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FILE:

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OFFICE: VERMONT SERVICE CENTER

DATE:

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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, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center (VSC), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 his initial Form I-821, Application for Temporary Protected Status, with the Texas Service Center (TSC) on May 29, 2001. On August 19, 2004, the director of the VSC denied the application because she found the applicant ineligible for TPS due to his having been convicted of a felony offense committed in the United States.

On appeal, counsel for the applicant submits a brief and additional correspondence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 § 244.3;
- (e) Is not ineligible under § 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.

- (g) Has filed an application for late registration with the appropriate Service director, within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

An alien shall not be eligible for TPS 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 regarding the applicant's criminal history:

- (1) On December 21, 1991, the applicant was arrested in Santa Ana, California, for "Drunk Driving," in violation of California Vehicle Code section [REDACTED] case number [REDACTED] the disposition of this offense is listed as "Unknown" in a Local Criminal History Transcript from the Santa Ana Police Department provided by the applicant, dated December 16, 2003.
- (2) On November 5, 1992, the applicant was arrested and charged in Orange County, California, with one count each of: (a) Inflicting Corporal Injury on a Spouse/Cohabitant, in violation of California Penal Code (CPC) section [REDACTED] (b)

Assault, in violation of CPC section 240; and, (c) Battery, in violation of CPC section 242. Documentation contained in the record indicates that count (a) was dismissed, and that the applicant received "Diversion Terminated/Successful," by motion of the prosecutor, on counts (b) and (c).<sup>1</sup>

- (3) On September 14, 2003, the applicant was arrested and charged in the Spring Valley Village Court, Rockland County, New York, with (a) "OP MV .08 of 1%," in violation of New York Vehicle Traffic Law (NY VTL) section 1192.2; (b) "OP MV INTOX 1<sup>ST</sup>," in violation of NY VTL section 1192.3; (c) "SCHOOL ZONE," in violation of NY VTL section 1180 OC; and, (d) "FAIL KEEP RIGHT," in violation of NY VTL section 1120. On January 27, 2004, these charges were transferred to the Rockland County court, where, on March 9, 2004, the applicant was convicted of "DWI," in violation of NY VTL section 1192.3(3) – a Class E felony.

On appeal, counsel concedes that the applicant's conviction of NY VTL under section 1192.3(3) (as detailed in No. 3, above) is designated as a Class E felony offense under New York statute. Counsel cites NY PL section 70.00 as providing that the maximum indeterminate period of incarceration that may be imposed for conviction of a Class E felony is at least three years, and not more than four years, however, the court **may** elect to impose a definite sentence of imprisonment of one year or less. Counsel concludes that because the applicant was not sentenced to imprisonment with regard to his conviction, that it does not fall within the meaning of a "felony" under 8 C.F.R. § 244.1.

As cited above, for immigration purposes, a felony is any offense that is punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any. In this case, New York law provides that a Class E felony offense is punishable by up to four years incarceration. Moreover, the court document submitted by the applicant clearly shows that he was charged with - and convicted of - a felony. Therefore, we conclude that the applicant's conviction in No. 3, above, qualifies as a "felony" as defined for immigration purposes in 8 C.F.R. § 244.1.

Based on a review of the record, it is concluded that the applicant is ineligible for TPS due to his having been convicted of a felony offense. 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application will be affirmed.

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.

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<sup>1</sup> The applicant received diversion, which was terminated. It has been previously established that, pursuant to *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), diversion in the State of California is not a conviction for immigration purposes.