

(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



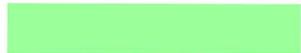
U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 12 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:

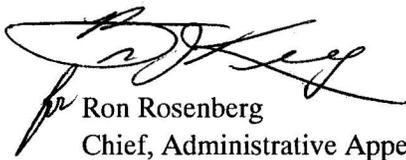


INSTRUCTIONS:

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,

  
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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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.

On March 5, 2013, the director withdrew TPS because the applicant had been convicted of a felony in the United States.

On appeal, counsel asserts that the crime, "Eluding Leo-Fail to Stop," is not a felony as it is defined by the state of New Jersey as a misdemeanor and the sentence imposed was no jail time.

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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 court documentation from the Superior Court of New Jersey for Bergen County, which indicates that on March 11, 2012, the applicant was arrested and subsequently charged with eluding a police officer in a motor vehicle, a violation of N.J.S.A. 2C:29-2b, a crime of the third degree. On May 22, 2012, the applicant pled guilty and was adjudged guilty of this offense. The applicant was sentenced to one year probation, credited for time served (12 days) and ordered to enroll in drug and alcohol counseling. Complaint [REDACTED]

It must be noted that the court documentation in Complaint # [REDACTED] also indicates that the applicant “was sentenced to a DWI under MV ticket [REDACTED] on May 22, 2012. The applicant, however, did not provide the court documentation relating to this case.

On appeal, counsel asserts that the applicant has not been convicted of any prior criminal violations. Counsel’s assertion is without merit as the record also contains court documentation from the Hawthorne Municipal Court of Hawthorne, New Jersey, which indicates that on October 28, 2004 the applicant was arrested driving while intoxicated. On December 16, 2004, the applicant pled guilty to driving while intoxicated, a violation of N.J.S.A. 39:4-50, and was ordered to pay a fine and court cost. Complaint # [REDACTED]

On appeal, counsel asserts, in pertinent part:

Eluding NJSA 2C:29-2a(3)(b) is a crime of the third degree so this degree will make the level of degree a “high misdemeanor” Under the exception of section 244 of the Act Title I CFR a felony is not a crime defined by the State as misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served.

The state of New Jersey no longer defines offenses as misdemeanors, high misdemeanors or felonies. The New Jersey Criminal Law now defines offenses as “crimes” and “disorderly person offenses.” Crimes, which are also called “indictable offenses” are categorized into first, second, third and fourth degree. Under the New Jersey sentencing guidelines, a person convicted of a crime of the third degree may be imprisoned for three to five years. See N.J.S. 2C: 43-6a(3). Counsel has not provided any evidence to support her assertion that the offense of which the applicant was convicted is a “misdemeanor.” The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 (9<sup>th</sup> Cir. 1965). Thus, whether a particular offense under state law constitutes a “felony” for immigration purposes is strictly a matter of federal law. See *Franklin v. INS*, 72 F.3d 571 (8<sup>th</sup> Cir. 1995);

*Cabral v. INS*, 15 F.3d 193, 196 n.5 (1<sup>st</sup> 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 "felony," 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 (5<sup>th</sup> 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 felony as stated in 8 C.F.R. § 244.1 applies in this case.

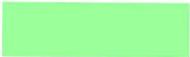
The fact that New Jersey legal taxonomy classifies driving while intoxicated/DWI as a "violation" rather than a "crime" and precludes the offense from giving rise to any criminal disabilities in New Jersey, is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. 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 New Jersey law, not the specific prison term meted out by the judge in a particular case. In this case, New Jersey law provides that a violation of section 39:4-50 is punishable by up to 90 days for a second offense and up to 30 days for a first offense incarceration. See N.J.S.A. 39:4-50(1) and (2). Therefore, the AAO concludes that the offense of DWI qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

The AAO need not address the issue of whether eluding a police officer is a crime involving moral turpitude as it was not the basis for the withdrawal of TPS and was not mentioned in the director's decision.

Assuming, arguendo, the court designated the felony offense to be a misdemeanor, the applicant would remain ineligible for the benefit sought as he would have at least two misdemeanor convictions in the United States.

The applicant is ineligible for TPS due to his felony conviction. 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.



While not the basis for the dismissal of the appeal, the applicant's misdemeanor offense of driving while intoxicated under Ticket [REDACTED] shall be addressed in any future proceedings. Finally, it is noted that a removal hearing was held on August 19, 1998, and the applicant was removed *in absentia*. On August 19, 2008, a Form I-205, Warrant of Removal/Deportation, was issued.

**ORDER:** The appeal is dismissed.