



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **FEB 20 2014**

Office: VERMONT SERVICE CENTER

[Redacted]

IN RE: Applicant:

[Redacted]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254a

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 application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The applicant appealed the decision of the AAO. A motion, rather than an appeal, is the proper forum in this case, pursuant to 8 C.F.R. § 103.5(a)(1)(i). The appeal, therefore, will be treated as a motion to reconsider.¹ The motion will be denied and the previous decision of the AAO will be affirmed.

The applicant claims to be a 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 the applicant failed to establish he was eligible for late registration, and because the applicant had been convicted of two misdemeanors in the United States.

The AAO, in dismissing the appeal on October 15, 2013, concurred with the director's findings. The AAO conducted appellate review on a *de novo* basis² and determined that the applicant had failed to establish continuous residence and continuous physical presence in the United States as evidence in the record indicated that he was in El Salvador in 2006. The AAO also determined that the applicant's absence of over four months was not considered brief, casual or innocent.

A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Service (USCIS) policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that may not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In the AAO's decision it was noted that the applicant's initial TPS application (LIN01157501145) had been denied on November 9, 2001 by the Director, Nebraska Service Center, after determining that the applicant had failed to appear for fingerprinting.³ On motion,

¹ Counsel indicates in his brief that he is filing a motion to reconsider.

² *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ The application was denied due to abandonment. A denial due to abandonment may not be appealed, but an applicant may file a motion to reopen. 8 C.F.R. § 103.2(b)(15).

counsel resubmits a form titled DBI TENPRINTER Applicant Information Worksheet (AIW) which indicates that on November 8, 2001, the applicant's fingerprints were completed at [REDACTED]

Accordingly, the decision of November 9, 2001 was in error and will be withdrawn. This finding, however, does not render the applicant eligible for late registration as the provisions for late registration were not created to allow applicants who had abandoned their initial applications to circumvent the normal application and adjudication process. The applicant had the opportunity to file a motion to reopen but failed to do so. As the initial registration period for El Salvador was still in effect, the applicant was advised in the decision of November 9, 2001, that he could file another TPS application. The applicant, however, waited over nine years to file the current TPS application. Consequently, the AAO's decision that the applicant had failed to establish his eligibility for late registration will not be disturbed.

The motion to reconsider will also be dismissed on the remaining grounds as they are not supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy, and they do not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

In the AAO's decision it was determined that the applicant did not provide any independent, corroborative, contemporaneous evidence to support his statement that he departed the United States to visit his ailing mother.

On motion, counsel submits a letter with English translation from [REDACTED], a medical doctor in El Salvador, who indicates that due to his mother's illness (acute perforated appendicitis which was complicated with peritonitis), the applicant traveled "in December in two thousand six as an emergency to El Salvador and remained there until August of two thousand seven, when his mother became stable."

Except for the doctor's letter, the applicant does not provide any independent, corroborative, contemporaneous evidence to support the statements of the doctor. Furthermore, the doctor's statement regarding the period of time the applicant traveled to El Salvador raises questions to its authenticity as it contradicts the court documentation from El Salvador which indicates that a criminal offense was committed by the applicant on January 13, 2006.

The applicant's absence of over 19 months (January 2006 to August 2007) from the United States was not of short duration and reasonably calculated to accomplish the purpose for the absence. The applicant's absence interrupted his continuous residence and continuous physical presence in the United States. Therefore, the applicant has not maintained continuous residence and continuous physical presence in the United States pursuant to 8 C.F.R. § 244.2(b) and (c). Consequently, the AAO's decision on these grounds will not be disturbed.

⁴ The form was submitted with the filing of the current TPS application.

Counsel, on motion, asserts that the statutory language of RCW § 46.61.5249 does not impose any specific sentence. This argument was previously presented in response to a Request for Evidence and on appeal.

The record indicates that the applicant has three convictions of negligent driving in the first degree. Negligent driving in the first degree is classified as a misdemeanor under Washington law. *See* RCW § 46.61.5249(1)(c).

Washington law at RCW § 9A.20.10(2)(a) defines "misdemeanors and gross misdemeanors" as any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor. Therefore, the applicant's convictions qualify as "misdemeanors" as defined for immigration purposes in 8 C.F.R. § 244.1

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).

As such, the criminal issue in which the denial of the application and the dismissal of the appeal were based has not been overcome on motion. Consequently, the AAO's decision on this ground will not be disturbed.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not sustained that burden. The previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is denied. The decision of the AAO dated October 15, 2013 is affirmed and the application remains denied.