



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 04 2014**

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. Two motions were filed by the applicant and the director affirmed her previous decision to withdraw TPS. 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. On January 31, 2012, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States. The applicant filed a motion to reopen and a motion to reconsider, and the previous decision was affirmed by the director on May 8, 2013. The applicant filed a second motion to reopen and a motion to reconsider from the decision of May 8, 2013, and the director again affirmed the decision to withdraw TPS on March 11, 2014.

On appeal, counsel asserts that the applicant's guilty plea to T.C.A. § 55-50-601(1) is not a conviction for immigration purposes. Counsel cites the memoranda issued by U.S. Citizenship and Immigration Services (USCIS) on January 17, 2010, and January 21, 2011, and the USCIS Adjudicator's Field Manual to support the argument that the applicant's Tennessee conviction should not disqualify him from maintaining TPS. Counsel states that the Tennessee misdemeanor sentencing provision is not subject to a "beyond a reasonable doubt" standard of proof and other constitutional requirements for criminal convictions because it authorizes any sentences up to the statutory maximum. Counsel asserts that the applicant did not serve any jail sentences and was not ordered to serve probation.

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.

Section 101(a)(48)(B) of the Act provides, “any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

The record contains:

1. Court documentation in Case no. [REDACTED] from the Criminal Court of Davison County, Tennessee which indicates that on December 12, 2010, the applicant was arrested and subsequently charged with violating T.C.A. §55-50-601(1), possession of revoked license. On March 21, 2011, the applicant pled guilty to the Class C misdemeanor offense and the case was dismissed on costs. The case was expunged on May 23, 2012 pursuant to TCA § 40-32-101.

A Class C misdemeanor is punishable by imprisonment not to exceed 30 days or a fine not to exceed fifty dollars (\$50.00), or both, unless otherwise provided by statute. TCA § 40-35-111(e).

2. Court documentation in Case no [REDACTED] from Carroll County Criminal Court of the Commonwealth of Kentucky, which indicates that on or about November 26, 2009, the applicant was arrested and subsequently charged with operating a motor vehicle while under the influence of .08 percent or more alcohol in the blood, a violation of K.R.S. 189A.010. On January 28, 2010, the applicant was adjudged guilty of the misdemeanor offense. On April 7, 2010, the applicant was sentenced and ordered to pay a fine, court costs and attend an alcohol or substance abuse education or treatment program.¹

The memorandum of January 17, 2010 specifically pertains to traffic infractions and violations committed in the state of New York. The state of Tennessee has not classified the above offense to be a violation or an infraction. Likewise, the memorandum dated January 21, 2011, specifically pertains to certain offenses where the court has issued a “no jail” or “no incarceration” certification. The court documentation in Case no. [REDACTED] does not indicate that a “no jail” or “no incarceration certification” had been issued and no certification was presented on appeal.

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

¹ The director inadvertently indicated that said arrest and conviction occurred in the state of Tennessee

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 the applicant was not sentenced to any jail time is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. The applicant, in this case, is applying for benefits under the federal law. The regulation clearly states that a misdemeanor is a crime "*punishable* by imprisonment for . . . one year or less, *regardless of the term . . . actually served.*" [Emphasis added.] Likewise, the regulation clearly states that a criminal violation will not be considered a misdemeanor only if it is "*punishable* by imprisonment for a maximum term of five days or less." [Emphasis added.] The operative word is "punishable," which indicates that a misdemeanor is defined under the regulation by the maximum imprisonment possible for the crime under Tennessee law, not the specific prison term meted out by the judge in a particular case. In this case, the applicant was convicted of an offense punishable by up to 30 days incarceration, which meets the definition of a misdemeanor for immigration purposes. We have reviewed counsel's brief on appeal and the authorities cited therein, and conclude that the misdemeanor conviction continues to affect immigration consequences.

The applicant entered a plea of guilty to violating T.C.A. §55-50-601(1), and the judge ordered some form of penalty (court costs.) The applicant, therefore, had been convicted within the meaning of section 101(a)(48)(A) of the Act. Under the statutory definition of "conviction" at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512. Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528.

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.