

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



M1

FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE: JUL 26 2006
[EAC 03 076 54717]

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, Chief
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 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 had been convicted of two misdemeanors. The director also found that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act because of his drug-related conviction.

On appeal, counsel for the applicant submits a brief 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.

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.

The record reveals the following offenses:

- (1) On May 20, 1996, the applicant was convicted in the First District Court of Nassau County, State of New York, of operating a motor vehicle under the influence of alcohol in violation of section 1192.2 VTL. Pursuant to section 1193(1)(a) VTL, this offense is classified as a traffic violation and is punishable by a fine of no less than three hundred dollars and no more than five hundred dollars or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both fine and commitment. (Date of Arrest: March 17, 1996; Case Number: [REDACTED])
- (2) On January 27, 1999, the applicant was convicted in the Municipal Court of Citrus Judicial District, County of Los Angeles, State of California, of possession of under 1 ounce of marijuana in violation of section 11357(b) H&S, a misdemeanor. (Date of Arrest: October 25, 1998; Case Number: [REDACTED])

On appeal, counsel for the applicant concedes that the applicant has been convicted of one misdemeanor, detailed in No. (2) above. Counsel contends that the director erred in finding that the 1996 conviction detailed in No. (1) above is a misdemeanor as defined by the New York Vehicle and Traffic Law (VTL) for immigration purposes. Counsel asserts that in order for an offense to qualify as a misdemeanor as described at 8 C.F.R. §244.1, the offense must satisfy a "two-prong test:" it must be a crime committed in the United States and it must be punishable by imprisonment for a term of one year or less, but more than five days. Counsel further asserts that under New York VTL, a traffic infraction does not constitute a crime. Counsel cites VTL §§ 10.00(2), (3), (4), and (6). Counsel points out that VTL § 10.00(4) defines a "misdemeanor" as "an offense, other than a "traffic violation. . ." Counsel states, "[t]hus there is no doubt that an offense of traffic infraction cannot be equated to a misdemeanor." Finally, counsel asserts that even though a traffic violation is punishable for a term of up to 15 days of imprisonment, it still cannot be considered a misdemeanor for immigration purposes because it is not defined as a "crime" under New York State law.

Counsel is incorrect in his assertion that the term "misdemeanor" as defined at 8 C.F.R. § 244.1 includes a two-pronged test. It is a well-established legal principle that words in the statute or the regulations will be interpreted according to their usual or "plain" meaning as understood by the general public. The plain meaning of the word "crime" as it is used at 8 C.F.R. § 244.1 in the definition of "misdemeanor" is interpreted in the general sense as "an unlawful act." No legal body has ever interpreted the regulatory definition of "misdemeanor" in this context to include a two-pronged test as asserted by counsel. Rather, the definition very clearly states that the determination of the classification of an offense rests solely on the maximum possible punishment.

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 "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 driving while ability impaired in violation of section 1192.2 VTL is punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's conviction in No. (1) above qualifies as a "misdemeanor" as defined at 8 C.F.R. § 244.1.

Counsel further contends that the director erred in her statement there is no waiver available to the applicant for his inadmissibility to the United States under section 212(a)(2)(A)(II) of the Act. Counsel states that there is a waiver available to the applicant under the provision of 244(c)(2)(a)(III)(ii) of the Act. Counsel concedes that the California court did not specify the exact amount of marijuana the applicant was found to possess, but asserts that the applicant is nevertheless eligible for waiver of this ground of inadmissibility since he has been convicted of a single offense of simple possession of 30 grams or less of marijuana. Counsel states that the applicant should have been provided with an opportunity to apply for a waiver of this ground of inadmissibility.

According to the California court disposition document, the applicant was charged with possession of less than one ounce, or approximately 28.5 grams, of marijuana. There is no indication in the record that the applicant has been convicted of any other drug-related offenses. Therefore, it appears that the applicant is eligible to apply for waiver of this ground of inadmissibility under section 244(c)(2)(a)(III)(ii) of the Act, and the director erred in not providing the opportunity for a waiver of this ground of inadmissibility. Nevertheless, even if the applicant were to be granted a waiver of inadmissibility, he would remain ineligible for TPS based on his record of two misdemeanor offenses as detailed above. 8 C.F.R. 244.1(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

It is noted that, although counsel was clearly aware of the availability of a waiver for the applicant's inadmissibility to the United States under section 244(c)(2)(a)(III)(ii) of the Act, he failed to file a Form I-601, Application for Waiver of Grounds of Inadmissibility.

It is further noted that the applicant was apprehended by the United States Border Patrol on May 18, 1992, near San Ysidro, California, after having entered the United States without inspection. The applicant applied for asylum in the United States on September 2, 1993. The Director of the New York Asylum Office denied the applicant's asylum application on December 1, 2003, and he was referred for a removal hearing before an Immigration Judge. On December 30, 2003, an Immigration Judge in New York, New York, administratively closed the removal proceeding because neither the applicant nor his representative appeared for the hearing and the Immigration and Naturalization Service (now Immigration and Customs Enforcement) did not express any opposition to administrative closure. The applicant has subsequently married a United States citizen, [REDACTED] who filed a Form I-130, Petition for Alien Relative, on the applicant's behalf on December 14, 2004.

Finally, it is noted that the applicant filed a TPS re-registration application with CIS on February 27, 2004, under CIS receipt number EAC 04 107 5396. The director denied that application on December 7, 2004, because the applicant's initial TPS application had been denied, and he was, therefore, ineligible to apply to re-register for TPS. The applicant subsequently filed a Form I-765, Application for Employment Authorization. The director denied the application on August 29, 2005, because the applicant's initial Form I-821 had been denied, and he was not eligible for extension of his employment authorization. On September 27, 2005, counsel filed a motion to reopen the matter. Counsel's motion will be addressed in a separate decision.

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.