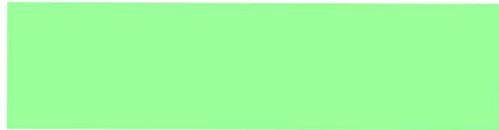




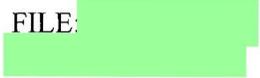
U.S. Citizenship
and Immigration
Services

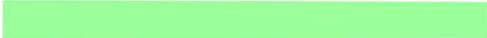
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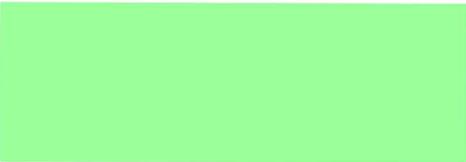
Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Applicant: 

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

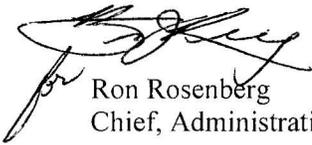
ON BEHALF OF APPLICANT:



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,



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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 January 17, 2014, the director withdrew TPS 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.

On appeal, citing *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), counsel asserts that the applicant remains eligible for the benefit as her first controlled substance offense does not render her inadmissible.

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.

Section 101(a)(48)(B) of the Act provides, “any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered

by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

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 report reflects the applicant’s criminal history in the Commonwealth of Virginia as follows:

1. On March 25, [REDACTED] the applicant was arrested by the [REDACTED] for unlawful wounding.
2. On December 2, [REDACTED] the applicant was arrested by the Fairfax Police Department for “drugs: possess w/intent to manuf/sell Sch 1, II.”

In response to the notice issued on June 4, 2012, which requested the applicant to provide certified judgment and conviction documents from the courts for all arrests, the applicant submitted the following:

- Court documentation in Case no. [REDACTED] from the Fairfax General District Court, which indicates that the charge of unlawful wounding was reduced to a violation of Virginia Code § 18.2-57, assault & battery, a Class 1 misdemeanor. On June 2, [REDACTED] the applicant pled *nolo contendere* to and was adjudged guilty of assault and battery. The applicant’s sentence of 300 days in jail was suspended for one year and she was placed on probation.
- Court documentation in Case no. [REDACTED] from the [REDACTED] Circuit Court, which indicates that on July 11, [REDACTED] the indictment was amended to possession of a controlled drug, a violation of Virginia Code § 18.2-250, and the applicant entered a plea of not guilty to the charge. On or about October 17, [REDACTED] the applicant was adjudged guilty of possession of a controlled substance. The court granted the applicant’s motion to refer the case to the District Probation Officer for investigation and report before sentencing. On or about December 8, [REDACTED], the court granted the applicant’s motion to be placed on supervised probation and to delay imposition of sentence for one year pursuant to Virginia Code § 18.2-251. The court vacated its previous finding of guilty and ordered that imposition of sentence be continued on condition that the applicant be placed on supervised probation for one year, undergo a substance abuse screening and random urine screens, complete 100 hours of community service and pay court costs. On or about December 14, 2012, the case was dismissed pursuant to Virginia Code § 18.2-251.

In his notice dated November 15, 2013, the director determined that the drug offense remained a conviction for immigration purposes as it was based upon a successful completion of the probation and drug rehabilitative program.

We note that *Lujan-Armendariz*¹ is not controlling as the applicant's criminal case arose in Virginia, which is in the Fourth Circuit, and her immigration proceeding arises in the Second Circuit. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).

The issue to be addressed is whether Virginia Code § 18.2-251 is equivalent to the Federal First Offender Act (FFOA) provision. Virginia Code § 18.2-251 provides, in part:

Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions.

* * *

The court shall require the person entering such program under the provisions of this section to pay all or part of the costs of the program, including the costs of the screening, assessment, testing, and treatment, based upon the accused's ability to pay unless the person is determined by the court to be indigent.

As a condition of probation, the court shall require the accused (i) to successfully complete treatment or education program or services, (ii) to remain drug and alcohol free during the period of probation and submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug and alcohol free, (iii) to make reasonable efforts to secure and maintain employment, and (iv) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of community service for a misdemeanor. Such testing shall be conducted by personnel of the supervising probation agency or personnel of any program or agency approved by the supervising probation

¹The 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.

The applicant was sentenced under a state equivalent (Virginia Code § 18.2-251) to the FFOA provision of the Controlled Substance Act. 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 the court order deferred program, the applicant's sentence cannot be used to find her inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). Further, a marijuana disposition under Virginia Code § 18.2-251 is not a conviction for immigration purposes. *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).

The record does not reflect any other grounds that would bar the applicant from maintaining TPS. Therefore, the director's decision to withdraw 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 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 case is remanded to the director for further action consistent with the above and entry of a decision.