



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF E-M-A-V-

DATE: APR. 25, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS

The Applicant, a native and citizen of El Salvador, seeks Temporary Protected Status (TPS). *See* Immigration and Nationality Act (the Act) section 244, 8 U.S.C. § 1254a. TPS provides lawful status and protection from removal for foreign nationals of specifically designated countries who timely register (and then periodically re-register) during designated periods, satisfy residence and physical presence requirements, are admissible to the United States, were not firmly resettled in another country, and are not subject to certain criminal- and security-related bars.

The Director of the Vermont Service Center withdrew the Applicant's TPS, concluding that the Applicant was ineligible for TPS due to multiple convictions for misdemeanors committed in the United States.

On appeal, the Applicant submits additional evidence and asserts that his convictions under the Florida Administrative Code should not be considered misdemeanors for TPS purposes.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking review of a decision withdrawing his TPS. The Director may withdraw the status of an applicant granted TPS under section 244 of the Act at any time if it is determined that the applicant 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 individual is ineligible for TPS if he or she has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B) of the Act. Department of Homeland Security (DHS) regulations define *felony* as a crime "punishable by imprisonment for a term of more than one year, regardless of the term actually served," with the exception of an offense defined by the State as a misdemeanor where the sentence actually imposed is one year or less regardless of the term actually served, which is treated as a misdemeanor. 8 C.F.R. § 244.1. DHS regulations define a misdemeanor as a crime "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." 8 C.F.R. § 244.1. That regulation further

provides that “any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.”

II. ANALYSIS

The issue on appeal is whether the Applicant is ineligible for TPS due to convictions for two or more misdemeanors committed in the United States. The Director found that the Applicant has been convicted of retail fraud as well as three fishing offenses defined by the Fish and Wildlife Conservation Commission in the Florida Administrative Code. The Director further determined that each of these four convictions was for a misdemeanor and, therefore, the Applicant was ineligible for TPS.

On appeal, the Applicant does not contest the Director’s determination that his conviction for retail fraud is a conviction for a misdemeanor, and this determination is supported by the record.¹ However, he states that his fishing convictions should not be considered misdemeanors because these offenses are not considered crimes in Florida. In support of his assertion, the Applicant cites to a 2010 memorandum that addresses TPS adjudications involving offenses classified as either violations or traffic offenses in New York (the New York memorandum).²

After reviewing the entire record, we conclude that the fishing offenses are properly classified as misdemeanors under the TPS regulations, as Florida law shows that these offenses are considered crimes punishable by imprisonment between five days and one year.

In 2005, the Applicant was convicted on one count of violating section 68B-21.006 of the Florida Administrative Code, which sets bag and possession limits for snook. He was also convicted on two counts of violating section 68B-21.006(1), which sets size limits on the killing, harvesting, or possession of snook.

The Applicant asserts that these offenses are not misdemeanors, because they are not crimes.³ In support, he states that the New York memorandum provides that offenses that appear to meet the definition of a misdemeanor based on their potential punishment may nonetheless not meet the requirements of a “crime,” and therefore they should not affect TPS determinations. The Applicant further states that, because New York excludes offenses punishable by a maximum of 15 days of imprisonment from its misdemeanor definition and designates such offenses as “violations,” conduct that would be a violation in New York could be a misdemeanor in Florida. He claims that, since the definition of a misdemeanor under the TPS regulations does not depend on the nomenclature used by

¹ The Applicant was convicted of violating section 750.356d of the Michigan Penal Code, which was punishable by up to 93 days of imprisonment at the time of his conviction. See Mich. Comp. Laws § 750.356d(1) (West 1997).

² Memorandum from Donald Neufeld, Associate Director, Service Center Operations, USCIS, and Perry J. Rhew, Chief, Administrative Appeals Office, USCIS, *Temporary Protected Status (TPS) adjudications involving New York Traffic infractions or New York violations* (January 17, 2010), <http://www.uscis.gov/laws/policy-memoranda>.

³ According to the Applicant, “crimes” are offenses that involve the threat of some type of restraint on a person’s liberty.

a particular jurisdiction, even if Florida law considers his conviction to be a misdemeanor, it should not be classified as such in determining his TPS eligibility. The Applicant further states that, under the New York memorandum, classifying his convictions as misdemeanors would lead to an incongruous result, and would therefore be in tension with the humanitarian purpose of TPS.

