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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: OCT 30 2008

[WAC 08 093 51074, motion]

[EAC 06 348 79002 as it relates to WAC 01 290 57469]

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 California Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Chief, Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The case will be reopened and the appeal will again be dismissed.

The applicant is 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 the applicant had been convicted of driving under the influence and possession of a controlled substance. A subsequent appeal from the director's decision was dismissed on January 11, 2008, after the AAO Chief found that the applicant had been convicted on May 14, 1997, of possession of a controlled substance, a violation of 11350(a) H&S, a felony, and on February 5, 2002 of driving under the influence, 23152(a) VC, a misdemeanor.

On motion to reopen, counsel acknowledges the applicant was convicted of driving under the influence on February 5, 2002. Counsel argues in the Ninth Circuit, the first conviction for simple drug possession does not constitute a "conviction" for any purpose, expressly including immigration purposes. Counsel states that the applicant successfully completed diversion under Section 1000 of the California Penal Code, a deferred entry of judgment, and the action was dismissed on February 15, 2001. Counsel further states that therefore, this "conviction" is not a conviction at all, for any purpose, including immigration purposes, following Lujan-Armandariz v. INS, 222 F.3d 728 (9th Cir. 2000).

The record shows that on May 14, 1997, in the Superior Court Northern Branch of the County of San Mateo, California, Case No. [REDACTED], (arrest date March 10, 1997), the applicant was permitted to enter a plea of nolo contendere for possession of a narcotic controlled substance, 11350(a) H&S. On May 15, 1997, the case was diverted from prosecution for eighteen months, prosecution was suspended, and the applicant was ordered to commence and continue a rehabilitative program. On February 15, 2001, upon motion of the probation department, he was deemed to have completed his diversion program and his charge was dismissed pursuant to section 1000.3 of the Penal Code (P.C.) of California. His dismissed charge for possession of a narcotic controlled substance after completion of the diversion program causes a finding that he was not convicted of the above offense. Therefore, he is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, and is not ineligible under the provisions of section 244(c)(2)(B)(i) of the Act due to this offense.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The new review of the record initiated by this motion to reopen reflects that the applicant's Federal Bureau of Investigation fingerprint results report shows that in addition to the February 5, 2002 driving under the influence conviction mentioned above, on January 26, 2004, he was arrested by the "SHERIFF-CNTRL ID BUR OAKLAND" in California, and charged with driving under the influence of alcohol or drugs. The court

disposition for this arrest has not been provided by the applicant, although he was required to provide dispositions for all of his arrests in a March 17, 2004, Notice of Intent to Deny.

Accordingly, the applicant is ineligible for temporary protected status because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a).

In removal proceedings held “in absentia” on July 5, 1990, an Immigration Judge in San Antonio, Texas, ordered the applicant deported to El Salvador. It is further noted that the record contains an outstanding Form I-205, Warrant of Deportation, issued by District Director of the San Antonio, Texas, office of Citizenship and Immigration Services, (formerly the Immigration and Naturalization Service) on August 2, 1990.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The motion to reopen will be dismissed and the previous decision of the AAO will not be disturbed.

ORDER: The appeal is dismissed.