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U.S. Citizenship
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FEB 17 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
[WAC 02 256 53705]

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 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 The decision of the director will be withdrawn, and the matter will be remanded for further consideration and action.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 after determining that the applicant had not submitted a waiver request for his "ground of inadmissibility" under section 241 of the Act based upon an order of removal issued at San Francisco on July 10, 1998. The director also stated, "[t]he applicant may submit a Form I-601, Application for Waiver of Grounds of Excludability with fee ($170.00), if the applicant believes he or she is eligible for such waiver."

On appeal, counsel asserts that the applicant did not depart the United States under an order of deportation as stated by the director in his decision. Counsel states that the applicant has never departed the United States since the order was entered against him. Counsel contends that an alien is not ineligible for TPS simply because he is subject to an outstanding order of removal.

The record shows that the applicant entered the United States on or around June 21, 1991. He was subsequently apprehended by the United States Border Patrol on that same day at a house that was being used to harbor illegal aliens. The applicant requested political asylum and relief from removal in 1992. His application for political asylum was denied by an Immigration Judge on April 30, 1998, and the applicant was granted voluntary departure to El Salvador on or before June 1, 1998, with an alternate order of deportation if he failed to depart as ordered. The applicant did not deport as ordered.

On July 10, 1998, the District Director, San Francisco, issued a Warrant of Removal/Deportation and a notice ordering the applicant to appear at the San Francisco District Office on August 3, 1998, for deportation to El Salvador.

The applicant's former counsel filed an appeal from the Immigration Judge's order with the Board of Immigration Appeals (BIA) on August 3, 1998. The BIA dismissed the appeal as untimely filed on September 30, 1998.

On October 19, 1998, the District Director, San Francisco, issued a notice instructing the applicant to appear at the San Francisco District Office on November 17, 1998, for removal to El Salvador. The notice bears a notation from a deportation officer indicating that the applicant again failed to appear to be deported as ordered. As of the date of this decision, the 1998 Warrant of Deportation is still outstanding.

TPS serves to protect an applicant temporarily from removal from the United States, if all other requirements of section 244 of the Act and the regulations are met. A waiver is not required if the applicant has not departed the United States since the order of removal was issued in 1998. Therefore, the director's decision will be withdrawn.

However, the record contains insufficient evidence to establish that the applicant did not depart the United States. Evidence of his presence in the United States from the date of the warrant in 1998 through the filing date of the application is not contained in the record. In addition, the applicant has not submitted sufficient evidence to establish continuous residence and continuous physical presence in the United States during the qualifying period. The only document relating to the applicant's residence and physical presence since January 1, 2002, is a letter dated July 25, 2002, from Manufacturing Manager of Construction Electrical Products in Dublin, California, stating that the applicant began his employment with that company on November 1, 1994, but has been on worker's compensation disability leave since October 19, 2001, due to an accident that occurred on September 21, 2001. It is reasonable to expect that the applicant would have some other type of contemporaneous evidence in addition to the letter from Mr. owever, no such evidence has been provided.

It is noted that a handwritten notation on the order of the Immigration Judge dated May 12, 1992, indicates that the applicant's former counsel advised the court that the applicant had returned to El Salvador at that time.

Accordingly, the matter is remanded for action consistent with the foregoing and issuance of a new decision. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS.

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 matter is remanded for further consideration and action.