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U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: **NOV 28 2008**

[EAC 08 062 51778, *appeal*]
[EAC 99 170 50641]

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 Vermont Service Center. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who was granted TPS on May 24, 2000. The director subsequently withdrew the applicant's status on November 28, 2007, when it was determined that the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel acknowledges that the applicant was found guilty of harassment on two occasions, but argues that these convictions were only penal violations under New York State Law. Counsel argues that had the applicant known that he was pleading guilty to misdemeanors instead of simple violations, he would have refrained from doing so. Counsel requests that his TPS be reinstated for humanitarian reasons and in the interest of justice.

Citizenship and Immigration Services may withdraw TPS if the alien was not eligible at the time the status was granted, or if he or she becomes ineligible for TPS. 8 C.F.R. § 244.14(a)(1).

Section 244(c) of the Act, and the related regulations at 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 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.

- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define "felony" and "misdemeanor" as:

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 reflects that on May 11, 2000, the applicant's aggravated harassment charge was reduced to harassment. He was convicted of harassment, [REDACTED], by a Judge in the District Court of Nassau County, Hempstead, New York. (Docket Number: [REDACTED]) On the same day, the applicant's assault charge was reduced to a charge of harassment. He was convicted of this second charge of harassment, by a Judge in the District Court of Nassau County, Hempstead, New York. (Docket Number: [REDACTED])

On appeal, counsel requests that his TPS be reinstated for humanitarian reasons and in the interest of justice. However, there are no waivers available for the basic TPS eligibility requirements under 8 C.F.R. § 244 that would allow the approval of the application as a matter of discretion. Counsel acknowledges that the applicant was found guilty of harassment on two occasions, but argues that these convictions were only penal violations under New York State Law.

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 offenses as “violations” rather than “crimes,” and precludes the offenses from giving rise to any criminal disabilities in New York, is simply 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, and 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, New York law provides that violation of _____ is punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's two convictions shown above qualify as “misdemeanors” as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his record of two misdemeanor convictions, 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 TPS is affirmed.

In removal proceedings held on November 6, 1995, an Immigration Judge in New York, New York, ordered the applicant deported “in absentia” to Honduras. It is further noted that the record contains an outstanding Form I-205, Warrant of Removal/Deportation, issued by the Assistant District Director for Deportation of the New York District office of Citizenship and Immigration Services, (formerly, the Immigration and Naturalization Service) on June 25, 1996.

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.