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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

FILE:

Office: VERMONT SERVICE CENTER

Date:

NOV 04 2008

[EAC 07 177 51469 appeal]
[WAC 01 169 50326]

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 Vermont Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO), on appeal. The director's decision will be withdrawn and the appeal will be sustained.

The applicant is a native and citizen of El Salvador who was granted TPS under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254 on March 15, 2002. The director subsequently withdrew the applicant's status on May 1, 2007, when it was determined that the applicant had been convicted of a crime considered a felony in the United States under the Act.

On appeal, counsel acknowledges that the applicant was convicted of battery under section 242 of the California Penal Code (PC) on or about August 17, 2004. Counsel argues that even though the court docket may state that the applicant was sentenced to two years in jail, a charge under that section of the PC is only punishable by a term of imprisonment not exceeding six months in the county jail. Counsel further states that the applicant's court docket is in error to prescribe a suspended sentence of 24 months imprisonment in the county jail because such a sentence is prohibited by the PC. Counsel forwards the applicant's petition and order for expungement and indicates that this order declares that his crime was a misdemeanor.

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS if the 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 that 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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define “felony” and “misdemeanor” as:

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 reflects that on August 17, 2004, the applicant was convicted by a Judge of the Superior Court of California of the County of Los Angeles, of battery in violation of section 242 PC, a misdemeanor, (Case # [REDACTED]). Although the court disposition initially stated that the applicant was sentenced to incarceration for a period of “24 months,” the court record was subsequently corrected to indicate a jail sentence of “24 days” was actually ordered by the court. On September 17, 2008, the AAO contacted the court directly and was informed that the amendment of the record was to correct a typographical error and the change was in no way the result of any type of rehabilitative treatment.

The record shows that the applicant was convicted of one misdemeanor and not a felony as found by the director. Therefore, he remains eligible for TPS.

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 met this burden.

ORDER: The director's decision is withdrawn and the appeal is sustained.