

identifiable information deleted to
prevent disclosure of an unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



M1

FILE:



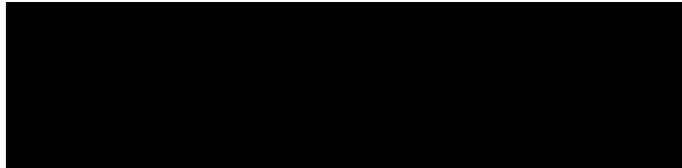
Office: CALIFORNIA SERVICE CENTER

Date: **SEP 01 2006**

[WAC 05 139 71679]

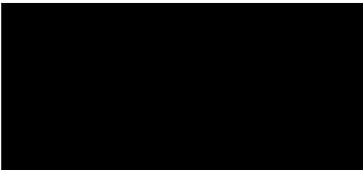
IN RE:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the California Service Center. Any further inquiry must be made to that office.

Cindy M. Gomez for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The initial application was denied by the Director, Texas Service Center. A subsequent application for re-registration was denied by the Director, California Service Center, and is currently before the Administrative Appeals Office, (AAO), on appeal. The initial application will be reopened, *sua sponte*, by the Chief, AAO, and the case 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 applicant filed an initial application for TPS under receipt number SRC 01 211 57531. The director denied the initial application on February 14, 2005, because applicant had abandoned his application by failing to appear for fingerprinting.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on February 16, 2005, and indicated that he was re-registering for TPS.

In this case, the applicant had not previously been granted TPS because he had not appeared for fingerprinting. However, the record contains a Form I-797C, Fingerprint Notification, showing that he appeared for fingerprinting at a Citizenship and Immigration Services office in Houston, Texas, that his prints were taken on April 21, 2005, and that they were processed for forwarding to the Federal Bureau of Investigation.

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.

The applicant’s Federal Bureau of Investigation fingerprint results report, contained in the record of proceeding, reflects the following:

1. On October 11, 2003, he was arrested by the Houston Police Department in Texas and charged with driving while intoxicated, (DWI). On October 27, 2003, he was convicted of DWI in "CO CRIM COURT NO 7 HOUSTON."
2. On February 8, 2004, he was arrested by the Bellaire Police Department in Texas and charged with DWI 2nd. On February 10, 2004, he was convicted of DWI in CO CRIM COURT NO 7 HOUSTON.

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 proceeding, in this case, does not contain the court's charging documents and final dispositions for the applicant's arrests to establish that he was in fact convicted of the crimes listed in the FBI report. Nor is there evidence in the record that the applicant was requested to submit the court documents of all of his arrests.

The case will, therefore, be remanded so that the CSC 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.

The director's denial of the initial application will be withdrawn; the application will be remanded for a new decision. The director's denial of the application for re-registration is also withdrawn as it is dependent upon the adjudication of the initial application. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS.

It is noted that the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The initial application is reopened, the TSC Director's decision is withdrawn, and the application is remanded to the CSC Director for a new decision. The re-registration application is remanded for further action consistent with the CSC Director's new decision on the initial application.