



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

JUN 11 2013

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel citing 8 C.F.R. § 244.14(b)(1) argues that the director violated the applicant's due process by not providing *personal service* of the withdrawal of TPS to him or his counsel.

Counsel asserts that the applicant was denied due process by not being personally served, she does not specify how the alleged deprivation interfered with the applicant's ability to prepare his appeal. In the instant case, the failure to personally serve the applicant was harmless error and did not prejudice the applicant. Both the applicant and counsel received the withdrawal notice, and the lack of personal service did not prevent the applicant from submitting a timely and responsive rebuttal to the director's notice of decision.

On appeal, counsel citing *New Jersey v. Walsh*, 236 N.J. Super, 151, 155 (1989) asserts that the applicant's driving under the influence offenses do not constitute either a felony or a misdemeanor for purposes of TPS eligibility.

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 TPS 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 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 submitted the following:

- Court documentation from Ocean Township Municipal Court of New Jersey, which indicates that on [REDACTED] the applicant pled guilty to driving while intoxicated, a violation of NJS 39:4-50. The applicant's driver's license was suspended and he was ordered to pay a fine and court cost.
- Court documentation from Tinton Falls Borough Municipal Court of New Jersey, which indicates that on [REDACTED] the applicant pled guilty to driving while intoxicated – 2nd offense, a violation of NJSA 39:4-50. The applicant was ordered to pay a fine and court costs and perform 30 days of community service. The applicant's driver's license was suspended for two years.

On appeal, counsel asserts that the applicant's convictions of driving while intoxicated are not misdemeanors, because in New Jersey "motor vehicle offenses are not crimes." Counsel states that, "it is clear that DWI offenses do not constitute a crime under New Jersey law, as they are mere traffic code violations."

Counsel's assertions are not persuasive. 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 the AAO 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 Jersey's legal taxonomy classifies the applicant's offenses as a "violation" rather than a "crime," and precludes the offense from giving rise to any criminal disabilities in New Jersey, is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" 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 a misdemeanor. In this case, New Jersey law provides that a violation of NJSA 39:4-50 (driving while intoxicated), is punishable by up to 30 days of incarceration. Therefore, it is concluded that the applicant's convictions qualify as misdemeanors as defined for immigration purposes in 8 C.F.R. § 244.1.

The record, in this case, indicates that the applicant entered a plea of guilty to violating NJSA 39:4-50, and that the judge ordered some form of punishment or penalty to each charge. The applicant, therefore, had been convicted of the misdemeanor offenses within the meaning of section 101(a)(48)(A) of the Act.

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). Consequently, the director's decision to withdraw TPS will be affirmed.

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.

ORDER: The appeal is dismissed.