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

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[redacted]

FILE: [redacted] [EAC 01 211 51802] OFFICE: VERMONT SERVICE CENTER DATE: JUL 30 2007

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.

for Robert P. Wiemann, Chief
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 case will be remanded to the director for further action.

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 was convicted of possession of marijuana and his drug offense conviction rendered him inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act

On appeal, counsel submits a statement and additional evidence.

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. 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:
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> > (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 felony or misdemeanor.

The Federal Bureau of Investigation (FBI) fingerprint results report indicates that the applicant was arrested for drug offenses on May 2, 2002, in West Orange, New Jersey. In a notice of intent to deny dated September 24, 2003, the applicant was requested to submit the final court dispositions of every charge against him, including the charges listed on the FBI report. Because the applicant, in response, failed to submit the actual final court disposition of his arrest, the director denied the application on July 6, 2005.

On appeal (filed on August 3, 2005), the applicant's former counsel submits the final disposition from the West Orange Municipal Court, New Jersey, indicating that on May 12, 2002, the applicant was arrested and charged with Count 1, possession of cocaine, NJS 2C:35-10a(1), a felony; Count 2, possession of marijuana, NJS 2C:35-10a(4), a felony; and Count 3, possession of drug paraphernalia, NJS 2C:36-2, a misdemeanor. On June 20, 2002, the applicant was placed under conditional discharge for a period of one year, and assessed $802 in fines and costs as to Count 2; Counts 1 and 3 were dismissed. On June 13, 2003, conditional discharge was dismissed.

On November 20, 2006, the applicant's present counsel filed a motion to reopen the initial TPS application. He submits additional court records of the applicant's drug arrests, including court records noted above. Counsel asserts that the applicant was not convicted of a criminal offense under New Jersey laws because the court

placed the applicant under supervisory terms (conditional discharge), that a "conditional discharge is not the equivalent of a conviction under N.J. Stat. Ann. § 2C:36A-1 (2006)," and that no guilty plea has been entered by the West Orange Municipal Court. Counsel submits the court docket or Municipal Court Order indicating that on June 20, 2002, the Municipal Court of West Orange, County of Essex, New Jersey, granted "Suspension of Proceedings" as to Complaint No. S-2002-84 (possession of marijuana, under Count 2), the applicant was placed on supervisory treatment for one year, and ordered to pay $802 in fines and costs.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

> (48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --
>
> > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> >
> > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

As noted in the court records, and as claimed by counsel, the applicant did not enter a plea of guilty or *nolo contendere*, nor did the court enter a Judgment of Conviction; rather, the court granted Suspension of Proceedings for the offense of possession of marijuana (Count 2 above).

The applicant, in this case, was not convicted of the felony drug offense within the meaning of section 101(a)(48)(A) of the Act. Therefore, he is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. Accordingly, this finding of the director will be withdrawn.

However, the record, as presently constituted, is insufficient to establish the applicant's continuous residence in the United States since February 13, 2001, and continuous physical presence since March 9, 2001. Additionally, although the record of proceeding contains an El Salvadoran birth certificate and English translation, the certificate was not accompanied by photo identification to establish the applicant's nationality and identity as required by 8 C.F.R. § 244.9(a)(1).

Accordingly, the case will be remanded so that the director could render a full adjudication of the application. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS.

It is noted that the applicant filed a TPS re-registration application [receipt number EAC 05 208 72593] on April 26, 2005. On December 22, 2005, the director denied the re-registration application because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS. The record does not contain evidence that the applicant appealed this decision of the director.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.