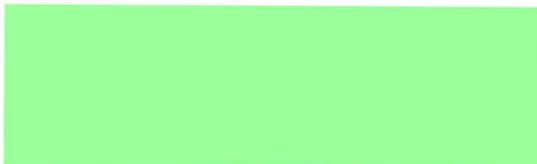


(b)(6)

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



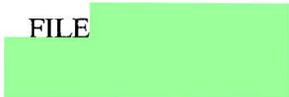
U.S. Citizenship
and Immigration
Services



DATE: **JUN 25 2014**

Office: VERMONT SERVICE CENTER

FILE

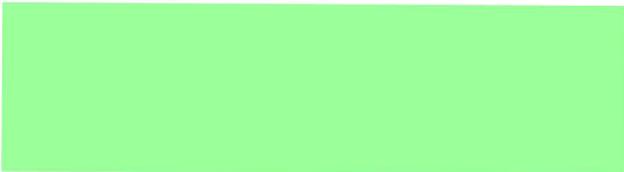


IN RE: Applicant:



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 (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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 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 puts forth a brief disputing the decision of the director. Citing case law, counsel asserts that the applicant is entitled to equal protection of the law when applying for TPS; that the 8 C.F.R. § 244.4 bar to TPS must be analyzed under rational scrutiny; that relevant sentencing limits will vary from state to state, making a grant of TPS an arbitrary decision based upon the state in which an applicant resides; and that neither of the applicant's convictions involved moral turpitude nor actual harm to another person. Counsel requests that TPS be reinstated.

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."

In response to the notice dated December 16, 2013, which requested the applicant to provide certified judgment and conviction documents from the courts for all arrests, the applicant submitted the following:

1. Court documentation in Case no. [REDACTED] from the [REDACTED] County Superior Court (California), which indicates that on February 8, 2013, the applicant pled nolo contendere to and was adjudged guilty of violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. Imposition of sentence was suspended and the applicant was placed on summary probation for 60 months, ordered to serve 55 days in the county jail, and ordered to pay a fine and court cost.
2. Court documentation in Case no. [REDACTED] from the [REDACTED] County Superior Court (California), which indicates that on January 26, 2010, the applicant pled guilty to and was convicted of violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. Imposition of sentence was suspended and the applicant was placed on summary probation for 36 months, ordered to pay court cost and ordered to pay a fine or serve 13 days in county jail.
3. Court documentation in Case no. [REDACTED] from the [REDACTED] County Superior Court (California), which indicates that on July 28, 1999, the applicant pled nolo contendere to and was adjudged guilty of violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. Imposition of sentence was suspended and the applicant was placed on summary probation for 36 months, ordered to serve 2 days in county jail, and ordered to pay a fine and court cost.

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 definition of a misdemeanor as stated in 8 C.F.R. § 244.1 applies in this case.

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 California law, not the specific prison term meted out by the judge in a particular case. In the instant case, the applicant was convicted of an offense which California law describes as a misdemeanor. See section 40000.15 of the California Vehicle Code. In addition, California law provides that a first violation of 23152(b) VC is punishable by up to six months incarceration. Section 23536(a) VC. Therefore, the AAO concludes that the offenses above qualify as misdemeanors as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant entered a plea of *nolo contendere* and/or guilty to the above offenses, and the judge accepted the plea and ordered some form of punishment, penalty and restraint on the applicant’s liberty. For immigration purposes, the applicant has 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 three misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Counsel’s brief submitted on appeal have been considered. Nevertheless, there is no waiver available, even for humanitarian reasons, of the requirements stated above. 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.