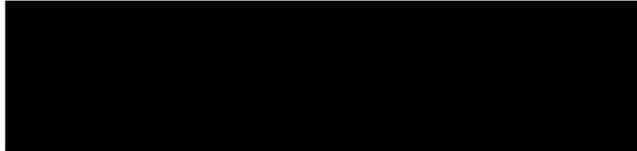


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and Immigration  
Services

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FILE: [REDACTED]  
[WAC 01 287 58035]

OFFICE: California Service Center

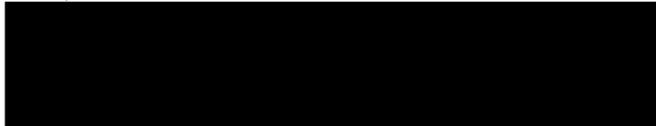
DATE:

AUG 27 2007

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 Director, California Service Center (CSC), withdrew the applicant's previously granted Temporary Protected Status. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The case will be remanded to the director for further consideration and the entry of a new decision.

The applicant is a 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 director withdrew the applicant's previously granted TPS on the ground that the applicant failed to provide requested evidence that he had not been convicted of a felony or two or more misdemeanors, and therefore did not establish his continued eligibility for TPS.

On motion, the applicant asserts that he responded to the director's request for evidence in a timely fashion, but that the post office was late in delivering it to the CSC. Copies of the materials sent to the CSC are re-submitted to the AAO.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
  - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
  - (2) During any subsequent extension of such designation if at the time of the initial registration period:
    - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
    - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

- (iii) The applicant is a parolee or has a pending request for reparole; or
- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

El Salvadoran nationals applying for TPS must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until March 9, 2009, upon the applicant's re-registration during the requisite time period.

An alien shall not be eligible for TPS 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" as follows:

*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 burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). See 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet the burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. See 8 C.F.R. § 244.9(b).

The record shows that the applicant filed his initial Form I-821, Application for Temporary Protected Status [WAC 01 287 58035], on August 29, 2001. It was approved on January 28, 2003.

On March 29, 2006, the CSC received a report from the Federal Bureau of Investigation (FBI), based on a fingerprint background check of the applicant, indicating that he had been arrested on June 26, 2005, by the

Metropolitan Police Department of Las Vegas, Nevada, and charged with 1<sup>st</sup> degree kidnapping and sexual assault. On December 5, 2006, the director issued a Notice of Intent to Withdraw (NOIW) in which the applicant was advised of the FBI report and requested to submit evidence of the final court disposition(s) of the arrest, and any other arrests. When no response was received from the applicant within the 30-day period prescribed in the NOIW, the director issued a Notice of Withdrawal on January 11, 2007, informing the applicant that his TPS had been withdrawn due to his failure to establish that he had not been convicted of a felony or two or more misdemeanors, as required under section 244(c)(2)(B) of the Act to establish his continued eligibility for TPS.

On January 18, 2007, one week after the denial decision was issued, the CSC received the applicant's response to the NOIW with a notarized letter, dated December 18, 2006, asserting that he did not commit the two offenses with which he was charged. According to the applicant, he was told that in 8-10 weeks he would receive his records signed by a judge confirming that he had never committed any crimes in the United States, and that he would forward such records to the CSC. The applicant also submitted a letter from the Las Vegas Metropolitan Police Department, dated December 13, 2006, which appears to confirm that the applicant was arrested for attempted sexual assault and kidnapping in the first degree, but is unclear as to the disposition of those charges.

On April 6, 2007, the applicant filed a Form I-290B, Notice of Appeal to the [AAO], on which he asserted that his response to the NOID should not have been late filed because it was mailed to the CSC on December 19, 2006. The applicant submitted a photocopied Certified Mail Receipt, indicating that he mailed a packet to the CSC on December 19, 2006, that was stamped as received by the CSC a month later on January 18, 2007. Those dates are confirmed by postage and receipt stamps on the envelope in which the applicant's response to the NOIW was mailed. In a letter accompanying the Form I-290B, dated February 7, 2007, the applicant stated that he called the post office and was told that the high volume of mail in December had caused the delay of his packet. The applicant reiterated that it would take 8-10 weeks for a judge to clear his record, and re-submitted copies of the materials previously submitted with his response to the NOIW.

The AAO notes that the Form I-290B submitted by the applicant was not a timely filed appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that an appeal together with the fee specified in 8 C.F.R. § 103.7 must be filed "with the office where the unfavorable decision was made" within 30 days of the date the decision was served. Three additional days are allowed for an appeal if the notice of decision was served by mail. *See* 8 C.F.R. § 103.5a(b). Since the notice of decision was mailed to the applicant in this case, a 33-day appeal period applies. If the last day of the appeal period falls on a weekend or a holiday, the deadline is extended until the next working day. *See* 8 C.F.R. § 1.1(h).

The CSC's decision was issued on January 11, 2007. Under the regulations, therefore, the filing deadline for an appeal was Tuesday, February 13, 2007. As specified in the regulations, a properly prepared document is filed on the date it is received by CIS.

An application or petition received in a [CIS] office shall be stamped to show the time and date of actual receipt and . . . shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted."

8 C.F.R. § 103.2(a)(7). The petitioner's appeal (Form I-290B) bears a receipt stamp showing that it was received by the CSC on April 7, 2006 – nearly two months after the deadline for an appeal.<sup>1</sup> The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) provides that “[a]n appeal which is not filed within the time allowed must be rejected as improperly filed.”

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the CSC Director. *See* 8 C.F.R. § 103.3(a)(1)(ii).

In view of the entire record – which shows that the applicant's response to the NOIW was mailed to the CSC well within the 30-day period specified in the NOIW, the response was delivered late to the CSC through no fault of the applicant's, and the materials pertaining to the applicant's arrest record were not before the director when she rendered her decision – the AAO concludes that the case should be remanded to the CSC Director for further consideration and the entry of a new decision on the initial application.

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 the entry of a new decision.

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<sup>1</sup> The Form I-290B bears evidence that the applicant made an earlier attempt to file his appeal on February 16, 2007, but a Rejection Notice issued to him by the CSC on February 21, 2007, stated that the appeal was not accepted at that time because it had not been properly signed and was not accompanied by the requisite filing fee. Even with a signature and a fee, however, the Form I-290B would still have been untimely filed at the CSC because the date of its receipt – February 16, 2007 – was three days past the deadline for an appeal.