U.S. Department of Homeland Security
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Washington, DC 20529

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[redacted]

FILE: [redacted] OFFICE: California Service Center DATE: JUL 31 2008

[WAC 05 348 70047]
[WAC 06 267 50792, *motion*]

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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's initial application for Temporary Protected Status was denied by the Director, Vermont Service Center (VSC). A subsequent application for re-registration was also denied by the Director, California Service Center (CSC), and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action.

The applicant is a native and citizen of Honduras 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 an initial TPS application on August 20, 2001, during the initial registration period, under receipt number EAC 99 256 52038. The VSC director denied that application on June 28, 2000, due to abandonment because the applicant failed to respond to the request for additional evidence. The director informed the applicant that 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, in this case, filed a motion to reopen from the director's decision on September 29, 2003. The director dismissed that motion on February 23, 2004 because it was untimely filed.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on September 13, 2005, under Citizenship and Immigration Services (CIS) receipt number WAC 05 348 70047, and indicted he was filing a new application for TPS. On March 23, 2006, the CSC director erroneously denied that application as a re-registration application for TPS. The applicant has now submitted an appeal.

On appeal, counsel claims that the applicant is clearly qualified for TPS since he has resided and been continuously physically present in the United States since 1997 and that the applicant has been a person of good moral character and has paid his tax obligations. Counsel further states that the applicant has never received any notice regarding the denial of his TPS application, instead, he only received a denial notice of his Form I-765, Employment Authorization Application.

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.
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> 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 record of proceeding reveals that the applicant has submitted sufficient evidence to establish his eligibility for late registration as a spouse of a TPS registrant, his continuous residence in the United States since December 30, 1998, and his continuous physical presence in the United States since January 5, 1999. However, the Federal Bureau of Investigation Fingerprint Result Report contained in the record reflects the following:

1. On November 10, 1998, the applicant was arrested by the County Police Department Arlington, Agency Case No. [redacted] and charged with (1) – POSESS FAKE ID, a misdemeanor; and (2) FAIL TO ID.

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 final dispositions for the applicant's arrest 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 final court dispositions of all of his arrests. The case will, therefore, be remanded so that the director may accord the applicant an opportunity to submit the court's final dispositions of all his arrests. The director shall enter a new decision.

It is noted that the Service did send the TPS denial notice, on June 28, 2000, to the correct address: [redacted] as the applicant had listed on his initial Form I-821. In addition, it is also noted that the applicant's B1/B2 Visa was issued on October 17, 1997 in Tegucigalpa, Honduras; however, a copy of the Visa appears to show that the applicant entered the United States on January 2, 1997.

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 director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.