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U.S. Department of Homeland Security  
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Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES, CALIFORNIA

Date:

APR 23 2004

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(g) of the Immigration and Nationality Act, 8 U.S.C. § 1182(g).

ON BEHALF OF APPLICANT:

[Redacted]

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INSTRUCTIONS:

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the application will be remanded to her for further action.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The CAA provides, in part:

[T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, (now the Secretary of Homeland Security, (Secretary)), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The district director found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II) for having been convicted for the offense of possession of a controlled substance. The district director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application. *See District Director Decision* dated June 20, 2003.

The AAO finds that the district director erroneously denied the application due to the applicant's drug conviction. The applicant was found inadmissible under section 212(a)(1)(A)(i) of the Act and filed the appropriate Application for Waiver of Grounds of Inadmissibility (Form I-601).

Section 212(a)(1)(A)(i) of the Act provides, in pertinent part, that:

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome Act is inadmissible.

Section 212(g) of the Act provides, in pertinent part, that:

The Attorney General may waive the application of subsection (a)(1)(A)(i) in the case of any alien who-

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa.

The applicant submitted Form I-601 pursuant to section 212(g) of the Act, to the Los Angeles, California district office. The Form I-601 has not been adjudicated and the district director inappropriately issued a decision denying the application for waiver of inadmissibility based the applicant's drug conviction. The applicant never filed a Form I-601 for a section 212(h) waiver.

On appeal counsel asserts that the applicant filed an application for a waiver based on his inadmissibility under section 212(a)(1)(A)(i) of the Act, and that he is not convicted for immigration purposes and thus a section 212(h) waiver is not required.

On appeal counsel argues that pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), the expungement of the applicant's conviction record renders him not convicted for federal immigration purposes, and thus not inadmissible. Since this case arises in the Ninth Circuit, *Lujan* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).<sup>1</sup>

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." *Id.* at 738.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), states that "conviction" means:

A formal judgment of guilt of the alien entered by a court or, if 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.

*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* at 749.

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 laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he 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 or the

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<sup>1</sup> In cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for Federal First Offender Act (FFOA) treatment. See *Matter of Salazar-Regino*, *supra*; see also *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9<sup>th</sup> Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187 (9<sup>th</sup> Cir. 1994), the Ninth Circuit rejected, on equal protection grounds, the rule that only expungements under exact state counterparts to the FFOA could be given effect in deportation proceedings. “[U]nder *Garberding*, persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the [FFOA] if they had been prosecuted under federal law.” *Lujan* at 738 (citing *Garberding* at 1190).

*Lujan* further explained that rehabilitative laws included “vacatur” or “set-aside” laws -- where a formal judgment of conviction is entered after a finding of guilt, but then erased after the defendant has served a period of probation or imprisonment. In addition, rehabilitative laws included “deferred adjudication” laws -- where no formal judgment of conviction or guilt is entered. *See Lujan* at 735. The Ninth Circuit then re-emphasized that determining eligibility for FFOA relief was not based on whether the particular state law at issue utilized a *process* identical to that used under the federal government’s scheme, but rather by whether the petitioner would have been *eligible* for relief under the federal law, and in fact received relief under a state law. *See Lujan* at 738.

The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offense, is applicable only in the Ninth Circuit, and is a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act. The Ninth Circuit continues to hold that “persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law.” *Lujan* at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 813 (9<sup>th</sup> Cir. 1994)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9<sup>th</sup> Cir. 2002), the Ninth Circuit further clarified that California Penal Code section 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. *See Ramirez* at 1175. Furthermore, the holding set forth in the Ninth Circuit case, *Garcia-Gonzales v. INS*, 344 F.2d 804 (9<sup>th</sup> Cir. 1965) remains applicable to expungement cases that do not fit the limited circumstances set forth in *Lujan*.

In deciding whether a criminal conviction expunged pursuant to section 1203.4 of the California Penal Code remained a “conviction” for immigration purposes, the Ninth Circuit in *Garcia* analyzed Congress’ intent in enacting section 241(a)(11) of the Act as in effect in 1965, 8 U.S.C. § 1251(a)(11). *See Garcia* at 806-7. Under section 241(a)(11), an alien in the United States was deportable if the alien:

At any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of . . . any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of . . . heroin.

*Garcia* at 810. The Ninth Circuit in *Garcia* stated that in enacting section 241 of the Act as in effect in 1965, “Congress intended to do its own defining of ‘conviction’ rather than leave the matter to variable state

statutes.” *Id.* at 807 (citing *Matter of A –F –*, 8 I&N Dec. 429, 445-46 (AG 1959)). The Ninth Circuit agreed that:

Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction. Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strengthened the deportation laws dealing with aliens involved in such traffic . . . . In the face of this clear national policy, I do not believe that the term “convicted” may be regarded as flexible enough to permit an alien to take advantage of a technical “expungement” which is the product of a state procedure wherein the merits of the conviction and its validity have no place . . . . I, therefore, regard it as immaterial for the purposes of § 241(a)(11) that the record of conviction has been cancelled by a state process such as is provided by § 1203.4 of the California Penal Code . . . .

*Garcia* at 809. *Lujan* discussed *Matter of A –F –*, stating that the case “remained the rule for all drug offenses until 1970, when Congress adopted the Federal First Offender Act . . . a rehabilitation statute that applies exclusively to first-time drug offenders who are guilty only of simple possession.” *Lujan* at 735. Thus, while *Lujan* supercedes *Garcia* in limited circumstances, the general holding that expungements do not erase “convictions” for federal immigration purposes remains valid, even in the Ninth Circuit.

In the present case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant was found guilty of possession of a controlled substance. The evidence in the record shows that he was not, prior to the commission of the 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. Finally, the applicant submitted evidence that the Los Angeles County, California, Superior Court entered an order pursuant to section 1203.4 of the California Penal Code, under which the criminal proceedings against the applicant were dismissed after probation.

The applicant has established that he is not “convicted” for immigration purposes. He is thus not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act and a section 212(h) waiver is not necessary.

The applicant is inadmissible under section 212(a)(1)(A)(i) of the Act. Since the waiver application under section 212(g) of the Act, has never been adjudicated the district director’s decision will be withdrawn and the application will be remanded to her for adjudication of the Form I-601 under section 212(g) of the Act.

**ORDER:** The district director's decision is withdrawn and the application is remanded as noted above.