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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: Vermont Service Center

Date:

MAR 22 2007

[EAC 02 281 50293]

[EAC 05 238 51503 – motion]

IN RE:

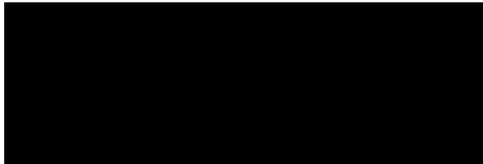
Applicant:



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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Director, Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted and 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 the applicant was convicted of two misdemeanors committed in the United States.

A subsequent appeal from the director's decision was dismissed on July 29, 2005, after the Director, now Chief, of the AAO also concluded that the applicant is ineligible for TPS based on her record of two misdemeanor convictions. On August 29, 2005, counsel, on behalf of the applicant, submitted a subsequent motion to reopen.

On motion to reopen, counsel asserts that the Service should reverse its decision because the applicant had been convicted of violations, not misdemeanors; and, therefore, the applicant is eligible for TPS.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 § 244.3;
- (e) Is not ineligible under § 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.

The phrase *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The phrase *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. Subsequent extensions of the TPS designation has been granted with validity until September 9, 2007, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

Further, 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.

The record contains a certified true excerpt record dated May 13, 2002, from the First District Court of Nassau County, New York, revealing that the applicant pled guilty and was convicted of: (1) PL 110-120.14, attempt to commit a crime (110.00) and menacing (120.14); and (2) PL 240.20, disorderly conduct.

Counsel states, in his motion, that the applicant's conviction under PL 240.20, disorderly conduct, is classified as a "violation" under New York Penal Law, and therefore should not be considered a "misdemeanor." Counsel also discusses "sentencing guidelines" with regards to the applicant's convictions. Counsel also states that the applicant was provided the option to pay a fee of \$200 or spend five days in jail for her convictions.

For immigration purposes, it is necessary to consult the statutory definition of the conviction to establish eligibility for TPS, not the legal nomenclature ("traffic violation" or "violations") of the state, as in this case, New York. As stated previously, 8 C.F.R. § 244.1 defines "misdemeanor" as a crime committed in the United States, that is 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. Additionally, 8 C.F.R. § 244.1 states that 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.

Disorderly conduct, 240.20 PL, is classified 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, 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)."

Menacing, 120.14 PL, is a classified as a "misdemeanor" by the State of New York. According to section 10.00(4) of the New York State Penal Law, "misdemeanor" means an offense that can carry a possible sentence

of imprisonment in excess of fifteen days, but not more than one year. Consequently, for immigration purposes, this offense is considered a "misdemeanor" as defined by 8 C.F.R. § 244.1.

The applicant is not eligible for temporary protected status because she 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.

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 previous decision of the AAO will not be disturbed.

**ORDER:** The previous decision of the AAO dated July 29, 2005, is affirmed.