

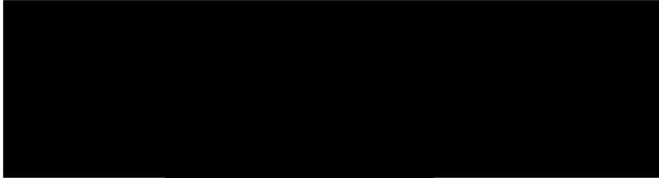
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U.S. Citizenship
and Immigration
Services

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FILE:

OFFICE: California Service Center

DATE:

FEB 27 2008

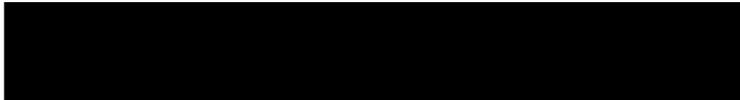
[WAC 06 132 52351, *motion*]

[WAC 06 090 50989, *appeal*]

[WAC 05 243 70723, I-821]

IN RE:

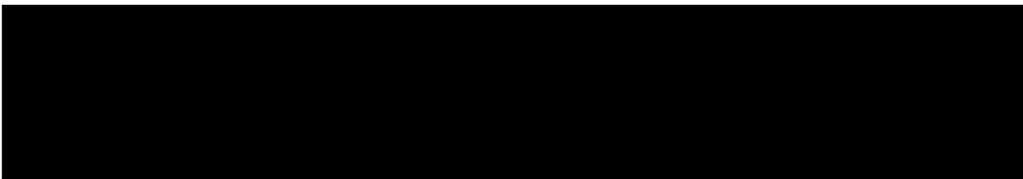
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's TPS re-registration application was denied by the Director, California Service Center (CSC). A subsequent untimely appeal was rejected by the CSC director. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion to reopen will be dismissed.

The applicant is stated to be 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 applicant's initial TPS application, filed under Citizenship and Immigration Services (CIS) receipt number WAC 01 171 50232, was denied by the CSC director on March 15, 2004, because the applicant had been convicted of two or more misdemeanors. The case was reopened on May 10, 2004, and denied again by the director on the same ground on July 9, 2004. The applicant filed a timely appeal which was dismissed by the Director (now Chief), AAO, on October 17, 2005, because the record reflected that the applicant had been convicted of two or more misdemeanors committed in the United States. The AAO also determined that the applicant had failed to submit final court dispositions for an April 2, 1993, arrest in Los Angeles, California for "disorderly conduct-soliciting lewd act" and an October 20, 1993, arrest in Los Angeles, California for "battery on a person."

The applicant filed a re-registration application on May 13, 2005, under CIS receipt number WAC 05 243 70723. The CSC director denied the application on December 14, 2005, because the applicant's initial TPS application had been denied, making him ineligible to re-register for TPS. The applicant filed an untimely appeal which was rejected by the director on February 22, 2006.

On motion to reopen, counsel states that the applicant made a mistake in sending the appeal to the AAO instead of to the California Service Center. Counsel requests that the applicant's appeal brief be considered because the applicant acted promptly to try to rectify the filing error. In addition, counsel asserts that CIS did not provide "enough specificity" regarding the applicant's misdemeanors, and that the applicant qualifies for TPS because two of his misdemeanors have been expunged from his record and he has only one misdemeanor remaining.

An appeal must be properly filed within thirty days after service of the decision. 8 C.F.R. § 103.3(a)(2)(i). Adding three days for mailing, as prescribed in 8 C.F.R. § 103.5a(b), the appeal in this case should have been filed on or before January 16, 2006. The Notice of Decision instructed that the Form I-290B, Notice of Appeal, was not to be sent directly to the AAO; but rather to "**THIS OFFICE**" – meaning the California Service Center, which made the unfavorable decision. The applicant, nevertheless, sent his appeal to the AAO. An appeal is not considered properly filed until it is received (with the requisite fee) by the office that rendered the unfavorable decision. The Form I-290B was received at the AAO on January 19, 2006, as evidenced by a receipt stamp of that date, and returned to the applicant the same day. The appeal was not received at the California Service Center – the correct office – until January 27, 2006. The CSC director rejected the appeal as untimely on February 22, 2006.

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant's attorney, on motion to reopen, states that an office clerk was responsible for the improper filing of the appeal. Assigning blame for the improper filing, however, does not alter the fact that the appeal was improperly filed. As such, the issue on which the previous decision was based has not been overcome on motion.¹

Moreover, while the current application – for re-registration of TPS – was denied because the applicant had not previously been granted TPS, the applicant's untimely appeal does not address this ground for denial. Rather, the appeal addresses the denial of the *initial* application for TPS, which was denied on July 9, 2004, due to the applicant's criminal record. Counsel contends that the previous decisions “do not give enough specificity regarding what misdemeanors they are alleging Applicant was convicted.” However, the record reveals that the AAO's decision dismissing the previous appeal identified each charge by name, by section of the California Vehicle Code (VC), by date, by court, and by case number. Counsel did not explain what additional “specificity” could possibly have been lacking from the AAO's previous outline of the applicant's criminal record.

