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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:  OFFICE: VERMONT SERVICE CENTER DATE: MAY 05 2010

IN RE: Applicant: 

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


for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The AAO will return the matter for further action by the director.

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 it was determined that the applicant had been convicted of two misdemeanors in the United States

On appeal, counsel asserts that the applicant has only one misdemeanor conviction. Counsel asserts that the applicant was arrested on November 9 and 20, 2000 due to one incident. Counsel cites *Lujan- Armendariz v. INS* and asserts that the applicant has not been convicted of any crime relating to possession of narcotics. Counsel provides copies of the court dispositions that were previously provided.

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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 FBI report dated September 16, 2009, reveals the following offenses in the state of California:

1. On June 5, 1999, the applicant was arrested by the Sheriff's Office in Norwalk for burglary.
2. On November 9, 2000, the applicant was arrested under the alias [REDACTED] by the Los Angeles Police Department for possession of a controlled substance.
3. On November 20, 2000, the applicant was arrested under the alias [REDACTED] by the Los Angeles Police Department for possession of a controlled substance.

4. On March 22, 2002, the applicant was detained by the Los Angeles Police Department for murder. The applicant was subsequently released due to insufficient evidence.

In response to the Notice of Intent to Deny dated October 6, 2009, which requested the applicant to submit the final court dispositions for the arrests in numbers one through three above, the applicant submitted:

- A letter from the Los Angeles County Superior Court, which indicated that there was no record under the name of [REDACTED]
- Court disposition in Case no. [REDACTED] which reflects that on June 8, 1999, the applicant was charged with violating section 459 PC, burglary, and section 484(a) PC, theft, both misdemeanors. On the same date, the applicant pled *nolo contendere* to violating section 484(a) PC. The applicant was placed on probation for two years, sentenced to serve six days in jail and ordered to pay a fine. The remaining charge was dismissed. The court record indicates that the applicant was arrested under the alias Tania Carolina Garcia for these charges.
- Court disposition in Case no. [REDACTED] which reflects that on November 15, 2000, the applicant was charged with violating section 11350(a) H&S, possession of a controlled substance, a felony. On January 10, 2001, the applicant pled guilty to the offense. The court accepted the applicant's plea, granted deferred entry of judgment for two years and ordered the applicant to pay a fine and attend a substance abuse class. The court record indicates that on June 17, 2003, the deferred entry of judgment was terminated, the plea was set aside, and the case was dismissed pursuant to section 1000.3 PC.

The arrests on November 9 2000, and November 20, 2000, relate to each other as the court document indicates that on November 16, 2000, an arrest warrant was issued and on November 21, 2000, the warrant was recalled.

On appeal, counsel asserts that pursuant to the United States Court of Appeals for the Ninth Circuit decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the applicant's successful completion of a diversion program renders him not convicted for immigration purposes.

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 she would have qualified for treatment under the FFOA. The applicant entered plea agreement for a deferred entry of judgment under section 1000 PC for a violation of section 11350(a) H&S. The applicant successfully completed her diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.PC.

The evidence in the record shows that she was not, prior to the commission of the offense, convicted of violating a federal or state law relating to controlled substances and that she was not previously accorded first offender treatment under any law. The applicant has, therefore, established that she is not "convicted" for immigration purpose of the drug offense.

The evidence of record reflects that the applicant has one misdemeanor conviction, and it does not render her ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the application will be withdrawn. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case will be returned for the purpose of sending the applicant a fingerprint notification form, and affording her the opportunity to comply with its requirements. Following completion of this requirement, the director will render a new decision. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

ORDER: The appeal is sustained and the matter is returned for further action by the director.