



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 05 2014

Office: VERMONT SERVICE CENTER

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 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. On April 15, 2014, the director withdrew TPS because it was determined that the applicant had been convicted of a felony in the United States. The director also determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to the drug-related conviction.

On appeal, counsel asserts that the director erred as a matter of law in concluding that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Citing *Lujan-Armendariz v. INS*, 222 F. 3d 728 (9th Cir. 2000), counsel asserts that the applicant's single possession of a controlled substance is not a conviction for immigration purposes.

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).

"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 term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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. Section 101(a)(48)(A) of the Act.

The Federal Bureau of Investigation report reflects that the applicant was arrested in the state of California: 1) on December [REDACTED], by the Los Angeles Police Department for shoplifting; 2) on September [REDACTED] by the Los Angeles Police Department for driving under the influence; 3), and on November [REDACTED] by the Burbank Police Department for one count of possess narcotic controlled substance.

The record contains the following court documents from the Los Angeles County Superior and Municipal Courts:

1. On January [REDACTED] the applicant was charged with one count of petty theft, a violation of section 484(a), a misdemeanor. On February 24, 1995, the applicant pled nolo contendere to the offense. Imposition of sentence was suspended and the applicant was placed on summary probation for 24 months, and was ordered to pay restitution. Case no. [REDACTED]
2. On September [REDACTED] the applicant was charged with and subsequently convicted of an infraction offense of section 22400(a), VC, minimum speed impede flow of traffic. Case no. [REDACTED]
3. On January [REDACTED] the applicant was charged with one count of possession of a narcotic controlled substance, a violation of section 11350(a) H&S, a felony. On February [REDACTED] the applicant pled guilty to the offense. The court accepted the plea, and the applicant was admitted to a diversion program pursuant to section 1000.2 PC for two years. The applicant was required to pay \$150 in diversion administrative fees. The applicant successfully completed the diversion program and the court terminated the deferred entry of judgment, set aside the plea and dismissed the case pursuant to section 1000.3 PC on August [REDACTED] Case no. [REDACTED]

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.¹ *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated in *Lujan* that, “if (a) person’s crime was a first-time drug offense, involving only simple possession or its equivalent,

¹ We note that the Ninth Circuit overruled its decision in *Lujan-Armendariz*, in the case of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), finding that the constitutional guarantee of equal protection, for immigration purposes, did not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that had been expunged under the FFOA. However, the Ninth Circuit decided to apply the decision in *Nunez-Reyes* only prospectively: for those aliens convicted before July 14, 2011 (the publication date of the decision), *Lujan-Armendariz* applies; for those aliens convicted after July 14, 2011, *Lujan-Armendariz* is overruled. Because the applicant was convicted before July 14, 2011, the rule announced by the Ninth Circuit in *Lujan-Armendariz* applies in this case.

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. *Lujan*, 222 F.3d at 749.

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 (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 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 a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act. The Ninth Circuit held 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, 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 for a violation of section 11350 H&S. The applicant successfully completed his diversion program, and 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 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 evidence of record reflects that the applicant has one misdemeanor conviction, 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 regulations in 8 C.F.R. § 244.4(a). Therefore, the director's decision to withdraw TPS will, itself be withdrawn.

The validity period of the applicant's fingerprint check, however, has expired.

Accordingly, the case will be remanded 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).

ORDER: The director's decision is withdrawn. The case is remanded for further action consistent with the above and entry of a decision.