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FILE:

[WAC 01 186 55709]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: NOV 09 2005

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
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 sustained and the application will be approved.

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 denied the application because the applicant had been convicted of a felony or two or more misdemeanors.

On appeal, counsel submits a statement.

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 shows that on October 15, 1991, in the Municipal Court of Los Angeles, Central Arraignment Judicial, County of Los Angeles, California, Case No. [REDACTED] (arrest date October 14, 1991), the applicant was convicted of carrying a loaded firearm in a public place, 12031(a) PC. She was placed on probation for a period of 12 months, and ordered to spend 2 days in the county jail.

The director determined that the applicant was ineligible for TPS based on her conviction, detailed above, and denied the application on September 17, 2003.

On appeal, counsel asserts that although a violation of this offense may be charged as either a felony or a misdemeanor, the applicant pled guilty to subsection 12031(a)(2)(F) PC, which is a misdemeanor.

California Penal Code (PC) 12031(a) states that a person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street. Pursuant to PC 12031(a)(2), carrying a loaded firearm in violation of PC 12031(a)(2)(A), (B), (C), (D), (E) is a felony offense, and carrying a loaded firearm in violation of PC 12031(a)(F) is a misdemeanor offense.

Although counsel, on appeal, asserts that the applicant entered a plea of guilty to subsection 12031(a)(2)(F) PC, the court record did not indicate the subsection under which the applicant was charged and/or convicted. Regardless, the record shows that the applicant's offense of 12031(a) PC was declared a misdemeanor by the court, and the applicant was charged and convicted of this misdemeanor offense, and sentenced to probation and 2 days in the county jail; therefore, her conviction of 12031(a) PC constitutes a misdemeanor conviction. See also *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). [In *MacFarlane*, the defendant's six-month jail sentence was suspended, and he was placed on probation; the court determined that the defendant had been convicted of a misdemeanor, not a felony.]

The record, in this case, shows that the applicant was convicted of only one misdemeanor offense. As the applicant is not ineligible for TPS based on this conviction, pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

The applicant has submitted sufficient evidence to establish that she has met the continuous residence and continuous physical presence requirements described in 8 C.F.R. §§ 244.2(b) and (c). Therefore, the director's decision will be withdrawn and the application will be approved.

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 appeal is sustained and the application is approved.