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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 05 239 70789]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: JUN 22 2007

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:

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.

Cindy N. Gomez

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 denied the application because he found the applicant had been convicted of a felony.

On appeal, counsel for the applicant submits a statement and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or
 - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

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).

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.

The record reveals the following offenses:

1. On June 14, 1995, the applicant was arrested in Hattiesburg, Mississippi, and charged with possession of a controlled substance, in violation of section 41-29-139 of the Mississippi Code Annotated, a felony. On March 8, 1996, the applicant pled guilty to this charge in the Circuit Court of Forrest County, State of Mississippi. The applicant was sentenced to three years imprisonment in the Mississippi Department of Corrections with one year to serve and the remaining two years suspended on good behavior.

The director determined that the applicant was ineligible for TPS based on his felony conviction and denied the application on December 5, 2005.

On appeal, counsel for the applicant states that the applicant’s conviction on the felony charge of possession of a controlled substance was expunged on February 6, 2006, by the Circuit Court, Forrest County, Mississippi, because the applicant had served his sentence of one year of imprisonment and had completed

the court-mandated two years suspended sentence. Counsel asserts that, under section 41-20-150(d) of the Mississippi Code Annotated, the court may dismiss the proceedings against a person and discharge that person from probation if he has not previously been convicted of a controlled substance offense, and has satisfactorily served his or her sentence of period of probation and parole, and the person had not reached his or her twenty-sixth birthday at the time of the offense. Counsel submits a photocopy of an Order of Expungement from the Circuit Court of Forrest County, Mississippi dated February 6, 2006, ordering that "any recordation relating to [the applicant's] arrest, waiver of indictment, entry of guilty plea, the court's Entry of Guilty Plea and Nunc Pro Tunc Judgment of Court are hereby expunged."

Counsel points out that the United States Court of Appeals for the Ninth Circuit partially reversed the holding of *Roldan* [*Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999)] in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The circuit court found that an alien whose first-time simple drug possession offense was expunged by a state rehabilitative statute could not be deported if first offender treatment would have been accorded under the federal first offender statute had the alien been prosecuted in federal court.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 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. Any subsequent action which overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. The Board of Immigration Appeals (BIA) held in *Matter of Roldan* that state rehabilitative actions that do not vacate a conviction on the *merits* or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes.

The applicant's conviction record was expunged, not based on the merits of the case, but because he successfully served his sentence of three years in prison and two years of probation. Therefore, for immigration purposes, the expungement order does not vacate the applicant's felony conviction. The applicant remains ineligible for TPS due to his felony drug conviction, detailed in No. 1 above. Sections 244(c)(2)(B)(i) and 244(c)(1)(A)(iii) of the Act. Consequently, the director's decision to deny the application for this reason will be affirmed.

While the issue of the applicant's inadmissibility was not raised by the director, the applicant is also ineligible for TPS because he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. Therefore, the application must also be denied for this reason. There is no waiver available for inadmissibility under this section of the Act. Section 244(c)(2)(A)(iii) of the Act.

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