



U.S. Citizenship
and Immigration
Services

MI

[REDACTED]

FILE: [REDACTED]
[EAC 01 165 53339]

OFFICE: Vermont Service Center

DATE: OCT 03 2008

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. 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 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 failed to submit requested court documentation relating to his criminal record. Therefore, the grounds of denial had not been overcome.

On appeal, counsel, on behalf of the applicant, submits evidence in support of 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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. Section 212(a)(2)(B) of the Act.

An alien is inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act.

Pursuant to a letter dated December 26, 2001, the applicant was requested to submit the final court disposition for each of the charges detailed above. In addition, if convicted, the applicant was also requested to provide evidence showing whether the charge for each arrest was classified as a felony or misdemeanor. The

applicant responded to the director's request and submitted three certified true excerpts dated February 28, 2002, from the First District Court of Nassau County, New York, reflecting the following:

- (1) On June 13, 1989, the applicant plead guilty and was convicted of Criminal possession of stolen property in the fifth degree (PL §§110-165.40) (Number: 94725, regarding [REDACTED])
- (2) On June 13, 1989, the applicant plead guilty and was convicted of VTL 509.1 and VTL 1192.1 [REDACTED] regarding NYSID [REDACTED] and,
- (3) On June 28, 1996, the applicant plead guilty and was convicted of Criminal possession of stolen property in the fifth degree (VTL 1163) [REDACTED]

The director determined that the applicant was ineligible for TPS because the applicant plead guilty to and was convicted of two misdemeanor offenses committed in the United States. Therefore, the director denied the application on June 16, 2003. Although not addressed by the director, it is also noted that the applicant provided a true excerpt from the First District Court of Nassau County (Number: 94726) regarding a conviction on June 28, 1996, as indicated in No. 3 above.

On appeal, counsel, on behalf of the applicant, states that on June 13, 1989, the applicant plead guilty to the following: Driving without a License (NYSVTL 509.1) and Driving While Ability Impaired (NYSVTL 1192.1), both traffic infractions, and Attempted Criminal Possession of Stolen Property in the fifth degree (NYSPL 110-165.40). Counsel argues that the applicant was convicted of only one misdemeanor, the Attempted Criminal Possession of Stolen Property in the fifth degree; therefore, the applicant is eligible for TPS. Counsel argues that the Driving without a License (NYSVTL 509.1) and Driving While Ability Impaired (NYSVTL 1192.1) convictions are "traffic infractions," not misdemeanors, according to New York Penal Law, and therefore, do not fit within the definition of a misdemeanor set forth by the CIS under 8 CFR 244.1. Further, counsel provides two certified true excerpts dated July 11, 2003, from the First District Court of Nassau County, New York, reflecting the following:

- (4) On June 13, 1989, the applicant plead guilty and was convicted of Criminal possession of stolen property in the fifth degree (PL §§110-165.40); and,
- (5) On June 13, 1989, the applicant plead guilty and was convicted of VTL 509.1 and VTL 1192.1.

For immigration purposes, it is necessary to consult the statutory definition of the conviction to establish eligibility for TPS, not the legal nomenclature ("traffic violation" or "violations") of the state, as in this case, New York. As state previously, 8 C.F.R. § 244.1 defines "misdemeanor" as a crime committed in the United States, that is 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. Additionally, 8 C.F.R. § 244.1 states that 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.

New York Penal Law provides that VTL 509, a violation of any provision of this section (this includes VTL 509.1) "shall be punishable by a fine of not less than fifty nor more than two hundred dollars, or by **imprisonment for not more than fifteen days**, or by both such fine and imprisonment..." Likewise, VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction and "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.) Consequently, for immigration purposes, these offenses, Driving without a License (NYSVTL 509.1) and Driving While Ability Impaired (NYSVTL 1192.1), are considered "misdemeanors" as defined by 8 C.F.R. § 244.1.

Further, the United States Court of Appeals for the Ninth Circuit has held that "*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 (9th Cir. 2000); Burr v. INS, 350 F. 2d 87.90 (9th Cir. 1965). Additionally, 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-Rodriquez, 237 F. 2d 405, 409 (2d Cir. 1956)."

A review of the case court dispositions (NYSID Number [REDACTED]) reflects that the applicant plead guilty to and was charged with the following on June 13, 1989: (1) Criminal possession of stolen property in the fifth degree (PL §§110-165.40), a misdemeanor; (2) Driving without a License (VTL 509.1), a misdemeanor; and, (3) Driving While Ability Impaired (VTL 1192.1), a misdemeanor.

The applicant is not eligible for temporary protected status because he has been convicted of three misdemeanors committed in the United States. 8 C.F.R. § 244.4(a). Therefore, 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 continuous residence during the requisite time periods. 8 C.F.R. § 244.2(b) and (c). Therefore, the application will also be denied for these reasons.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.