



U.S. Citizenship
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Services

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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER DATE: **JUL 30 2007**
[SRC 01 203 56803]
[WAC 05 125 75950]

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, California Service Center (CSC), and the case is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254, on April 3, 2003. The CSC director subsequently withdrew the applicant's TPS status on August 14, 2006, when it was determined that the applicant had failed to respond to a notice of intent to withdraw (ITW) dated May 25, 2006, requesting that he submit the final court dispositions of all of his arrests, including arrests listed on the Federal Bureau of Investigation (FBI) fingerprint results report. Within the same decision, the director denied the applicant's re-registration application, filed on February 2, 2005, under Citizenship and Immigration Services (CIS) receipt number WAC 05 125 75950, because the applicant had abandoned his re-registration application based on his failure to respond to the ITW.

The director may withdraw the status of an alien granted TPS at any time if it is found that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An appeal that is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded. 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.5a(b).

8 C.F.R. § 103.2(a)(7) states, in part:

An application or petition received in a Service 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. An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as non-payable will not retain a filing date.

The director's decision of denial, dated August 14, 2006, clearly advised the applicant that Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), must be filed at "THIS OFFICE" [California Service Center] within thirty days after service of the decision. 8 C.F.R. § 103.3(a)(2)(i). Coupled with three days for mailing, the appeal, in this case, should have been filed on or before September 18, 2006. The appeal, however, was sent to the AAO and was stamped received on September 5, 2006. Simultaneously, a Form I-290B was also received at the CSC on September 5, 2006. The Form I-290B was returned to the applicant on September 7, 2006, and he was advised that the appeal cannot be accepted because the form had not been properly signed. The applicant was further advised that since the case was not properly filed, a priority or processing date cannot be assigned. The Form I-290B was resubmitted by the applicant and was again received at the CSC on September 15, 2006. Again, the Form I-290B was returned to the applicant on September 18, 2006, and once again he was advised that the appeal cannot be accepted because the form had not been properly signed. The applicant was further advised that since the case was not properly filed, a priority or processing date cannot be assigned. The Form I-290B was properly received at the CSC on December 4, 2006.

Based upon the applicant's failure to file a timely appeal, the appeal will be rejected.

It is noted that the applicant, on appeal, has not overcome the director's findings of ineligibility. Pursuant to section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Secretary of the Department of Homeland Security (DHS) finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The record reveals the following offenses:

- (1) The FBI report indicates that on March 4, 2002, in Webster, Texas, the applicant was arrested for "injury to a child-bodily injury," a felony. On May 22, 2002, in the District Court of Harris County, Texas, Cause No. [REDACTED] the applicant entered a plea of guilty to the offense. The court deferred adjudication of guilt and placed the applicant on community supervision for a period of 3 years, he was assessed a fine in the amount of \$250, and ordered to perform a total of 250 hours of community service.
- (2) The FBI report indicates that on August 7, 2005, in Houston, Texas, the applicant was arrested for "fail to identify fugitive from justice" [PC 38.02(d), a misdemeanor]. On November 21, 2005, in District Court of Harris County, Texas, Cause No. [REDACTED], the applicant was convicted of the offense. He was sentenced to 6 days in county jail, and assessed a fine in the amount of \$300.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law **regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.** (Emphasis added.)

Notwithstanding the fact that the court deferred adjudication of guilt (No. 1 above), the record reflects that the applicant entered a plea of guilty and the judge ordered some form of punishment (community supervision, fine, and community service). The applicant, therefore, had been convicted within the meaning of section 101(a)(48)(A) of the Act.

The applicant submits a document from the District Court of Harris County, Texas, dated October 6, 2005 (5 years after the applicant entered a plea of guilty as to No. 1 above) indicating that the court authorized the state to prosecute the case as a misdemeanor, deferred adjudication of guilt terminated, defendant [applicant] discharged, and case dismissed, based upon the applicant's completion of community supervision.

However, the order of the court dated May 22, 2002, indicates that the applicant was indicted for a felony offense, and the applicant entered a plea of guilty to the felony offense. The bottom of the court order listed

four blocks or selections under "Mark appropriate selections below, if applicable." One of the blocks or selections states: "In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor." This block was not marked. Only after the applicant had completed community supervision did the court authorize the state to prosecute the case as a misdemeanor. Furthermore, even if the applicant was in fact prosecuted and convicted of a misdemeanor, he remains ineligible for TPS based on convictions of two misdemeanor offenses.

Accordingly, although deferred adjudication was terminated and the case was prosecuted as a misdemeanor on July 1, 2005, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999). Therefore, the applicant remains convicted, for immigration purposes, of the offense listed in No. 1 above.

The applicant is ineligible for TPS based on his felony or two misdemeanor convictions detailed in Nos. 1 and 2 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the applicant's TPS and to deny the re-registration application will be affirmed.

On July 14, 1987, a Warrant of Deportation [Removal], Form I-205, was issued on July 14, 1987, based on the final order of removal by an Immigration Judge on February 17, 1987. The applicant was removed from the United States to El Salvador on November 21, 1989.

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 appeal is rejected.