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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED]
[WAC 01 226 58241]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: AUG 12 2005

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, 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 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 the applicant had been convicted of a felony committed in the United States.

On appeal, counsel submits a statement 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.

The record reveals the following offenses:

- (1) On December 13, 1993, in the Municipal Court of Los Angeles, Glendale Courthouse Judicial, County of Los Angeles, California, the applicant entered a nolo contendere to discharging firearm from a vehicle, 12034(d) PC, a felony. The court found the applicant guilty of the felony offense. On January 13, 1994, the case was "called for felony sentencing." He was placed on probation for a period of 3 years, ordered to perform 30 days of "Cal Trans," and pay a restitution fine.
- (2) On May 29, 2003, in the Phoenix Municipal Court, Phoenix, Arizona, Charge No. [REDACTED] (arrest date December 14, 1997), the applicant was convicted of driving under the influence of liquor or drugs, 28-1381.A.1, a misdemeanor. He was sentenced to serve 10 days in jail, and ordered to pay \$485 in fines and costs.

On appeal, counsel asserts that the applicant's conviction of 12034(d) PC was a misdemeanor and not a felony. He submits a copy of the statute.

According to section 12034(d) of the California Penal Code, any person who willfully and maliciously discharges a firearm from a motor vehicle is guilty of a public offense punishable by imprisonment in the county jail for not more than one year or 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 conviction record of the Municipal Court shows that the applicant was charged with the felony offense of 12034(d) PC, the applicant pled nolo contendere to the felony offense, and the court found the applicant guilty of "12034(d) 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.) We find that the applicant was, in fact, convicted of a felony, not a misdemeanor.

The applicant is ineligible for TPS due to his felony conviction, detailed in No. 1 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

The record shows that on August 18, 1988, a Form I-213, Record of Deportable Alien, was issued in El Paso, Texas, and he was granted voluntary departure from the United States until August 23, 1988.

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.