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EX-103 10/05/05

U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



MI

FILE:



OFFICE: VERMONT SERVICE CENTER

DATE: SEP 26 2005

[EAC 02 085 51910]

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.

for 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 found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction.

On appeal, counsel, on behalf of the applicant, asserts the applicant's eligibility for TPS and submits evidence in support of her claim.

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, 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.

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.

The record reveals that the applicant was arrested on April 5, 1997, by the Newark Police Department for "Possession of PDS or Analog." Pursuant to a letter dated April 12, 2002, the applicant was requested to submit the final court dispositions for the charge as detailed above. The applicant responded to the director's request and submitted a letter dated May 20, 2002, from [REDACTED] reflecting that the applicant was charged on July 22, 1997, with Possession of Drug Paraphernalia/DWG/Prowling in Public Places. The director denied the application on February 6, 2004, because the applicant was found inadmissible to the United States under Section 212(a)(2)(A)(i)(II) of the Act due to his conviction of a drug-related offense.

On appeal, counsel, on behalf of the applicant, provides a court disposition from the Newark Municipal Court dated March 4, 2004, indicating that the applicant was charged with "Loitering as a Disorderly Persons Offense" (Section 2C:33-2.1). In addition, counsel states, on appeal, that the applicant does not have a drug

offense conviction which renders him ineligible. Counsel further states that "loitering" is a disorderly persons offense and not a crime in New Jersey; therefore, the applicant does not have a misdemeanor conviction as well.

A review of the court disposition reveals that the applicant plead guilty and was charged with "Loitering to obtain or distribute CDS" under New Jersey law section 2C:33-2.1. Pursuant to Section 2C:33-2.1b:

"A person...commits a disorderly persons offense if (1) wanders, remains or prowls in a public place with the purpose of unlawfully obtaining or distributing a controlled substance or controlled substance analog; and (2) engages in conduct that, under the circumstances, manifests a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog."

The applicant's plea of guilty, including his subsequent conviction under this section, clearly and unequivocally exhibits the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States relating to a controlled substance. Furthermore, as stated previously, 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.

The applicant is ineligible for TPS due to his inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(2)(C) of the Act. There is no waiver available for inadmissibility under these sections of the Act. Consequently, the director's decision to deny the application for TPS on these grounds will be affirmed.

It is also noted that counsel argues that a disorderly persons offense is not a misdemeanor under New Jersey state law. A disorderly persons offense is punishable up to 6 months in jail. Consequently, for immigration purposes, this offense is considered a "misdemeanor" 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 (9<sup>th</sup> Cir. 2000); Burr v. INS, 350 F.2d 87.90 (9<sup>th</sup> 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 (5<sup>th</sup> 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)."

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.