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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

OFFICE: California Service Center

DATE:

FEB 04 2008

[WAC 05 155 71193,
as it relates to WAC 01 226 52489]

IN RE:

Applicant:

[REDACTED]

APPLICATION:

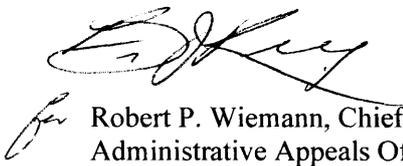
Application for Temporary Protected Status under Section 244 of the Immigration
and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

[REDACTED]

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The initial application was denied by the Director, California Service Center. A subsequent application for re-registration was also 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. The appeal will be sustained and the applications will be approved.

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 record reveals that the applicant filed a TPS application during the initial registration period on May 10, 2001, under receipt number WAC 01 226 52489. The director denied that application based on abandonment on March 24, 2004, because the applicant had failed to respond to a March 17, 2004, request to submit the final court disposition of an arrest on December 17, 2000, in Redwood City, California, when he was charged with one count of "POS/MFG/SELL DANG WPN/ETC," a misdemeanor, in violation of California Penal Code, PC 653K, a misdemeanor; and, one count of "POSS WPN TO COMMIT ASLT," in violation of California Penal Code, PC 12024, a misdemeanor. A denial due to abandonment may not be appealed; however, an applicant may file a motion to reopen under 8 C.F.R. § 103.5 within 30 days of the denial decision. The applicant did not file a motion to reopen within 30 days from the date of the denial.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on March 4, 2005, under receipt number WAC 05 155 71193, and indicated that he was re-registering for TPS. The director denied the re-registration application on June 27, 2005, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

On appeal, the applicant asserts that he is *prima facie* eligible for TPS, and requests reconsideration of his application because his attorney had sent the wrong information regarding his arrest record. A review of the record, however, indicates that the notice of intent to deny (NOID) dated March 17, 2004, and the director's denial decision dated March 13, 2004, were both mailed to the applicant at his address [REDACTED] and also to his attorney or representative at that time. There is no evidence in the record that the applicant or his representative responded to either the NOID or the director's denial decision, nor is there evidence that the notices were returned to CIS as undeliverable.

With his appeal, the applicant submits the final court disposition for the arrest on December 17, 2000. According to the court document, on October 15, 2003, as to Count 1, the court convicted the applicant, on a nolo contendere plea, of a violation of PC 653K, a misdemeanor, and sentenced the applicant to one (1) day jail, and 2 years probation, plus fines; and as to Count 2, the court dismissed the charge of possession of a dangerous weapon in violation of PC 12024.

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.

As noted above, the record contains a final court disposition which reveals only one misdemeanor conviction. The applicant, is therefore, not ineligible for TPS.

The record does not reflect a criminal record that would bar the applicant from receiving TPS. Additionally, the record contains sufficient evidence to establish the applicant's eligibility for TPS and does not reflect any grounds that would bar the applicant from receiving TPS: the record contains sufficient evidence to establish the applicant's identity and nationality, his continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States from March 1, 2001, to the date of filing his initial TPS application, April 24, 2001. In addition, the record contains documentation, including tax and employment records, which cumulatively establishes the requisite continuous residence and continuous physical presence, and the biographic page of the applicant's passport. Therefore, the director's decision will be withdrawn, and the initial application will be approved.

The director's denial of the application for re-registration or renewal is dependent upon the adjudication of the initial application. Since the initial application is being approved, the appeal from the denial of the re-registration will be sustained and that application will also be approved.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden.

ORDER: The application is reopened and the director's denial of the initial application is withdrawn. The initial application and the re-registration application are both approved. The appeal is sustained.