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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: AUG 16 2013

Office: VERMONT SERVICE CENTER

FILE: [Redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew TPS because it was determined that the applicant's misdemeanor conviction of sexual battery constitutes a crime of violence aggravated felony under § 101(a)(43)(F) of the Act. The director also determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

On appeal, citing case law,<sup>1</sup> counsel asserts that the misdemeanor statute under which the applicant pled guilty was not an aggravated felony under 18 U.S.C. § 16(b). Counsel states the misdemeanor statute cannot be interpreted as a "crime of violence" where a battery needs only the slightest touch to constitute a "battery." Counsel further states that the applicant's conviction was not a "crime of violence", where battery under Virginia Statute §18.2-67.4 may have been accomplished without the degree of force contemplated under section 101(a)(43)(F) of the Act. Counsel states that the record does not demonstrate that the act to which the applicant pled involved a crime involving moral turpitude.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

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* Sections 244(c)(2)(B)(i) and 208(b)(2)(A) of the Act and 8 C.F.R. § 244.4(a).

"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. 8 C.F.R. § 244.1.

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

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<sup>1</sup> *Johnson v. U.S.* 130 S. Ct. 1265 (2010); *Flores v. Ashcroft*, 350 F. 3d 666 (7<sup>th</sup> Cir. 2003); *Matter of Martin*, 23 I&N Dec. 491, 493 (BIA 2002); *In re Velasquez* 25 I&N Dec. 278 (BIA 2010).

Section 101(a)(48)(B) of the Act provides, “any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

Section 101(a)(43)(F) of the Act defines “aggravated felony” as “a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year.”

A crime of violence is further defined in 18 U.S.C. §16, which states, in pertinent part, that:

Crime of violence defined

The term “crime of violence” means--

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Virginia Code § 18.2-67.4 provides that:

Sexual battery

A. An accused is guilty of sexual battery if he sexually abuses, as defined in § 18.2-67.10, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse, (ii) an inmate who has been committed to jail or convicted and sentenced to confinement in a state or local correctional facility or regional jail, and the accused is an employee or contractual employee of, or a volunteer with, the state or local correctional facility or regional jail; is in a position of authority over the inmate; and knows that the inmate is under the jurisdiction of the state or local correctional facility or regional jail, or (iii) a probationer, parolee, or a pretrial defendant or posttrial offender under the jurisdiction of the Department of Corrections, a local community-based probation services agency, a pretrial services agency, a local or regional jail for the purposes of imprisonment, a work program or any other parole/probationary or pretrial services or agency and the accused is an employee or contractual employee of, or a volunteer with, the Department of Corrections, a local community-based probation services agency, a pretrial services agency or a local or regional jail; is in a position of authority over an offender; and knows that the offender is under the jurisdiction of the Department of Corrections, a local community-based probation services agency, a pretrial services agency or a local or regional jail.

B. Sexual battery is a Class 1 misdemeanor.

Virginia Code § 18.2-67.10, in pertinent part, defines “sexual abuse” as:

6. "Sexual abuse" means an act committed with the intent to sexually molest, arouse, or gratify any person, where:
- a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;
  - b. The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts;
  - c. If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts; or
  - d. The accused forces another person to touch the complaining witness's intimate parts or material directly covering such intimate parts.

The record contains:

- Court documentation in [REDACTED] from the Circuit Court for the City of Winchester of the Commonwealth of Virginia, which indicates on January 24, 2011, the applicant pled guilty and was found guilty as charged of violating Virginia Code § 18.2-67.4, sexual battery, a Class one misdemeanor. The applicant was ordered to pay a \$300 fine and a jail sentence of 12 months was imposed (which was suspended for one year).
- Court documentation in [REDACTED] from the Circuit Court for the City of Winchester of the Commonwealth of Virginia, which indicates on January 25, 2011, a nolle prosequi was entered for the charge of abduction with intent to defile, a violation of Virginia Code § 18.2-48.

Counsel's brief on appeal has been considered. In *Johnson v. U.S.*, 130 S. Ct. 1265 (2010), cited by counsel, the Supreme Court found that "simple battery" under Florida law did not constitute a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). Counsel has cited to no statute or case law indicating that "simple battery" and "sexual battery" constitute the same offense under Virginia law or that the facts and holding in *Johnson* are relevant to the instant case.

To determine whether a conviction constitutes a crime of violence, the Fourth Circuit Court of Appeals, under whose jurisdiction this case falls, generally follows the categorical approach. See *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir 2012); *Mbea v. Gonzales*, 482 F.3d 276, 279 (4th Cir 2007). However, "[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not," the court may apply a modified categorical approach. *Karimi v. Holder*, 715 F.3d 561, 567 (4<sup>th</sup> Cir. 2013) (citing *Johnson*, 130 S.Ct. at 1273). This approach allows us to consider "whether the specific conduct underlying a defendant's prior state conviction constitutes a crime of violence by examining 'the terms of the charging document, ... a plea agreement, ... [a] transcript of colloquy between judge and defendant, ... or ... some comparable judicial record' revealing the 'factual basis for the plea.' "

*Karimi v. Holder*, 715 F.3d at 567 (citing *Torres-Miguel*, 701 F.3d at 167). Although Virginia Code § 18.2-67.4 provides that the offense of sexual battery may be committed through “force, threat, intimidation, or ruse,” 18 U.S.C. §16(b) only requires “a substantial risk that physical force may be used against the person in the course of committing the offense.” In the case at hand, the record of conviction indicates that the applicant’s victim was a 19-year-old male, thus the conviction necessarily involved sexual abuse as defined in subsections a, b, or d of Virginia Code § 18.2-67.10, each of which, “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” as set forth in definition under 18 U.S.C. §16(b) as the risk of force is inherent in the crime of touching an individual’s intimate parts without their consent. It is immaterial whether the use of violent force actually occurs in a particular case; what matters is that the *risk* of the use of such force was substantial. See *Aguilar v. Attorney General of U.S.* 663 F.3d 692, 702 -703 (3rd Cir. 2011); *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005); *Zaidi v. Ashcroft*, 374 F.3d 357, 361 (5th Cir. 2004).

Counsel also states that because the offense “is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. §16(b), citing *Matter of Martin*, 23 I&N Dec. 491,493 (BIA 2002). This specific argument; however, was addressed by the U.S. Court of Appeals for the Fourth Circuit. In *Wireko v. Reno*, the Fourth Circuit held that “[u]nder the plain language of [Section 101(a)(43)(F) of the Act], there is no requirement that the offense actually have been a felony, as that term is conventionally understood. Rather, the offense need only have been one of violence for which the term of imprisonment is one year or more.” 211 F. 3d 833, 835 (4th Cir. 2000). The Virginia offense for which the applicant was convicted, although a misdemeanor, was a crime of violence for which the term of imprisonment was at least one year.

Accordingly, the director’s findings that applicant’s sexual battery conviction is a crime of violence aggravated felony under § 101(a)(43)(F) of the Act will be affirmed. As we have found the applicant to have committed an aggravated felony, we need not determine at this time whether the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The TPS will be withdrawn for the above stated reasons, with each considered as an independent and alternative basis for withdrawal. An alien applying for TPS 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.