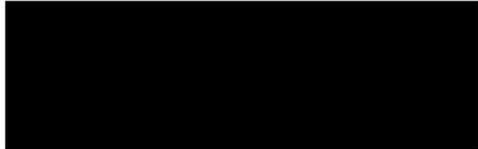




U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 27 2007

[WAC 02 140 51688 as it relates to WAC 05 140 74982]

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

Cindy M. Gomez for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was initially approved on February 25, 2003, and subsequently denied by the Director, California Service Center (CSC), on September 12, 2005.¹ An appeal is now before the Administrative Appeals Office (AAO). The appeal will be sustained and the application approved.

The applicant is a citizen of El Salvador who was granted Temporary Protected Status (TPS) on February 25, 2003 [receipt application WAC 02 140 51688] under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on February 17, 2005, and indicated that he was re-registering for TPS [WAC 05 140 74982].²

The director denied the re-registration application on September 12, 2005, because he found the applicant had been convicted of a felony.

On appeal, counsel for the applicant submits a brief 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:

¹ After determining that the applicant was ineligible for Temporary Protected Status (TPS) because he had been convicted of a felony, the director should have withdrawn the applicant's TPS rather than denying the re-registration application.

² A subsequent TPS re-registration application was filed on August 21, 2003, and approved on February 3, 2004.

- (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 that the applicant was arrested in Sacramento, California, on June 1, 1997, and charged with one count of inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC, a felony, and one count of assault with a deadly weapon likely to cause great bodily injury in violation of section 245(a)(1) PC, a felony.

On July 9, 2005, the applicant was requested to provide the final court disposition of this arrest.³ The applicant, in response, submitted the following:

1. a photocopy of a formal probation order from the Sacramento Superior and Municipal Courts, relating to the applicant's conviction on the charge of battery in violation of section 242 PC, a misdemeanor, indicating that the applicant was granted three years probation, ordered to serve 90 days in the county jail less credit for five days served, to participate in the Batterer's Treatment Program as directed by the probation officer, and finally, not to strike his spouse. (Case No. [REDACTED])
2. a photocopy of a document from the Superior Court of California, County of Sacramento, dismissing the applicant's conviction on the charge of 273.5(a) PC, a felony, pursuant to section 1203.4 PC, on January 19, 2000, because the applicant had successfully completed his probation period (Case No. [REDACTED])
3. a photocopy of a memorandum from the Sacramento County Deputy Probation Officer to the Superior Court, County of Sacramento, informing the court that the applicant had, during the past two years and seven months, satisfactorily met the conditions of his three-year grant of probation, and recommending that the conviction be dismissed pursuant to section 1203.4 PC. (Case No. [REDACTED])

The director determined that the applicant had been convicted of a felony and denied the re-registration application.

On appeal, counsel for the applicant states that the applicant was convicted of battery in violation of section 242 PC, a misdemeanor, and not under the initial felony charges. Counsel further states that the Probation Department erroneously referred to the applicant's conviction in its memo to the court (No. 3 above) as a felony conviction on the charge of inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC, instead of battery in violation of section 242 PC, a misdemeanor. Counsel points out that the same case number appears on all of the relevant documents, and that the original conviction and probation documents correctly indicate that the applicant had been convicted of battery in violation of section 242 PC, a misdemeanor. Counsel also submits the following documentation:

4. an original document from the Superior Court of California, County of Sacramento, indicating that the applicant pled guilty on June 5, 1997, to one count of battery in violation of section 242 PC, a misdemeanor, and that count 2 was dismissed in the interest of justice. (Case No. [REDACTED])

³ It also is noted that on October 30, 2002, in relation to the applicant's initial TPS application filed under WAC 02 140 51688, the applicant was requested to provide the final court disposition of this 1997 arrest. The applicant, in response, provided documentation relating to his residence and physical presence in the United States, but did not submit the final court disposition of the arrest. As previously stated, the director approved the applicant's initial TPS application on February 25, 2003.

5. an original Subsequent Action Disposition Information document indicating that the applicant was convicted on June 5, 1997, on one charge of battery in violation of section 242 PC, a misdemeanor (Case No. [REDACTED])
6. the original copy of No. 3 above;
7. an original Jail Commitment document dated June 5, 1997, from the Sacramento Superior/Municipal Courts, indicating that the applicant would be committed to the County Jail for a period of 90 days, less credit for five days served, in connection with his conviction on the charge of battery in violation of section 242 PC, a misdemeanor (Case No. [REDACTED] and,
8. a minute order dated April 5, 2006, from the Superior Court of California, County of Sacramento, *nunc pro tunc* correcting the probation memorandum dated January 12, 2000, to reflect that the applicant was convicted of battery in violation of section 242 PC, a misdemeanor.

The court documents indicate that the applicant was convicted of battery in violation of section 242 PC, a misdemeanor, and not on the felony charge of inflicting corporal injury on a spouse or cohabitant in violation of section 273.5(a) PC. On appeal, counsel has submitted an order (No. 8 above) from the Superior Court of California, County of Sacramento, *nunc pro tunc* correcting the Probation Department memorandum (No. 1 above), and the Superior Court dismissal document (No. 2 above) to indicate that the applicant was convicted of battery in violation of section 242 PC, a misdemeanor. As stated by counsel, and as supported by the evidence submitted, the applicant's conviction is incorrectly reflected on the Probation Department memorandum and the Supreme Court dismissal document as a felony conviction in violation of section 273.5(a) PC.

Since the applicant has only been convicted of one misdemeanor, he is eligible for TPS. Therefore, the director's decision will be withdrawn, the TPS application will be approved, and the appeal will be sustained.

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.