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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services



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DATE: **MAY 04 2012** OFFICE: VERMONT SERVICE CENTER



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the Vermont Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The applicant claims to be 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 it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others. The AAO, upon a *de novo* review,¹ determined that the applicant had been convicted of four misdemeanors. On February 2, 2011, the AAO issued a notice to the applicant advising him that it was the AAO's intent to dismiss the appeal based upon his four misdemeanor convictions. The applicant was granted 30 days to provide evidence to overcome, fully and persuasively, these findings. The applicant failed to respond to the AAO's notice. Therefore, the record was considered complete and on February 12, 2011, the AAO dismissed the appeal based on the four misdemeanor convictions.

On motion, counsel asserts that neither he nor the applicant had received the notice of February 2, 2011.

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

The record contained court documents from the District and Circuit Courts of Montgomery County, Maryland, which reflected:

1. On [REDACTED] 2000, the applicant was arrested and subsequently charged with driving while intoxicated, a violation of Maryland Vehicle Code article 21, section 902(a). On [REDACTED] 2001, the applicant pled guilty to this misdemeanor. The applicant was sentenced to serve time in jail, ordered to pay a fine and was placed on probation. Case no. [REDACTED]
2. On [REDACTED] 2000, the applicant was arrested and subsequently charged with driving while intoxicated and fail to keep to right of center. On [REDACTED] 2002, the applicant pled guilty to driving while intoxicated, a violation of Maryland Vehicle Code article 21, section 902(a) a misdemeanor. The applicant

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has long been recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

was sentenced to the Montgomery County Department of Corrections and Rehabilitation for 364 days and all but 60 days were suspended. The applicant was placed on supervised probation for 11 months. The remaining charge was dismissed. Case no. [REDACTED]

3. On [REDACTED] 2001, the applicant was charged with driving while intoxicated, operating a vehicle while license suspended and fail to keep to right of center. On [REDACTED] 2001, the applicant pled guilty to driving while intoxicated, a violation of Maryland Vehicle Code article 21, section 902(a), a misdemeanor. The applicant was sentenced to the Montgomery County Department of Corrections and Rehabilitation for one year and all but 90 days were suspended. The applicant was placed on supervised probation for 364 days. The remaining charges were dismissed. [REDACTED]
4. On [REDACTED] 2001, the applicant was charged with driving while license is revoked and fail to obey an official red signal. On [REDACTED] 2001, the applicant pled guilty to driving while license is revoked, a violation of Maryland Vehicle Code article 21, section 303(d), a misdemeanor. The applicant was sentenced to the Montgomery County Department of Corrections and Rehabilitation for one year and all but 30 days were suspended. This sentence ran consecutive with the sentence handed down in number three above. The applicant was placed on supervised probation for 364 days. The remaining charge was dismissed. Case [REDACTED]

Counsel's assertion that the applicant did not receive the notice of February 2, 2011 is not supported by the record. The notice of February 2, 2011 was sent to the applicant's address of record which he still maintains, and it was not returned by the U.S. Postal Service as undeliverable. Accordingly, the notice was properly served on the applicant in compliance with 8 C.F.R. § 103.5a(a)(1).

However, the mailing address of counsel indicated on the notice of February 2, 2011, was incomplete. On February 8, 2012, the AAO informed counsel of this error and provided him with a copy of the notice of February 2, 2011.

Counsel, in response, asserts that none of the offenses are "crimes" within the meaning and usage of the TPS regulations as none of them are "criminal in nature or charged / punished under the Criminal Laws of Maryland." Counsel states that the offenses were traffic offenses and do not trigger ineligibility under the relevant TPS regulations.

Counsel's claim that the applicant was only convicted of traffic offenses and not criminal offenses is without merit. 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).

Pursuant to Maryland Criminal and Motor Vehicle Law section 27-101, it is a misdemeanor for any person to violate any of the provisions of the Maryland Vehicle Law unless the violation is declared to be a felony or is punishable by a civil penalty.² Furthermore, the term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

The applicant entered a plea of guilty to violating Article 21, sections 902(a) and 303(d), and the judge ordered some form of punishment to each charge. Therefore, the applicant has been "convicted" of the offenses for immigration purposes.

The applicant is ineligible for TPS due to his four misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for humanitarian reasons, of the requirements stated above.

An alien applying for TPS 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. Therefore, the motion will be dismissed.

ORDER: The motion is dismissed.

² Maryland Vehicle law section 27-101, provides that a first driving while intoxicated conviction is punishable by up to 60 days imprisonment and a first driving while license is revoked conviction is punishable by up to one year imprisonment.