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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
[EAC 01 177 50558]

OFFICE: Vermont Service Center

DATE: JUL 19 2007

IN RE: Applicant: [REDACTED]

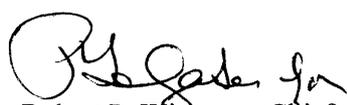
APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application is now before the Administrative Appeals Office (AAO) 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 director denied the application because he determined that the applicant was ineligible for TPS because the applicant had been convicted of two misdemeanor offenses committed in the United States.

On appeal, counsel, on behalf of the applicant, asserts the applicant's eligibility 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.
8 C.F.R. § 244.1.

The Federal Bureau of Investigation fingerprint results report reveals that the applicant was arrested by the Mineola County (New York) Police on October 19, 2001, and charged with "NYS VTL 1192.02 Driving While Intoxicated (Auto)." On August 18, 2003, the applicant was requested to submit the final court disposition for that charge. In addition, if convicted, the applicant was requested to provide evidence showing whether the charge was classified as a felony or misdemeanor.

On April 9, 2003, the applicant was requested to submit evidence to establish his qualifying continuous physical presence in the United States. In response, the applicant submitted some evidence in an attempt to establish his continuous physical presence in the United States. On August 18, 2003, the director also requested the applicant to submit the final court dispositions relating to his arrest as noted above. On August 29, 2003, the applicant responded to the director's August 18, 2003, request and provided copies of a transcript from the Freeport Village Court of Freeport, New York, reflecting that the applicant pleaded guilty to "Unlicensed Operator" and "Fld. To Obey Traf. Con. Dev" on February 26, 2001.

The director determined that the applicant was ineligible for TPS because he had been convicted of two misdemeanor offenses committed in the United States. Therefore, the director denied the application on July 22, 2004.

On August 12, 2004, counsel filed an appeal which is now before the AAO. On appeal, counsel argues that the applicant has only been convicted of traffic infractions, and thus, is not ineligible for TPS. Counsel also provides copies of the previously submitted certificates of disposition from the District Court of Nassau County and Freeport Village Court of Freeport, New York, along with excerpts from the New York penal code pertaining to Sections 1192 and 509.

On August 29, 2004, counsel, on behalf of the applicant, submitted a certificate of disposition from the District Court of Nassau County reflecting that on October 23, 2001, the applicant pleaded guilty to Operating a Vehicle Under the Influence of Drugs or Alcohol (VTL 1192.1). The applicant was ordered to pay a fine of \$300 and given a conditional discharge of one year. In addition, counsel provided copies of transcripts from the Freeport Village Court at Freeport, New York reflecting that the applicant pleaded guilty to "Unlicensed Operator" (VTL 509.1) and "Fld. To Obey Traf. Con. Dev." (VTL 1110-A) on February 26, 2001. The applicant was ordered to pay fines of \$215.

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 an 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.

New York VTL 509 states that a violation of any provision of this section (this includes VTL 509.1) "shall be punishable by a fine of not less than fifty nor more than two hundred dollars, or by **imprisonment for not more than fifteen days**, or by both such fine and imprisonment..."

New York VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction and "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.)

In this case, New York law provides that a violation of VTL 1192.1 and VTL 509.1 are punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's convictions above qualify 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 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.