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FILE:



[EAC 02 003 50865]

OFFICE: VERMONT SERVICE CENTER

Date: JUN 27 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The director subsequently dismissed a motion to reopen the case, and the case is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration and action.

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), 8 U.S.C. § 1254.

The record reveals that the applicant appeared for his fingerprint appointment on February 28, 2002, and again on April 16, 2002. The Federal Bureau of Investigations (FBI) fingerprint results reports indicated that the applicant's fingerprints were unclassifiable. On November 8, 2002, the applicant was requested to submit the final court dispositions of all arrests since his arrival in the United States. The notice was returned to the Immigration and Naturalization Service, now Citizenship and Immigration Services, on November 25, 2002, as undeliverable mail.

On June 17, 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 July 21, 2003, the applicant filed a motion to reopen the case. On motion, the applicant stated that he never received the Notice of Intent to Deny dated November 8, 2002.

On March 17, 2004, the director reopened the matter and provided the applicant with another opportunity to submit the final court disposition of all arrests since his arrival in the United States. In response, the applicant submitted final court disposition documents reflecting the following:

1. On March 27, 2003, the applicant pled guilty in the First District Court of Nassau County, Nassau County, State of New York, to the following charges: "DRIVING WHILE ABILITY IMPAIRED" in violation of section 1192.1 VTL, an infraction; "FACILITATE AGGRAVATED UNLICENSED OPERATION MV" in violation of section 511(a) VTL, an infraction. Another charge, "VEHICLE REGISTRATION VIOLATON" in violation of section 401.1(a) VTL, was conditionally discharged. (Date of Arrest: September 30, 2002; Case Number [REDACTED])
2. On March 1, 2004, the applicant pled guilty in the First District Court of Nassau County, Nassau County, State of New York, to "OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL" in violation of section 1192.3 VTL, a Class U misdemeanor, "AGGRAVATED UNLICENSED OPERATOR MOTOR VEHICLE" in violation of section 511.2 VTL, a traffic infraction; and, "DISORDERLY CONDUCT" in violation of 240.20 VTL, a violation. (Date of Arrest: February 10, 2004; Case Number [REDACTED])

On August 11, 2004, the director denied the application because he found the applicant was convicted of two or more misdemeanors.

The applicant filed an appeal on September 10, 2004. On appeal, the applicant submits additional final court disposition documents regarding the offenses detailed in (1) and (2) above.

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 subsequent denial of the application. Therefore, the case will be remanded and the director shall consider the applicant's response as a Motion to Reopen.

It is noted that, under New York State Vehicle and Traffic Law, a conviction on the charges of driving while ability impaired (No. 1 above), facilitating aggravated unlicensed operation of a motor vehicle (Nos. 1 and 2 above), and disorderly conduct (No. 2 above), are all punishable by up to 15 days in a penitentiary or county jail. Consequently, for immigration purposes, these offenses are considered to be "misdemeanors" as defined by 8 C.F.R. § 244.1.

It is further noted that the record of proceeding, as it is presently constituted, does not contain sufficient evidence to establish the applicant's qualifying continuous residence and continuous physical presence in the United States throughout the requisite periods.

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.