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FILE: [REDACTED] Office: California Service Center Date: MAR 01 2007
[WAC 06 235 51129 (motion)]
[WAC 01 206 59593]

IN RE: Applicant: [REDACTED]

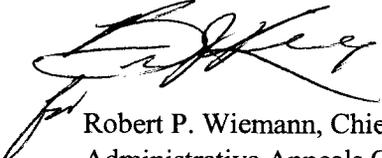
APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254.

ON BEHALF OF APPLICANT:



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, California Service Center. A subsequent appeal was dismissed by the Director, Administrative Appeals Office. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion to reopen will be dismissed.

The applicant is stated to be a 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 record reveals that the applicant filed a late initial TPS application on May 7, 2001, under CIS receipt number WAC 01 206 59593. The director denied that application on January 19, 2005, because the applicant had been convicted of two misdemeanors.

A subsequent appeal from the director's decision was dismissed on June 27, 2006, after the Director of the AAO also concluded that the applicant had been convicted of two misdemeanors, and therefore, was ineligible for TPS. The AAO noted that the court disposition showed that the applicant had been convicted on January 28, 2003, in the Superior Court of California, County of Santa Clara, of one count of burglary in the second degree – Entering With The Intent To Commit Theft – in violation of California Penal Code, section 459/460 (b) PC, a misdemeanor, and one count of Petty Theft Of Personal Property – in violation of California Penal Code, section 484/488, a misdemeanor. (Date of arrest: January 8, 2003; case Number [REDACTED])

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion to reopen, counsel states that the conviction for petty theft of personal property in violation of section 484/488, is not punishable by imprisonment of one year or less as “The sentence for a violation of PC 484/488 is a fine \$1000.00 and/or up to six months in the county jail”. Counsel, therefore, reasserts that the applicant is eligible for TPS as he concludes that the conviction for petty theft of personal property does not meet the definition of the term “misdemeanor” as defined in Section 241.1. 8 C.F.R. § 244.4(a).

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).

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, California law provides that a violation of California Penal Code section 484/488 is punishable by a fine of \$1000.00 and/or up to six months in the county jail. Therefore, we conclude that the applicant's conviction for petty theft of personal property qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to her record of at least two misdemeanor convictions, detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

It is noted that the applicant failed to submit evidence sufficient to establish the requisite continuous residence in the United States, and the continuous physical presence. Although the applicant submitted various documents dating from July 30, 2001, the only document submitted that relates to the requisite continuous residence and continuous physical presence periods is a letter, which is not notarized, from [REDACTED] stating that the applicant was present in Watsonville, California on February 13, 2001, and that in February 2001, the applicant worked for Del Sol Market, in Gilroy, California. Furthermore, there is no evidence that the applicant was physically present from March 9, 2001 to the date of filing, May 7, 2001.

As discussed above, the issue on which the underlying decisions were based has not been overcome on motion. The record confirms that the applicant has two misdemeanor convictions, detailed above. Therefore, the applicant is ineligible for TPS.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met since the applicant has not provided any new facts or additional evidence to overcome the previous decision of the AAO. Accordingly, the motion to reopen will be dismissed and the previous decision of the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed. The previous decision of the AAO dated May 3, 2006 is affirmed.