

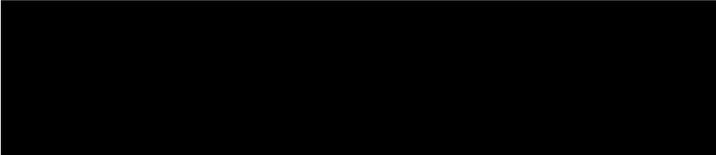


U.S. Citizenship
and Immigration
Services

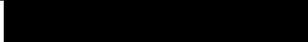
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 19 2007

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IN RE:

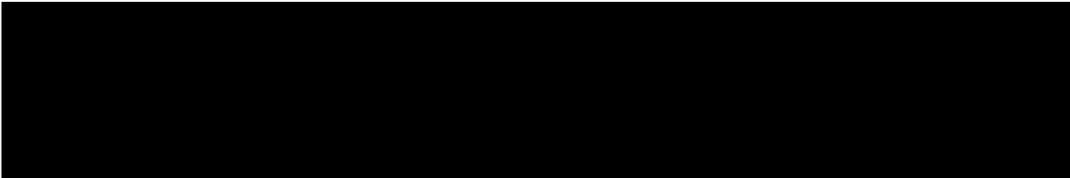
Applicant:



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 California Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: Approval of the application was withdrawn by the Director, Vermont Service Center (VSC), and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the case will be remanded for further consideration and action.

The applicant is a citizen of Honduras who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew approval of the applicant's TPS because he found the applicant ineligible due to his having been convicted of two or more misdemeanor offenses.

On appeal, counsel for the applicant submits a brief.

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 TPS 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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record reveals that the applicant was convicted of the following offenses in Bronx County, New York:

- (1) Disorderly Conduct, in violation of New York Penal Law section 240.20, on March 11, 2005 (Docket # [REDACTED]); and,
- (2) Unlawful Possession of Marijuana, in violation of New York Penal Law section 221.05, on September 29, 2004 (Docket # [REDACTED])

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 offenses as "violations" rather than as "crimes," and precludes the offenses from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offenses qualify as "misdemeanors" 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 section 240.20 is punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's conviction, as detailed in No. 1, above, qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1. It appears, however, that the conviction, as detailed in No. 2, above, is classified under NYPL as an infraction, and is not punishable by any term of imprisonment. Therefore, the applicant is not ineligible for TPS due to having been convicted of a felony or two or more misdemeanor offenses. Consequently, the director's decision to withdraw approval of the applicant's TPS on this ground will be withdrawn.

Though not discussed by the director, the applicant's conviction, as detailed in No. 2, above, indicates that he is inadmissible to the United States due to his conviction of a drug-related offense. Section 244(c)(2)(A)(iii) of the Act and 8 C.F.R. § 244.3(c)(1). There is a waiver available for this ground of inadmissibility insofar as it relates to simple possession of 30 grams or less of marijuana. A waiver application was neither requested by the director, nor furnished by the applicant (or his counsel).

From the record, it cannot be ascertained the amount of marijuana the applicant was convicted of possessing. Matter of Grijalva, 19 I&N Dec. 713, 718 (BIA 1988), holds that where the amount of marijuana an alien has been convicted of possessing cannot be ascertained from the alien's conviction record, the alien must come forward with credible testimony or other evidence to meet his burden of proving that his conviction is related to 30 grams or less of marijuana. Therefore, at this time, CIS will not make a determination of the applicant's ineligibility for TPS based on his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and the case will be remanded to the director for further consideration. The director may request any additional evidence he considers pertinent. Similarly, the applicant may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

It is noted that the director may withdraw the status of an alien granted Temporary Protected Status under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. The case is remanded for further consideration and action.