in San Francisco, California.
- (3) Salvadoran national identity card "cedula" issued in El Salvador on November 24, 1993.
- (4) Salvadoran driver's license issued in El Salvador on July 29, 1994.
- (5) Form I-589, Application for Asylum and for Withholding of Removal, filed on March 27, 1998, as an El Salvadoran national, and an eight-page affidavit submitted to the Court in support of his asylum application detailing the problems he had in El Salvador and the reasons he is seeking asylum.
- (6) Form I-862, Notice to Appear, dated May 15, 1998, alleging that the applicant is a native and citizen of El Salvador.

Counsel states that the evidence in the applicant's file is overwhelming as to his Salvadoran nationality, and that there has never been any inconsistency in his statements regarding his nationality with the exception of a one-time interview, in which he feared return to his country should he be deported. Counsel further states that the applicant never filed for any immigration benefits as anything other than a Salvadoran national, and he has submitted extensive documentation supporting his nationality.

A review of the record of proceeding shows that the applicant claimed to have entered the United States on November 15, 1994. On March 27, 1998, the applicant filed Form I-589 requesting asylum in the United States as an El Salvadoran national (No. 5 above). The applicant appeared for his asylum interview on May 6, 1998, and he was advised that he must appear in person at the San Francisco Asylum Office on May 20, 1998, to receive the decision on his application. A Form I-862 was issued on May 15, 1998 (No. 6 above). On September 28, 1999, the applicant was arrested in Redwood City, California, for burglary. He informed the arresting officer that his name is [REDACTED] and that he was born in Guatemala. On November 10, 1999, the applicant was encountered by the Service pursuant to his incarceration at the San Mateo County Jail, Redwood City, California, and Form I-213, Record of Deportable Alien, was issued. The applicant gave the Service officer his true name, [REDACTED] and his alias [REDACTED] and stated that he is a native and citizen of Guatemala. In removal proceedings held on March 28, 2000, in San Francisco, California, the applicant failed to appear; therefore, the immigration judge determined that the applications are deemed abandoned and ordered the applicant removed to El Salvador *in absentia*. A Form I-205, Warrant of Removal/Deportation, was issued on March 28, 2000.

The record, in this case, shows that the nationality the applicant claimed and/or established at the time he first came in contact with Department of Homeland Security (DHS), namely when he filed his asylum application on March 27, 1998, was that of El Salvador. As maintained by counsel, in support of his asylum application, the applicant submitted affidavits and documents to prove El Salvadoran nationality. The applicant had explained the reason he informed the officers that he was a Guatemalan citizen was because he was fearful of being deported back to El Salvador.

The record as presently constituted, establishes that the applicant is a citizen and national of El Salvador. Therefore, the applicant has overcome this finding of the director.

It is noted, however, that the record of proceeding contains records of arrests and/or convictions relating to the applicant.

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).

The record reveals the following offenses:

- (1) On November 8, 1999, the Superior Court Northern Branch of the State of California, County of San Mateo, Case No. [REDACTED] (arrest date September 28, 1999), the applicant, under the name of [REDACTED] was convicted of burglary, 460(b) PC, a misdemeanor. He was placed on probation for a period of 2 years, and ordered to serve 30 days in the county jail with credit for time served.
- (2) The Federal Bureau of Investigation (FBI) fingerprint results report shows that on May 10, 1996, in Colma, California, the applicant was arrested for Count 1, theft of telephone services; and Count 2, possession of property without serial numbers.

The FBI report (No. 2 above) shows that on May 22, 1996, "prosecutor reject" as to both Counts 1 and 2. However, the record of proceeding is devoid of the actual final court disposition of the applicant's arrest to establish that the information on the FBI report was accurate, and that the applicant was in fact not convicted of the offenses listed in No. 2 above. Nor is there evidence in the record that the applicant was provided the opportunity to submit the court dispositions of all of his arrests.

The case will, therefore, be remanded so that the director may accord the applicant an opportunity to submit arrest reports and the court's final dispositions of all of his arrests.

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 for appropriate action consistent with the above discussion and entry of a new decision.