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FILE: [REDACTED]
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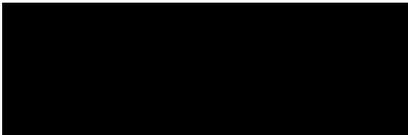
OFFICE: VERMONT SERVICE CENTER

Date: **JUN 28 2006**

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied, reopened, and denied again by the Director, Vermont Service Center. The case is now before the Administrative Appeals Office (AAO) on appeal and 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 Federal Bureau of Investigation (FBI) fingerprint results report contained in the record of proceeding reflects the following offenses:

1. On September 3, 1995, the applicant was arrested in Mineola, New York, under the name [REDACTED] and charged with "driving while intoxicated" in violation of section 1192.2-02 VTL, a misdemeanor. On September 5, 1995, this charge was dismissed in the City Court: City of Glen Cove, New York, County of Nassau, State of New York, and the applicant was found guilty of "disorderly conduct" in violation of section 240.20(7) VTL, a violation. (Index [REDACTED])
2. On August 7, 1998, the applicant was arrested in Mineola, New York, and charged with: (1) "driving while intoxicated with a blood alcohol content of 0.10% or greater" in violation of section VTL 1192.2, a misdemeanor; (2) "driving while intoxicated" in violation of section 1192.3 VTL, a misdemeanor; (3) driving without a valid driver's license" in violation of section 509.1VTL, a violation; and (4) "driving while ability impaired" in violation of section 1192.1 VTL a misdemeanor. On November 20, 1998, the applicant was convicted in the First District Court of Nassau County, State of New York, of counts (1) and (3) above. (Case [REDACTED])

According to Citizenship and Immigration Services (CIS) records, a Notice of Intent to Deny was mailed to the applicant on November 13, 2002, however, the Notice of Intent to Deny is not contained in the record of proceeding.

On May 9, 2003, the director denied the application after determining that the applicant had abandoned his application by failing to respond to a request for evidence. The director informed the applicant that there is no appeal from a denial due to abandonment, but that he could file a motion to reopen the case within 33 days of the date of issuance of the Notice of Decision.

On June 23, 2003, the applicant filed a motion to reopen the case. On motion, the applicant stated that he failed to respond to the Notice of Intent to Deny because he never received it, even though he had not moved.

On May 26, 2004, the director reopened the matter and denied the application because he found the applicant had been convicted of two misdemeanors.

On appeal, counsel for the applicant asserts that the director denied the application without providing the applicant with an opportunity to produce additional evidence. Counsel further asserts that the applicant has not

convicted of two misdemeanors as stated by the director in his denial decision. Counsel states that the applicant has been convicted of only one misdemeanor, and the other conviction is classified by the State of New York as a violation.

There is no appeal from a denial due to abandonment. 8 C.F.R. 103.2(b)(15).

A field office decision made as a result of a motion may be appealed to the AAO only if the original decision was appealable to the AAO. 8 C.F.R. 103.5(a)(6).

The director accepted the applicant's response to the director's latest decision as an appeal and forwarded the file to the AAO. However, in this case, the director denied the original application due to abandonment; since the original decision was not appealable to the AAO, the AAO has no jurisdiction to consider the current appeal from the director's denial of the application because the applicant has been convicted of two misdemeanors. Therefore, the case will be remanded and the director shall consider the applicant's response as a Motion to Reopen.

It is noted that the applicant was previously deported from the United States to El Salvador on October 16, 1985.

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 case is remanded to the director for further action consistent with the above and entry of a decision.