Counsel also contends that “USCIS only have proof of three actual convictions.” However, the court records provided by the applicant, himself, clearly reveal the following offenses:

- (1) On April 27, 1993, in the Municipal Court of San Fernando Courthouse Judicial, County of Los Angeles, California, Case No. [REDACTED] (arrest date April 12, 1993), the applicant, under the name of [REDACTED] was indicted for Count 1, driving under the influence of alcohol/drug, 23152(a) VC, a misdemeanor; Count 2, driving with .08 percent blood alcohol level or more, 23152(b) VC, a misdemeanor; and Count 3, driving with suspended license, 14601.1(a) VC, a misdemeanor. The indictment also alleges three prior convictions on Count 3: 14601.1(a) VC – driving with suspended license on or about December 8, 1988, in Pasadena Municipal Court Judicial District under Case Number [REDACTED] 14601.1(a) VC – driving with suspended license on August 6, 1992 in L.A. Municipal-Hollywood Judicial District under Case Number [REDACTED] and 14601.1(a) VC – driving with suspended license on September 16, 1992 in L.A. Municipal-Metro Judicial District under Case Number [REDACTED]. On May 3, 1993, the applicant was convicted of Count 2. He was placed on probation for a period of 36 months under the condition that he serve 20 days in the county jail, ordered to pay \$1,142 in fines and costs, enroll and successfully complete a three-month licensed first-offender alcohol and other drug education and counseling program, and his license was suspended for 180 days. Counts 1 and 3 were dismissed.

¹ It is also noted that even if the AAO had been the correct office at which to file the appeal, the Form I-290B was not received at the AAO until January 19, 2006, which was three days after the filing deadline of January 16, 2006. Thus, the appeal would have been late filed in any event.

- (2) On December 28, 1993, in the Municipal Court of Burbank Judicial District, County of Los Angeles, California. Case No. [REDACTED] (arrest date December 14, 1993), the applicant, under the name of [REDACTED], was indicted for Count 1, driver unrestrained, 27315(d) VC, an infraction; and Count 2, driving with suspended license, 14601.1(a) VC, a misdemeanor. On June 4, 2001, the court ordered the case dismissed.
- (3) On January 13, 1994, in the Municipal Court of Malibu Judicial District, County of Los Angeles, California. Case No. [REDACTED] (arrest date January 3, 1994), the applicant, under the name of [REDACTED], was indicted for Count 1, driving with suspended license, 14601(a) VC, a misdemeanor; Count 2, driving with suspended-revoked license, 14601.5(a) VC, a misdemeanor; Count 3, driving with suspended license, 14601.1(a) VC, a misdemeanor; and Count 4, starting/backing when unsafe, 22106 VC, an infraction. The indictment also alleges three prior convictions on Count 1: 14601.1(a) VC – driving with suspended license on or about May 30, 1989, in Pasadena Municipal Court Judicial District under Case Number [REDACTED] 14601.1(a) VC – driving with suspended license on or about November 12, 1992 in L.A. Municipal-Metro Judicial District under Case Number [REDACTED] and 14601.1(a) VC – driving with suspended license on or about November 2, 1992 in L.A. Municipal-Metro Judicial District under Case Number [REDACTED]. On April 11, 1994, the applicant was convicted of Count 3. The applicant also admitted the three prior convictions on Count 1 under Case Nos [REDACTED]. He was placed on probation for a period of 36 months under the condition that he serve five days in the county jail, and ordered to pay a fine of \$1,435 or perform 224 hours of community service as to Count 3. Counts 1, 2, and 4 were dismissed.

In addition, the Federal Bureau of Investigation (FBI) fingerprint results report reveals the following charges:

- (4) On April 2, 1993, the applicant was arrested in Los Angeles, California, for disorderly conduct-soliciting lewd act. The final court disposition of this arrest is not contained in the record although the applicant was requested on January 5, 2004, to submit the final court dispositions of any and all arrests.
- (5) On October 20, 1993, the applicant was arrested in Los Angeles, California, for battery on a person. The final court disposition of this arrest is not contained in the record although the applicant was requested on January 5, 2004, to submit the final court dispositions of any and all arrests.

Furthermore, a report of the State of California's Department of Justice, dated November 12, 1993, identifies one final charge (not cited by the CSC director or the AAO in previous decisions):

- (6) On October 14, 1988, the applicant was arrested by the Los Angeles Police Department and charged with rape by force/fear under section 261(2) of the California Penal Code. The final court disposition of this arrest is not contained in the record.

Counsel's contention that the applicant had only been convicted of three misdemeanors ignores the prior convictions (identified by charge, date, court and case number in No. 3 above) that were admitted-to by the applicant as part of his plea agreement. Counsel failed to cite any reason for ignoring these three additional

misdemeanor convictions. Counsel inadvertently stated that the applicant had also been convicted of the charge detailed in No. 2 above, while the court records reveal that the charges were dismissed.

Counsel submits evidence that two of the convictions have been expunged pursuant to section 1203.4 PC. However, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions which 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 of these offenses for immigration purposes.

Accordingly, the applicant is ineligible for TPS due to his record of at least five misdemeanor convictions, detailed in Nos. 1 and 3 above, and because he failed to provide the final court dispositions of his arrests detailed in Nos. 4, 5, and 6 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, even if the untimeliness of the re-registration appeal were overlooked, it would have to be dismissed because no application for re-registration can be approved if the applicant was ineligible for an initial grant of TPS.

Finally, it is noted that while the applicant is applying for benefits made available to citizens of El Salvador, counsel's brief dated January 9, 2006, makes reference to hardships which would fall on the applicant's family if they were forced to return "to Mexico." It is not clear whether this statement means that the applicant is not, in fact, a citizen of El Salvador.

The FBI report further shows that the applicant was placed in removal proceedings on June 10, 1993, in Los Angeles, California (File [REDACTED]). The applicant was subsequently removed from the United States to El Salvador on October 26, 1998, but claims to have re-entered the United States without inspection on December 29, 1998.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met since the appeal was not filed within the allotted time period. In addition, the overwhelming evidence of record confirms that the applicant is not eligible for TPS due to his criminal record. Accordingly, the motion to reopen will be dismissed. The CSC director's decision of December 14, 2005, denying the application for re-registration, is affirmed.

ORDER: The motion to reopen is dismissed.