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U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]

[EAC 01 225 59214]

OFFICE: VERMONT SERVICE CENTER

DATE: **DEC 05 2005**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, and the previous decision of the AAO to dismiss the appeal will be affirmed.

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.

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 director denied the application on July 9, 2002, after determining that the applicant was ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his convictions of two misdemeanors committed in the United States; namely: (1) on July 6, 1995, for driving while intoxicated, VTL 1192.3; and (2) on September 13, 1995, for driving while ability impaired, VTL 1192.1.

The AAO reviewed the record of proceeding and noted that although counsel argued, on appeal, that VTL 1192.1 is a “traffic infraction” and is not a misdemeanor, the penalty for VTL 1192.1 can carry a possible sentence of imprisonment for up to fifteen days; therefore, for immigration purposes, this offense is considered a misdemeanor as defined by 8 C.F.R. § 244.1. The AAO maintained that it was held in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 117 (1983), “that whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the vagaries of state law.” The AAO concurred with the director’s decision to deny the application and dismissed the appeal on April 15, 2003.

On motion, counsel reiterates that VTL 1192.1 is a traffic infraction; therefore the applicant was convicted of only one misdemeanor (VTL 1192.3). She contends that while the AAO correctly pointed out that the offense of traffic infraction is punishable for a term of no more than fifteen days, the AAO did not establish that the traffic infraction conviction is a “crime.” Counsel further asserts that the AAO’s analysis of *Dickerson v. New Banner Institute, Inc.*, *supra*, is irrelevant to the issue because the issue is not whether a federal statute should supersede state law in the finding of conviction, but rather whether AAO incorrectly applies a federal rule (8 C.F.R. § 244.1). Counsel cites NYVTL § 155 that states, in pertinent parts:

A traffic infraction is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof...

Counsel further cites NYPL § 10.00, subsections 4 and 6:

Subsection 4:

“Misdemeanor” means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

Subsection 6:

“Crime” means a misdemeanor or a felony.

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 York'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 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 violation of NY VTL 1192.1 is punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's conviction qualify as a “misdemeanor” as defined for immigration purposes in 8 C.F.R. § 244.1.

Because the applicant was convicted of an offense for which he could have received a jail sentence of more than five days, he has, for immigration purposes, been convicted of a misdemeanor. 8 C.F.R. § 244.1. Therefore, the applicant remains ineligible for TPS based on his convictions of two misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Accordingly, the decision of the AAO dated April 15, 2003, dismissing the appeal, will be affirmed.

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 AAO dated April 15, 2003, dismissing the appeal, is affirmed.