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

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**MAY 11 2007**

FILE:

[EAC 01 202 52609]

OFFICE: VERMONT SERVICE CENTER

DATE:

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and the case is now before the Administrative Appeals Office (AAO) on appeal.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 was granted Temporary Protected Status on July 30, 2003. The director subsequently withdrew the applicant's Temporary Protected Status on January 27, 2006, when it was determined that the applicant had been convicted of two or more misdemeanors.

The director may withdraw the status of an alien granted Temporary Protected Status under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

On appeal, counsel states that the applicant has only been convicted of one misdemeanor and is therefore 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 in New York under Docket # [REDACTED]

- On March 10, 2005, the applicant was convicted of attempted possession of a controlled substance (Dangerous Drug) in violation of PL 110-220.03, and sentenced to a \$200.00 fine and 10 days incarceration, with a conditional discharge of one year.
  - On March 10, 2005, the applicant was convicted of operating a vehicle under the influence of drugs or alcohol in violation of VTL 1192.1, and sentenced to a \$300.00 fine and 10 days incarceration, with a conditional discharge of one year.
- On March 10, 2005, the applicant was convicted of following too close in violation of VTL 1129, and sentenced to a \$50.00 fine and 10 days incarceration.

On appeal, counsel states that the applicant has been convicted of one misdemeanor and traffic infractions. Counsel also states that the Service is misinterpreting the regulations and that Congressional intent could not have been to deem an applicant ineligible for TPS for committing crimes not deemed misdemeanors on the state level.

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 (9<sup>th</sup> 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 (8<sup>th</sup> Cir. 1995); *Cabral v. INS*, 15 F.3d 193, 196 n.5 (1<sup>st</sup> 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 (5<sup>th</sup> Cir. 1989); *Babouris v. Esperdy*, 269 F.2d 621, 623 (2<sup>nd</sup> Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2<sup>nd</sup> 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, numbers 1, 2, and 3 above are all punishable by imprisonment for more than 5 days under New York State law. Therefore, we conclude that the applicant has been convicted of two or more "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 application for this reason will be affirmed.

The application will be denied for the above reasons, with each considered as an independent and alternative basis for denial. 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.