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FILE:

[REDACTED]
[EAC 02 283 51212]

OFFICE: VERMONT SERVICE CENTER

DATE: JUN 27 2006

IN RE:

Applicant:

[REDACTED]

APPLICATION:

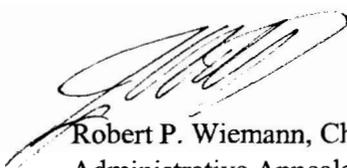
Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied, reopened, and denied again by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 on June 26, 2003, because he found that the applicant had failed to submit requested court documentation relating to his criminal record.¹

On July 29, 2003, the applicant, through counsel, filed a motion to reopen the matter. On motion, the applicant stated that neither he nor counsel ever received the Notice of Intent to Deny dated May 5, 2003.

On February 18, 2004, the director reopened the matter and provided the applicant with another opportunity to provide the final court disposition of the charges related to his arrest on June 16, 2002.

On July 22, 2004, the director again denied the application because he found that the applicant had failed to submit requested court documentation relating to his criminal record.

On appeal, counsel for the applicant submits a brief and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f) (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or

¹ It is noted that the applicant filed a prior Form I-821, Application for Temporary Protected Status, on March 30, 2001, under CIS receipt number EAC 01 164 54884. The director denied that application on June 12, 2002, after determining that the applicant had abandoned his application by failing to appear to be fingerprinted or request that his fingerprint appointment be rescheduled. The applicant was informed that there is no appeal from a denial due to abandonment, but he could file a motion to reopen the matter within 30 days of the issuance of the denial decision. The applicant failed to file a motion to reopen. He filed the current Form I-821 on September 6, 2002.

- (2) During any subsequent extension of such designation if at the time of the initial registration period:
- (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or
 - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

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.

8 C.F.R. § 244.1.

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) fingerprint results report dated November 8, 2002, revealed that the applicant was arrested in Alexandria, Virginia, and charged: (1) with one count of possession of burglary tools and (2) one count of grand larceny.

Pursuant to a letter dated February 18, 2004, the applicant was requested to submit the final court disposition for the charge detailed above. Counsel for the applicant responded to the Notice of Intent to Deny, and his response was received at the Vermont Service Center on March 3, 2004. In response, counsel for the applicant submitted computer printouts from the Virginia Courts Case Information, Alexandria General District Court, website. These documents indicate that Count 1, grand larceny in violation of section 18.2-95 was amended to one count of petit larceny in violation of section 18.2-96, a misdemeanor, and the applicant was found guilty of the amended charge on July 23, 2002. (Case Number [REDACTED] Prosecution was declined on Count 2, possession of burglary tools in violation of section 18.2-94, a felony. (Case No. [REDACTED])

The director erroneously determined that the applicant had failed to submit evidence necessary for the proper adjudication of the application and denied the application on July 22, 2004.

On August 6, 2004, the Vermont Service Center received correspondence from counsel pointing out that he had responded to the Notice of Intent to Deny dated February 18, 2004 in a timely manner, and his response was received at the Vermont Service Center on March 3, 2004. Counsel re-submitted a photocopy of the evidence previously submitted in response to the Notice of Intent to Deny, along with a photocopy of a United States Postal Service domestic return receipt indicating receipt of mail at the Vermont Service Center on March 3, 2004.

On August 23, 2004, counsel filed an appeal from the denial decision. On appeal, counsel states that the applicant has provided evidence establishing that he has only been convicted of one misdemeanor, and, therefore, cannot be found ineligible for TPS because of his criminal record.

Since counsel did provide the final court disposition of the charges detailed above in response to the Notice of Intent to Deny dated February 18, 2004, the director's decision will be withdrawn. However, an updated FBI fingerprint results report contained in the record of proceeding indicates that the applicant was subsequently arrested in Alexandria, Virginia, on August 22, 2004, and charged with assault and battery on a family member.

The director shall provide the applicant with an opportunity to provide the final court disposition of this 2004 arrest and shall issue 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 matter is remanded for further action consistent with the above and entry of a new decision.