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

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FILE: [REDACTED]
[WAC 0121853496]

OFFICE: VERMONT SERVICE CENTER

DATE: **MAY 05 2008**

INRE: 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) 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 withdrew the applicant's TPS because he found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction.

On appeal, counsel asserts that the applicant successfully participated in a deferred entry of judgment and, therefore, the drug offense cannot be considered a conviction for any purpose.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined 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)(I).

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

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.

In response to a Request for Additional Evidence dated June 6, 2005, the applicant submitted the requested court disposition, which revealed that on February 5, 2005, the applicant was arrested by the Los Angeles Police Department for possession of narcotic control substance, a violation of section 11350(a) H&S, a felony. On May 23, 2005, the applicant pled guilty to the drug offense. The court accepted the applicant's plea, granted deferred entry of judgment for a period of 18 months, and ordered the applicant to participate in drug abuse program and pay a \$100.00 administrative fee. Case no. [REDACTED]

The director, in withdrawing the approval of the TPS application, on September 18, 2007, concluded the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug conviction.

On appeal, counsel cites *Lujan-Armendariz v. INS*, 222 F. 3d 728 (9th Cir. 2000), and argues that because the director neglected to take into account the effect of the Federal First Offender Act (FFOA), his decision was legally incorrect and must be set aside. Counsel asserts, "because [the applicant] fully complied with the terms of his 18-month probationary period, the charge was dismissed."

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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. Section 101(a)(48)(A) of the Act.

The definition of conviction at section 101(a)(48)(A) of the Act applies to all crimes *except* simple possession of a controlled substance where the proceedings were dismissed or deferred under the FFOA or an equivalent state statute within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

To qualify for first offender treatment under federal laws, the applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred or the proceedings have been or will be dismissed after probation. *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir, 2000). In the instant case, the applicant has established these essential requirements.

The applicant's 18-month probation ended in November 2006. The director's decision to withdraw the applicant's TPS occurred over ten months after the applicant's 18-month probation ended. The applicant had the opportunity to provide, within those ten months and on appeal, documentation from the court indicating he had successfully completed the terms of his probation. However, no evidence has been provided that the applicant had successfully completed the terms of his probation and that the charge was dismissed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1,3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, the applicant has failed to establish he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act. There is no waiver available for inadmissibility under this section of the Act. In accordance with 8 C.F.R. § 244.14, the director's decision to withdraw the applicant's TPS is affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Beyond the decision of the director, as no court documentation has been provided indicating the applicant had successfully completed the terms of his probation, the AAO finds the applicant convicted of a felony. The applicant is, therefore, ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), based on his felony conviction committed in the United States.

The application will be withdrawn for the above stated reasons, with each considered as an independent and alternative basis for withdrawal. 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.