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**U.S. Citizenship
and Immigration
Services**

M1

FILE:

[REDACTED]
[EAC 01 194 55595]

OFFICE: VERMONT SERVICE CENTER

DATE: **OCT 31 2006**

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's TPS was withdrawn by the Director, Vermont Service Center. The application 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 is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The applicant's TPS application was approved on June 22, 2001. On August 8, 2005, the director requested that the applicant submit final court dispositions concerning his May 6, 2000, and September 6, 2004 arrests. The director withdrew the approval of the TPS application on September 14, 2005, because the evidence showed that the applicant had been convicted of two misdemeanors.

On appeal, counsel states that the applicant is eligible for TPS.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or

- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

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 record reveals the following offenses:

- (1) On June 21, 2000, the applicant was convicted of one count of operating a vehicle under the influence of drugs or alcohol in violation of New York State VTL 1192.1.
- (2) On October 22, 2004, the applicant was convicted of one count of criminal mischief in the 4th degree in violation of New York State PL 145.00.

On appeal, counsel states that the applicant should not be disqualified for TPS because the charge of operating a vehicle under the influence of drugs or alcohol, under the New York vehicle and traffic law, is considered a traffic infraction and not a misdemeanor conviction.

Contrary to counsel's assertions, federal immigration law should be applied uniformly, without regard to the nuances of state law. See *Ye v. INS*, 214 F.3d 1128, 1132 (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 (2nd Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2nd Cir. 1956).

The fact that New York's legal taxonomy classifies the applicant's offenses as "violations" or "infractions" rather than "crimes," and precludes the offense from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offenses qualify as "misdemeanors" 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 a violation of section 1192.1 of Article 31 (operating a vehicle under the influence) is punishable by imprisonment in a penitentiary or county jail for not more than fifteen days. Therefore, we conclude that the applicant's convictions in No. 1 and 2 above qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his record of two or more misdemeanor convictions, as detailed above. Section 244 (c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the applicant's TPS application for this reason will be affirmed.

An alien applying for temporary protected status 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.