

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

(b)(6)



**U.S. Citizenship
and Immigration
Services**

DATE: **APR 18 2013**

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:

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,

A handwritten signature in black ink.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn. The appeal will be sustained.

The applicant is a native and citizen of Honduras 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 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)(1).

The director withdrew the applicant's TPS because he had failed to submit requested court documentation for his arrest on October 7, 2009 by the Sheriff's Office in Norwalk, California for possession of controlled substance. The AAO, in dismissing the appeal on February 23, 2012, concurred with the director's findings.

On motion, counsel states that the applicant failed to submit the court documentation due to his former attorney's ineffective assistance. Counsel, citing *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), asserts that the applicant is not ineligible for TPS because he was granted deferred entry of judgment by the court and the charges were subsequently dismissed. Counsel submits the requested court disposition.

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

On motion, the applicant submits the court documentation in Case [REDACTED] from the Los Angeles County Superior Court of California, which indicates that on October 14, 2009 the applicant was charged with violating section 11377(a) H&S, possession of a controlled substance, a felony, and section 11364(a) H&S, possession of a controlled substance-paraphernalia, a misdemeanor. On December 21, 2009, the applicant pled guilty to both charges. The applicant was ordered to pay court costs and was placed on deferred entry of judgment for 18 months. The applicant successfully completed the diversion program and the court terminated the deferred entry of judgment, the plea was set aside and the case was dismissed pursuant to section 1000.3PC on June 20, 2011.

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

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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.

To qualify for first offender treatment under federal law, an applicant must show that (1) he or she has been found guilty of simple possession of a controlled substance; (2) he or she has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he or she 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 pending successful completion of probation, or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

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 December 21, 2009, for violating section 11377(a). 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 applicant's failure to submit the requested final court disposition has been overcome on motion. The applicant has established that his criminal record does not render him ineligible or inadmissible for TPS under the provisions of sections of 244(c)(2)(B)(i) and 212(a)(2)(A)(i)(II) of the Act and the related regulations in 8 C.F.R. §§ 244.3 and 244.4(a). The applicant, however, does remain convicted of violating section 11364 H&S. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Accordingly, the record does not reflect any other ground that would bar the applicant from maintaining his TPS. Therefore, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn and the applicant's TPS reinstated.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has been met.

ORDER: The motion is granted. The order dismissing the appeal will be withdrawn. The appeal will be sustained.