According to the Applicant, the New York memorandum recognizes that New York violations are not “crimes” under New York law, as they do not involve the intent commonly associated with a criminal act. The Applicant asserts that, for similar reasons, his fishing offenses should not be considered crimes because they are not *mala in se*, or morally wrong, but instead are violations of administrative regulations, and such conduct is punishable without showing any evil or criminal intent. He also states that Florida considers his fishing offenses to be less serious than misdemeanors, as shown by the fact that their definition and punishment are not located within the Florida Penal Code, but instead are designated under other sections of the Florida Statutes.

After reviewing the Applicant’s arguments, we find that the New York memorandum does not support his claim that his convictions are not misdemeanors.

The New York memorandum instructs U.S. Citizenship and Immigration Services adjudicators that crimes classified as “violations” under the New York Penal Law (or local New York ordinances) should not be considered disqualifying misdemeanors for TPS purposes although they do not satisfy the regulatory exception of imprisonment for a maximum term of five days or less. However, the memorandum does not state that New York violations are distinguished because they are not crimes under immigration law.⁴ And while the criminal nature of an offense is a threshold question in assessing whether an applicant is ineligible due to a conviction, that determination does not rest on questions of criminal intent or the moral nature of the offense.

Under immigration law, a conviction occurs when a judgment of guilt is entered in a “genuine criminal proceeding,” a proceeding conducted for the purpose of determining whether the accused committed a crime and which provides the requisite constitutional safeguards. *See Matter of Eslamizar*, 23 I&N Dec. 684, 688 (BIA 2004)(providing that a court’s finding of guilt in a violation proceeding under Oregon law does not fall within the meaning of the term “conviction” under section 101(a)(48)(A) of the Act). Here, the Applicant has not provided evidence showing that the proceedings in which he was convicted were not genuine criminal proceedings, and therefore has not established that his offenses are not convictions.

The next issue is whether the Applicant’s Florida convictions are misdemeanors under the TPS regulations. As previously stated, the regulatory definitions for misdemeanor or felony are based on

⁴ The New York memorandum recognizes that New York does not characterize violations as crimes under state law, but this characterization is not controlling for immigration purposes. The memorandum also instructs that traffic infractions under New York law are not disqualifying, but this is because they would not satisfy the requirements for a “criminal” conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), per *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).

the severity of the penalty provided in a state's laws, and, in some circumstances, by the way those laws classify the offense. *See* 8 C.F.R. § 244.1. At the time of his convictions, section 370.021(1) of the Florida Statutes provided:

Unless otherwise provided by law, any person, firm, or corporation who is convicted for violating any provision of this chapter, or any rule of the Fish and Wildlife Conservation Commission relating to the conservation of marine resources, shall be punished:

- (a) Upon a first conviction, by imprisonment for a period of not more than 60 days or by a fine of not less than \$100 nor more than \$500, or by both such fine and imprisonment.

Because his offenses were punishable by imprisonment for more than five days, but less than one year, they meet the misdemeanor definition in 8 C.F.R. § 244.1.

The Applicant cites the New York memorandum to support his claim that his Florida convictions should not be considered misdemeanors. According to the Applicant, the State of Florida considers his offenses to be less severe than misdemeanors because they are not within Florida's Penal Code, and the offenses are not labeled as misdemeanors. However, the Applicant's convictions are punishable as second degree misdemeanors. *See* Fla. Stat. Ann. § 775.082(4)(b) (West 2005) (providing that second degree misdemeanors are punishable by up to one year of imprisonment). Other than the limited exception for treating crimes as misdemeanors that would otherwise be felonies, the regulation defining "misdemeanor" for TPS purposes does not incorporate the definition of "misdemeanor" or "crime" codified by any given state or local jurisdiction; rather, the regulation looks to the maximum possible sentence for the specific conviction. Given the equivalent punishment of the Applicant's offenses and second degree misdemeanors under Florida statutes, we conclude that the State neither classifies nor considers his offenses as less severe than those which it has designated as misdemeanors. As a result, we find that the Applicant has not established that his convictions for violations of fishing regulations should be excluded from the misdemeanor definition as provided in the New York memorandum.

For these reasons, the Applicant is ineligible for TPS due to his convictions for three misdemeanors, pursuant to section 244 of the Act.

III. CONCLUSION

The Applicant has not overcome the basis of the Director's denial and demonstrated that he is eligible for TPS.

Matter of E-M-A-V-

ORDER: The appeal is dismissed.

Cite as *Matter of E-M-A-V-*, ID# 106915 (AAO Apr. 25, 2017)