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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER DATE: **AUG 05 2005**
[WAC 01 162 50108]

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: 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.

Robert P. Wiemann 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 (AAO) 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 he found the applicant had been arrested, cited, and/or convicted of two or more misdemeanors.

On appeal, the applicant submits a statement and additional evidence.

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.

The Federal Bureau of Investigations (FBI) Identification Report contained in the record of proceeding reflects the following:

1. On August 10, 1996, the applicant was arrested by Sheriff's officers in San Bernardino, California, under the name [REDACTED] and charged with driving under the influence of alcohol in violation of section 23152(a) VC, a misdemeanor. (Agency Case [REDACTED])
2. On May 18, 2002, the applicant was arrested by Sheriff's officers in [REDACTED] California, and charged with one count of driving under the influence of alcohol or drugs with a prior conviction in violation of section 23152(a) VC, a misdemeanor; and one count of

driving under the influence of alcohol with a blood alcohol content of 0.08% or greater with prior conviction in violation of section 23152(b), a misdemeanor. (Agency Case Number [REDACTED])

3. On May 7, 2003, the applicant was arrested by Sheriff's Officers in San Bernardino, California, and again charged with one count of driving under the influence of alcohol with prior convictions in violation of section 23152(a) VC, a misdemeanor; one count of driving under the influence of alcohol with a blood alcohol content of 0.08% or higher with prior conviction(s) in violation of section 23152(b) VC, a misdemeanor; apparently as a result of his failure to appear for a hearing relating to his arrest detailed in No. 2 above. (Case No. [REDACTED]).

Based on information contained in the FBI report, the director determined that the applicant was ineligible for TPS because he had been convicted of two or more misdemeanors.

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 for 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 of 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.

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.