



U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
[EAC 02 180 52391]

OFFICE: Vermont Service Center

DATE: NOV 08 2006

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 had failed to provide the final court dispositions of the charges relating to his criminal record.

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

Any alien convicted of two 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 five years or more is inadmissible. Section 212(a)(2)(B) of the Act.

The Federal Bureau of Investigation fingerprint results report reveals that the applicant was arrested for the following offenses in New York:

- (1) On June 23, 1991, the applicant was arrested and charged with “Discon” and “Resisting Arr” by the Suffolk County Police Department; and,
- (2) On September 1, 2001, the applicant was arrested and charged with “NYS PL 120.05 Assault 2nd” by the Mineola County Police.

On May 3, 2004, the applicant was requested to submit the final court disposition for the charges as detailed above. In addition, if convicted, the applicant was requested to provide evidence showing whether the charge was classified as a felony or misdemeanor. Counsel, on behalf of the applicant, responded to the director’s request and submitted the following documents: a certified record from the District Court of Nassau County,

New York reflecting that the applicant pled guilty to 240.20 on September 21, 2001 (No. 2 above); and a copy of a letter dated May 26, 2004, [REDACTED] regarding the pending criminal case involving the applicant's arrest detailed in No. 1 above. Counsel also requested an 60-day extension in order to submit the final disposition. On July 28, 2004, the director denied the application because the record did not contain all of the dispositions of the applicant's past arrests.

On appeal, counsel, on behalf of the applicant, argues that the applicant has only been convicted of two violations and, therefore, he remains eligible for TPS. Counsel also provides the following documentation on appeal: a copy of a true transcript from the District Court of the County of Suffolk revealing that the applicant pled guilty to 240.20, Disorderly Conduct, on June 28, 2004 (No. 1 above); a copy of a certified record dated June 28, 2004, from the District Court of Nassau County, New York reflecting that the applicant pled guilty to 240.20 (No. 2 above); a copy of a letter dated May 26, 2004, from [REDACTED] regarding the pending criminal case involving the applicant's arrest; a copy of counsel's request for an extension dated June 1, 2004; and, a copy of a FedEx receipt.

A review of the court disposition from the District Court of Nassau County, New York, reveals that on September 2, 2001, the applicant pled guilty to 240.20 (Disorderly Conduct). In addition, the copy of the certified record from the District Court of Nassau County, New York, also reveals that on June 28, 2004, the applicant pled guilty to 240.20.

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 "violation" 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 as misdemeanors.

In this case, disorderly conduct, 240.20 PL, is classified as a "violation" by the State of New York. According to section 10.00(3) of the New York State Penal Law, "violation" means an offense that can carry a possible sentence of imprisonment for up to fifteen days. Consequently, for immigration purposes, these offenses are considered "misdemeanors" as defined by 8 C.F.R. § 244.1.

The applicant is not eligible for temporary protected status because he has been convicted of two 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 his continuous residence in the United States during the requisite time periods. 8 C.F.R. § 244.2(b) and (c).

Beyond the decision of the director, it also is noted that 8 C.F.R. § 244.9 states that each application for TPS must be accompanied by evidence of the applicant's identity and nationality.

Sec. 244.9 Evidence.

(a) *Documentation.* Applicants shall submit all documentation as required in the instructions or requested by the Service. The Service may require proof of unsuccessful efforts to obtain documents claimed to be unavailable. If any required document is unavailable, an affidavit or other credible evidence may be submitted.

(1) *Evidence of identity and nationality.* Each application must be accompanied by evidence of the applicant's identity and nationality, if available. If these documents are unavailable, the applicant shall file an affidavit showing proof of unsuccessful efforts to obtain such identity documents, explaining why the consular process is unavailable, and affirming that he or she is a national of the designated foreign state. A personal interview before an immigration officer shall be required for each applicant who fails to provide documentary proof of identity or nationality. During this interview, the applicant may present any secondary evidence that he or she feels would be helpful in showing nationality. Acceptable evidence in descending order of preference may consist of: (Amended 11/16/98; 63 FR 63593)

(i) Passport;

(ii) Birth certificate accompanied by photo identification;
and/or

(iii) Any national identity document from the alien's country of origin bearing photo and/or fingerprint.

The applicant has not provided evidence to establish that he is a national or citizen of El Salvador. Therefore, the application will also be denied for this reason.

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.