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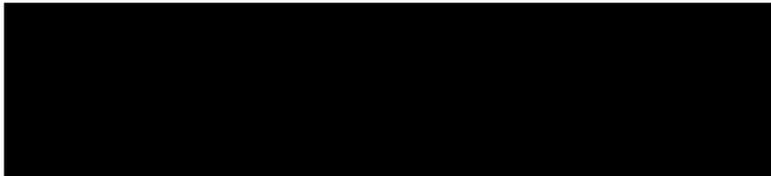
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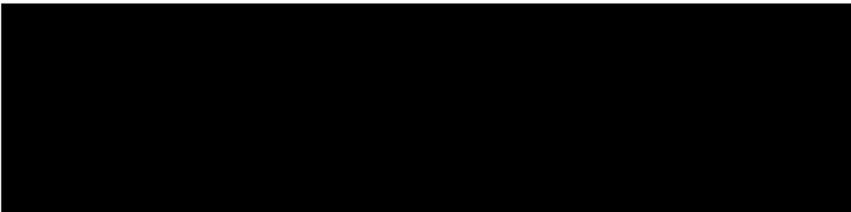
Applicant:



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 office that originally decided your case. Any further inquiry must be made to that office.

Cindy N. Gomez

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, and the previous decision of the AAO to dismiss the appeal will be affirmed.

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.

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 director denied the application on July 18, 2002, after determining that the applicant was ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his convictions in New York of two misdemeanors; namely: (1) harassment in the 2nd degree-physical contact, PL 240.26, on September 27, 1998; and (2) disorderly conduct, creating a dangerous act, PL 240.20, on December 25, 1998.

The AAO reviewed the record of proceeding, concurred with the director's conclusion, and dismissed the appeal on April 15, 2003.

On motion, counsel asserts that the applicant's two convictions are “violations,” and that violations are not “crimes” under the New York Penal Law. Counsel states that these convictions cannot be deemed misdemeanors under 8 C.F.R. § 244.1, irrespective of the fact that the offenses may be punishable by imprisonment of more than five days. Counsel cites NYPL § 110.00, subsection 3, that states:

“Violation” means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

Counsel further cites NYPL § 10.00, subsections 4 and 6:

Subsection 4:

“Misdemeanor” means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

Subsection 6:

“Crime” means a misdemeanor or a felony.

As argued by counsel, pursuant to NYPL § 10.00, disorderly conduct (PL 240.20) and harassment in the 2nd degree (PL 240.26) are classified as violations. However, as also pointed out by counsel, these offenses can carry a sentence of imprisonment of up to fifteen days.

Counsel's assertion that the applicant's convictions are not crimes is not persuasive. Federal immigration laws should be applied uniformly, without regard to the nuances of state law. *See Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000); *Burr v. INS*, 350 F.2d 87, 90 (9th Cir. 1965). Thus, whether a particular offense under state law constitutes a “misdemeanor” for immigration purposes is strictly a matter of federal law. *See Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995); *Cabral v. INS*, 15 F.3d 193, 196 n.5 (1st Cir. 1994). While we must look to relevant state law in order to determine whether the statutory elements of a specific offense satisfy the regulatory definition of “misdemeanor,” the legal nomenclature employed by a particular state to classify an offense, or the consequences a state chooses to place on an offense in its own courts under its own laws, does not control the consequences given to the offense in a federal immigration proceeding. *See Yazdchi v. INS*, 878 F.2d 166, 167 (5th Cir. 1989); *Babouris V. Esperdy*, 269 F.2d 621, 623 (2d Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405,409 (2d Cir. 1956).

The fact that New York's legal taxonomy classifies the applicant's offense as a “violation” rather than a “crime,” and precludes the offense from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offense qualifies as a “misdemeanor” for immigration purposes. As cited above, for immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any. It is also noted that offenses that are punishable by imprisonment for a maximum term of five days or less shall not be considered misdemeanors. In this case, New York statute provides that violations of NY PL 240.20 and PL 240.26 are punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's convictions qualify as “misdemeanors,” as defined, for immigration purposes in 8 C.F.R. § 244.1.

Because the applicant was convicted of offenses for which he could have received jail sentences of more than five days, he has, for immigration purposes, been convicted of the misdemeanor offenses. 8 C.F.R. § 244.1. Therefore, the applicant remains ineligible for TPS based on his convictions of two misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Accordingly, the decision of the AAO dated April 15, 2003, dismissing the appeal, will be affirmed.

It is noted in the record that an Order to Show Cause and Notice of Hearing, Form I-221, was issued on April 9, 1992, in New York, New York [A94 095 698], based on the applicant's entry into the United States without inspection on or about February 1, 1990.

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 decision of the AAO dated April 15, 2003, dismissing the appeal, is affirmed.