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**U.S. Citizenship
and Immigration
Services**

ML

[REDACTED]

FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE: NOV 05 2007
[EAC 01 248 52643]

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 TPS application was initially approved. The approval was subsequently withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 applicant's TPS application was initially approved by the Vermont Service Center on April 3, 2003.

Based upon the results of a Federal Bureau of Investigations (FBI) fingerprints results report, the director requested the applicant to submit the final court dispositions stemming from his two arrests in July of 2003 and November of 2004. The applicant submitted final court dispositions as requested.

The director determined that the applicant had been convicted of two misdemeanors, and subsequently withdrew the approval of the TPS application on September 15, 2006.

The director may withdraw the status of an alien granted Temporary Protected Status under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

On appeal, counsel asserts the applicant's claim of eligibility for TPS.

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 July 13, 2003, the applicant was arrested by the Yaphank, New York, Police Department, and charged with one count of driving while under the influence, first offense; and, one count of operating a motor vehicle where the blood/alcohol ratio content was .08 of one percent, and failure to stay in a single lane. The applicant was convicted on February 27, 2004, of operating a motor vehicle while impaired, a misdemeanor. (VTL 1192.1).
- On November 14, 2004, the applicant was arrested by the Yaphank, New York, Police Department, and charged with one count of sexual abuse in the first degree, and forcible compulsion, felony offenses. The applicant was convicted on November 21, 2005, of one count of attempted forcible touching, a misdemeanor (110-130.52).

On appeal, counsel claims that the applicant has been convicted of one misdemeanor and one traffic infraction/violation and thus, is eligible for TPS.

Contrary to the applicant's assertion, federal immigration law should be applied uniformly, without regard to the nuances of state law. See *Ye v. INS*, 214 F.3d 1128, 1132 (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); *Bahouris v. Esperdy*, 269 F.2d 621, 623 (2nd Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2nd Cir. 1956).

The fact that New York's legal taxonomy classifies the applicant's offenses as "violations" or "infractions" rather than "crimes," and precludes the offense from giving rise to any criminal disabilities in New York, is not relevant to the question of whether the offenses qualify as "misdemeanors" 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, a conviction for the offense of operating a motor vehicle under the influence of drugs or alcohol carries a penalty of \$300.00 to \$500.00 and/or a maximum of 15 days in jail (VTL 1192.1). Therefore, it is concluded that this conviction is considered a misdemeanor for immigration purposes and the applicant has been convicted of two or more "misdemeanors," as defined in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his record of two or more misdemeanor convictions, as detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the approved TPS application for this reason will be affirmed.

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.