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U.S. Citizenship
and Immigration
Services

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MAY 02 2005

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

[WAC 02 095 55712]

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 matter will be remanded for further consideration and 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 after determining that the applicant had abandoned his application by failing to respond to a request for evidence.

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 January 23, 2002. On January 21, 2004, the applicant was requested to submit police clearances from every city in which he has resided since arriving in the United States and a certified copy of the final court dispositions of all arrests since arriving in the United States. The applicant was granted until February 21, 2004, to respond to the notice. As of that date, the applicant had not responded to the notice. Therefore, the director concluded that the applicant had abandoned his application and issued a Notice of Denial on February 28, 2004. The director also 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.

It is noted that the applicant subsequently responded to the Notice of Intent to Deny. His response was received at the California Service Center on March 3, 2004, eleven days after the response deadline indicated in the Notice of Intent to Deny, and four days after the issuance of the denial notice.

In response to the denial, the applicant stated that he did not respond to the Notice of Intent to Deny by the specified deadline because it took him additional time to obtain all of the documents requested in the notice. The applicant provided copies of the court dispositions of his charges and additional evidence in an attempt to establish continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001.

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 court dispositions provided by the applicant in response to the Notice of Intent to Deny indicate that he has been convicted of the following offenses:

1. On October 5, 2002, the applicant was arrested in San Jose, California, on one count of DRIVING UNDER THE INFLUENCE OF ALCOHOL in violation of VEHICLE CODE SECTION C23152(A), a misdemeanor, and one count of DRIVING WITH A BLOOD ALCOHOL LEVEL OF 0.08 OR MORE, in violation of VEHICLE CODE SECTION 23152(B), a misdemeanor. He was convicted of count two by the Superior Court, County of Santa Clara, California, on November 19, 2002, and was sentenced to serve five days in jail, ordered to pay \$680, and granted formal probation for a period of three years from the date of the order. He was also required to enroll and participate in a First Offender Alcohol Program within 7 days of the order.

2. On October 18, 2003, the applicant was charged with BATTERY ON SPOUSE, COHABITANT, PARENT OF CHILD, FORMER SPOUSE, FINACE, FIANCEE OR DATING RELATIONSHIP, in violation of PENAL CODE 242-243 (E), a misdemeanor. He was convicted of the charge in the Superior Court, County of Santa Clara, California, on October 22, 2003. He was sentenced to serve 45 days on weekends beginning on November 8, 2003, fined \$225, and granted formal probation for a period of three years from the date of the order, with the condition that he have no contact with his wife. He was also ordered to: pay restitution to his wife in the form of a Domestic Violence Fee of \$200 and a Shelter Fee of \$300; possess no weapon for 10 years; participate in a "Parenting Without Violence" Program, and in alcohol and domestic violence programs, as directed; submit to an alcohol or drug test at any time without benefit of a search warrant as directed by a Peace Officer; and, serve 40 hours of volunteer work as directed.

Since the applicant has been convicted of two misdemeanors, he is ineligible for TPS under 8 C.F.R. § 244.4(a).

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.