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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: JAN 3 0 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

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: Self-represented

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the Vermont Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew TPS because the applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction.

On appeal, the applicant asserts that he had previously submitted the court disposition for his criminal charge and it indicated that he paid all the penalties imposed by the court.

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. 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS 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).

"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. 8 C.F.R. § 244.1.

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.

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.

The record contains court documentation in Case no. [redacted] from the Los Angeles County Superior Court of California, which reflects that on January 12, 2010, the applicant was charged with violating section 11377(a) H&S, possession of controlled substance, a felony. On January

21, 2010, the charge was amended to a misdemeanor pursuant to section 17(b)(1-5) PC. On same date, the applicant pled guilty to the misdemeanor charge. The applicant was ordered to pay a fine and was placed on deferred entry of judgment for 18 months. A court date of September 30, 2010, was scheduled for proof of completion.

Contrary to the applicant's assertion, payment of fines do not indicate a charge has been dismissed.

As the present case arises in the Ninth Circuit, the decision reached in *Lujan-Armendariz v. INS* 222 F. 3d 728 (9th Cir. 2000), is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated in *Lujan* that, "if (a) person's crime was a first-time drug offense, involving only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Lujan,* 222 F.3d at 738.

Lujan holds that the definition of "conviction" at section 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA), or the rule that no alien may be deported based on an offense that could have been tried under the FFOA, but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute. *Lujan,* 222 F.3d at 749.

In the instant case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant entered a plea agreement for a deferred entry of judgment under section 1000 PC on January 21, 2010, in the Los Angeles County Superior Court for violating section 11377(a) H&S. The evidence in the record shows that he was not, prior to the commission of this offense, convicted of violating a federal or state law relating to controlled substances and that he was not previously accorded first offender treatment under any law. The court documentation, however, does not indicate that the applicant has successfully completed the diversion program and that the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 PC.

Accordingly, the applicant remains 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 except for a single offense of simple possession of thirty grams or less of marijuana. Consequently, the director's decision to withdraw TPS will be affirmed.

An alien applying for TPS 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.