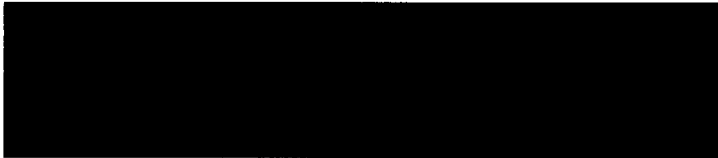


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prevent clearly unwarranted
invasion of personal privacy



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

NOV 09 2005

[WAC 01 264 59983]

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.

Cindy N. Gomez
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded to the director for further 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 director determined that the applicant was ineligible for TPS because he had been convicted of a felony committed in the United States. The director, therefore, denied the application.

On appeal, the applicant states that he needs an additional 30 days in which to submit a brief and/or evidence because he "must revise the charge(s) against me and determine if those charges lead to a conviction that would enable me to successfully prove my eligibility..." To date, the file contains no further response from the applicant. Therefore, the record shall be considered complete.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

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 shows that on September 24, 1996, in the Municipal Court of California, Santa Clara County Judicial District, Sunnyvale Facility, California, Case No. [REDACTED] (arrest date September 19, 1996), the applicant was indicted for attempted unlawful sexual intercourse with a minor, in violation of Penal Code § 664/261.5(c), a felony. The charge was subsequently amended to a misdemeanor offense of 261.5(c) PC, unlawful sexual intercourse with a minor. On October 24, 1996, the applicant was convicted of the misdemeanor offense. He was placed on probation for a period of 3 years, and as condition of probation, he was ordered to pay the total of \$205 in fines and costs, and spend 90 days in the county jail.

Although unlawful sexual intercourse with a minor is named a "felony" under section 261.5(c) PC, it is punishable by up to one year in the county jail or state imprisonment. 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). Because the offense was declared a misdemeanor by the court, and because the applicant was sentenced to 90 days in the county jail as the condition of his probation, his conviction of 261.5(c) PC constitutes a misdemeanor conviction.

The applicant, in this case, was not convicted of a felony offense as determined by the director. Further, the applicant's single misdemeanor conviction does not render him ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act, or inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Since the applicant has overcome the director's sole reason for denial of the application, the decision of the director will be withdrawn.

However, the evidence contained in the record of proceeding is insufficient to establish the applicant's qualifying continuous residence in the United States since February 13, 2001, or continuous physical presence since March 9, 2001, as described in 8 C.F.R. § 244.2(b) and (c).

The case will be remanded to enable the applicant to present sufficient evidence of his qualifying continuous physical presence and continuous residence during the requisite periods. The director may request any additional evidence he considers pertinent.

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 case is remanded for appropriate action consistent with the above discussion.