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

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FILE: [redacted] OFFICE: VERMONT SERVICE CENTER DATE: JAN 06 2006

[EAC 04 072 51718]

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 she found the applicant had been convicted of two misdemeanors.

On appeal, the applicant 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.
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> *Misdemeanor* means a crime committed in the United States, either
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> (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.
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> 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 that the applicant filed a prior Form I-821, Application for Temporary Protected Status, on May 8, 2001, under CIS receipt number EAC 01 194 56143. The Federal Bureau of Investigation (FBI) fingerprint results report revealed the following offenses:

1. On July 27, 1997, the applicant was arrested in Suffolk County, New York, and charged with driving while intoxicated.

2. On March 14, 1998, the applicant was arrested in Suffolk County, New York, and charged with one count of driving while intoxicated and one count of aggravated unlicensed operator in the second degree.

On May 23, 2002, the applicant was requested to provide the final court disposition of the offenses detailed above. He was also requested to submit additional evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods. The applicant, in response, submitted a disposition document indicating that he was convicted on January 26, 1998, in the First District Court, Central Islip, County of Suffolk, State of New York, to the reduced charge of operating a motor vehicle under the influence of alcohol in violation of section 1192.1 VTL. [redacted]

The applicant also submitted a separate court disposition document from the First District Court, County of Suffolk, State of New York, indicating that he pled guilty on September 28, 1998, in the First District Court, Central Islip, State of New York, to driving while intoxicated in violation of section 1192.3 VTL, and also to

facilitating aggravated unlicensed operation of a motor vehicle in the third degree in violation of section 511(a)(1)) VTL. (Docket Number [redacted]

The director denied the applicant's prior TPS application on April 16, 2003, because the applicant had been convicted of two misdemeanor offenses.

On May 8, 2003, the applicant filed a motion to reopen the denial decision. On appeal, counsel for the applicant asserted that one of his misdemeanor charges was reduced to a traffic infraction, and he had only been convicted of one misdemeanor.

The director dismissed the motion on July 23, 2003, because it did not meet the requirements for a motion to reopen as described at 8 C.F.R. § 103.5(a)(4).

The applicant filed the current application on December 22, 2003.

The director denied the current application on September 10, 2004, because the applicant has been convicted of two misdemeanor offenses.

On appeal, the applicant states that he needs work authorization in order to support his children. He submits a police clearance letter dated September 27, 2004, from the Police Department, Yaphank, New York, stating that a criminal record search was conducted under the name [redacted] and no criminal record was found.

However, the applicant's criminal record was discovered through an FBI fingerprint search. FBI records are regulated by law and furnished for official use only. It is the position of Citizenship and Immigration Services (CIS) that an FBI fingerprint search provides a more thorough account of an applicant's criminal background than local record searches conducted by name. Furthermore, the applicant's court disposition documents indicate that he was arrested under the name [redacted] the name under which the criminal record search was conducted. The police clearance letter specifically states:

> This is a name check only of the files of the Suffolk County Police Department valid up to the date of issuance or as otherwise noted. **It does not include** New York States Department of Motor Vehicle Drivers License record check. . . .

The applicant asserts that he has only been convicted of one misdemeanor, and his other convictions were traffic 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 "traffic 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 a violation of sections 1192.1 VTL and 511(a)(1) VTL are punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's convictions detailed in Nos. 1 and 2 above qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his record of at least 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 deny the application for this reason will be affirmed.

Beyond the decision of the director, it is noted that the applicant's Form I-821, Application for Temporary Residence, was filed on December 22, 2003. The applicant indicated on the current Form I-821 that he was applying for re-registration. The initial registration period for Salvadorans was from March 9, 2001 through September 9, 2002. Since the application initial TPS application was denied on April 16, 2003, the current TPS application cannot be considered as a re-registration. Therefore, this application can only be considered as a late registration. The applicant has not provided any evidence to establish his eligibility for late initial registration as described at 8 C.F.R. § 244.2(f)(2). Therefore, the application also must be denied for this reason.

The application will be denied for the above stated 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.