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



U.S. Citizenship
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Services

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MM

FILE:



OFFICE: VERMONT SERVICE CENTER

DATE: JUN 05 2006

[EAC 01 282 51014]

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:

Self-represented

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, Chief
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 determined that the applicant had been convicted of at least two misdemeanors in the United States. The director, therefore, denied the application.

On appeal, the applicant states that he is providing proof that he only has one violation and all others were dismissed.

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.

The record reveals the following offenses:

On February 9, 2000, the applicant was arrested for the following:

- (1) VTL § 1192.2, “Driving While Intoxicated per se”;
- (2) VTL § 1192.3, “Driving While Intoxicated”;
- (3) VTL § 1163B, Failure to Signal;
- (4) VTL § 1128A, “Failure to Stay in Lane”;
- (5) VTL § 375.22, “Operating a Motor Vehicle with Unsafe Windshield”;
- (6) VTL § 375.2A, “Driving without Lights”;
- (7) VTL § 509.1, “Unlicensed Operator”.
- (8) On January 22, 2003, the applicant was convicted of a violation of VTL § 1192.1, “Driving While Ability Impaired.”

- (9) On September 28, 2002, the applicant was arrested for a violation of PC § 145.00, "Criminal Mischief, Fourth Degree." The applicant was subsequently convicted of this charge on April 24, 2003.

On appeal, the applicant states that he only has one violation and the rest were dismissed.

The applicant submitted the final disposition of the February 9, 2000 charge, which indicates his conviction for violating New York State VTL § 1192-1, "Driving While Ability Impaired was a violation and not a misdemeanor. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this proceeding arises, has consistently emphasized that the federal "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). Thus, whether a particular offense under state law constitutes a "misdemeanor" for immigration purposes is strictly a matter of federal law. See Burr v. INS, supra; 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 "misdemeanor" definition, 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). Although the applicant claims the conviction was for a violation and not a misdemeanor, in the present case, the conviction is punishable by a term of no more than 15 days imprisonment. As stated above, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. Therefore, this conviction is considered to be a misdemeanor for TPS purposes.

Based on records provided by the applicant, he was convicted of only one of the February 9, 2000 charges. However, the applicant was also convicted of criminal mischief on April 24, 2003 as shown in #(9).

The applicant is ineligible for TPS due to his two misdemeanor convictions, detailed above. 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

Beyond the decision of the director, it is noted that the applicant has provided insufficient evidence to establish his qualifying continuous residence and continuous physical presence during the requisite time periods. Therefore, the application must be denied for these reasons as well.

It is also noted that the applicant was ordered removed on March 18, 2002 under alien registration [REDACTED]. It is further noted that the Border Patrol in Buffalo, New York apprehended the applicant on March 6, 2001. Consequently, the applicant is not eligible for TPS as an El Salvadoran because he arrived in the United States subsequent to the requisite date to establish continuous residence in the United States.

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.