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Memorandum

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SUBJECT: Temporary Protected Status (TPS) adjudications involving New York traffic infractions or New York violations

I. Purpose

This memorandum provides guidance for adjudication of TPS applications and administrative appeals in cases involving aliens convicted of certain minor New York traffic infractions or violations.

II. Background

Questions have arisen as to whether the following New York offenses should constitute disqualifying convictions for “misdemeanors” in determining TPS eligibility under section 244(c)(2)(B)(i) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 244.4:

- “Traffic infractions,” as defined at N.Y. PENAL LAW §10.00(2) (referencing N.Y. VEH.&TRAF.LAW § 155);
- “Violations,” as defined at N.Y. PENAL LAW § 10.00(3); and
- Certain minor offenses that are described as “violations” under certain local New York laws.¹

¹ New York violations and traffic infractions are not considered “crimes” under state law, do not constitute misdemeanors or felonies, and may not be punished by more than 15 days of imprisonment. See N.Y. PENAL LAW, § 10.00(2)-(4) and (6); N.Y. VEH. & TRAF. LAW §§ 155, 1800(b).

The Department has determined that these New York offenses should not be considered disqualifying misdemeanors for purposes of the TPS statute and regulations.

Examples of “traffic infractions” include, but are not limited to, driving more than 10 miles over the speed limit and crossing a street at places other than a crosswalk. N.Y. VEH. & TRAF. LAW §§ 1180(f)(1)(ii), 1152. New York violations include, among others, loitering, trespassing, disorderly conduct, exposure of a person, possession of certain weapons on school grounds, and unlawfully posting advertisements.² Numerous local laws, rules, and ordinances within New York are also labeled violations, but not misdemeanors in the local codes.³

Although many New York traffic infractions are punishable by imprisonment of more than five days imprisonment, but not more than one year, they do not satisfy the requirements for a criminal “conviction” and thus, cannot lawfully constitute “misdemeanors” under INA, § 244(c)(2)(B)(i) and 8 C.F.R. part 244.⁴ Unlike traffic infractions, New York violations under N.Y. PENAL LAW § 10.00(3) and various local laws could lawfully be characterized as misdemeanors for purposes of TPS eligibility; however, the Department has determined that deeming such New York violations as disqualifying an individual for TPS would be in tension with the humanitarian purpose of the TPS program and would lead to incongruous results.

III. Field Guidance

USCIS officers should not deny any TPS application, or TPS administrative appeal, where the *only* basis for the denial would be the alien’s conviction of two or more New York “traffic infractions,” as defined by N.Y. PENAL LAW § 10.00(2)(referencing N.Y. VEH.&TRAF.LAW § 155) or New York “violations,” as defined by N.Y. PENAL LAW § 10.00(3). This includes other provisions of the New York Consolidated State Laws that are covered by the definition of “violation” in N.Y. PENAL LAW § 10.00(3). Similarly, TPS applications and administrative appeals should not be denied where the *only* basis would be the alien’s conviction for minor violations of local town, city or county laws and ordinances in New York where such violations are not termed “misdemeanors” by the local governing entity.

² See, e.g., N.Y. PENAL LAW §§ 240.35, 140.05, 240.20, 245.01, 265.06, 145.30. Violations may also be found in other chapters of New York’s consolidated state laws. See, e.g., N.Y. AGRIC. & MKTS. LAW § 113 (failure to notify appropriate official of death of a licensed dog; N.Y. PARKS REC. & HIST. PRESERV. §§ 25.03, 27.11 (operating a snow mobile at excessive speed or without lights). Unless otherwise provided in the consolidated New York state laws, the definitions in §10.00 of the New York Penal Law apply to those state provisions as well, provided that such provisions were enacted after the date of the Penal Law. See N.Y. PENAL LAW § 5.05(2).

³ See, e.g., BUFFALO, N.Y., CODE § 216-15(C) (failure to separate recyclables) and 216-50 (violation of § 216 is subject to fine and/or maximum of fifteen days imprisonment); N.Y. CITY ADMIN. CODE § 10-113 (unlawful parking in a vacant lot subject to fine and/or maximum of ten days imprisonment).

⁴ Cf. *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (Oregon “violation” was not a conviction where offense was not subject to “beyond a reasonable doubt” standard of proof and other constitutional requirements for criminal convictions).

