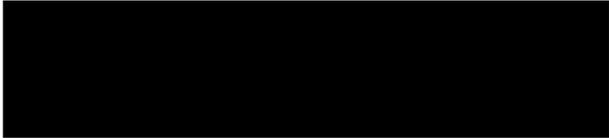




U.S. Citizenship
and Immigration
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OFFICE: VERMONT SERVICE CENTER

DATE: OCT 02 2007

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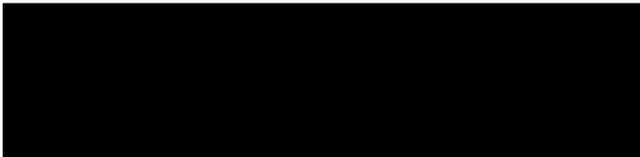
IN RE:

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 application was denied by the Director, Vermont Service Center, and 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 director denied the application because the applicant had been convicted of two misdemeanors committed in the United States.

On appeal, counsel submits a statement and additional evidence.

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) The Federal Bureau of Investigation (FBI) fingerprint results report shows that on January 23, 1994, in Yaphank, New York, the applicant (name used: [REDACTED]) was arrested for driving while intoxicated. The final court disposition of this arrest is not contained in the record although the applicant was requested on January 7, 2004, to submit the final disposition of this offense.
- (2) On December 13, 1999, in the District Court of the County of Suffolk, First District Court, Central Islip, New York, Docket No. [REDACTED] (arrest date August 11, 1999), the applicant was convicted of Count 1, operating a motor vehicle while under the influence of drug or alcohol, VTL 1192.3, a misdemeanor; and Count 2, aggravated unlicensed operation of a motor vehicle in the second degree, VTL 511.2(a), a misdemeanor. He was placed on probation for a period of 3 years, fined \$500, and his driver's license was revoked as to Count 1; he was fined \$500 as to Count 2.
- (3) On July 6, 2004, in Yaphank, New York, the applicant was arrested for menacing, PL 120.14. On March 29, 2005, in the District Court of the County of Suffolk, First District Court, Central Islip, New York, Docket No. [REDACTED], the applicant entered a plea of guilty to the amended charge of disorderly conduct, PL 240.20(7). He was placed on unconditional discharge for an unspecified period, and ordered to pay \$95 in fines and costs.
- (4) The records of the State of New York Department of Motor Vehicles (DMV) indicate that on January 10, 2002, in Suffolk County Court, New York (arrest date September 25, 2000), the applicant was convicted of facilitating aggravated unlicensed operation of a motor vehicle (VTL 511-a). He was fined \$200.

- (5) The records of the New York DMV indicate that on January 10, 2002, in Suffolk County Court, New York (arrest date February 11, 2001), the applicant was convicted of facilitating aggravated unlicensed operation of a motor vehicle (VTL 511-a). He was fined \$200,
- (6) The records of the New York DMV indicate that on September 20, 2002, in Suffolk County Court, New York (arrest date June 28, 2002), the applicant was convicted of operating a motor vehicle without a license (VTL 509.1). He was fined \$70.

On appeal, counsel asserts that the applicant has been convicted of only one misdemeanor (No. 2 above) because his conviction of disorderly conduct PL 240.20 (No. 3 above) is a "violation," and that a violation is technically not considered to be a "crime" under New York law. Counsel cites section 10 of the New York State Penal Law that states, in part:

"Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

Counsel's assertion is not persuasive. 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 "traffic infraction" 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 violations of NY PL 240.20 (No. 3 above), VTL 511-a (Nos. 4 and 5 above), and VTL 509.1 (No. 6 above) are punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's convictions of Nos. 3, 4, 5, and 6 above qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1.

Because the applicant was convicted of offenses for which he could have received jail sentences of more than five days, he has, for immigration purposes, been convicted of the misdemeanor offenses listed in Nos. 2, 3, 4, 5 and 6 above. Therefore, applicant is ineligible for TPS due to his record of at least six misdemeanor convictions. 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.

The record indicates that in removal proceedings held on September 13, 1989, in New York, New York, the Immigration Judge administratively closed proceedings based on the applicant's failure to appear.

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.