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U.S. Citizenship
and Immigration
Services

MI

FILE: [REDACTED]
[WAC 01 171 54958]

OFFICE: CALIFORNIA SERVICE CENTER DATE: JUL 29 2005

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 office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The application is now before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

The applicant claims 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 record contains a Federal Bureau of Investigation (FBI) Identification Report indicating that the applicant was arrested in San Jose, California, on June 29, 1992, and charged with one count of grand theft in violation of section 487 PC.

The director denied the application after determining that the applicant had abandoned his application by failing to respond to a request for evidence relating to his criminal record.

If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied. 8 C.F.R. § 103.2(b)(13). A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen. 8 C.F.R. § 103.2(b)(15).

The record reveals that the applicant filed his application on April 7, 2001. On March 13, 2003, the applicant was requested to submit the final court disposition of all arrests since his arrival in the United States. The record does not contain a response from the applicant; therefore, the director concluded that the applicant had abandoned his application and issued a Notice of Denial on February 24, 2004. The director erroneously advised the applicant that he could file an appeal with the AAO within 33 days of the date of issuance of the Notice of Decision.

Counsel for the applicant responded to the Notice of Decision on March 26, 2004. Counsel states that the applicant was working on a construction project in Hawaii during the time period given to submit the requested evidence. Counsel explains that the applicant's employer refused to give him time off to fly back to the United States, and the applicant was unable to obtain the requested evidence by any other means. Counsel submits a letter dated March 2, 2004, from [REDACTED] Human Resource Manager for [REDACTED] Contracting Co., LLC, stating that the applicant worked "on the Big Island of Hawaii" for [REDACTED] Contracting Co. LLC from March 11, 2003 to October 2, 2003. Counsel also submits police clearance letters from the following jurisdictions: Hawaii Criminal Justice Data Center, State of Hawaii; the Superior Court of California, County of Santa Clara; the Police Department in Mountain View, California; the San Jose Police Department in San Jose, California; and, the Sunnyvale Department of Public Safety in Sunnyvale, California. All of the police clearances indicate no criminal record for [REDACTED], date of birth November 24, 1971. Counsel did not, however, provide the final court disposition of the applicant's arrest on June 19, 1992, on the charge of "Grand Theft."

The director erroneously accepted the applicant's response as an appeal instead of a motion to reopen and forwarded the file to the AAO. However, as the director's decision was based on abandonment, the AAO has no jurisdiction over this case. Therefore, the matter will be remanded and the director shall consider the applicant's response as a motion to reopen.

It is noted that the applicant was apprehended by the United States Border Patrol near Laredo, Texas, on February 16, 1991, and placed under removal proceedings. The proceeding was subsequently administratively closed by an Immigration Judge on May 25, 2001, because the applicant provided evidence that he had filed the application for TPS.

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 matter is remanded for further action consistent with the above and entry of a new decision.