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U.S. Citizenship
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Services

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FILE:

[SRC 01 255 54979]

OFFICE: TEXAS SERVICE CENTER DATE:

AUG 25 2006

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 N. Gomez
for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was initially denied due to abandonment by the Director, Texas Service Center (TSC). The applicant filed a motion to reopen the denial decision. The Director of the Administrative Appeals Office (AAO) remanded the matter to the TSC Director, because the initial decision had been denied due to abandonment and the AAO lacked jurisdiction. The TSC Director approved the motion and reopened the initial TPS application. The applicant subsequently appeared for required fingerprinting that revealed that he had a criminal record. The TSC Director then denied the initial TPS application for cause. The matter is now again before the AAO. The case will be remanded to the director for further action.

The applicant claims to be a native and citizen of Honduras 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 determined that the applicant was ineligible for TPS because he had been convicted of two misdemeanor offenses committed in the United States. The director, therefore, denied the application.

On appeal, the applicant submits a statement. The applicant indicates that he will send additional evidence within 30 days of the date of the appeal. To date, no additional evidence has been received into the record, and the record will be considered complete.

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 Investigation (FBI) fingerprint results report, contained in the record of proceeding, reflects the following:

1. On March 13, 2004, the applicant was arrested by the Highway Patrol, Blythewood, South Carolina, and charged with:
 - Charge 01: Driving Under the Influence-1ST Offense
 - Conviction Date: April 29, 2004
 - Warrant No. [REDACTED] (1)-Misdemeanor; and,
 - Charge 02: Operating Uninsured Motor Vehicle-1ST Offense
 - Conviction date: April 29, 2004
 - Warrant [REDACTED] (A)-Misdemeanor;
2. On August 14, 2005, the applicant was arrested by the Sheriff's Office Camden, South Carolina, and was charged with:
 - Charge 1-Public Disorderly Conduct; and,
3. On February 5, 2006, the applicant was arrested by the Sheriff's Office Columbia, South Carolina, and was charged with:
 - Charge 1-Public Disorderly Conduct
 - Charge 2- Malicious Injury to Personal Property.

Based on information contained in the FBI report, the director determined that the applicant was ineligible for TPS because of his two misdemeanor convictions.

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 proceedings, in this case, does not contain the court's charging documents and final dispositions for the applicant's arrests to establish that he was convicted of the crimes listed in the FBI report. Nor is there evidence in the record that the applicant was requested to submit the final court dispositions of all of his arrests. The information contained in the record indicates that a fine was imposed, and that additional data is available.

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. The director shall enter a new decision.

It is noted that the applicant also has not submitted sufficient evidence to establish his continuous residence in the United States since December 30, 1998, and his continuous physical presence in the United States since January 5, 1999.

In addition, it is noted that the FBI report reflects that the applicant, at the time of his arrest in 2004, indicated his place of birth as Mexico, rather than Honduras. The record of proceedings contains only a photocopy of a birth certificate, with English translation. The applicant failed to submit photo identification or a national identity document from his country of origin bearing a photograph and/or fingerprint. The birth certificate alone is insufficient to establish the applicant's identity and nationality under the provisions of 8 C.F.R. § 244.9(a)(1).

The director may request any evidence necessary in order to determine 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 director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.