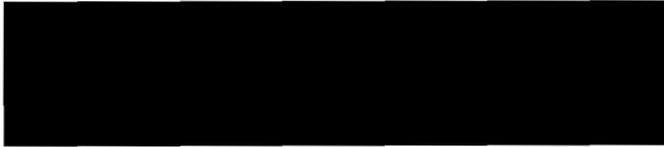




U.S. Citizenship
and Immigration
Services

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invasion of personal privacy



FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE: MAY 21 2007

[WAC 01 189 50462]

[WAC 05 126 82280]

IN RE:

Applicant:



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, Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, California Service Center, and the case is now before the Administrative Appeals Office on appeal.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 was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254, on March 1, 2002. The director subsequently withdrew the applicant's TPS on August 5, 2006, when it was determined that the applicant had been convicted of a felony or two or more misdemeanor offenses. Within the same decision, the director denied the applicant's re-registration application, filed on February 3, 2005, under receipt number WAC 05 126 82280, also because the applicant had been convicted of a felony or two or more misdemeanor offenses.

The director may withdraw the status of an alien granted TPS at any time if it is found that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

On appeal, the applicant submits a statement.

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.

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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

Based on the Federal Bureau of Investigation (FBI) fingerprint results report, the director, in a Notice of Intent to Withdraw dated August 25, 2005, requested that the applicant submit the final court dispositions of all of his arrests, including the arrests listed on the FBI report. In response, the applicant submitted court records relating to his following arrests:

- (1) On August 15, 1997, in the Superior Court of Central District Judicial District, County of Los Angeles, California, Case No. [REDACTED] (arrest date August 1, 1997), the applicant was indicted for Count 1, possession of cocaine base for sale, 11351.5 H&S, a felony. In a pre-trial conference held on October 24, 1997, the court ordered the information amended by interlineation to add the felony violation of 11350(a) H&S, possession of a narcotic controlled substance, as Count 2. The applicant entered a plea of guilty as to Count 2. The court accepted the applicant's plea, he was granted diversion for a period of 2 years, and he was referred to the Probation Department. In a hearing held on April 26, 1999, the applicant was not present in court, and was not represented by counsel. The court dismissed Count 1. The court also ordered diversion terminated as to Count 2 and criminal proceedings were reinstated, and the case was dismissed pursuant to § 1000.3 PC.
- (2) The FBI report indicates that on August 23, 1997, in Los Angeles, California, the applicant was arrested for "OBSTRUCTS RESISTS PUBLIC OFFICER ETC," 148(a) PC, a misdemeanor. The applicant submitted a letter dated February 14, 2002, from the Superior Court, County of Los Angeles, indicating that "after a thorough search of our records, there was no case filed within our jurisdiction."
- (3) The FBI report indicates that on June 11, 2004, in Los Angeles, California, the applicant was arrested for "DUI, ALC/DRUG, RSLT, BOD INJ." The applicant submitted a letter dated September 2, 2005, from the Superior Court of California, County of Los Angeles, indicating that there is no record in their office making reference to [REDACTED]

On appeal, counsel asserts that the applicant's felony drug conviction of October 24, 1997 [No. (1) above], was dismissed on April 26, 1999; therefore, he remains eligible for TPS. Counsel further asserts that the applicant's case falls under *Lujan-Almendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), in that "this is a first-time conviction for a simple-possession drug offense that has been dismissed pursuant to a state rehabilitative statute, Section 1000.3 of the California Penal Code. As such, there is no conviction for immigration purposes."

Counsel's assertions are without merit. *Lujan-Almendariz* 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. Rather, the court granted the applicant diversion for a period of 2 years after he pled guilty to Count 2 and after the court accepted his plea, and that the court subsequently terminated diversion and reinstated criminal proceedings prior to dismissing the case on April 26, 1999.

The applicant's conviction, as detailed in No. (1) above, indicates that on April 26, 1999, the court dismissed the applicant's conviction pursuant to § 1000.3 PC. The Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), 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. Therefore, the applicant remains convicted, for immigration purposes, of the felony offense despite the dismissal of the conviction [No. (1) above].

The applicant submitted letters from the Los Angeles County Superior Court indicating that no records were found in that court relating to the applicant's arrests on August 23, 1997 and June 11, 2004 [Nos. (2) and (3) above]. There is no evidence that the applicant's cases were heard at that court. It may be assumed that the

applicant would have known where his cases were heard. If no charges were brought against the applicant, he could have submitted a statement(s) from the District or State Attorney.

The applicant is ineligible for TPS due to his felony conviction pursuant to section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), and because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Additionally, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act based on his drug-related conviction. Consequently, the director's decision to withdraw the applicant's TPS and to deny the re-registration application will be affirmed.

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.