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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: **OCT 31 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.

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 (AAO) 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 the 18-month sentence received for the applicant's misdemeanor conviction of assault rose to the level of an aggravated felony under section 101(a)(43)(F) of the Act, and that the conviction was considered to be a particularly serious crime under section 208(b)(2)(A)(ii) of the Act. The director also withdrew TPS because it was determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction.

On appeal, counsel asserts that the applicant was not aware that he was pleading guilty to a felony for the purposes of immigration law and that his trial attorney failed to inform him of the immigration consequences of a guilty plea. Citing Maryland Criminal Law Code § 14-101, counsel asserts that second degree assault is not classified or defined as a crime of violence and therefore not an aggravated felony for immigration purposes. Citing case law,<sup>1</sup> counsel asserts that the applicant's conviction did not necessarily involve use of physical force and thus was not a crime of violence. Counsel states that the applicant's conviction was neither evil nor malicious and therefore does not rise to the level of being a crime involving moral turpitude. Counsel states that said conviction may be waived for humanitarian purposes.

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 Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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

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<sup>1</sup> *Garcia v. Gonzales* 455 F.3d 465 (4<sup>th</sup> Cir. 2006); *Chrzanoski V. Ashcroft* 327 F.3d 1988 (2d Cir. 2003).

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.

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) of the Act defines aggravated felonies for purposes of determining classes of deportable aliens under section 237(a)(2)(A)(iii) of the Act. A crime of violence (as defined in Title 18, United States Code § 16, but not including a purely political offense) for which the term of imprisonment is at least one year. Section 101(a)(43)(F) of the Act.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act. 8 U.S.C. § 1182(a)(2)(A)(i).

The record contains court documentation in Case no. [REDACTED] from the Circuit Court for [REDACTED] Maryland, which indicates that the applicant was arrested and charged with second degree assault, reckless endangerment, deadly weapon with intent to injure and sexual offense in the fourth degree. On February 2, 2007, the applicant pled guilty to second degree assault and he was sentenced to 18 months imprisonment (which was suspended), ordered to pay a fine and placed on probation for two years. The remaining charges were *nolle prossed*.

The first issue to be addressed is whether the applicant's conviction is a crime involving moral turpitude.

"Assault" means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings. Maryland Code Criminal Law § 3-201(b).

Section 34 of the Maryland Law Encyclopedia states that:

The Maryland Criminal Pattern Jury Instructions also define second-degree assault as attempted battery. Under this definition, second-degree assault is an attempt to cause offensive physical contact or physical harm. In order to convict

the defendant of the attempted battery form of second-degree assault, the State must prove:

- (1) that the defendant actually tried to cause immediate offensive physical contact with or physical harm to the victim;
- (2) that the defendant intended to bring about offensive physical contact or physical harm; and
- (3) that the defendant's actions were not consented to by the victim or not legally justified, if the defense of legal justification is raised.

It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). The Board of Immigration Appeals has also found:

[M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

*Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added). The AAO notes that in *Matter of B-*, 1 I. & N. Dec. 52 (BIA 1941; A.G. 1941), the BIA found second degree assault to not be a crime involving moral turpitude when a non-deadly weapon was used. Neither the arrest report nor indictment is contained in the record of proceedings. Therefore, it cannot be determined at this time that the applicant's conviction for second degree assault involved an aggravating dimension. The AAO notes that assault crimes involving aggravating factors are generally covered by first degree assault under Maryland law, which includes assaults causing or attempting to cause serious bodily injury and assaults with a firearm. *See* Maryland Code, Criminal Law, § 3-202. The applicant was not convicted of sexual assault and there is no evidence that he caused injury to a person "deserving of special protection." Upon reviewing the record and the statute of conviction, the AAO finds that the applicant's conviction is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Therefore, the director's finding on this ground will be withdrawn.

The second issue to be addressed is whether the applicant's conviction is a crime of violence. 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.

In *Johnson v. United States* 130 S. Ct 1265 (2010), the Supreme Court held that “physical force” in definition of a violent felony under the Armed Career Criminal Act (ACCA) means “violent force,” that is, force capable of causing physical pain or injury to another person.

There is not sufficient evidence in the record to determine whether the second degree assault conviction was indeed a violent felony. Accordingly, the director’s finding on this ground will be withdrawn.

It is noted that in *Karimi V. Holder* 715 F. 3d 561(4<sup>th</sup> Cir. 2013), it was held that in Maryland a misdemeanor second degree assault conviction was not a “crime of violence,” and thus, did not qualify as an “aggravated felony” sufficient to trigger removability under the Act.

Maryland Criminal Law § 3-203 states that “a person who violates this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$2,500 or both.” The applicant is applying for benefits under the federal law. Therefore, the federal definition of felony as stated in 8 C.F.R. § 244.1 applies in this case. While a “felony” is defined as a crime punishable for a term of more than one year, the regulation provides for an exception 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. In this case, the applicant does not qualify for this exception as the applicant received a sentence of 18 months.

Therefore, the applicant remains ineligible for TPS due to his felony conviction. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Counsel’s brief submitted on appeal has been considered. Nevertheless, there is no waiver available, even for humanitarian reasons, of the requirements stated above. Consequently, the director’s decision to withdraw TPS will be affirmed.

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.