



U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

[EAC 01 195 51232]

OFFICE: Vermont Service Center

DATE: JUL 15 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application is now before the Administrative Appeals Office 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 denied the application because he determined that the applicant was ineligible for TPS because the applicant had been convicted of two misdemeanor offenses committed in the United States.

On appeal, counsel, on behalf of the applicant, asserts the applicant's eligibility 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.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.

On January 29, 2003, the director denied the applicant's Form I-765, Application for Employment Authorization, [EAC 03 058 50461], because the initial Form I-821, Application for Temporary Protected Status, was denied. Counsel, on behalf of the applicant, filed a motion to reopen on September 8, 2003. Counsel indicated that the applicant had never received the notice of intent to deny or a denial notice of the Form I-821 from the Service.

The director approved the motion and pursuant to a letter dated August 10, 2004, the applicant was requested to submit the final court dispositions for the following offenses:

- (1) NYS VTL 1192.02 – Driving While Intoxicated; and,
- (2) Aggravated Unlicensed Operation.

In addition, if convicted, the applicant was requested to provide evidence showing whether each charge was classified as a felony or misdemeanor.

On August 20, 2004, counsel, on behalf of the applicant, submitted a certificate of disposition from the District Court of Nassau County reflecting the following:

- (3) On January 2, 2003, the applicant pled guilty to "Operating Veh Under the Influence of Drugs or Alcohol" (VTL 1192.1). The applicant was ordered to pay a fine of \$550 and given a conditional discharge of one year; and,
- (4) On January 2, 2003, the applicant pled guilty to "Facilitate Aggravated Unlicensed Operation MV" (VTL 511A). The applicant was ordered to pay a fine of \$200.

The director determined that the applicant was ineligible for TPS because the applicant was convicted of two or more misdemeanor offenses committed in the United States. Therefore, the director denied the application on November 1, 2004.

On December 4, 2004, the applicant filed an appeal that is now before the AAO. On appeal, counsel, on behalf of the applicant, argues that the applicant has never pled or has been found guilty of any misdemeanor charges. Counsel further argues that the applicant has only been convicted of traffic infractions, and thus, the applicant is not ineligible for TPS. Counsel also provides a copy of the certificate of disposition from the District Court of Nassau County along with excerpts from the New York penal code pertaining to Sections 1192 and 511.

New York VTL 1192.1 states that driving while ability impaired "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.)

New York VTL 511, facilitating aggravated unlicensed operation of a motor vehicle in the third degree, states that "[w]hen a person is convicted thereof, the sentence of the court must be: (i) a fine of not less than two hundred dollars nor more than five hundred dollars or (ii) **a term of imprisonment of not more than fifteen days**, or (iii) both." (Emphasis added.)

The United States Court of Appeals for the Ninth Circuit has held that the immigration laws should be applied uniformly across the country, without regard to the nuances of state law. See, e.g., Ye v. INS, 214 F. 3d 1128, 1132 (9th Cir. 2000); Burr v. INS, 350 F. 2d 87, 90 (9th Cir. 1965). 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); Baouris v. Esperdy, 269 F. 2d 621, 623 (2d Cir. 1959); United States v. Flores-Rodriguez, 237 F. 2d 405, 409 (2d Cir. 1956).

Consequently, for immigration purposes, these offenses are considered "misdemeanors" as defined by 8 C.F.R. § 244.1.

Therefore, the applicant is not eligible for temporary protected status because he has been convicted of two or more misdemeanors committed in the United States. 8 C.F.R. § 244.4(a), and the director's decision to deny the application for TPS on this ground is affirmed.

Beyond the decision of the director, it also is noted that the applicant has provided insufficient evidence to establish his qualifying continuous physical presence and his continuous residence in the United States during the requisite time periods. 8 C.F.R. § 244.2(b) and (c). Therefore, the application will also be denied for these reasons.

It is also noted that the proceedings previously instituted, including an order to show cause, issued at New York City, on April 22, 1992, appear to have been administratively closed on January 21, 1998.

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.