



U.S. Citizenship
and Immigration
Services

Identifying and disclosing to
prevent identity information
invasion of personal privacy

PUBLIC COPY

M,

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: OCT 01 200

[WAC 05 127 71847]

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:

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.

John H. Vaughan
for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant claims to be a 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 record reveals that the applicant filed a TPS application during the initial registration period under CIS receipt number WAC 02 063 57079. The director denied that application on November 1, 2004, because the applicant failed to establish his eligibility for TPS.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on February 4, 2005, and indicated that he was re-registering for TPS.

The director denied the re-registration application because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

If the applicant is filing an application as a re-registration, a previous grant of TPS must have been afforded the applicant, as only those individuals who are granted TPS must register annually. In addition, the applicant must continue to maintain the conditions of eligibility. 8 C.F.R. § 244.17.

In this case, the applicant has not previously been granted TPS. Therefore, he is not eligible to re-register for TPS. Consequently, the director's decision to deny the application will be affirmed.

There is no indication that the applicant was attempting to file a late initial application for TPS instead of an annual re-registration. Moreover, there is no evidence in the file to suggest that the applicant is eligible for late registration for TPS under 8 C.F.R. § 244.2(f)(2).

Moreover, 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.

Under § 101(a)(48)(A) of the Immigration and Nationality Act (Act), the term conviction is defined as:

a formal judgment of guilt of the alien entered by a court or, if 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.

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 addition to his being ineligible for re-registration, the record reveals that the applicant is also ineligible for TPS due to the following criminal record in California:

1. On May 16, 1998, the applicant was arrested under the name [REDACTED] in Santa Ana for disorderly conduct-solicitation of prostitution in violation of California Penal Code (PC) section 647(b), a misdemeanor. (Docket [REDACTED]). The applicant pled guilty to this misdemeanor on July 2, 1998, and was placed on probation for a period of three years.
2. On November 10, 1998, the applicant was arrested under the name [REDACTED] for possession of a narcotic controlled substance in violation of California Health and Safety Code (HS) section 11350(a), a felony. (Docket [REDACTED]). On November 13, 1998, the applicant pled guilty to this offense and was placed on probation for a period of 36 months. The applicant completed his period of probation and on March 28, 2003, the charge was dismissed pursuant to PC section 1210.
3. On March 22, 2002, the applicant was arrested under the name [REDACTED] in Santa Ana for possession of a narcotic controlled substance. The final court disposition of this offense is unknown.
4. On April 2, 2005, the applicant was arrested for battery against his spouse or cohabitant in violation of PC section 243(e)(1), and for unlawfully removing a telephone line in violation of PC section 592. (Docket [REDACTED]). The applicant was subsequently convicted of an amended charge of fighting in a public place in violation of PC section 415(1), a misdemeanor.

The first issue to be determined in this proceeding is whether the offense detailed in No. 2 above can be considered a conviction for immigration purposes in light of the state action purporting to erase the original determination of guilt. 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. See *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).

The Ninth Circuit Court of Appeals stated in *Lujan* that “if (a) person’s crime was a first-time drug offense, involved 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. *See Lujan*, 222 F.3d at 749.

The Ninth Circuit *Lujan* decision explained that:

The [FFOA] is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. The [FFOA] allows the court to sentence the defendant in a manner that prevents him from suffering *any* disability imposed by law on account of the finding of guilt. Under the [FFOA], the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant’s having committed the offense. The [FFOA’s] ameliorative provisions apply for *all* purposes. *Id.* at 735.

To qualify for first offender treatment under federal laws, an 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 pending successful completion of probation or the proceedings have been or will be dismissed after probation. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), the Ninth Circuit rejected, on equal protection grounds, the rule that only expungements under exact state counterparts to the FFOA could be given effect in deportation proceedings. “[U]nder *Garberding*, persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the [FFOA] if they had been prosecuted under federal law.” *Lujan*, 222 F.3d at 738 (citing *Garberding*, 30 F.3d at 1190).

Lujan further explained that rehabilitative laws included “vacatur” or “set-aside” laws -- where a formal judgment of conviction is entered after a finding of guilt, but then erased after the defendant has served a period of probation or imprisonment. In addition, rehabilitative laws included “deferred adjudication” laws -- where no formal judgment of conviction or guilt is entered. *See Lujan*, 222 F.3d at 735. The Ninth Circuit then re-emphasized that determining eligibility for FFOA relief was not based on whether the particular state law at issue utilized a *process* identical to that used under the federal government’s scheme, but rather by whether the petitioner would have been *eligible* for relief under the federal law, and in fact received relief under a state law. *See Lujan*, 222 F.3d at 738.

The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offense, is applicable only in the Ninth Circuit, and is a *limited* exception to the generally recognized rule that an expunged conviction continues to qualify as a conviction under the Act. The Ninth Circuit continues to hold that “persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not

entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law.” *Lujan*, 222 F.3d at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 812 (9th Cir. 1994)).

In the present case, it appears the applicant would have qualified for treatment under the FFOA. The applicant was convicted of a single offense of simple possession of a controlled substance. The applicant successfully completed his probation and the court dismissed the case pursuant to section 1210 of the California Penal Code on March 28, 2003. 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.

Therefore, the evidence of record establishes that the offense detailed in No. 2 above is not considered a “conviction” for immigration purposes and will not serve to establish the applicant’s ineligibility to adjust to permanent resident status pursuant to section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.11(d)(1), or his inadmissibility under Section 212(a)(2)(A)(i)(II) of the Act.

However, the record of proceedings reveals a second arrest for possession of a controlled substance as detailed in No. 3 above. The applicant has failed to provide any court documentation showing the final disposition of this subsequent offense. Therefore, the applicant’s admissibility pursuant to Section 212(a)(2)(A)(i)(II) of the Act cannot be determined at this time.

Nevertheless, the applicant is statutorily ineligible for TPS due to his record of at least two misdemeanor convictions detailed in Nos. 1 and 4 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Accordingly, the director’s decision to deny the application is also affirmed for this reason.

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.