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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] OFFICE: VERMONT SERVICE CENTER DATE: AUG 12 2005

[EAC 01 245 55865]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
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.

The director denied the application because the applicant had been convicted of two or more misdemeanors committed in the United States.

On appeal, counsel submits a statement and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

(a) Is a national of a state designated under section 244(b) of the Act;

(b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;

(c) Has continuously resided in the United States since such date as the Attorney General may designate;

(d) Is admissible as an immigrant except as provided under section 244.3;

(e) Is not ineligible under 8 C.F.R. § 244.4; and

(f) (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or

(2) During any subsequent extension of such designation if at the time of the initial registration period:

(i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;

(ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

An alien shall not be eligible for temporary protected status 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).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

> *Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: 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 such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.
>
> *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.

The record reveals the following offenses:

(1) On February 1, 1995, in the First District Court of Nassau County, New York, Docket No. [redacted] arrest date November 20, 1994), the applicant was convicted of Count 1, driving while ability impaired, VTL 1192.1; and Count 2, operating a motor vehicle without a license, VTL 509.1. He was placed on probation for a period of one year, and ordered to pay a fine in the amount of $300 or spend 15 days in jail.

(2) On September 15, 1999, in the First District Court of Nassau County, New York, Docket No. [redacted] rrest date March 30, 1998), the applicant was convicted of Count 1, operating a motor vehicle under influence of drug or alcohol, VTL 1192.3, a misdemeanor; and Count 2, following too closely, VTL 1129(a), an infraction. He was placed on probation for a period of 3 years, ordered to pay a fine in the amount of $550, and his license was revoked.

On appeal, counsel asserts that the applicant was convicted of only one misdemeanor, VTL 1192.3 (No. 2 above), and that VTL 1129(a) and VTL 1192.1 are traffic infractions, and VTL 509.1 is a violation. He states that neither traffic infractions nor violations amount to a misdemeanor, and that they are both non-criminal offenses. Counsel contends that while the applicant concedes that both traffic infractions and violation offenses under New York statutes are punishable for a term of no more than fifteen days, they are not "crimes." She cites NYVTL § 155 that states, in pertinent part: "A traffic infraction is not a crime."

Counsel further cites NYPL § 10.00, subsections 2, 3, and 6:

> Subsection 2: "Traffic infraction" means an offense defined as "traffic infraction" by section one hundred fifty-five of the vehicle and traffic law.
>
> Subsection 3. "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.
>
> Subsection 6: "Crime" means a misdemeanor or a felony.

New York VTL 509 states that a violation of any provision of this section (this includes VTL 509.1) "shall be punishable by a fine of not less than fifty nor more than two hundred dollars, or by imprisonment for not more than fifteen days, or by both such fine and imprisonment..." Likewise, VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction and "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both such fine and imprisonment."

As argued by counsel, the State of New York defines VTL 1192.1 as a traffic infraction, and VTL 509.1 as a violation. However, these offenses can each carry a possible sentence of imprisonment for up to fifteen days. Counsel's assertion that the applicant's convictions of a violation and of a traffic infraction should not be considered crimes for immigration purposes, is not persuasive. 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 it 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 fact that New York's legal taxonomy classifies the applicant's offense as a "violation" or "traffic infraction" rather than a "crime," and precludes the offense from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. As cited above, for immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any. It is also noted that offenses that are punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. In this case, New York law provides that a violation of NY VTL 1192.1 and VTL 509.1 are punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's conviction of No. 1 above qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for TPS due to his three misdemeanor convictions, detailed in Nos. 1 and 2 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application will be affirmed.

It is noted that on October 16, 2001, the Immigration Judge administratively closed removal proceedings based on the filing of a TPS application by the applicant.

An alien applying for temporary protected status 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.