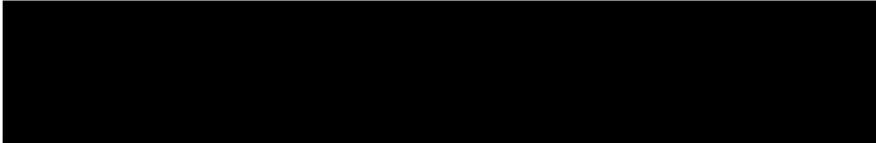




U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy

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M

FILE:



OFFICE: California Service Center

DATE:

FEB 05 2007

[WAC 03 037 54005]

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:

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California Service Center, and is now on appeal before the Administrative Appeals Office (AAO). The case will be remanded to the director for further action.

The applicant claims to be a 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 the ground that the applicant failed to respond to a request for evidence (RFE), dated May 23, 2005, of the final court disposition(s) resulting from the applicant's arrest on October 16, 2004 by the Sheriff's Office of Norwalk, California.

On appeal, the applicant asserts that he did not receive the cited RFE and submits the requested final court disposition of the case resulting from his arrest.

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
  - (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.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until September 9, 2007, upon the applicant's re-registration during the requisite time period.

An alien shall not be eligible for TPS 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” as follows:

*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 burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). *See* 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet the burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. *See* 8 C.F.R. § 244.9(b).

On May 23, 2005, the service center issued an RFE requesting the applicant to submit documentary evidence of police clearances from every city in which he had resided since arriving in the United States, as well as a copy of the certified final court disposition of the applicant’s arrest on October 16, 2004 by the sheriff’s office in Norwalk, California. The applicant was given a 90-day period, until August 21, 2005, to submit the requested information.

As no response to the RFE was received, the director denied the application on the ground of abandonment on March 2, 2006, citing the regulation at 8 C.F.R. § 244.9(c), which reads as follows:

Failure to timely respond to a request for information . . . without good cause, will be deemed an abandonment of the application and will result in a denial of the application for lack of prosecution. Such failure shall be excused if the request for information . . . was not mailed to the applicant's most recent address provided to the Service.

The RFE of May 23, 2005 was mailed to the address provided in the applicant's initial Form I-821, filed in September 2002. As indicated in the record, however, the applicant's address changed before May 2005 and the service center had notice thereof. In an application for employment authorization (Form I-765) filed with the service center in September 2003 the applicant provided a new address. Subsequent correspondence from the service center to the applicant in 2004 was correctly sent to the address indicated in the Form I-765 of September 2003. In March 2005 the applicant filed another Form I-821 application, for re-registration or renewal of TPS, in which he provided yet another address. Though the director's decision of March 2, 2006 on the initial application for TPS benefits was correctly mailed to this address, the antecedent RFE of May 23, 2005 was not. Since the RFE was not mailed to the applicant's most recent address provided to the Service, the applicant's failure to timely respond should have been excused, in accordance with 8 C.F.R. § 244.9(c), and the application should not have been denied on the ground of abandonment.

Ordinarily, a denial due to abandonment may not be appealed, though an applicant or petitioner may file a motion to reopen. *See* 8 C.F.R. § 103.2(b)(15). In the instant case, however, the applicant's failure to timely respond to the RFE was for "good cause" within the meaning of 8 C.F.R. § 244.9(c). The applicant had no notice of the RFE until he received the director's decision denying the application on the faulty ground of abandonment. The applicant filed an appeal on Form I-290B within the requisite 33-day period, as specified in the director's decision. Since abandonment was an improper ground for denying the application, the AAO will treat the applicant's filing as an appeal in accordance with the provisions of 8 C.F.R. § 103.3, rather than a motion to reopen under 8 C.F.R. § 103.2(b)(15).

On appeal the applicant submits a copy, dated March 14, 2006, of the final disposition by the Superior Court of California, County of Los Angeles, Compton Courthouse Division 004, of the complaint filed against the applicant based upon his arrest on October 16, 2004. The court record shows that the applicant was charged on December 14, 2004 with two misdemeanor offenses of the state vehicle code: driving a vehicle under the influence of alcohol or drugs (Count 1) and driving a vehicle with a blood alcohol content of 0.08% or more (Count 2). The applicant pleaded not guilty to both counts. On January 31, 2005 the court ordered the complaint amended by interlineation to add a third misdemeanor count, identified as "violation 23103.5 VC – wet reckless" to which the defendant pleaded nolo contendere. The court found the defendant guilty of Count 3 and sentenced him to six days in the Los Angeles County Jail. In connection with the applicant's conviction on Count 3, the court dismissed Count 1 and Count 2.

Thus, the court record shows that the applicant has been convicted of a single misdemeanor crime. As such, he is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

Beyond the decision of the director, however, the AAO notes that the service center's receipt stamp on the applicant's initial Form I-821 bears the date of September 12, 2002. The initial TPS registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. Thus, the applicant's initial Form I-821 was filed three days after the deadline. To qualify for late registration the applicant must provide evidence that during the initial registration period he satisfied at least one of the criteria enumerated under 8 C.F.R. § 244.2(f)(2). Since the director did not request such evidence from the applicant prior to the decision, the case must be remanded to the director for the purpose of affording the applicant the opportunity of providing evidence that he qualifies for late registration – *i.e.*, that he meets one of the criteria enumerated under 8 C.F.R. § 244.2(f)(2).

The AAO also notes that the record includes an FBI (Federal Bureau of Investigation) report indicating that the applicant was charged with another count – driving without a license – in connection with his arrest on October 16, 2004. The final court disposition in the record, issued by the Superior Court of California, County of Los Angeles, Compton Courthouse Division 004, does not mention this count.

As always in these proceedings, the burden of proof rests solely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The case is remanded to the director for further action consistent with the above and for the entry of a decision.