



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] OFFICE: California Service Center DATE: **MAY 14 2007**
[WAC 05 083 73288 –
as it relates to EAC 99 213 51966]

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 Director, California Service Center (CSC), denied the application for re-registration of Temporary Protected Status. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The applicant's previously granted TPS will be withdrawn.

The applicant claims to be a 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 re-registration application because he found that the applicant had been convicted of two misdemeanors in the State of New York, making him ineligible for TPS under section 244(c)(2)(B) of the Act.

On appeal, counsel acknowledges that the applicant has one misdemeanor conviction, but states that the other conviction was for a traffic infraction which is not a misdemeanor crime. According to counsel, therefore, the applicant has not been convicted of two misdemeanors and is not ineligible for TPS. Documentation is provided in support of the appeal.

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 record shows that the applicant was initially granted TPS on June 5, 2000, pursuant to an application filed at the Vermont Service Center on July 8, 1999. The applicant filed the current application for re-registration of TPS at the California Service Center (CSC) on December 22, 2004. On April 19, 2005, the Director, CSC, issued the applicant a Request for Evidence (Form I-797) – based on a Federal Bureau of Investigation (FBI) background check indicating that he had been arrested twice for motor vehicle violations – asking for the certified court dispositions of those and all other arrests. The applicant responded by submitting the final court disposition of the second arrest, which occurred in 2004, but not the first, which occurred in 1999.

On November 22, 2005, the director issued a Notice of Decision denying the re-registration application on the ground that the record showed the applicant had been convicted of two misdemeanor charges under New York State’s Vehicle and Traffic Law (VTL), described as follows:

1. Violation of VTL section 1192.1 & 2 (operating a motor vehicle while ability impaired and driving while intoxicated, per se), Mamaroneck Village Court, Westchester County, New York, convicted on April 27, 2000.
2. Violation of VTL section 1192.3 (operating a motor vehicle while intoxicated), Rye City Court, New York, convicted on October 12, 2004.

Based on the foregoing record, the director determined that the applicant was ineligible for TPS under section 244(c)(2)(B)(i) of the Act.

On appeal counsel acknowledges that the applicant was convicted of a misdemeanor on October 12 2004 – driving while intoxicated – stemming from an arrest on July 26, 2004. The court record previously submitted confirms that the applicant was convicted in the Rye City Court, Criminal Division, of VTL section 1192.3, which under New York State law is punishable by imprisonment of up to one year. *See* VTL section 1193.1(b). With respect to the other conviction, counsel submits a printout from the New York State Division of Criminal Justice Services (NYSID: [REDACTED]) showing that the applicant was arrested on December 11, 1999 on two misdemeanor charges – VTL section 1192.2 & 3 – but that he was only convicted on April 27, 2000, of violating VTL section 1192.1 – DWAI (Driving While Ability Impaired) Alcohol – which is an infraction, not a misdemeanor crime, under New York State law. As indicated in the printout, the applicant was punished with a fine of \$350 and a license suspension. According to counsel, therefore, the applicant has only been convicted of one misdemeanor committed in the United States and is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.1.

The AAO does not agree with counsel’s argument. Section 1193.1(a) of New York State’s VTL specifies that a violation of VTL section 1192.1 is punishable by up to 15 days in jail. That makes a conviction under that subsection a misdemeanor for immigration purposes under 8 C.F.R. § 244.1, whether or not such a sentence was imposed on the applicant.

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 "infraction" rather than a "misdemeanor" is not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. As cited above in 8 C.F.R. § 244.1, 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. The regulations also provide that offenses "punishable by imprisonment for a maximum term of *five days or less* shall not be considered a misdemeanor." (Emphasis added.) In this case, New York law provides that a violation of VTL section 1192.1 is punishable by up to fifteen days incarceration. Therefore, the applicant’s conviction for "driving while ability impaired" is a "misdemeanor" as defined for immigration purposes 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), due to his record of two misdemeanor convictions, detailed above. Accordingly, the director's decision to deny the re-registration application will be affirmed.

In addition, the applicant's previously granted TPS will be withdrawn, in accordance with 8 C.F.R. § 244.14(a)(1), which provides that TPS may be withdrawn "at any time" if "[t]he alien was not in fact eligible at the time such status was granted, *or at any time thereafter becomes ineligible for such status.*" [Emphasis added.]

Since the decision to withdraw the applicant's Temporary Protected Status is entered by the AAO, the applicant is hereby advised that he has the right to a *de novo* determination of eligibility for TPS in deportation proceedings. *See* 8 C.F.R. § 244.14(c).

According to Citizenship and Immigration Services (CIS) records, the applicant was previously removed from the United States pursuant to the order of an Immigration Judge on November 22, 1996, and re-entered the United States without inspection on or about July 1, 1997.

An alien applying for temporary protected status has the burden of proving that he or she meets the requirements for TPS enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet that burden.

ORDER: The appeal is dismissed. The applicant's previously granted TPS is withdrawn.