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FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE: NOV 02 2006

[WAC 05 116 75492]

IN RE:

Applicant:



APPLICATION:

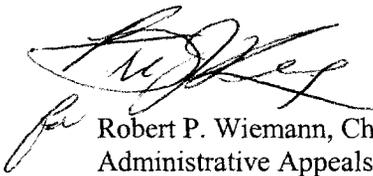
Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

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.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The initial application was denied by the Director, California Service Center. A subsequent application for re-registration was denied by the Director, California Service Center, and is currently before the Administrative Appeals Office (AAO) on appeal. The initial application will be reopened, *sua sponte*, by the Chief, Administrative Appeals Office, and the case will be remanded for further consideration and action.

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 applicant filed an initial application for TPS on March 26, 2001, under receipt number WAC 01 170 53766. The director denied the initial application on February 10, 2004, after determining that the applicant had been convicted of a felony. However, the record of proceedings reveals that the director's decision was in error. Specifically, the record indicates that the applicant was convicted of only one misdemeanor, as noted below; therefore, the applicant is not ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act:

On December 19, 1995, in the Municipal Court of L.A.-Van Nuys Judicial District, County of Los Angeles, California, Case No. [REDACTED] (arrest date December 16, 1995), the applicant was indicted for Count 1, violence used against former spouse, 242-243(e) PC, a misdemeanor; Count 2, inflicting corporal injury on a spouse, 273.5(a) PC, a misdemeanor; Count 3, false imprisonment, 236 PC, a misdemeanor; and Count 4, battery on a person with injury, 242-243(d) PC, a misdemeanor. On December 19, 1995, the applicant was convicted of Count 2. He was placed on probation for a period of 36 months under the condition that he serve 4 days in the county jail, ordered to pay the total of \$300 in fines and costs, and perform 16 days of "Cal Trans," and complete a 12-month domestic violence program. Counts 1, 3, and 4 were dismissed.

Although inflicting corporal injury on a spouse is named a "felony" under section 273.5(a) of the California Penal Code, it is punishable by up to 4 years in the state prison, or one year in the county jail. In California, an offense with this type of alternate punishment remains a "felony" unless the defendant is, in fact, fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor." *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.) Because the offense, in the present case, was declared a misdemeanor by the court, and because the applicant was sentenced to probation with condition that he serve 4 days in the county jail, his conviction of 273.5(a) PC constitutes a misdemeanor conviction.

The director's denial of the initial application will be withdrawn; the application will be remanded for a new decision. The director's denial of the application for re-registration or renewal is dependent upon the adjudication of the initial application. Since the initial application is being remanded, that decision will be remanded to the director for further adjudication. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS offered to Salvadorans.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The initial application is reopened, the director's decision is withdrawn, and the application is remanded for a new decision. The re-registration application is remanded for further action consistent with the director's new decision on the initial application.