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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF J-A-A-L-

DATE: NOV. 18, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS

The Applicant, a native and citizen of Honduras, was granted temporary protected status (TPS). *See* Section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a. The Acting Director, Vermont Service Center, withdrew the Applicant's TPS and denied the application for re-registration. The matter is now before us on appeal. The appeal will be dismissed.

On June 6, 2014, the Director withdrew the Applicant's TPS and denied the application for re-registration because the Applicant did not submit requested court documentation relating to his drug arrest on [REDACTED] 2006, and because the Applicant did not appear to have his biometrics collected on April 17, 2014.

On appeal, the Applicant asserts he was unable to appear for his biometrics appointment on [REDACTED] 2014, because he was in the custody of a local police department in Kentucky. The Applicant also asserts that his criminal case in Kentucky resulted in a misdemeanor conviction, which does not render him ineligible for TPS. The Applicant submits the certified court disposition for his conviction in Kentucky, and re-submits the photocopied certified court disposition for his arrest on [REDACTED] 2006, for possession of a controlled substance.

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. 8 C.F.R. § 244.1. 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. *Id.*

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

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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.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The record contains the following information relating to the Applicant's criminal history:

1. An arrest on [REDACTED], 2013, by the Sheriff's Department, [REDACTED], Kentucky, for 2nd degree assault and 3rd degree assault. On [REDACTED] 2014, in the [REDACTED] Circuit Court – Criminal Division, the Applicant pled guilty to disorderly conduct - 1st degree, a violation of K.R.S. 525.05, a misdemeanor. The Applicant was sentenced to serve six months of imprisonment.
2. An arrest on [REDACTED] 2006 by the sheriff's office in [REDACTED], California, for a violation of section 11377(a) H&S, possession of a controlled substance. The Applicant entered a plea in the Superior Court for the County of [REDACTED]. The court accepted the Applicant's plea and granted deferred entry of judgment. The Applicant successfully completed his diversion program. On October 24, 2013, the court terminated the deferred entry of judgment, set aside the plea, and dismissed the case pursuant to section 1000.3 PC.
3. On or about [REDACTED] 2009, the Applicant was arrested by the sheriff's office in [REDACTED] Kentucky under the name [REDACTED] for violating two counts of operating motor vehicle with alcohol concentration of or above 0.08, two counts of no operator's license, and one count of failure of owner to maintain required insurance.¹

In *Lujan-Armendariz v. INS*, 222 F.3d 728,738 (9th Cir. 2000), the Ninth Circuit stated that, “if (a) person's crime was a first-time drug offense, involved 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. *Lujan*, 222 F.3d at 749.

¹ Operating motor vehicle with alcohol concentration of or above 0.08, no operator's license, and failure to maintain required insurance are classified as Class B misdemeanors, which carry a maximum punishment of 90 days in jail. K.R.S. 532.090.

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The Ninth Circuit *Lujan* 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).

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 under section 1000 PC for violating section 11377(a) H&S and successfully completed the diversion program. The evidence in the record shows that he was not, prior to the commission of this 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.²

The Applicant, therefore, has not been convicted of the drug offense and is not found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act.

On March 31, 2014, the Director issued a notice of intent to deny, which requested the Applicant to provide certified judgment and conviction documents from the courts for all arrests. The Applicant, however, did not provide the requested court disposition for his arrest on or about [REDACTED] 2009.

² 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 Federal First Offender Act. 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. As the Applicant was convicted before July 14, 2011, the rule announced by the Ninth Circuit in *Lujan-Armendariz* applies in this case.

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In a notice of intent to dismiss the appeal dated July 2, 2015, we afforded the Applicant an opportunity to submit certified court documentation relating to his arrest on or about [REDACTED] 2009. The Applicant was advised that the disposition must include his plea, the sentence, probation, or dismissal of each charge.

In response, the Applicant addresses his arrest on [REDACTED] 2006, by Sheriff's Office in [REDACTED] California. The Applicant states that a certified copy of the disposition had been previously submitted for that arrest and that he is having difficulty obtaining a new certified copy. However, we found in our notice of July 2, 2015, that the Applicant had submitted sufficient evidence to establish that he had not been convicted of the possession of a controlled substance offense, and that he was not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. *Lujan*, 222 F.3d at 749.

Nevertheless, the Applicant has not submitted the requested certified disposition relating to his arrest on [REDACTED] 2009, for violating two counts of operating motor vehicle with alcohol concentration of or above 0.08, two counts of no operator's license, and one count of failure of owner to maintain required insurance.

The Applicant therefore remains ineligible for TPS because he did not provide information necessary for the adjudication of his application. 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) and 244.9(a). Consequently, the Director's decision to withdraw TPS will be affirmed.

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of J-A-A-L-*, ID# 10625 (AAO Nov. 18, 2015)