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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
[WAC 07 196 53357, motion]
[WAC 05 126 82280 as it relates to WAC 01 189 50462]

Date: JUL 01 2009

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the Vermont Service Center. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, California Service Center (CSC). A subsequent appeal was dismissed by the Chief, Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The matter will be reopened, *sua sponte*, by the Chief, AAO, and the case will be remanded for further consideration and action.

The applicant claims to be a native and citizen of El Salvador who is seeking TPS under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The applicant filed an initial Form I-821, Application for TPS, under receipt number WAC 01 189 50462. The CSC Director approved the initial application on March 1, 2002. He filed a subsequent Form I-821 for re-registration under receipt number WAC 05 126 82280. The CSC Director denied the re-registration application and withdrew TPS because the applicant had been convicted of the possession of a narcotic controlled substance, a violation of the State of California Health and Safety Statute, H&S § 11350(a), a felony. A subsequent appeal from the director's decision was dismissed on May 21, 2007, after the AAO affirmed the director's determination and also found that the applicant had failed to submit final court dispositions for his arrests on August 23, 1997 and June 11, 2004.

On motion to reopen, counsel submits a copy of a letter dated June 20, 2007 from a Senior Management Analyst II, Acting Commanding Officer of the Records and Identification Division of the City of Los Angeles confirming the incarceration of a person named [REDACTED] arrested on August 23, 1997 for a charge of obstructing and/or resisting a public officer. The letter indicates that the person was released by the prosecutor and that no case filing information was found in Los Angeles County. Counsel also submits a copy of a letter from a Supervising Attorney of the Metropolitan Branch of the City of Los Angeles indicating that [REDACTED] was arrested by the California Highway Patrol on June 11, 2004 on suspicion of Driving Under the Influence under booking number [REDACTED], (file number [REDACTED]). The Supervising Attorney explains that the case was submitted to her office for possible prosecution and that their records indicate that no criminal charges were filed by her office in connection with this arrest.

It is determined that the applicant has established that he was not convicted of charges stemming from his August 23, 1997 and June 11, 2004 arrests.

On motion to reopen, counsel again argues that Citizenship and Immigration Services misinterpreted the law and failed to follow the holding in *Lujan-Armendaziz v. INS*, concerning his felony conviction for the possession of a narcotic controlled substance.

The record shows that on August 15, 1997, in the Superior Court of Central District Judicial District, County of Los Angeles, California, [REDACTED] (arrest date August 1, 1997), the applicant was indicted for Count 1, possession of cocaine base for sale, 1135.5 H&S, a felony. In a pre-trial conference held on October 24, 1997, the court ordered the information amended by interlineation to add the felony violation of 11350(a) H&S, possession of a narcotic

controlled substance, as Count 2. The applicant entered a plea of guilty as to Count 2. The court accepted the applicant's plea, he was granted diversion for a period of 2 years, and he was referred to the Probation Department. In a hearing held on April 26, 1999, the applicant failed to appear in court. The Judge dismissed Count 1 and ordered his diversion terminated as to Count 2. Criminal proceedings were reinstated, and the case was dismissed pursuant to section 1000.3 of the California Penal Code (PC).

The Ninth Circuit Court of Appeals stated in *Lujan* 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*, 222 F.3d at 738. *Lujan* also holds that the definition of conviction at section 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA) or that the rule 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.

This case emanates from California and is under the jurisdiction of the Ninth Circuit Court of Appeals. The record reflects that the applicant pled not guilty prior to his guilty plea on October 24, 1997. On that date he entered a plea agreement for a deferred entry of judgment on a charge of the possession of a narcotic controlled substance. He successfully completed his diversion program, the court terminated the proceedings and the charges were dismissed and effectively expunged or erased pursuant to Section 1000.3 PC, a state rehabilitative statute. Accordingly, the applicant has not been convicted of a felony, for immigration purposes. The director's decision to deny the application on this ground is withdrawn.

Although not addressed by the CSC Director, the applicant has provided insufficient evidence to establish that he is a national or citizen of El Salvador. He has provided a copy of his birth certificate along with an English translation. However, a birth certificate alone does not establish nationality. The record does not contain any photo identification such as a passport or national identity document to establish his nationality. 8 C.F.R. § 244.2(a) and § 244.9(a)(1).

The CSC Director's withdrawal of the approval of the initial application will be withdrawn; the application will be remanded for a new decision. The director's denial of the application for re-registration or renewal is dependent upon the adjudication of the initial application. Since the initial application is being remanded, the re-registration decision will be remanded to the director for further adjudication. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS offered to Salvadorans.

In these proceedings the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The initial application is reopened; the CSC Director's decision of August 5, 2006 and the AAO Chief's decision of May 21, 2007 are withdrawn. The applications are remanded for new decisions.