

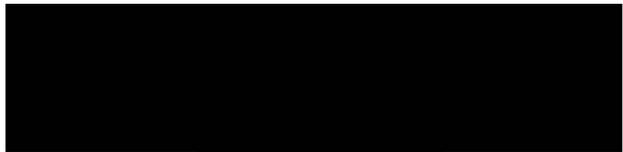


U.S. Citizenship
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Services

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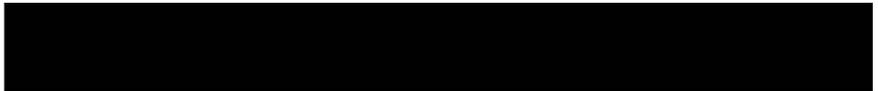
Office: VERMONT SERVICE CENTER

Date: MAY 23 2008

[EAC 07 224 50443, *appeal*]
[EAC 01 17051889]

INRE:

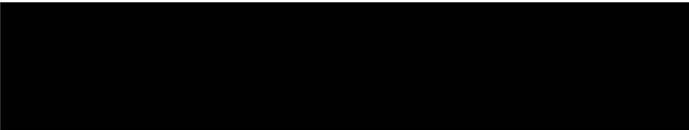
Applicant:



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 Vermont Service Center. 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center (VSC), and the case is now before the **Administrative** Appeals Office (AAO) on appeal of an earlier determination. The case will be *sua sponte* reopened, and the appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (fPS) on November 14, 2001. The director withdrew the applicant's status on September 4, 2007, because the applicant had been convicted of two misdemeanors.

The applicant's initial application under receipt number EAC 01 170 51889 was approved by the Director, Vermont Service Center on November 14, 2001. A Notice of Intent to Withdraw (NIW) Temporary Protected Status (**TPS**), was sent to the applicant on October 26, 2006, requiring her to submit final court dispositions for arrests on September 19, 2004 and March 25, 2005 for driving under the influence.

The applicant responded to the NIW on May 16, 2007 by **providing** the required court disposition **documentation**. On June 21, 2007, the director denied the applicant's Form I-765, Application for Employment Authorization. In that decision, the director **stated** that on June 20, 2007, the applicant's TPS had been withdrawn. However, a copy of that determination is not in the record. The applicant, through counsel, filed an appeal to the June 20, 2007 decision while **asserting** that she had never received a copy of that determination. On September 4, 2007, the director issued a decision withdrawing the applicant's TPS because she had been convicted of two misdemeanors. The appeal was forwarded to the AAO for resolution. As **this** case focuses on a **factual** determination based upon the applicant's court dispositions, nothing would be **gained** by remanding this case to the director to reconcile the sequence of decisions.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (fPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

On appeal, counsel acknowledges that the applicant was twice convicted for driving while intoxicated. Counsel argues that although her second conviction qualifies as a misdemeanor, her first conviction under Vehicle and Traffic Law (VTL), Section 1192.1 - driving while impaired – is not a conviction for a crime; rather, it is a non-criminal infraction, on par with **failing** to signal when changing lanes, passing a red light or **exceeding** a posted speed limit. Counsel concludes that as the applicant's conviction for driving impaired is not a crime, she has only been convicted of a single misdemeanor and is eligible to renew her TPS.

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state designated by the Attorney General 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.
- (g) Has filed an application for late registration with the appropriate Service director **within** a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define "felony" and "misdemeanor" as:

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 the following offenses:

- (1) On October 5, 2004, the applicant was convicted by a Judge in the District Court of Nassau County, Hempstead, New York, of driving **while her ability** was impaired by the consumption of alcohol, VTL 1192.1. (Docket # _
- (2) On July 6, 2006, the applicant was convicted by a Judge in the District Court of Nassau County, Hempstead, New York, of operating a motor vehicle while she had .08 of one per centum or more by weight of alcohol in her blood, VTL 1192.2, a misdemeanor. (Docket #

On appeal, counsel states that the **applicant's** first conviction is for a violation and that the director's classifying it as a misdemeanor under Federal law is incorrect.

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 in No. 1 above 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, and 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 State law provides that violation of VTL 1192.2 is punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's convictions of #1 and #2 listed above qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to her record of 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 withdraw TPS is affirmed.

In removal proceedings held on January 8, 1999, an Immigration Judge in Los Angeles, California, ordered the applicant deported "in absentia" to El Salvador. It is further noted that the record contains an outstanding Form I-205, Warrant of Removal/Deportation, issued by the District Director of the Los Angeles, California, office of Citizenship and Immigration Services, (formerly, the Immigration and Naturalization Service) on April 3, 1999.

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.