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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

OFFICE: California Service Center

DATE:

FEB 15 2007

[WAC 01 187 54909]

[WAC 05 224 90200]

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 Director, California Service Center, withdrew the applicant's previously granted Temporary Protected Status and denied the application for re-registration. The matter is now on appeal before the Administrative Appeals Office (AAO). The case will be remanded to the director for the entry of new decisions.

The applicant is 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 withdrew the applicant's previously granted TPS on the ground that he failed to establish his eligibility for such benefits and denied the re-registration application on the ground of abandonment because the applicant failed to respond to a request for evidence (RFE), dated February 2, 2006, of the final court disposition(s) of two arrests for DUI (driving under the influence of alcohol and/or drugs).

On appeal, the applicant asserts that he did not receive the cited RFE and that he was only arrested on one DUI charge, for which he previously submitted the final court disposition showing that he was convicted of a single misdemeanor.

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).

The record shows that the applicant filed his initial Form I-821, Application for Temporary Protected Status [WAC 01 187 54909], on April 16, 2001, which was approved on December 2, 2003. The applicant filed his current Form I-821 to re-register for TPS [WAC 05 224 90200] on May 12, 2005. The re-registration application was accompanied by a certified copy of a complaint filed by the El Cerrito Police Department at the Superior

Court of California, County of Contra Costa, City of Richmond, filed on June 30, 2004, stating that the applicant had been arrested on May 14, 2004 for driving under the influence of alcohol and drugs, along with the final court disposition, dated October 6, 2004, indicating that the applicant was convicted of a single count of DUI and sentenced to three years probation and five days in jail.

On February 2, 2006, the service center issued an RFE advising the applicant that an alien convicted of a felony or two or more misdemeanors committed in the United States is ineligible for TPS under 8 C.F.R. § 244.4(a) and requesting the applicant to submit evidence of the final court disposition(s) of two DUI arrests, identified as: (1) May 14, 2004, police department of El Cerrito, California, charging the applicant with driving under the influence of alcohol/drugs, and (2) October 29, 2004, sheriff's office in Martinez, California, charging the applicant with driving under the influence with a blood alcohol weight of 0.08% or more. The applicant was given 30 days to submit the requested information.

As no response to the RFE was received, the director issued a decision of April 20, 2006, withdrawing the applicant's previously granted TPS on the ground of ineligibility, in accordance with section 244(c)(3)(A) and (C) of the Act and the regulations at 8 C.F.R. § 244.14(a)(1) and (3). The director also denied the re-registration application on the ground of abandonment, citing the regulations at 8 C.F.R. § 244.17(a) and 8 C.F.R. § 244.9(c).

The applicant filed a timely appeal in accordance with 8 C.F.R. § 244.14(b)(1) and (3). Counsel asserts on appeal that the applicant did not receive the RFE issued by the service center, possibly because of mail theft in his neighborhood, and that the requested final court disposition of the applicant's arrest had already been submitted with the re-registration application. According to counsel, the applicant was only arrested once, on May 14, 2004, and convicted of a single misdemeanor charge, section 23152(b) of the Motor Vehicle Code, which does not make him ineligible for TPS. The applicant submits a declaration, dated June 15, 2006, acknowledging the arrest on May 14, 2004, and the subsequent conviction, but asserting that there was no second arrest or conviction on October 29, 2004.

The director's finding that the applicant was arrested twice is based on a record compiled by the Federal Bureau of Investigation (FBI) after fingerprinting the applicant. The FBI record states that the applicant was "arrested or received" on May 14, 2004 by the Police Department of El Cerrito and on October 29, 2004 by the Sheriff's Office in Martinez, and that each resulted in a DUI charge. Both arrest entries are identified as [REDACTED]. The FBI record states that the applicant was sentenced on October 29, 2004 (the same day as the second "arrested or received" entry) to "005 days workp." The AAO notes that the applicant was sentenced to five days in jail based on the conviction flowing from his arrest on May 14, 2004, as indicated in the final court disposition previously submitted. Based on the foregoing information, it is unclear to the AAO whether the applicant was arrested once or twice, and whether he was convicted once or twice. The final court disposition in the record refers to a single arrest and a single conviction.

The AAO also notes that the FBI record lists another earlier arrest of the applicant, on October 3, 2004, for entering the United States without inspection, which led to deportation proceedings and, on August 3, 1997, to a warrant of removal/deportation from an immigration judge.

The case will be remanded to the director for a review of the evidence and a determination of whether the applicant has been convicted of a felony or two or more misdemeanors committed in the United States, making him ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), and whether the applicant is otherwise eligible for TPS. The director will then reconsider whether the applicant's TPS should be withdrawn.

Since the decision on the re-registration application hinges on the disposition of the initial application, the case will also be remanded for the director to determine whether a change is warranted in the decision rendered on the applicant's re-registration application.

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 to the director for further action consistent with the above. The director shall issue a new decision on the initial application [WAC 01 187 54909] and reconsider the decision on the re-registration application [WAC 05 224 90200] in light of the new decision on the initial application.