Adjudicators should pay attention to whether a particular New York offense falls within the scope of this guidance. For example, certain traffic offenses are considered to be misdemeanors or felonies. *See, e.g.*, N.Y. VEH. & TRAFF. LAW, § 155 (excepting articles 47 and 48 of the N.Y. Vehicle & Traffic Law from the definition of “traffic infraction”). If an adjudicating officer has any question as to whether a particular offense falls within the scope of this guidance memorandum and should not be deemed a misdemeanor for TPS, the officer should consult with his or her supervisor and, whenever necessary, USCIS local or headquarters counsel.

Adjudicators also should not deny TPS for failure to reregister where an alien was previously denied TPS solely on the basis of two New York traffic infractions or violations, but is now eligible to be granted TPS under this guidance. Officers, however, must consider whether the alien meets all other requirements for TPS, such as continuous presence, continuous residence, and satisfactory background checks. Where the alien’s fingerprint check results or any other biometrics have expired, the standard operating procedures will be followed to obtain fingerprint and photograph collection and updated FBI fingerprint checks. A new biometrics fee shall not be required, however, if the only reason that the alien’s biometrics expired was because his or her TPS application or appeal was placed on hold pending issuance of this guidance.

IV. Affected Cases

USCIS offices temporarily holding certain TPS cases involving New York traffic infractions and violations in anticipation of this field guidance should proceed to adjudicate those cases promptly and issue relevant documentation and work authorization, where applicable. Officers should document in the aliens’ A file (or T file) that TPS is being granted pursuant to this guidance.

Until further notice, USCIS offices also should maintain a cumulative record of the names, A numbers, specific New York traffic infractions or violations involved (including citations to the New York offenses), and adjudication actions taken with respect to TPS applications involving two or more New York traffic infractions or violations that are covered by this guidance.

Individuals who have been denied TPS in the past *solely* on the basis of two New York traffic infractions or violations may bring their cases to USCIS’ attention for the agency to consider reopening the case on USCIS motion under 8 C.F.R. § 103.5(a)(5). Where it appears that such a self-identified case is potentially approvable, USCIS offices may reopen the case and adjudicate in accordance with this guidance. Affected aliens may file a Form I-290B, Notice of Appeal or Motion, with the required fee or a fee waiver request with appropriate documentation of inability to pay. They should also provide the date of the TPS application, the date of denial, and a copy of the original USCIS decision (if available). If an alien meets all requirements specified in this memo and the alien is not otherwise ineligible, then the motion to reopen shall be approved, TPS shall be granted, and the Form I-290B fee, if paid, shall be refunded. This will ensure that a balance is maintained between providing due consideration to eligible aliens and curtailing frivolous filings by ineligible aliens.

Consistent with the Department’s determination, the ICE Office of the Principal Legal Advisor has advised its attorneys on the handling of cases for aliens currently in removal proceedings

where New York traffic infractions or violations are the only issues affecting the aliens' eligibility for TPS. USCIS offices should work closely with local ICE counsel on appropriate handling of any cases involving only New York traffic infractions or violations and deemed to fall within this guidance.

Employment Authorization Documents: Where a denied TPS case is reopened by USCIS and granted pursuant to this guidance, an Employment Authorization Document (EAD) should be issued to the alien, without additional fee, *provided that* the alien had previously applied and paid for an EAD (or been granted an EAD application fee waiver) in conjunction with the TPS application that was denied by USCIS solely because of two or more New York traffic infractions or violations. However, if that EAD application was denied for any other reason (*e.g.*, failure to pay required fee or obtain fee waiver), then the alien must re-file an I-765 for an EAD and pay the application fee, or submit an approvable fee waiver request.

Where a case on appeal is granted by the Administrative Appeals Office (AAO) under this guidance, the AAO should inform the VSC TPS program officials of the grant so that the VSC can determine whether an EAD should be issued or whether the alien needs to file a new I-765 with fee or fee waiver request. Similarly, where an immigration judge or the BIA grants TPS to an alien who was previously denied TPS by USCIS *solely* due to New York traffic infractions or violations, an EAD should be issued, without additional fee, where the alien had paid the EAD application fee (or been granted a fee waiver) at the time that he or she initially submitted the TPS and EAD application packet to USCIS.

V. Use

This memorandum is intended solely for the internal guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instruction and guidance in this memorandum is in no way intended to and does not prohibit enforcement of the immigration laws of the United States.

VI. Contact Information

Questions related to this memorandum should be directed to TPS Operations Program Manager, (202) 272-1533 USCIS Headquarters Office of Service Center Operations, through appropriate supervisory channels.