

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

M

DEC 07 2007

FILE:



OFFICE: VERMONT SERVICE CENTER DATE:

consolidated herein]
[EAC 01 195 52197]

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:



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DISCUSSION: The approval of the application was revoked by the Director, Vermont Service Center (VSC). A subsequent appeal from that decision was dismissed by the Director (now Chief), Administrative Appeals Office (AAO). The case is now before the AAO on a motion to reconsider. The motion will be dismissed.

The applicant claims to be 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 initially approved the application on August 13, 2003. On September 9, 2003, the director revoked approval of the application because he found the applicant ineligible for TPS due to his having been convicted of two or more misdemeanors committed in the United States.

A subsequent appeal from that decision was dismissed by the AAO on September 16, 2005. The reasons for the dismissal were clearly explained in that decision.¹

The applicant, through counsel, filed the current motion to reconsider at the VSC on October 11, 2005. On motion, counsel for the applicant submits a brief and requests that the VSC reconsider the decision rendered by the AAO.

¹ The AAO decision of September 16, 2005 stated, in part:

"...The record reveals the following offenses:

1. On June 8, 2000, the applicant was convicted of Trespass, in violation of New York Penal Law (NYPL) §140.05. (Docket # [REDACTED])
2. On March 26, 1996, the applicant was convicted of Unauthorized Use of a Motor Vehicle, in violation of NYPL §165.05. (Docket # [REDACTED])

On appeal, counsel asserts that the applicant's convictions do not result in two misdemeanors; rather, one is a misdemeanor (No. 2, above) and one is a violation (No. 1 above). Counsel argues that in order to be deemed a misdemeanor, an offense must be a "crime" **and** must be punishable for more than five days of imprisonment, and that under NYPL, a violation is not a "crime."

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 a misdemeanor. In this case, New York law provides that a violation of trespass is punishable by up to fifteen days incarceration.

Therefore, we conclude that the applicant's conviction in No. 1, above, qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1. The applicant is ineligible for TPS due to his record of at least two misdemeanor convictions, 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 deny the application will be affirmed..."

Pursuant to 8 C.F.R. § 103.5(a)(ii), the official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. Since the Chief of the AAO made the decision to dismiss the appeal, the VSC does not have jurisdiction in this matter. The VSC therefore transferred the motion to the AAO on March 2, 2006.

Under 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy and must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel asserts that the AAO “failed to address the crux of the issue presented by the Applicant, to wit, a violation under New York Penal Law is [not] a misdemeanor as defined in 8 C.F.R. [§] 244.1.” Counsel’s argument essentially ignores the AAO’s previous decision, which clearly explained that the legal nomenclature applied by individual states is irrelevant in determining whether a particular transgression constitutes a misdemeanor for immigration purposes under federal law. Moreover, the federal regulation itself uses the terms “offense,” “misdemeanor,” and “crime” interchangeably in defining an exception to the general rule that a crime punishable by imprisonment of more than one year is a felony – *i.e.*:

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 . . . the crime shall be treated as a misdemeanor.

In view of this overlapping terminology in the federal regulation, counsel’s contention that the applicant’s conviction for trespass in New York State is not a misdemeanor crime under 8 C.F.R. § 244.1 merely because New York Penal Law calls it a “violation” rather than a “crime” is unpersuasive. The only factor that determines whether a transgression constitutes a “misdemeanor” under 8 C.F.R. § 244.1 is whether it is punishable by more than five days imprisonment.

Both of the applicant’s convictions in New York State were punishable by up to 15 days imprisonment. Since he has been convicted of two misdemeanors as defined in 8 C.F.R. [§] 244.1, the applicant is ineligible for TPS under Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

Counsel has failed to establish that the AAO’s prior decision was based on an incorrect application of the law or Service policy. Accordingly, the motion to reconsider will be dismissed. The previous decision of the AAO will not be disturbed.

It is noted that the applicant was granted voluntary departure to El Salvador until February 24, 1997, by order of an Immigration Judge in New York City on April 24, 1996. When the applicant failed to depart the United States as scheduled, the deportation order became immediately effective.

ORDER: The motion to reconsider is dismissed. The previous decision of the AAO dated September 16, 2005, is affirmed.