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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

MAY 15 2005

[WAC 01 221 55962]

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.

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 on appeal. The appeal will be rejected.

The applicant claims to be 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), § U.S.C. § 1254.

The director determined that the applicant was ineligible for TPS under section 244(c)(2)(B)(i) of the Act because he was convicted on August 24, 1996,<sup>1</sup> in Santa Clara, California, of Count 2, 23152(b) VC, driving with .08 percent blood alcohol level or more; Count 3, 12500(a) VC, unlicensed driver; and Count 4, 20002(a), hit and run driving resulting in property damage. The director, therefore, denied the application.

An appeal that is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee accepted will not be refunded. 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.5a(b).

The director's decision of denial, dated July 18, 2003, clearly advised the applicant that any appeal must be properly filed within thirty days after service of the decision. 8 C.F.R. § 103.3(a)(2)(i). Coupled with three days for mailing, the appeal, in this case, should have been filed on or before August 20, 2003. The appeal was received at the California Service Center on August 22, 2003.

Based upon the applicant's failure to file a timely appeal, the appeal will be rejected.

It is noted for the record that the applicant, on appeal, has not overcome the director's findings that he had been convicted of two or more misdemeanors. Counsel asserts that the misdemeanor offenses arose out of the same "single scheme;" therefore, the applicant was convicted of only one misdemeanor. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with three separate counts and the court issued three separate offenses. *Black's Law Dictionary*, 314 (5th Ed., 1979), defines the term "count" to mean a separate and independent claim. It also indicates that the term "count" is used to signify the several parts of an indictment, each charging a distinct offense; therefore, the applicant has been convicted of three separate and distinct offenses. Moreover, Congress did not make any special allowances for TPS applicants who had been convicted of multiple counts under the same criminal case.

Counsel submits an order of the Superior Court of California, County of Santa Clara, dismissing the applicant's October 8, 1996 convictions. He asserts that the Ninth Circuit Court of Appeals, in *Lujan-Almendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), overturned *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999), and held that state rehabilitative statutes can cure criminal grounds for removal and can be given effect in immigration proceedings. This assertion of counsel is without merit. *supra*, refers to first-time offenders of simple possession of a controlled substance who were subject to or convicted under the Federal First Offender

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<sup>1</sup> Counsel is correct in his assertion, on appeal, that the director incorrectly stated that the applicant was convicted on August 28, 1996, and in his conclusion that the applicant was convicted in 1997 and 1998. The record shows that the applicant was arrested on August 28, 1996, and that he was subsequently convicted of these offenses on October 8, 1996, in the Municipal Court of California, Santa Clara County Judicial District, under Case No. [REDACTED]

Act. The applicant, in this case, was not convicted of a drug-related offense, nor was he convicted under the Federal First Offender Act. Therefore, despite the dismissal of the criminal case, the applicant remains convicted, for immigration purposes, of the three misdemeanor offenses listed above.

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 appeal is rejected.