



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

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

MATTER OF J-E-M-

DATE: SEPT. 12, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant, a native and citizen of El Salvador, seeks review of a decision withdrawing the Applicant's Temporary Protected Status (TPS). *See* Immigration and Nationality Act (the Act) section 244, 8 U.S.C. § 1254a. TPS provides lawful status and protection from removal for foreign nationals, of specifically designated countries, who register during designated periods, satisfy country-specific continuous residence and physical presence requirements, are admissible to the United States, are not firmly resettled in another country, and are not subject to certain criminal- and security-related bars.

The Director, Vermont Service Center, withdrew the Applicant's TPS and denied the application for re-registration. The Director concluded that the Applicant did not submit requested court documentation relating to his criminal record. The Director determined that the Applicant was ineligible for TPS under section 244(c)(2)(B)(i) of the Act for two misdemeanor convictions in the United States. The Director further found the Applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of controlled substance violations, possession of drug paraphernalia and possession of marijuana, with no waiver available. The Director affirmed the decision after a motion to reopen and reconsider was filed.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and states he was not convicted of possession of marijuana and possession of drug paraphernalia. The Applicant adds that even if he were convicted of these two offenses, they are not misdemeanors for immigration purposes, and he is eligible for a waiver of inadmissibility for his controlled substance violation, as he had less than 30 grams of marijuana in his possession at the time of his arrest.

Upon *de novo* review, we will withdraw the Director's decision. The matter is remanded to the Director for further proceedings consistent with this opinion.

I. LAW

The Applicant is seeking review of a decision withdrawing the Applicant's TPS. Section 244(c)(1)(A)(iii) of the Act provides that an applicant is not eligible for TPS if the applicant is inadmissible to the United States or ineligible under section 244(c)(2)(B) of the Act.

The regulation at 8 C.F.R. § 244.14(a)(1) provides that the Director may withdraw the status of an applicant granted TPS if the applicant was not eligible at the time such status was granted or becomes ineligible for such status.

Section 244(c)(2)(B) of the Act provides that an applicant is ineligible for TPS if he has been convicted of any felony or two or more misdemeanors committed in the United States. A felony is defined as a crime committed in the United States that is punishable by imprisonment of more than 1 year. 8 C.F.R. § 244.1. A misdemeanor is defined as a crime committed in the United States, either punishable by imprisonment for a term of 1 year or less, regardless of the term such alien actually served, if any, or 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 5 days or less shall not be considered a misdemeanor. *Id.*

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), provides that a conviction for immigration purposes is: 1) a guilty judgment entered by a court against an alien, or when adjudication is withheld, 2) a judge or jury made a finding of guilt, 3) the alien entered a plea of guilty, 4) the alien entered a plea of nolo contendere, or 5) the alien admitted sufficient facts to warrant a finding of guilt. In addition, when a guilty judgment is not entered by a court, a judge must order some form of punishment, penalty, or restraint imposed on the alien's liberty.

Section 212(a)(2)(A) of the Act provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt 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 U.S.C. § 802)), is inadmissible.

Individuals found inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a violation relating to controlled substances may seek a TPS waiver under section 244(c)(2) of the Act for a single offense of simple possession of 30 grams or less of marijuana.

The regulation at 8 C.F.R. § 244.9 provides that the burden of proof is upon the Applicant to establish that the above requirements are met through submission of all documentation required in the instructions or requested by USCIS. The Applicant must provide supporting documentary evidence of eligibility apart from his own statement and the sufficiency of the evidence will be judged according to its relevancy, consistency, credibility, and probative value. *Id.*

II. ANALYSIS

The issues presented on appeal are whether the Applicant is ineligible for TPS under section 244(c)(2)(B)(i) of the Act based on convictions for two misdemeanors committed in the United States, and inadmissible under section 212(a)(2)(A)(i)(II) of the Act for being convicted of controlled substance offenses.

Before the Director, the Applicant asserted that he was arrested for drug offenses, but his convictions should be considered disorderly persons convictions under New Jersey state law. The Director determined that, even accepting the Applicant's assertion, he had been convicted of two misdemeanors for immigration purposes, as the maximum term of imprisonment under New Jersey law for a disorderly person offense and a petty disorderly person offense exceeded 5 days. The Director further found the Applicant to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on his controlled substance violations, for which there was no waiver available.

On appeal, the Applicant does not contest that he was arrested and subsequently charged with possession of marijuana and possession of drug paraphernalia. However, the Applicant states that the charges did not result in convictions as the court did not enter formal judgment against him. The Applicant further states he did not enter a guilty plea, a *nolo contendere* plea, nor admit sufficient facts to warrant a finding of guilt. He also asserts that his arrest record was not expunged based on a conviction or rehabilitation. The Applicant adds that he is not inadmissible to the United States for a controlled substance violation, as he had less than 30 grams of marijuana in his possession at the time of his arrest.

The Applicant submits additional copies of documents that were previously submitted, including a summons, a certified laboratory report, a dismissal order, and an amended expungement order relating to his arrest in 2012.

In our request for evidence, the Applicant was advised that he provided conflicting statements for which no explanation was offered. Specifically, on motion from the 2014 Director's decision, the Applicant indicated that he pled guilty to both drug charges as a part of a conditional discharge program. However, on appeal, the Applicant claims he did not enter a plea to the drug charges. We requested certified complete court proceedings or a certified letter from the state/district attorney's office specifying the Applicant's pleas for possession of marijuana and possession of drug paraphernalia.

In response, the Applicant asserts he pled guilty to a disorderly person offense of possession of marijuana, which carries a maximum sentence of 6 months in jail. The Applicant explains that based on the information that was available to him at the time, he believed that he did not enter a plea. He submits a certified court document for the possession of marijuana offense indicating that he was placed on conditional discharge for 6 months, paid penalties, and the charge was subsequently dismissed in 2013. The court documentation presented for the possession of drug paraphernalia

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indicates the Applicant entered a plea of not guilty, and the charge was dismissed. The Applicant also submits copies of court documents that were previously submitted on appeal.

The entire record was reviewed and considered in rendering this decision. The record establishes that the possession of drug paraphernalia charge did not result in a misdemeanor conviction, as it does not meet the definition of conviction for immigration purposes. We do find the Applicant to have been convicted of a misdemeanor offense of possession of marijuana, as it has not been established that this conviction was expunged for underlying procedural or constitutional defect having to do with the merits of the case. We also find that the Applicant's conviction was for a single offense of simple possession of 30 grams or less of marijuana, so he is eligible to apply for a waiver.

A. Eligibility

As stated above, the Director found the Applicant ineligible for TPS under section 244(c)(2)(B)(i) of the Act for having two misdemeanor convictions.

In 2012, the Applicant was arrested in [REDACTED] New Jersey for violating New Jersey Statutes Annotated (N.J.S.A.) section 2C:35-10A(4), possession of marijuana, and N.J.S.A. section 2C:36-2, possession of drug paraphernalia. As stated above, the Applicant pled guilty to the charge of possession of marijuana. He was placed on conditional discharge for 6 months, paid penalties, and the charge was subsequently dismissed. The Applicant pled not guilty to the charge of possession of drug paraphernalia, no guilty judgment was entered by the court, and no sentence was ordered as the charge was dismissed. The Applicant then had the charge expunged pursuant to N.J.S.A. section 2C:52-11.¹

Because the Applicant's charge for possession of drug paraphernalia does not meet the definition of conviction for immigration purposes, we withdraw the Director's finding that the Applicant had been convicted of the drug paraphernalia violation. As the Applicant's drug paraphernalia arrest is not a conviction for immigration purposes, he does not have two misdemeanor convictions in the United States. Accordingly, the Applicant is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act.

B. Inadmissibility

As stated above, the Director found the Applicant to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his marijuana possession conviction.

¹ N.J.S.A. section 2C:52-11 provides, "[i]f, prior to the hearing, there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served under 2C:52-10, and no reason, as provided in N.J.S.A. section 2C:52-14, appears to the contrary, the court may, without a hearing, grant an order directing the clerk of the court and all relevant criminal justice and law enforcement agencies to expunge records of said disposition including evidence of arrest, detention, conviction and proceedings related thereto."

An applicant is only eligible for TPS if, amongst other requirements, he is admissible to the United States as an immigrant, except as otherwise provided under section 244(c)(2)(A) of the Act.

At the time of the Applicant's conviction, N.J.S.A. section 2C:3510(a)(4), possession of marijuana, stated it is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog. Any person who violates this section with respect to possession of 50 grams or less of marijuana, including any adulterants or dilutants, or 5grams or less of hashish is a disorderly person. *Id.* The Applicant's marijuana possession conviction is a controlled substance violation that would render him inadmissible under section 212(a)(2)(A) of the Act,

For the Applicant's possession of marijuana conviction, the Applicant entered a guilty plea and the court ordered some form of punishment in the form of penalties and a restraint on his liberty, in the form of conditional discharge. Accordingly, we find that the Applicant's possession of marijuana conviction is a conviction for immigration purposes, within the meaning of section 101(a)(48)(A) of the Act.

1. Expungement

The 2013 amended expungement order indicates that all information relating to the Applicant's criminal proceedings, including his 2012 arrest, charges and any convictions would be removed from the New Jersey and New York courts and police departments' records.

Under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes), *reversed on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). The Applicant has not submitted on appeal, and there is no evidence in the record to show that, the possession of marijuana conviction was expunged because of a statutory or constitutional violation in the merits of the case. Therefore, we find the possession of marijuana offense remains a conviction for immigration purposes.

2. Waiver

Section 244(c)(2)(A) provides for the waiver of certain grounds of inadmissibility under section 212(a) of the Act, for humanitarian purposes, to assure family unity, or when it is otherwise in the

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public interest. However, section 244(c)(2)(A)(iii)(I) of the Act specifies that inadmissibility under section 212(a)(2)(A) may not be waived, except as it relates to a single offense of simple possession of 30 grams or less of marijuana.

The record contains a certified laboratory report from the New Jersey State Police, [REDACTED] indicating the Applicant had 1.71 grams of marijuana in his possession at the time of the arrest.

As the Applicant has demonstrated that the marijuana in his possession at the time of his arrest was 30 grams or less, he is eligible to apply for a waiver due to his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

III. CONCLUSION

An applicant for TPS has the burden of proving that he or she meets the requirements for this benefit and is otherwise eligible under the provisions of section 244 of the Act. The Applicant does not have a conviction for possession of drug paraphernalia. The Applicant has one misdemeanor conviction for possession of marijuana, which 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). However, the Applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his possession of marijuana conviction. As the record reflects the Applicant possessed less than 30 grams of marijuana, he is eligible for a waiver of inadmissibility under section 212(h) of the Act. Therefore, the matter is remanded to the Director in order to allow the Applicant the opportunity to file a Form I-601, Application for Waiver of Grounds of Inadmissibility. Following completion of this requirement, the Director will render a new decision. Should the decision be adverse to the Applicant, 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 decision of the Director, Vermont Service Center, is withdrawn. The matter is remanded to the Director, Vermont Service Center, for further proceedings consistent with the foregoing opinion.

Cite as *Matter of J-E-M-*, ID# 14695 (AAO Sept. 12, 2016)