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FILE: [REDACTED]
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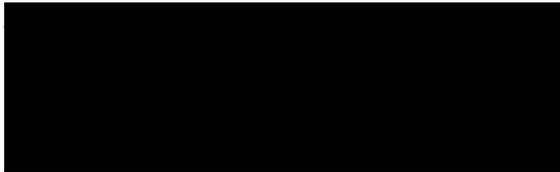
OFFICE: VERMONT SERVICE CENTER

DATE: AUG 25 2005

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:



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.

for Robert P. Wiemann, Director
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 October 31, 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 or more misdemeanors.

The AAO reviewed the record of proceeding and found that the applicant was convicted in New York: (1) on July 23, 1999, for PL 240.20, disorderly conduct; (2) on March 19, 2002, for VTL 1192.1, driving while ability impaired; and (3) on March 19, 2002, for VTL 509.1, unlicensed operation of a motor vehicle. The AAO maintained that for immigration purposes, a misdemeanor is a crime punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, with the exception for crimes that carry a maximum penalty of a jail sentence of five days or less. 8 C.F.R. § 244.1. Further, it was held in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 117 (1983) “that whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the vagaries of state law.”

The AAO concluded that although the convictions of PL 240.20, VTL 1192.1, and VTL 509.1 are classified as “violations” and/or “traffic infractions” by the State of New York, they are punishable by imprisonment for a term of up to 15 days. Therefore, for immigration purposes, these convictions are considered misdemeanors. The AAO concurred with the director’s decision to deny the application, and dismissed the appeal on April 21, 2003.

It is noted that although the AAO, in its decision, listed the applicant's three convictions, the AAO erroneously concluded that the applicant was ineligible for TPS based on his two convictions. The record, in this case, shows that the applicant was, in fact, convicted of three offenses, namely: PL 240.20, VTL 1192.1, and VTL 509.1.

On motion, counsel asserts that the applicant pled guilty to the "traffic infractions" of driving while impaired and unlicensed operation of a motor vehicle, and to the "violation" of disorderly conduct. He reiterates that these offenses are not misdemeanors under the law of the State of New York.

Counsel's assertions are 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" or "traffic infraction" 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 a misdemeanor. In this case, New York law provides that violations of NY VTL 1192.1, VTL 509.1, and PL 240.20 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 three 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 21, 2003, will be affirmed.

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 21, 2003, dismissing the appeal, is affirmed.