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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

[redacted]

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DATE: MAY 31 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:

[redacted]

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.

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 sustained.

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.

The director withdrew 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On appeal, counsel asserts that the applicant's nolo *contendere* plea was withdrawn and he subsequently entered a not guilty plea to the drug charge. As evidence counsel provides certified court documentation from the San Mateo County Superior Court of California.

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 director determined that the applicant had pled *nolo contendere* on [redacted] 2005, to violating section 11350(a) H&S, possession of a controlled substance. The director concluded that the applicant was inadmissible due to the drug conviction and withdrew the applicant's TPS.

A review of the court documentation in Case no. [redacted] from the San Mateo County Superior Court indicates that 16 days later, on [redacted] 2005, the people's motion to reinstate the complaint was filed pursuant to section 871.5 PC. On [redacted] 2005, the applicant's *nolo contendere* plea was set aside and the complaint was reconstituted to its original state pursuant to section 871.5 PC. The applicant entered a plea of not guilty to all counts. On [redacted] 2005, the applicant was released on supervised own recognizance and was ordered to abstain from the use of alcohol and controlled substances, submit to chemical testing and attend two NA/AA meetings per week. On [redacted] 2005, the applicant was placed on diversion for 18 months. The applicant successfully completed his diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 PC. on [redacted] 2007.

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).

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.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a "conviction" for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, and have not previously been the subject of a disposition under FFOA, and were placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007).

In the present 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 for a violation of section 11350 H&S. The applicant successfully completed his diversion program. On [redacted] 2007, the court ordered that the applicant's plea of guilty be set aside and the case be dismissed pursuant to section 1000.3.PC. The evidence in the record shows that the applicant was not, prior to the commission of the 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 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. As the applicant successfully completed a court order diversion

program, the applicant cannot be found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

The record does not reflect any grounds that would bar the applicant from receiving TPS. As there are no other known grounds of ineligibility, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn.

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. Here, the applicant has met this burden.

ORDER: The appeal is sustained