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



U.S. Citizenship
and Immigration
Services

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FILE:



[EAC 02 138 52875]

OFFICE: VERMONT SERVICE CENTER

DATE: **AUG 15 2005**

IN RE:

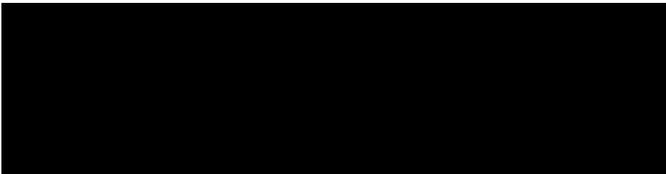
Applicant:



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 office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and 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 the applicant had been convicted of two misdemeanors committed in the United States.

On appeal, counsel 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.

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 New Jersey Criminal History Detailed Record shows that the applicant was arrested on July 6, 2000, in Elizabeth, New Jersey, for Count 1, NJ 2C:29-2A, resisting arrest; Count 2, tampering with vehicle, NJ 39:4-49; and Count 3, unlicensed alcoholic beverage, NJ 4-8.2. On July 22, 2002, the applicant was requested to submit the final court disposition of every charge against him, including the final disposition of his July 6, 2000 arrest. In response, the applicant submitted court documents revealing the following:

- (1) On September 28, 2000, in the Elizabeth Municipal Court, New Jersey, Case No. [REDACTED] Summons No. [REDACTED] (arrest date July 6, 2000), the applicant (name used: [REDACTED]) was convicted of driving while intoxicated, NJ 39:4-50 (sentence: \$505 fine and “LREK 6 MOS”). He was also convicted of resisting arrest, NJ 2C:29-2(a), a misdemeanor (Summons No. [REDACTED] and he was fined \$80.
- (2) On September 28, 2000, in the Municipal Court of the City of Elizabeth, New Jersey, Complaint/Summons No. W-00-4457, the applicant (name used [REDACTED]) was convicted of loitering, NJ 91-2, a misdemeanor. He was fined \$80.

On appeal, counsel asserts that the applicant’s conviction of driving while intoxicated (No. 1 above) is not a misdemeanor, because in New Jersey “motor vehicle offenses are not crimes.” She further asserts that “since New Jersey law, which is controlling, defines DWI as a Motor Vehicle Regulation violation NOT as a crime, the charge cannot be considered a misdemeanor.”

Counsel’s assertions are not persuasive. 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 Jersey's legal taxonomy classifies the applicant's offense as a "violation" or "traffic infraction" rather than a "crime," and precludes the offense from giving rise to any criminal disabilities in New Jersey, 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 Jersey law provides that a violation of NJS 39:4-50 (driving while intoxicated), is punishable by up to 30 days of incarceration. Therefore, it is concluded that the applicant's conviction of No. 1 above 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 three misdemeanor convictions, detailed in Nos. 1 and 2 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 will be affirmed.

The Federal Bureau of Investigation report shows that the applicant was apprehended at San Ysidro, California, on December 27, 1993, and he was subsequently placed in removal proceedings.

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.