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FILE:

[WAC 01 244 52919]

OFFICE: CALIFORNIA SERVICE CENTER 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: SELF-REPRESENTED

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. Gomez for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration and 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 director denied the application because he found the applicant had been convicted of two misdemeanors.

On appeal, the applicant submits a statement.

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).

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.

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.

The Federal Bureau of Investigations (FBI) fingerprint results report, contained in the record of proceeding, reflects the following:

1. On April 14, 1999, the applicant was arrested in Sunnyvale, California, and charged with one count of "petty theft," in violation of section 484/488 PC, a misdemeanor. According to the FBI report, that charge was dismissed in the Superior Court of California, County of Palo Alto,

in the furtherance of justice, and the applicant was convicted on the charge of "petty theft of property less than \$50 in value without a prior charge," in violation of section 490(1)(a) PC.

2. On August 16, 1999, the applicant was arrested in San Jose, California, and charged with one count of "prostitution," in violation of section 647(b) PC, a misdemeanor.

On March 4, 2004, the applicant was requested to submit the final court disposition of the arrest detailed in (2) above. In response, the applicant submitted a court document from the Superior Court of California, County of Santa Clara, indicating that the applicant pled guilty to "prostitution," in violation of section 647(b) PC, a misdemeanor, on October 27, 1999.

Based on information contained in the FBI report and the disposition provided by the applicant, the director determined that the applicant was ineligible for TPS because he had been convicted of two misdemeanors and denied the application.

The instructions regarding the usage of the FBI report, and the provisions of 28 C.F.R. § 50.12, state, in part:

If the information on the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. The deciding official should not deny the license or employment based on the information in the record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

The record of proceeding, in this case, does not contain the court's charging documents and final dispositions for the applicant's arrest detailed in (1) above to establish that he was in fact convicted of that charge. Nor is there evidence in the record that the applicant was requested to submit the final court disposition of his arrest on April 14, 1999.

It is noted that, under the California Penal Code, the charge of petty theft of property less than \$50 in value without a prior conviction can be charged as either a misdemeanor or an infraction. The FBI report does not indicate whether the applicant was convicted of this charge as a misdemeanor or an infraction.

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 his arrests. The director shall enter a new decision.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion.