(b)(6)

U.S. Citizenship and Immigration Services

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

MATTER OF M-C-R-L-

DATE: JAN. 7, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Applicant, a native and citizen of El Salvador, seeks temporary protected status. *See* Immigration and Nationality Act (the Act) § 244, 8 U.S.C. § 1254(a). The Director, Vermont Service Center, denied the application. A subsequent appeal was dismissed and two motions have been denied by the Administrative Appeals Office. The matter is now before us on a motion to reconsider. The motion will be denied.

The record reflects that on 1990, the Applicant was adjudged guilty of violating of N.J.S. § 2C:35-10a(4), possession of 50 grams or less of marijuana. In a Petition for Expungement filed March 20, 2009, before the Superior Court of New Jersey, the Applicant indicated that he was found guilty of the marijuana possession charge. The Applicant was placed under conditional discharge for one year and assessed a fine and court costs. On March 15, 2010, the conviction was expunged.

On June 17, 2013, the Director denied the application because the Applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction. In dismissing the appeal on March 19, 2014, we concurred with the Director's findings. We determined that without the police report or complaint/indictment indicating the amount of marijuana in the Applicant's possession at the time of his arrest, the Applicant remained inadmissible under section 212(a)(2)(A)(i)(II) of the Act. We also determined that the Applicant's conviction remained valid for immigration purposes as it has not been established that the conviction was expunged for underlying procedural or constitutional defect having to do with the merits of the case. The first and second motions were denied on May 12, 2014, and April 15, 2015, as the grounds for denial on which the underlying decision was based had not been overcome on motion.

On this third motion, the Applicant asserts that resolution for his arrest for possession of a brown, leafy substance under 50 grams does not constitute a conviction as defined by the Act, because the Applicant was conditionally discharged, which does not constitute any form of punishment, penalty, or restraint. The Applicant adds that the criminal complaint does not allege that the vegetation was marijuana, and because the court ordered in the expungement that the arrest/conviction shall be deemed, in contemplation of law, not to have occurred, there was no restraint placed on his liberty. The Applicant also claims that he has provided sufficient evidence to show the amount of leafy substance he was arrested for possessing, which should make him eligible for TPS benefits.

While the complaint indicates that the Applicant was charged with possession of a quantity of a brown leafy vegetation believed to be marijuana, the Applicant was convicted under New Jersey statue 2C:35-10(4), for marijuana possession. Contrary to the Applicant's claim, the court did ordered some form of punishment in the form of a fine and court costs, and a restraint on his liberty in the form of conditional discharge for a year. Where, as in the present matter, an alien pleads guilty or *nolo contendere*, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. *See Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512.

Citing *Retuta. v. Holder*, 591 F.3d 1181, (9th Cir. 2010), the Applicant asserts a criminal judgment whose only consequence is a suspended non-incarceratory sanction does not qualify as a conviction under section 101(a)(48)(A) of the Act.

We find *Retuta* to be distinguishable from the present case. In *Retuta*, the Ninth Circuit held that a deferred entry of judgment did not constitute a conviction because the only consequence was a stayed fine and the alien suffered no loss or wealth nor loss of liberty. *Id.* at 1189. In the present matter, the Applicant was required to pay a fine and court costs, and he was sentenced to probation for one year.

Citing *Moncrieiffe V. Holder*, 133 S. Ct. 1678,1684 (2013), the Applicant asserts a state offense is a categorical match only if a conviction of the state offense necessarily involved facts equating to the generic federal offense. *Moncrieiffe*, however, is inapplicable to the instant case as we are only evaluating the offense under state law, not equating the state offense to an unknown generic federal offense.

The Applicant is applying for benefits under federal law which requires him to meet certain eligibility and admissibility requirements. *See* section 244(c)(1)(iii) of the Act. Section 244(c)(2)(A)(iii)(II) of the Act allows for an exception to inadmissibility of an individual convicted of simple possession of 30 grams or less of marijuana. Although requested, the Applicant has not provided the police report or any other documentation to establish whether the conviction of possession of marijuana was less than 30 grams. The Applicant, therefore remains inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The burden of proof in application proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Therefore, the motion will be denied and our previous decision will not be disturbed.

**ORDER:** The motion to reconsider is denied.

Cite as *Matter of M-C-R-L-*, ID# 14291 (AAO Jan. 7, 2016)