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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE: SEP 24 2007

[WAC 07 078 52049, appeal]

[WAC 99 152 51573]

IN RE:

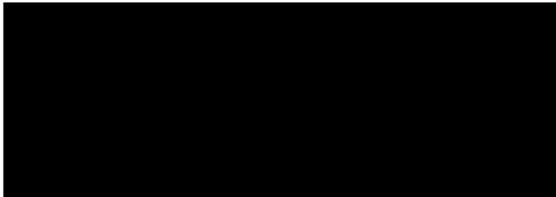
Applicant:



APPLICATION:

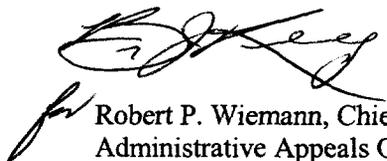
Application for Temporary Protected Status under Section 244 of the Immigration  
and Nationality Act, 8 U.S.C. § 1254

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.

  
for 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 (AAO) on appeal. The case will be remanded to the director for further action.

The applicant is a native and citizen of Honduras 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 indicates that the applicant filed his TPS application during the initial registration period on April 14, 1999, under receipt number WAC 99 152 51573. The director denied that application on December 18, 2000, for lack of prosecution, or abandonment, based on the applicant's failure to appear for a scheduled interview. On January 31, 2005, the director dismissed the motion to reopen, filed on December 6, 2004, because the motion was not filed within 30 days from the date of the denial.

The applicant filed a subsequent TPS application for re-registration under receipt number WAC 05 099 81079. The director denied the re-registration application on June 24, 2005, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS. The applicant appealed the director's decision to the AAO on August 2, 2005. On September 11, 2006, the AAO reviewed the record of proceeding and noted that on June 6, 2000, the applicant provided a new address; however, on July 28, 2000, a notice to appear for interview was sent to the applicant at his old address. The AAO noted that the record did not reflect that a Notice to Deny was sent to the applicant.<sup>1</sup> The AAO also noted that the Federal Bureau of Investigation (FBI) fingerprint results report shows two arrests relating to the applicant on August 16, 1996 and on May 18, 2004. The AAO reopened the case *sua sponte* and remanded the case to the director for further action.

On November 26, 2006, the director issued a Notice of Intent to Deny (NOID) and accorded the applicant 30 days in which to submit the final court dispositions of all of his arrests including the arrests listed on the FBI report. The director denied the application on December 21, 2006, after determining that the applicant, in response to the NOID, submitted court documents indicating that he was convicted of a felony or two or more misdemeanors.

Counsel filed an appeal on January 24, 2007 [the appeal was assigned receipt number WAC 07 078 52049], and asserts that the director incorrectly denied the TPS application because the applicant was not convicted of two misdemeanors; rather, the applicant was convicted of only one misdemeanor and one citation. It is noted that the applicant simultaneously filed a Motion to Reopen that was also received on January 24, 2007 [the motion was assigned receipt number MSC 07 116 22721].

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:"

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<sup>1</sup> The TPS application was denied on December 18, 2000, for "Lack of Prosecution" pursuant to 8 C.F.R. § 103.2(12) based on the applicant's failure to appear for a scheduled interview. The denial was in the form of a "Memorandum" to the file. There is no evidence in the record to show that a copy of the "Memorandum" was issued to the applicant as required in 8 C.F.R. § 244.10(c) and 8 C.F.R. § 103.2(b)(19).

*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 offenses:

- (1) On August 20, 1996, in the Municipal Court of Inglewood Courthouse Judicial District, County of Los Angeles, California, Case No. [REDACTED] (arrest date August 16, 1996), the applicant was convicted of battery against spouse, former spouse/fiancé, 243(e)(1) PC, a misdemeanor. He was sentenced to serve 45 days in the county jail.
- (2) The FBI report indicates that on May 18, 2004, in Hawthorne, California, the applicant was arrested for Count 1, "FORCE/ADW NOT FIREARM, GBI," and Count 2, "THREAT CRIME, INT, TERRORIZE." On June 11, 2004, in the Superior Court of California, County of Los Angeles, Case No. [REDACTED] the applicant was indicted for Count 1, "challenge to fight in public," 415(1) PC, a misdemeanor. On June 23, 2004, the court ordered the "complaint deemed amended to allege Count 1 as an infraction pursuant to 17B4 of the Penal Code and count shall proceed as an infraction." The applicant entered a plea of *nolo contendere* to Count 1, a violation of section 415(1) PC, and the court found the applicant guilty of the amended charge. He was ordered to pay a fine of \$100.

The record, in this case, shows that the misdemeanor charge (No. 2 above) was amended and reduced to an infraction, and the court found the applicant guilty of an infraction. As the applicant's one misdemeanor conviction (No. 1 above) does not render him ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

However, the evidence contained in the record of proceeding is insufficient to establish the applicant's qualifying continuous residence in the United States since December 30, 1998, and continuous physical presence since January 5, 1999, as described in 8 C.F.R. § 244.2(b) and (c).

Accordingly, the case will be remanded so that the director could render a full adjudication of the application. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS.

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 director's decision is withdrawn. The case is remanded to the director for further action consistent with the above.