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



FILE:

[EAC 01 165 53339]

Office: VERMONT SERVICE CENTER

Date: APR 02 2008

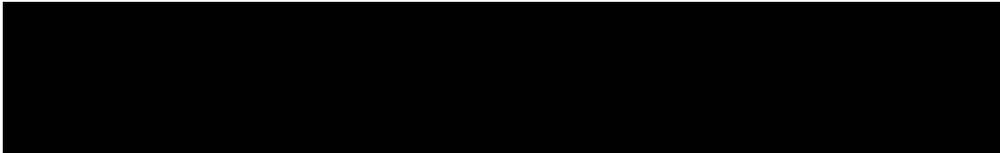
INRE:

Applicant:



APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act (the 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the application. The Director, now Chief, Administrative Appeals Office (AAO), dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The case will be reopened and the appeal will again be dismissed.

The applicant is a citizen of El Salvador who seeks 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 found the applicant ineligible for TPS for having been convicted of two or more criminal offenses.

A subsequent appeal from the director's decision was dismissed on October 3, 2005, after the Director, AAO also concluded that the applicant had failed to establish that he was eligible for TPS. On motion, counsel for the applicant reasserts the applicant's claim of eligibility for TPS and asserts that one of the applicant's convictions was for a traffic infraction, not a crime, and should not preclude the applicant from TPS eligibility.

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. § 244A(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 reflects that on June 13, 1989, in the First District Court of Nassau County, in Nassau County New York, the applicant pleaded guilty to the following charges:

1. Criminal Possession of Stolen Property in the Fifth Degree, pursuant to § 165040 of the New York Penal Law (PL)(Docket # 15616/88);
2. Driving While Ability Impaired, pursuant to § 1192.1, of the New York Vehicle and Traffic Law (VTL)(Docket # 10011/88); and,
3. Driving Without a License, pursuant to § 509.1, of the New York VTL (Docket # 10011/88).

In New York, criminal possession of stolen property in the fifth degree is considered a Class A misdemeanor. Class A misdemeanors are punishable by incarceration of no more than one year. Therefore, the applicant's conviction for criminal possession of stolen property in the fifth degree is a misdemeanor for purposes of determining TPS eligibility.

Under New York law, Driving While Ability Impaired is considered a violation. Violations, however, are punishable by incarceration of up to 15 days. Therefore, the applicant's conviction for Driving While Ability Impaired is a misdemeanor for purposes of determining TPS eligibility.

Under New York law, Driving Without a License is also considered a violation, punishable by incarceration of up to 15 days. Therefore, the applicant's conviction for Driving While Ability Impaired is a misdemeanor for purposes of determining TPS eligibility.

Counsel asserts that the sections of law the applicant pled guilty to under the VTL are not crimes, but merely violations and should not be classified as misdemeanors by Citizenship and Immigration Services (CIS) if the New York legislature has specifically termed them as violations.

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 violations of VTL 1192.1 and VTL 509.1 are punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's convictions in New York qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1.

The dispositions submitted by the applicant indicate that he has been convicted of at least three misdemeanors and is ineligible for TPS under the specific criminal provisions for TPS applicants under Section 244(c)(2)(B)(i) of the Act.¹ Consequently, the director's decision to withdraw the approval of the TPS application 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 that burden.

ORDER: The appeal is dismissed.

¹ In response to the director's request for evidence, the applicant also submitted a conviction document from the District Court of Nassau County, in Hempstead, New York, for an individual named [REDACTED]. The date of birth on this disposition differs from the applicant's date of birth as does the address. On appeal, the applicant asserts that this person is not him. The applicant, however, has not explained why he submitted this disposition if it does not belong to him.