

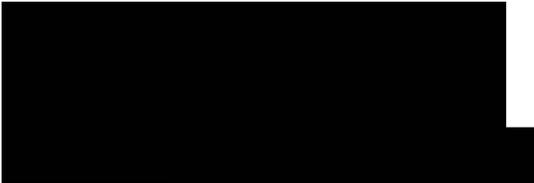
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
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**U.S. Citizenship
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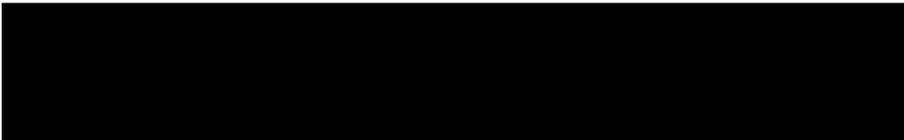


FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE: **MAR 11 2008**
[EAC 01 210 50436]

INRE: 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:



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 "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, withdrew the applicant's Temporary Protected Status (TPS). 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 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 had been convicted of at least two misdemeanors in the United States.

On appeal, counsel asserts that, under New York law, the applicant has been convicted of two violations and only one misdemeanor, and therefore is eligible for TPS.

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.P.R.* § 244.4(a).

The regulation at 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 reveals the following offenses:

1. On March 10, 2004, the applicant was convicted in the District Court of Nassau County-Hempstead of violations of New York Vehicle and Traffic Law section 509.1, operating a vehicle without a license; section 1192.1, operating a vehicle under the influence (DUI) of drugs or alcohol; and section 1229c.3, operating a vehicle without a seatbelt. He was fined for each offense and was placed on a one-year conditional discharge for the DUI offense. Docket number [REDACTED]
2. On January 12, 2006, the applicant was convicted in the District Court of Nassau County-Hempstead of violating New York Vehicle and Traffic Law section 1192.2, operating a vehicle with a blood alcohol content of .08%. He was fined \$500, his license was revoked, and he was placed on three years probation. The applicant was also convicted of section 1111.d1, failure to

stop for a red light; and sect vehicle without a seatbelt. He was fined for each offense. Docket numbe

On appeal, counsel states that under New York law, the applicant's conviction for DUI and operating a vehicle without a license, as outlined in number 1 above, are classified as violations pursuant to sections 509.1 and 1193, respectively, of the New York Criminal and Motor Vehicle Laws. Counsel also states that the applicant's conviction of operating a vehicle with a blood alcohol content of .08% is a misdemeanor under New York law. Counsel asserts, therefore, that the applicant has been convicted of two violations and a misdemeanor. Counsel argues, that as the applicant has been convicted of only one misdemeanor, he is not ineligible for TPS.

Section 1193 of the New York Traffic Law provides that a violation of section 1192.1 is punishable by imprisonment for not more than 15 days and a fine of not less than 300 dollars, and that a violation of section 1192.2 is a misdemeanor, punishable by imprisonment for not more than one year and a fine of not less than \$500 and not more than \$1,000. Subsection 5 of section 1229-c provides that a violation of the state's seat belt laws is punishable by a fine of up to 50 dollars. Driving without a license in violation of section 509.1 is defined as a violation. Pursuant to section 10.00 of the New York Penal Law, punishment for a violation cannot exceed 15 days imprisonment. Section 10.00 defines "crime" as a misdemeanor or a felony.

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 a violation of section 1192.1 or 509.1 is punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's convictions for DUI and operating a vehicle without a license, as outlined in number one 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 withdraw the applicant's TPS for this reason 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.