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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: VERMONT SERVICE CENTER DATE: DEC 15 2005

[EAC 04 178 52641

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 is a native and citizen of Honduras 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 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.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

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.
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> *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.
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> 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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The record reveals the following offenses:

(1) On June 8, 1999, in the District Court of the County of Suffolk, First District Court Held at Central Islip, New York, the applicant was indicted for Count 1, forgery, PL 170.10, a felony; Count 2, criminal impersonation, PL 190.25, a misdemeanor; Count 3, aggravated unlicensed operation of motor vehicle, VTL 511.1, a misdemeanor; Count 4, operating a motor vehicle without insurance, VTL 319.1, a misdemeanor; Count 5, vehicle registration violation, VTL 401.1A, an infraction; Count 6, safety belt violation, VTL 1229.C3, an infraction; Count 7, registration plate display violation, VTL 402.1, an infraction; and Count 8, illegal signal: less than 100 feet, VTL 1163.B, an infraction. On June 8, 1999, Count 1 was reduced to PC 110-170.05, attempted forgery in the third degree, a class A misdemeanor. [Attempt to commit a crime, in violation of PL 110.00, is a class B misdemeanor when the crime attempted is a misdemeanor. In this case, forgery (PL 170.05), the crime attempted by the applicant, is a misdemeanor; therefore, PL 110.00 is also a misdemeanor.] The applicant entered a plea of guilty to PC 110-170.05 as to Count 1, and he was convicted of the offense. He was placed on probation for a period of one year. Counts 2, 3, 4, 5, 6, 7, and 8 were dismissed.

(2) On September 22, 1999, in the District Court of the County of Suffolk, First District Court Held at Central Islip, New York, the applicant was indicted for aggravated unlicensed operation of a motor vehicle in the third degree, VTL 511.1(a). The charge was subsequently reduced to VTL 509.1, operating a motor vehicle without a license. On September 22, 1999, the applicant was convicted of VTL 509.1, and he was ordered to pay a fine in the amount of $100.

On appeal, counsel asserts that the director is incorrect to classify VTL 509.1 (No. 2 above) as a misdemeanor because under the New York State Vehicle and Traffic Law, this offense is a "violation, and that violations are not "crimes" under New York State Law. He cites NYVTL § 155 that states, in part, "a traffic infraction is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment." Counsel also refers to *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002), and states that in this case, the Board of Immigration Appeals has established that the classification of the convicting jurisdiction should be used to determine an alien's eligibility for immigration benefits.

In *Matter of Santos-Lopez*, the Board held that a determination whether an offense is a "felony" depends on the classification of the offense under the law of the convicting jurisdiction. The alien was convicted in Texas of two misdemeanor offenses of possession of marijuana, and that neither conviction is for a "felony" or an "aggravated felony." Possession of marijuana in violation of section 481.121 of the Texas Penal Code are "class B misdemeanors," punishable under Texas law by "confinement in jail for a term not to exceed 180 days."

The crimes committed by *Santos-Lopez* are class B misdemeanors and are punishable by imprisonment of up to 180 days; therefore, they are misdemeanors as held by the Board. This is on point with the applicant's conviction, in the present case. New York VTL 509.11 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..." Therefore, the applicant's conviction qualifies as a misdemeanor pursuant to 8 C.F.R. § 244.1.

Counsel's assertion that the applicant's conviction of a "traffic infraction" or a "violation" is not a misdemeanor nor a crime 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 violation of NY VTL 509.1 is punishable by up to 15 days of incarceration. Therefore, it is concluded that the applicant's conviction of No. 2 above qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is, therefore, ineligible for TPS due to his two 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 for this reason will be affirmed.

It is noted for the record that the applicant filed his TPS application on May 27, 2004, after the initial registration period for Hondurans (from January 5, 1999 to August 20, 1999) had closed. The applicant, in this case, met the eligibility for late initial registration, under the provisions described in 8 C.F.R. § 244.2(f)(2), because he had a pending application for relief from removal. The record shows that the applicant filed Form I-589, Application for Asylum and for Withholding of Deportation, on August 4, 1997. He subsequently withdrew this application on July 1, 1998. On November 4, 1998, the applicant filed Form EOIR 42B, Application for Cancellation of Removal and Status for Certain Nonpermanent Residents. On October 23, 2002, the Immigration Judge granted the application for cancellation of removal. On May 14, 2004, the Board of Immigration Appeals vacated the Immigration Judge's order, and the applicant was ordered removed from the United States to Honduras. The applicant filed his TPS application on May 27, 2004, within the 60-day period required by 8 C.F.R. § 244.2(g).

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.