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U.S. Citizenship
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FILE: [Redacted]
[WAC 03 268 53301]

OFFICE: CALIFORNIA SERVICE CENTER DATE:

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.

Cindy 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 (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 determined that the applicant was ineligible for TPS because he had been convicted of a felony offense committed in the United States. The director, therefore, denied the application.

On appeal, counsel asserts that the director improperly denied the application based on a determination that the applicant had been convicted of a felony, because the director did not issue a notice informing the applicant of the adverse information and affording the applicant an opportunity to provide evidence regarding the derogatory information cited by the director in his decision in violation of 8 C.F.R. § 103.2(b)(16)(iii).

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.

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

1. On May 15, 1993, the applicant was arrested by officers of the Sheriff's Office in Salinas, California, and charged with "hit and run resulting in death or injury." The applicant was subsequently convicted in the Superior Court of California, County of Salinas, of "driving under the influence of alcohol or drugs causing bodily injury," in violation of section 23153(a) PC, a felony.
2. On January 29, 1995, the applicant was arrested by police officers in Yuma, Arizona, on the charges of being a fugitive from a warrant in California and of violation of probation, a felony. No complaint was filed in connection with this arrest.
3. On February 9, 1996, the applicant was arrested by officers of the Sheriff's Office in Yuma, Arizona, on the charge of "failure to appear," in violation of section 5015, a misdemeanor.
4. On August 30, 2003, the applicant was arrested by officers of the Sheriff's office in Salinas, California, on one count of "warrant or probation violation, rearrest/revocation of probation."
5. On September 8, 2003, the applicant was arrested by officers of the Sheriff's Office in Salinas, California, under the name [REDACTED] and charged with "driving under the influence of alcohol or drugs resulting in bodily injury."

It appears that one or more of the arrests detailed in Nos. 2, 3, 4, and 5 above may be related to the applicant's initial arrest detailed in No. 1 above; however, in the absence of any court documents reflecting the final disposition of these charges, it is not possible to ascertain whether these subsequent arrests are in fact related to the arrest detailed in No. 1 above.

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

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 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.