U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 14 2008

[EAC 01 198 54478]

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.

for 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 (AAO) 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 determined that the applicant failed to establish he had: 1) continuously resided in the United States since February 13, 2001; and 2) been continuously physically present in the United States since March 9, 2001. The director also determined that the applicant had failed to submit requested court documentation relating to his criminal record. The director, therefore, denied the application.

On appeal, counsel for the applicant states that the director issued a decision prior to the expiration of the 60-day period given to the applicant to respond to the notice. Counsel also requests an additional 60 days in which to submit the court disposition. The applicant subsequently submitted the court disposition.

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 as designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

(a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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.

The term *continuously physically present*, as used in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The term *continuously resided*, as used in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

Persons applying for TPS offered to El Salvadorans must demonstrate entry on or prior to February 13, 2001, that they have continuously resided in the United States since February 13, 2001, and that they have been continuously physically present in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. Subsequent extensions of the TPS designation have been granted by the Secretary of the Department of Homeland Security, with the latest extension granted until March 9, 2009, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

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. 8 C.F.R. § 244.1.

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. Section 212(a)(2)(B) of the Act.

The record reveals the following offenses occurring on May 9, 1994:

(1) A violation of New York State Vehicle & Traffic Law, Section 1192, Driving While Intoxicated, a misdemeanor, and;

(2) A violation of New York State Penal Code, Section 165.45 Criminal Possession of Stolen property 5th Degree, a misdemeanor.

The record shows that the applicant filed his TPS application on May 16, 2001. On April 17, 2003, the applicant was provided the opportunity to submit evidence establishing continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States from March 9, 2001, to the filing date of the application. The applicant was also requested to submit the final court disposition of every charge against him. On May 17, 2003, a response was received in which the applicant provided evidence in an attempt to establish continuous residence and continuous physical presence in the United States during the qualifying period. The applicant also stated that he was unable to provide a final disposition of his "1995" arrest and requested additional time in which to provide this document. The applicant submitted the following evidence:

1. A copy of a New York State Driver License issued on January 18, 2002.

2. Copies of Optimum TV receipts dated December 9, 2001 and (Month Unknown) 13, 2001.

3. A copy of an AIU Insurance Company bill with payment due on October 26, 2001.

4. Copies of two hand-written generic receipts dated August 9, 2001, August 27, 2001, August 31, 2001, October 1, 2001 and November 2, 2001.

5. Copies of a New York State Department of Motor Vehicles Interim ID Cards and New York State Department of Motor Vehicles Record of Convictions dated September 20, 2001.

6. A copy of a 2001 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement.

7. Copies of Suffolk County Police Department Application for Letter of Good Conduct/Background Checks dated May 7, 2003 and July 15, 2003.

On July 31, 2003, the applicant was again provided the opportunity to submit evidence establishing continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States from March 9, 2001, to the filing date of the application. The applicant was also again requested to submit the final court disposition of every charge against him. The applicant was granted an additional 60 days in which to submit the requested evidence. The applicant failed to respond to the notice. Therefore, the director denied the application.

On appeal, counsel for the applicant states that the director sent the applicant a letter on July 31, 2003 requesting additional evidence. Counsel points out that the applicant was granted 60 days in which to provide the requested evidence, but the application was denied on September 25, 2003, prior to the expiration of the 60-day period.

Counsel also states that he provided a response on September 23, 2003. That response included the following evidence:

8. A copy of a Suffolk County District Court Certification of Order Vacating District Court Warrant(s) dated September 19, 2003.
9. A letter from [redacted] who states that he has known the applicant since April 1999.
10. A letter from [redacted] Owner/Operator of Premier Landscaping, Kings Park, New York, who states that the applicant has worked for him since 1999.
11. Receipts from A&F Gulf Service dated January 2, 2001, RJ Auto Hospital dated June 28, 2001, and Urgente Express dated August 15, 1999.

The IRS Form W-2 is for 2001, but it does not establish the applicant's continuous residence and continuous physical presence during the qualifying periods. Of the remaining evidence, one of the hand-written generic rent receipts is dated August 9, 2001, and is the earliest date presented as evidence of the applicant's presence in the United States. This is subsequent to the dates required to establish entry, continuous residence and continuous physical presence during the qualifying period. Furthermore, the receipt is not supported by any corroborative evidence. It is reasonable to expect that the applicant would have some type of contemporaneous evidence to support these assertions; however, no such evidence has been provided. Therefore, this evidence is of little or no probative value.

The September 19, 2003 Suffolk County certification does not identify the court warrant(s) that were vacated. [redacted] letter is not supported by any corroborative evidence. Affidavits are not, by themselves, persuasive evidence of continuous residence or continuous physical presence. [redacted] statement also has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, the affiant does not provide the address where the applicant resided during the period of his employment. It is further noted that the affiant did not indicate the applicant's exact dates of employment or his duties of employment.

On appeal, counsel for the applicant also requested an additional 60 days in which to submit the "final

disposition" because the "case is still pending with the Suffolk County District Court," and the applicant's next court date would be on November 26, 2003. The applicant subsequently provided the final court disposition for the May 9, 1994 arrest which indicates the applicant was convicted of "Operating a Motor Vehicle Under the Influence of Alcohol or Drugs", a traffic infraction. 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 an "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 "Operating a Motor Vehicle Under the Influence of Alcohol or Drugs" is punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's conviction qualifies as a "misdemeanor" 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.

The applicant has not submitted sufficient evidence to establish that he has met the criteria for continuous residence and continuous physical presence described in 8 C.F.R. § 244.2(b) and (c). Consequently, the director's decision to deny the application for temporary protected status 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 this burden.

ORDER: The appeal is dismissed.