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U.S. Department of Homeland Security  
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Washington, DC 20529

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**U.S. Citizenship  
and Immigration  
Services**



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

NOV 03 2004

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, Director  
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 director determined that the applicant was ineligible for TPS because he had been convicted of a felony offense. The director, therefore, denied the application.

On appeal, counsel asserts that the applicant's conviction is not a felony. He claims that the applicant was convicted of a misdemeanor, the misdemeanor conviction was set aside, and that the expunged misdemeanor conviction does not meet the federal definition of a "felony conviction."

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

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 felony or misdemeanor.

Section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

- (A)(i) Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of ...
  - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or...

The record shows that on March 9, 1993, in the Municipal Court of Compton Judicial District, County of Los Angeles, California, Case # [REDACTED] the applicant was indicted for the felony offense of unlawful sexual intercourse with a minor, in violation of Penal Code Section 261.5. The indictment report shows that the victim was "then and there under the age of eighteen years, to wit, 12 years." On April 8, 1993, the applicant entered a plea of guilty to the charge. The case was subsequently transferred to the Superior Court of Los Angeles County for "felony sentencing" on April 22, 1993. The applicant was granted probation for a period of 4 years, and was ordered to spend 10 days in jail.

On August 19, 1997, the court administratively deemed the offense to be a misdemeanor, the plea of guilty or conviction was set aside, a plea of not guilty was entered, and the case was dismissed pursuant to 1203.4 PC.

The Board of Immigration Appeals (BIA), in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no

effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. The applicant, therefore, remains convicted of the felony offense.

It is noted that in removal proceedings, based on an application for relief of cancellation of removal, on February 13, 2003, the immigration judge (IJ) determined that the applicant was inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(I) of the Act, based on his conviction of a crime involving moral turpitude. The IJ noted that although the applicant's conviction of unlawful sexual intercourse with a minor, in violation of California Penal Code Section 261.5, was expunged, "it does not confer on him any beneficial Immigration consequences since the expungement has no affect in Immigration proceedings" based on *Matter of Roldan, supra*. The IJ, therefore, denied the application for cancellation of removal.

The applicant appealed the decision of the IJ to the BIA. In a decision dated February 2, 2004, the BIA adopted and affirmed the decision of the IJ. The BIA determined that the applicant pled guilty to the felony offense of unlawful sexual intercourse with a minor 12 years of age, and that it was clear the applicant was convicted under section 261.5(d) PC and subject to a maximum term of incarceration of 4 years in state prison; therefore, the "petty offense" exception of section 212(a)(2)(A)(ii)(II) of the Act does not apply in his case. The BIA dismissed the applicant's appeal.

Accordingly, the applicant is ineligible for TPS based on his felony conviction pursuant to section 244(c)(2)(B)(i) of the Act, and because he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. There is no waiver available to an alien found inadmissible under this section. *See* 8 C.F.R. § 244.3(c)(1). Nor is there a waiver available for convictions of a felony or two or more misdemeanors committed in the United States.

The burden of proof is upon the applicant to establish that he 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.