U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 0 8 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and 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 TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel puts forth a brief disputing the director's findings.

The director may withdraw the status of an alien granted TPS 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).

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).

"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.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

Section 101(a)(48)(B) of the Act provides, "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

The director withdrew TPS because the applicant had been convicted of driving under the influence on October 16, 2002, and brandishing a firearm on December 8, 2005.

On appeal, counsel asserts that the applicant does not have a conviction for driving under the influence in 2002, "but instead alleges that [the applicant] had an appear in intoxicated condition in public which is a non-incarcerable charge that calls for a fine...." Counsel provides court documentation in Case no. which indicates that on July 28, 2002, the applicant violated Virginia Code § 18.2-388, appear in public in an intoxicated condition, a Class 4 misdemeanor.[1] On or about September 12, 2002, the applicant was ordered to pay a fine and court cost.

Counsel's assertion, however, is not supported by the record.

In response to a notice dated October 12, 2012, the applicant provided court documentation in Case no. from the General District Court of Virginia which clearly indicates that on or about September 15, 2002, the applicant did unlawfully violate Virginia Code § 18.2-266, driving under the influence with .08 % or more alcohol in the blood. On September 17, 2002, the applicant was charged with violating this offense. On October 16, 2002, the applicant was found guilty of this misdemeanor offense and was sentenced to serve 60 days in jail (50 days were suspended), ordered to pay a fine of $500 and court cost of $264 and his driver's license was suspended for three years.

Counsel asserts that driving under the influence charges are traffic offenses and not criminal offenses for they are not criminal in nature requiring intentional mens rea hence, it cannot be a conviction as a criminal offense.

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).

Virginia law specifically states that a violation of section 18.2-266 is a Class 1 misdemeanor punishable by up to one year in jail. *See* Virginia Code sections 18.2-270 and 18.2-11. The court documentation clearly indicates that the driving while intoxicated offense is a Class 1 misdemeanor.

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[1] The punishment for a violation of a Class 4 misdemeanor is a fine of not more than $250. Virginia Code § 18.2-11(d).

For immigration purposes, the applicant was convicted of the misdemeanor offense of driving under the influence whether the offense is defined a crime or a traffic offense. Section 101(a)(48)(A) of the Act and 8 C.F.R. § 244.1.

On appeal, citing *Padilla v. Kentucky* 130 S. Ct. 2473 (U.S 2010),[2] counsel states that the applicant's conviction of brandishing a firearm should be vacated.

The record contains court documentation in Case no. from the General District Court of Virginia which indicates that on August 6, 2005, the applicant did unlawfully violate Virginia Code § 18.2-282, brandishing a firearm, a Class 1 misdemeanor. On November 2, 2005, the applicant was found guilty of violating this offense. The applicant was sentenced to serve 90 days in jail (60 days were suspended) ordered to pay a fine and court cost and was placed on probation for one year. On November 17, 2005, the applicant appealed his case to the Circuit Court. On December 8, 2005, the applicant through his attorney withdrew his appeal prior to trial. On December 14, 2005, the judgment of the general district court was affirmed. Case no.

In the instant case, counsel has not provided any credible evidence to support his assertion that the applicant had not been advised of the possible immigration consequences of a guilty plea by either his attorney or the trial court. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without credible evidence from the court indicating that the conviction has been vacated for underlying procedural defects having to do with the merits of the case, the brandishing a firearm conviction continues to effect immigration consequences.

The applicant is ineligible for TPS due to his two misdemeanor convictions. 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 will be affirmed.

An alien applying for TPS 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.

[2] Counsel must inform a client whether his plea carries a risk of deportation.