

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



M<sub>1</sub>

DATE: **DEC 22 2011**

Office: CALIFORNIA SERVICE CENTER

FILE:



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:

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, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO will reopen the matter on a service motion pursuant to 8 C.F.R. § 103.5(a)(5)(i). The appeal will be sustained.

The applicant is 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.

On February 20, 2003, the director denied the application because it was determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to her drug-related conviction. The AAO, in dismissing the appeal on June 29, 2005, concurred with the director's finding and also determined that the applicant had been convicted of a felony.

Upon conducting a *de novo* review, the AAO has determined that the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) decision in *Lujan-Armendariz V. INS*, 222 F. 3d 728 (9<sup>th</sup> Cir. 2000) was not applied at the time its decision was issued. Therefore, the AAO will withdraw its decision of June 25, 2005.

An alien shall not be eligible for TPS 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.

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 court documentation from the Los Angeles County Superior Court of California indicates that on August 27, 1998, the applicant was charged with sell/transportation of a controlled substance and possession of a narcotic controlled substance for sale. On November 19, 1998, a charge of possession of a controlled substance was added. The applicant pled guilty to violating section 11350 H&S, a felony. The court accepted the guilty plea, and the applicant was placed on deferred entry of judgment for three years. The applicant was ordered to pay a fine or perform 100 hours of community service. The remaining charges were dismissed. On December 12, 2001, the court discharged the applicant from the deferred entry of judgment program, the plea was set aside and the case was dismissed pursuant to section 1000.3 P.C. Case no. [REDACTED]

In *Lujan*, the Ninth Circuit stated 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* 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.

The Ninth Circuit in *Lujan* 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 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 (9<sup>th</sup> Cir. 2000).

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* . 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 qualifies 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 (9<sup>th</sup> Cir. 1994)).

In the present case, the applicant has established that she would have qualified for treatment under the FFOA. The applicant entered a plea agreement for a deferred entry of judgment on November 19, 1998, for a violation of section 11350 H&S. The applicant successfully completed her diversion program. On December 21, 2001, the court ordered that the applicant’s plea of guilty be set aside and the case be dismissed pursuant to section 1000.3.PC. The evidence in the record shows that the applicant 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 definition of conviction at section 101(a)(48)(A) of the Act applies to all crimes *except* simple possession of a controlled substance where the proceedings were dismissed or deferred under the FFOA or an equivalent state statute. As the applicant successfully completed a court order diversion program, the applicant cannot be found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) or ineligible for TPS due to a felony conviction.

Therefore, the director's decision to deny the application and the AAO’s decision affirming the director’s finding will be withdrawn. The record does not reflect any grounds that would bar the applicant from receiving TPS. As there are no other known grounds of ineligibility, the TPS application will be approved.

An alien applying for TPS 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. Here, the applicant has met this burden.

**ORDER:** The appeal is sustained. The decisions of the Director, California Service Center, dated February 20, 2003, and of the AAO dated June 29, 2005, are withdrawn.