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FILE:



[WAC 01 167 53740]
[WAC 05 224 75422]

OFFICE: CALIFORNIA SERVICE CENTER

DATE:

AUG 20 2007

IN RE:

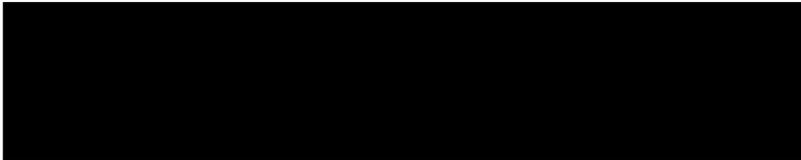
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 record reveals that the applicant filed a TPS application during the initial registration period on March 29, 2001, under receipt number WAC 01 167 53740. The director denied that application on March 15, 2006, after determining that the applicant had abandoned his application based on his failure to appear for fingerprinting. On April 19, 2006, the applicant filed a motion to reopen his case, and on July 13, 2006, the director approved the motion. On May 12, 2005, the applicant filed Form I-821, Application for Temporary Protected Status, under receipt number WAC 05 224 75422, and indicated that he was re-registering for TPS. On November 28, 2006, the director issued a Notice of Intent to Deny (NOID) both the initial application and the re-registration application, and requested that the applicant submit evidence to establish: (1) that he was eligible for late registration; (2) his nationality and identity; (3) that he had continuously resided in the United States since February 13, 2001, and had been continuously physically present since March 9, 2001; (4) his correct date of birth; and (5) the final court dispositions of all of his arrests, including his arrest listed on the Federal Bureau of Investigation (FBI) fingerprint results report. The director determined that the applicant had failed to respond to the NOID and denied both the initial application and the re-registration application on February 12, 2007.

On appeal, the applicant asserts that he did send a response to the director's NOID to the California Service Center on December 15, 2006. A review of the record indicates that the applicant's response is indeed contained in the applicant's file. He submitted:

1. A copy of his birth certificate with English translation; a copy of an El Salvadoran passport issued on November 14, 2006, in Los Angeles, California; a copy of State of California Identification Card issued on December 30, 2005; and a copy of his Social Security Card.
2. Copies of receipts, Income Tax Returns, and pay statements all dated during the periods from 2003 to 2006.

Based on the evidence furnished above, the applicant has established his nationality and identity. Additionally, the birth certificate, passport, and California Identification Card all indicate his date of birth as March 24, 1974. The applicant, however, has failed to submit sufficient evidence to establish continuous residence and continuous physical presence during the qualifying period, as described in 8 C.F.R. § 244.2(b) and (c).

Although the director requested in the NOID that the applicant submit evidence to establish eligibility for late initial registration, as previously noted above, the applicant had indicated on Form I-821 filed on May 12, 2005, under receipt number WAC 05 224 75422, that he was re-registering for TPS. The record does not contain a subsequent initial TPS application that was filed by the applicant other than the application filed on March 29, 2001 (WAC 01 167 53740).

An alien shall not be eligible for temporary protected status 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.

Based on the FBI report, the applicant was requested on November 28, 2006, to submit the final court dispositions of all of his arrests. The applicant responded by submitting the following:

- (1) On June 23, 1995, in the Municipal Court of San Fernando Courthouse Judicial, County of Los Angeles, California, case No. [REDACTED] (arrest date June 4, 1995), the applicant was indicted for "use/under influence of a controlled substance," 11550(a) H&S, a misdemeanor. On August 7, 1995, the applicant was granted diversion.

Under the pretrial diversion program, a defendant is not required to enter a plea or to admit any facts sufficient to warrant a finding of guilty. The record indicates that the applicant did not enter a plea of guilty or *nolo contendere*, nor did the judge find the applicant guilty of the above offense. On February 7, 1996, diversion was terminated and the case was dismissed pursuant to 1000.3 PC. Diversion in California, pursuant to section 1000 PC, is not a conviction for immigration purposes. The applicant, in this case, completed diversion, and the case was dismissed.

Although the applicant failed to submit the court dispositions of all of his arrests, the record of proceeding contains additional criminal records pertaining to the applicant:

- (2) On May 12, 2004, in the Superior Court of the State of California, County of Los Angeles, Case No. [REDACTED] (arrest dated April 7, 2004), the applicant was indicted for Count 1, driving under the influence of alcohol or drug with prior convictions, 23152(a) VC, a felony [priors on May 4, 1998 for 23152(a) VC; on May 14, 2003 for 23152(b) VC; and on July 30, 2003 for 23152(b) VC]; Count 2, driving with .08 percent or higher blood alcohol with prior convictions, 23152(b) VC, a felony [priors on May 4 1998; on May 14, 2003; and on July 30, 2003]; Count 3, perjury-application for driver's license, 118(a) PC, a felony; Count 4, driving when privilege suspended for prior DUI conviction, 14601.2(a) VC, a misdemeanor [prior 14601.2(a) VC on July 30, 2003]; Count 5, possession for sale of a controlled substance (cocaine), 11351 H&S, a felony; and Count 6, possession of a controlled substance (cocaine), 11351 H&S, a felony. On May 27, 2004, the applicant was convicted of Count 2. He was placed on probation for an unspecified time; also, the court disposition failed to indicate whether Counts 1, 3, 4, 5 and 6 were dismissed. [Although the applicant was requested to submit the final court dispositions of all of his arrests, he failed to submit the court dispositions of his 4 prior misdemeanor convictions: on May 4, 1998 for 23152(a)

VC; on May 14, 2003 for 23152(b) VC; on July 30, 2003 for 23152(b) VC; and on July 30, 2003 14601.2(a) VC.]

- (3) April 13, 2005, in the Superior Court of the State of California, County of Los Angeles, Case No. [REDACTED] (arrest date April 11, 2005), the applicant was indicted for Count 1, driving under the influence of alcohol or drug with prior conviction(s), 23152(a) VC, a felony [prior on October 8, 2004¹ for 23152(b)]; and Count 2, driving with .08 percent or higher blood alcohol with prior conviction(s), 23152(b) VC, a felony [prior on October 8, 2004 for 23152(b)]. On April 5, 2005, the applicant was convicted of Count 2. He was sentenced to 1 year, 4 months in prison.

The applicant is ineligible for TPS due to his two felony convictions (Nos. 2 and 3 above), and because he failed to submit the final court dispositions of his 4 prior convictions listed in No. 2 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the TPS application will be affirmed.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for temporary protected status has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.

ORDER: The appeal is dismissed.

¹ It appears that this prior refers to Count 2 of No. (2) above, conviction date May 27, 2004.