



U.S. Citizenship
and Immigration
Services

Classification data extracted in
accordance with the provisions of
Executive Order 13526, 66 FR 59122
10/17/01



M1

FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER DATE: AUG 6 2 2005
[WAC 02 274 52959]

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: 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 black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 denied the application because he found the applicant had been convicted of a felony.

On appeal, the applicant submits a brief and additional evidence.

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.

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:"

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The record reveals that the applicant was arrested in Los Angeles, California, on November 19, 1999, and charged with one count of "FORCE/ADW NOT FIREARM, GBI." The record contains a Minute Order from the Superior Court of California, County of Los Angeles, indicating that the applicant was convicted in that court on January 18, 2000, of "making a terrorist threat" in violation of section 422 PC, a felony. Counts 1 and 3, assault with a deadly weapon in violation of section 245(a)(1) PC, a felony, and inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC, a felony, were dismissed due to plea negotiation.

The applicant was placed on formal probation for a period of five years, and was credited for 44 days served in the Los Angeles County Jail. The applicant was also ordered to pay a restitution fine pursuant to section 1202.4(b) PC in the amount of \$200, to pay a \$200 fine to the Domestic Violence Fund, and to enroll in a one-year domestic violence program including a mandatory one-year anger management program. The record contains a Certificate of Completion dated April 24, 2001, from the [REDACTED] Metro Center, Los Angeles, California; indicating that the applicant successfully met the requirements of the facility's 52-week Domestic Violence Prevention Program.

On appeal, the applicant asserts that his conviction could "arguably be considered" a misdemeanor, not a felony. The applicant contends that an offense that is punishable by sentencing to state prison or county jail is considered in California to be a "Felony-Misdemeanor," or "Wobbler."

According to section 422 PC, making a terrorist threat is punishable by "imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." If the court documents do not specify whether the defendant is being charged with a felony or a misdemeanor, an offense with this type of alternate punishment is considered a "felony" unless the defendant is in fact fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor". See *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). In this applicant's case, the Minute Order from the Superior Court of California, County of Los Angeles, specifically indicates that the applicant was convicted of "making a terrorist threat," in violation of section 422 PC, a felony.

Furthermore, even if the court documents had not specified that the charge was a felony, the sentencing in the applicant's case would be consistent with a felony conviction; the judge did not merely impose a jail sentence, nor did he simply fine the applicant. See *People v. Banks*, 338 P.2d 214, 215 (1959), 348 P.2d 102, 113 (1959). (In *Banks*, the defendant pled guilty, the proceedings were suspended, and the defendant was placed on probation for a period of three years; the court held that the defendant had been convicted of a felony, not a misdemeanor.) As stated above, the applicant was placed on probation for a period of five years, sentenced to pay a restitution fine and a domestic violence fine, and ordered to complete a one-year domestic violence prevention program including a one-year anger management program. We find that the applicant was, in fact, convicted of a felony, not a misdemeanor.

The applicant asserts that the offense of which he was convicted, "making a terrorist threat" in violation of section 244 PC, is not a violent crime, nor should it be considered a crime of moral turpitude. The applicant states that he is not a threat to national security or a danger to society. He further states that he has been completely rehabilitated. The applicant submits the following:

1. a letter dated March 4, 2003, from [REDACTED] stating that the applicant cooperated fully with his Probation Officer by keeping all appointments, enrolling in and completing a fifty-two week anger management/domestic violence counseling program, and making payments toward completing his financial obligations, and indicating that the Superior Court of California may order the felony conviction reduced to a misdemeanor and order probation terminated and the case dismissed prior to the scheduled expiration date of January 13, 2005; and,
2. a document from the [REDACTED] Metro Center in Los Angeles, California, indicating that the applicant "completed very satisfactorily" the center's 52-week Domestic Violence Prevention Program.

The applicant has not provided any evidence to establish that his conviction has subsequently been reduced from a felony to a misdemeanor, or that the case has subsequently been dismissed by the Superior Court of California, County of Los Angeles. Nevertheless, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the *merits* are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999).

The applicant's completion of a domestic violence prevention/anger management program is acknowledged; however, the fact remains that the applicant is ineligible for TPS due to his record of one felony conviction, detailed above. 8 C.F.R. § 244.4(a). There is no waiver available for this ground of ineligibility for TPS. See

8 C.F.R. § 244.3(c)(1). Consequently, the director's decision to deny the application for this reason will be affirmed.

It is noted that the applicant currently has a pending application for asylum and for withholding of removal as an American Baptist Church v. Thornburgh (ABC) class member.

An alien applying for temporary protected status has the burden of proving that he or she 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.

ORDER: The appeal is dismissed.