

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

MM1

FILE:

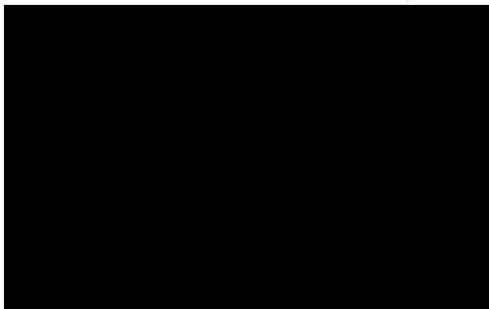


[WAC 01 190 52159]

OFFICE: CALIFORNIA SERVICE CENTER DATE: JUN 02 2005

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: Self-represented

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.

Cinder N. Gomez for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded to the director for further 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 director denied the application because the applicant was convicted of a felony or two or more misdemeanors committed in the United States.

On appeal, the applicant states that the incidents happened almost 10 years ago, and probation periods were completed as instructed.

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The Federal Bureau of Investigation (FBI) fingerprint results report, contained in the record of proceeding, reflects the following:

- (1) On November 29, 1992, in Oakland, California, the applicant (name used: [REDACTED]) was arrested and charged with Count 1, giving false information to a peace officer; and Count 2, possession of a narcotic controlled

substance, 11377 H&S. The FBI report shows that the applicant was subsequently convicted of Count 2 in Fremont, California.

- (2) On March 4, 1993, in Oakland, California, the applicant (name used: Flores, [REDACTED]) was arrested and charged with burglary.
- (3) On April 1, 1993, in Oakland, California, the applicant (name used: [REDACTED]) was arrested and charged with taking a vehicle without consent.
- (4) On May 19, 1993, in Fremont, California, the applicant (name used: [REDACTED]) was arrested and charged with resisting arrest. The FBI report shows that the applicant was subsequently convicted of "FIGHT NOISE OFFENSIVE WORDS."
- (5) On June 15, 1993, in Oakland, California, the applicant (name used: Flores, [REDACTED]) was arrested for resisting arrest.
- (6) On July 14, 1993, in San Francisco, California, the applicant (name used: [REDACTED]) was arrested for "PETTY THEFT/PT RETAIL MERCHANDISE/ETC."

Based on information contained in the FBI report, the director determined that the applicant was ineligible for TPS because he was convicted of Nos. 1 and 4 above.

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 of 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 his arrests.

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

It is noted that, on the Form I-821, the applicant, under penalty of perjury, certified that he had never been arrested.

It is also noted that the applicant submitted a letter dated March 20, 2003, from the Superior Court of California, Fremont, California, indicating that no record existed of the two arrests in Fremont (Nos. 1 and 4 above), under the name of [REDACTED]. However, as previously noted, the first arrest in Fremont, was under the alias and conviction of [REDACTED] while the second was under the name of [REDACTED].

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.