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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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[Redacted]

FILE: [Redacted] OFFICE: VERMONT SERVICE CENTER DATE: **MAR 29 2010**
[EAC 99 131 50638]

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. §103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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

The applicant is a native and citizen of Honduras 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 withdrew the applicant's TPS because the applicant had failed to submit requested court documentation relating to his criminal record.

On appeal, counsel asserts that the applicant did not receive the Notice of Intent to Withdraw TPS as it was mailed to [REDACTED] a notary," who did not notify the applicant of the notice. Counsel asserts that the applicant had only one misdemeanor conviction.

The director may withdraw the status of an alien granted TPS 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).

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).

"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 FBI report dated January 30, 2009, reflects the following offenses in the state of Virginia:

1. On April 30, 2002, the applicant was arrested by the police in Fairfax County for assault and battery on a family member.
2. On December 2, 2007, the applicant was arrested for driving under the influence.
3. On July 5, 2008, the applicant was arrested by the police in Fairfax County for identity theft – obtain identification to avoid arrest, driving while intoxicated - third offense in five years, driving while license is forfeited, and refusal to take a blood or breath test.

On February 3, 2009, the director issued a Notice of Intent to Withdraw TPS, which advised the applicant to submit certified court dispositions for every charge against him. The applicant was given 33 days in which to submit a response. The applicant, however, failed to respond to the notice. On June 17, 2009, the director withdrew the applicant's TPS.

Contrary to counsel's assertion on appeal, the Notice of Intent to Withdraw TPS was sent to the applicant's counsel, who had been representing the applicant since December 2004.¹

On appeal, counsel submits court dispositions, which revealed the following:

- The applicant was arrested on April 30, 2002, in violation of section 18.2-57-2, assault and battery on spouse, a Class 1 misdemeanor. On June 20, 2002, a *nolle prosequi* was ordered on prosecution's motion.
- The applicant was arrested on December 2, 2007, in violation of section 18.2-266/18.2-270, driving while intoxicated, a Class 1 misdemeanor. On March 5, 2008, the applicant pled guilty to the offense. The applicant was sentenced to serve 30 days in jail, ordered to pay a fine and was placed on probation for one year.
- The applicant was arrested on July 5, 2008, and subsequently charged with violating section 18.2-186.3, use identification documents of another to avoid summon, arrest, prosecution, or to impede a criminal investigation, a Class 1 misdemeanor, and section 18.2-66/18.2-270, driving while intoxicated, a felony. On September 17, 2008, the driving while intoxicated charge was amended to a misdemeanor, and the applicant pled guilty to the misdemeanor offense. On September 30, 2008, a *nolle prosequi* was ordered on prosecution's motion for the remaining charge.

On appeal, counsel asserts that the applicant has only one conviction as the charge of driving while intoxicated on December 2, 2007, was a lesser charge and was disposed of in traffic court.

The penalty for a subsequent offense or prior conviction of the Virginia Code section 18.2-270 is confinement of a minimum period of five days. 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 applicant, in this case, is applying for benefits under the federal law. Therefore, the applicant's conviction qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

¹ The record contains three Form G-28's, Notice of Entry of Appearance as Attorney or Representative, signed by counsel and the applicant on December 16, 2004, May 9, 2006 and June 4, 2007.

Furthermore, the applicant has failed to provide the final disposition of *every* charge against him as required by the director. As noted above, the FBI report reflects that the applicant's arrest on December 2, 2007, for driving while intoxicated was his *third offense* in five years. The applicant has the burden to establish with *affirmative evidence* that the offenses were either dismissed or were in error.

The applicant is ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The applicant is also ineligible for TPS due to his failure to submit the final disposition pertaining to his earlier driving while intoxicated arrests necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Consequently, the director's decision to withdraw TPS 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.