



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 19 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:

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, and is now before the Administrative Appeals Office on appeal. The appeal 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.

On June 13, 2013, the director denied the application because she found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction.

On appeal, counsel puts forth the same brief that was submitted in response to the request for evidence.

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.”

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The records reflects that on or about July 26, 1990, the applicant pled guilty to possession of a brown leafy vegetation believed to be marijuana under 50 grams, a violation of N.J.S. §2C:35-10a(4). On March 15, 2010, the conviction was expunged.

On February 20, 2013, the applicant was advised that a conviction vacated for rehabilitative or other reasons unrelated to the underlying criminal proceedings remained a conviction for immigration purposes. The applicant was requested to provide the police report or court documentation indicating, in grams, the amount of marijuana involved at the time of his arrest. In response, counsel provided a brief indicating that the above offense is considered a disorderly offense under New Jersey statute, and that since New Jersey statute indicates that this is not a crime, it cannot constitute a misdemeanor.

The director determined that the applicant had not submitted the requested documentation from either the arresting agency or the court relating to his drug arrest. The director noted that a rehabilitative expungement remains a conviction for immigration purposes. The director concluded that the drug conviction rendered the applicant inadmissible under section 212(A)(2)(a)(i)(II) of the Act.

Citing *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), counsel asserts that the offense is subject to a state rehabilitative statute. In cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for Federal First Offender Act (FFOA) treatment. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).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 (2^d Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2^d Cir. 1956).

¹ The AAO notes that the Ninth Circuit overruled its decision in *Lujan-Armendariz*, in the case of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), finding that the constitutional guarantee of equal protection, for immigration purposes, did not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that had been expunged under the FFOA.

The fact that New Jersey's legal taxonomy classifies the applicant's offense as a "disorderly offense" 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.

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. *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. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). *Matter of Pickering* reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. 23 I&N Dec. at 624.

In this case, there is no evidence in the record to suggest that the applicant's conviction for possession of a brown leafy vegetation was expunged because of an underlying procedural defect in the merits of the case and, thus, the vacated conviction remains valid for immigration purposes.

Furthermore, contrary to counsel's assertion, the application was not denied due to the above misdemeanor conviction. Rather, the applicant was deemed inadmissible due to his failure to submit the requested police report or court documentation indicating, in grams, the amount of marijuana involved at the time of his arrest. The burden is on the applicant, not U.S. Citizenship and Immigration Services, to show that he is admissible and that he was not convicted of an offense that may not be waived for TPS applicants.

The applicant is ineligible for TPS because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Without the police report or complaint/indictment indicating the amount of marijuana that was in the applicant's possession, the applicant remains inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Consequently, the director's decision to deny the application for this reason 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.