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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **JAN 26 2012**

Office: VERMONT 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration and action.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew TPS because it was determined that the applicant had been convicted of three misdemeanors in the United States.

On appeal, counsel citing *Lujan-Armendariz v. INS*, 222 F. 3d 728 (9th Cir. 2000) asserts that the applicant is not ineligible for TPS because he was granted diversion by the court and the charges were subsequently dismissed.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

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).

"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 Federal Bureau of Investigation report dated October 8, 2008, reflects the following offenses in the state of California:

1. On June 12, 2004, the applicant was arrested by the Sheriff's Office of Riverside for driving under the influence.
2. On October 5, 2006, the applicant was arrested by the Sheriff's Office of Riverside for one count of possession of controlled substance.

The court documentation in Case no. [REDACTED] from the Riverside County Superior Court indicates that on August 3, 2004, the applicant pled guilty to one count of driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC, a misdemeanor. The applicant was ordered to pay a fine, serve time in jail and was placed on probation for three years.

The court documentation in Case no. [REDACTED] from the Riverside County Superior Court indicates that on October 31, 2005, the applicant was charged with violating section 11377(a) [REDACTED], possess controlled substance, and section [REDACTED] possess paraphernalia. On May 31, 2007, the applicant pled guilty to each charge. The court accepted the guilty plea, and the applicant was ordered to pay a fine and was placed on deferred entry of judgment for 18 months. On December 1, 2008, 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.

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated in [REDACTED] 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." [REDACTED] 222 F.3d at 738.

[REDACTED] 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. [REDACTED] 222 F.3d at 749.

The [REDACTED] 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 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 (9th Cir. 2000).

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* [REDACTED] 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 [REDACTED], 222 F.3d at 738.

The rule set forth in [REDACTED] 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 (9th Cir. 1994)).

In the instant case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant entered a plea agreement for a deferred entry of judgment on May 31, 2007, under section 1000 PC for violating sections 11377(a) H&S and 11364 H&S. The applicant successfully completed his diversion program. On December 1, 2008, the court ordered that the applicant's guilty pleas 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 he 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 ordered diversion program, he 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 under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The applicant has one misdemeanor conviction for violating section 23152(b) VC and it does not render him ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulation in 8 C.F.R. § 244.4(a). Therefore, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn.

The record, however, reflects that 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 him 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 case is remanded to the director for further action consistent with the above and entry of a decision.