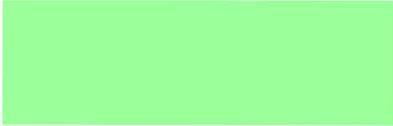




U.S. Citizenship  
and Immigration  
Services

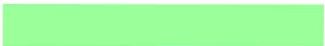
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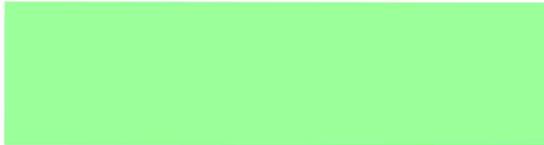
Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Temporary Protected Status under Section 244 of the  
Immigration and Nationality Act, 8 U.S.C. § 1254a

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 application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded for further action.

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. On July 26, 2013, the director denied the application because the applicant had been convicted of two misdemeanors 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 a drug-related conviction.

On appeal, citing *Lujan-Armendariz v. INS*, 222 F. 3d 728 (9<sup>th</sup> Cir. 2000), counsel asserts that the applicant is eligible for treatment under the Federal First Offender Act “for his possession of cocaine offense.” Counsel states that the applicant was sentenced to a lesser included misdemeanor and was ordered to complete counseling for the offense. Counsel argues that as the director neglected to take into account the effect of the Federal First Offender Act (FFOA), her decision was legally incorrect and must be set aside.

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.

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 Federal Bureau of Investigation (FBI) report reflects that on June [REDACTED], the applicant was arrested by the Metropolitan Police Department of [REDACTED] Nevada for possession of cocaine, DUI controlled substances and driving under the influence. On May [REDACTED] the applicant pled guilty to a misdemeanor offense of possession of drug not introduced into commerce, a violation of NRS 454.351. The applicant was sentenced to ‘ [REDACTED] [REDACTED]’. The FBI report also reflects that on January [REDACTED] the applicant pled guilty to driving under the influence, a violation of NRS. 484.379, a misdemeanor and was sentenced to serve time in jail, ordered to pay a fine and court cost, and enroll in a DUI school. A charge of open container in vehicle was dismissed on May [REDACTED]

The record contains a certified Record Search Information Sheet dated July 13, 2012, from the [REDACTED] Justice Court, which indicates that on January [REDACTED], the applicant pled to a lesser included misdemeanor offense of possession of drug not introduced into commerce. On May [REDACTED] the applicant was sentenced to counseling and credited with time served. The information sheet also indicates that on January [REDACTED] the applicant was found guilty of driving under the influence – 1<sup>st</sup> offense, and the applicant was sentenced to serve time in jail, ordered to pay a fine and court costs and attend a DUI school. On June [REDACTED] the case was closed. The remaining charge of open container in vehicle was dismissed on January [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 (9<sup>th</sup> Cir. 2000) is the controlling precedent.<sup>1</sup> *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, 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.

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<sup>1</sup> We note that the Ninth Circuit overruled its decision in *Lujan-Armendariz*, in the case of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> 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.

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).

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

The applicant entered a guilty plea for violating NRS 454.351, and successfully completed the counseling program as 30 days later the case was closed. The applicant has therefore established, by the preponderance of the evidence,<sup>2</sup> that he would have qualified for treatment under the FFOA. 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.

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<sup>2</sup> The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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. In the instance case, the applicant has established that he has not been convicted of possession of a controlled substance, for immigration purposes. Therefore, 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 NRS. 484.379, 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 deny TPS will 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.