



U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE: DEC 28 2007

[WAC 02 072 53029]

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.

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 case will be remanded to the director for further 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 director initially denied the application on December 3, 2003, after determining that the applicant had abandoned his application because he failed to appear for fingerprinting on January 25, 2002, or to request that his fingerprint appointment be rescheduled. On January 7, 2004, the applicant filed a motion to reopen his case. He stated that he was never aware that he had an appointment to be fingerprinted because he never received a notice at his address, or from his former attorney. The director subsequently reopened the case and on January 9, 2004, the applicant was requested to appear for fingerprinting on February 7, 2004. The applicant appeared for his fingerprint appointment as scheduled.

Based on the Federal Bureau of Investigation (FBI) fingerprint results report, a Notice of Intent to Deny (NOID) was issued on May 20, 2004, requesting that the applicant submit the final court dispositions of his arrests on August 11, 2001 and on November 3, 2001, as listed on the FBI report. Because the applicant, in response, failed to submit all of the requested court documentation relating to his criminal record, the director denied the application on July 8, 2004.

On appeal, counsel submits a brief and additional evidence.

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.

The record reveals the following:

1. The FBI report indicates that on August 11, 2001, the applicant was arrested by the Sheriff's Office in Redwood City, California. In response to the NOID and on appeal, the applicant subsequently submitted court documents indicating that on September 14, 2001, in the Superior Court Northern

Branch of the State of California, County of San Mateo, Case No. [REDACTED] the applicant was indicted for Count 1, driving under the influence of alcohol, 23152(a) VC, a misdemeanor; Count 2, driving with .08 percent blood alcohol level or more, 23153(b) VC, a misdemeanor; and Count 3, driving with an open container of alcohol, 23222(a) VC, an infraction. On September 18, 2001, the applicant entered a plea of guilty to Count 2. He was placed on probation for a period of 3 years, ordered to serve 48 days in the county jail, and pay \$1,131 in fines and costs. He was further ordered to surrender himself to the county jail on October 27, 2001, to serve his 48-day sentence. Counts 1 and 3 were dismissed.

2. The FBI report indicates that on November 3, 2001, the applicant was arrested or received by the Sheriff's Office, Redwood City, California, for driving with .08 percent blood alcohol level or more. The director denied the application after determining that the applicant had failed to submit the final court disposition of this arrest.

On Appeal, counsel explains that the applicant's arrest on November 3, 2001 (No. 2 above), relates to the applicant's arrest on August 11, 2001, detailed in No. 1 above. Counsel submits a copy of a custody chronology printout from the Sheriff's office, San Mateo County, California, indicating that the applicant was arrested on November 3, 2001, in connection with his conviction detailed in No. 1 above; and a criminal case docket summary from the Superior Court of California, County of San Mateo, listing the charges and dispositions relating to the arrest detailed in No. 1 above. The documents indicate that the applicant was arrested on November 3, 2001, and booked in the San Mateo County Jail. According to the court documents submitted in response to the NOID and on appeal, it appears that the applicant was arrested on November 3, 2001, based on the court's order that the applicant surrender himself to the county jail, and was booked at the county jail to serve his 48-day sentence resulting from his conviction on the charge of driving with .08 percent blood alcohol level or more (No. 1 above). The applicant's arrest on November 3, 2001, is not a separate charge, but rather relates to the charges detailed in No. 1 above, and bears the same case number, Case No. [REDACTED]

The evidence of record confirms that the applicant was convicted of only one misdemeanor offense. The applicant's one misdemeanor conviction does not render him ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), as an alien who has been convicted of a felony or two or more misdemeanors committed in the United States. The sole ground for denial of the application has, therefore, been overcome.

However, although the record of proceeding contains an El Salvadoran birth certificate and English translation, the applicant has not submitted an official photo identification document to establish his nationality and identity as required by 8 C.F.R. § 244.9(a)(1).

Therefore, the case will be remanded to the director to accord the applicant the opportunity to submit documentation to establish nationality and identity. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS.

It is noted that the applicant filed a Form I-587, Application for Asylum and for Withholding of Removal, on March 27, 1996. He also filed a Form EOIR-40, Application for Suspension of Deportation, on August 21, 1996. In a removal hearing before an Immigration Judge (IJ) in San Francisco, California, the applicant's asylum application was withdrawn, his application for suspension of deportation was denied, and he was granted the privilege of voluntary departure on or before June 1, 1997, with an alternate order of deportation to El Salvador if he failed to depart in compliance with the grant of voluntary departure. On March 4, 1997, the applicant filed an appeal from the decision of the IJ with the Board of Immigration Appeals (BIA). On August

23, 2001, the BIA administratively closed removal proceedings in order to allow the applicant to file a Form I-821, Application for Temporary Protected Status.

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 case is remanded for appropriate action consistent with the above.