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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 15 2011

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:



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, California 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 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 determined that the applicant was ineligible for TPS because he had been convicted of a felony committed in the United States. The director, therefore, denied the application.

On appeal, counsel submits a statement.

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

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

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 felony or misdemeanor.

Section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

(A)(i) Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of ...

* * *

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802).

The record shows that on August 19, 1998, in the Superior Court-Salinas, County of Monterey, California, Case No. [REDACTED] the applicant was convicted of possession of a controlled substance while armed with a firearm, HS 11350 with PC 12022(a), a felony. He was placed on probation for a period of 3 years, ordered to spend 108 days in jail, and pay the total sum of \$200 in fines and costs.

Counsel, on appeal, states that the applicant's conviction of violating HS 11350 is subject to expungement under California PC 1203.4. He asserts that the TPS application arises within the jurisdiction of the 9th Circuit Court of Appeals; therefore, the decision in *Lujan-Almendarez v. INS*, 222 F.3d 728 (9th Cir. 2000), controls, and the director's reliance on *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), is misplaced. He states that under the Court's holding in *Lujan-Almendarez*, once expunged, the applicant will no longer be considered convicted of a drug offense. Counsel further asserts that the director erred in finding that the applicant has a felony conviction. He states that the applicant's conviction is considered a misdemeanor because he was not sentenced to state prison, and he has successfully completed probation.

These assertions of counsel are without merit. *Lujan-Almendariz, supra*, refers to first-time offenders of simple possession of a controlled substance who were subject to or convicted under the Federal First Offender Act. The applicant, in this case, was not convicted under the Federal First Offender Act. Furthermore, even if the applicant's conviction were to be dismissed, the Board of Immigration Appeals, in *Matter of Roldan, supra*, held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.

Additionally, the fact that the applicant was not sentenced to state prison is not evidence that the applicant's conviction was a misdemeanor. The court disposition indicates that the applicant was convicted of the felony offense of "HS 11350 W/PC 12022(A)," and that "THE MAXIMUM PENALTY FOR THIS OFFENSE IS 5 YEARS(S) 0 MONTH(S) STATE PRISON." 8 C.F.R. § 244.1 defines "felony" to mean 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**. The applicant, therefore, has been convicted of a felony offense.

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his felony conviction. Furthermore, the applicant's conviction of possession of a controlled substance while armed with a firearm renders him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. There is no waiver available to an alien found inadmissible under this section. *See* 8 C.F.R. § 244.3(c)(1). Nor is there a waiver available for convictions of a felony or two or more misdemeanors committed in the United States.

It is noted in the record that an Order to Show Cause and Notice of Hearing, Form I-221, was issued on February 21, 1996, in San Francisco, California, based on the applicant's entry into the United States without inspection on September 22, 1992.

The burden of proof is upon the applicant to establish that he 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.