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Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE # [REDACTED]

Office: SAN FRANCISCO, CA

Date: FEB 14 2003

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO affirmed the prior decisions on a motion to reconsider. The matter is now before the AAO on a second motion to reconsider. The motion will be granted and the previous decisions of the District Director and the AAO will be withdrawn. The waiver application is moot, as the applicant has not been convicted for immigration purposes, and is thus not inadmissible.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole in January 1989. The applicant married a native of El Salvador and naturalized United States citizen on April 1, 1997, and he is the beneficiary of an approved petition for alien relative. The applicant was found to be inadmissible to the United States under 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 of possession of less than 30 grams of marihuana. The applicant's controlled substance conviction was expunged in a San Francisco, California municipal court on March 5, 1999, pursuant to section 1203.4 of the California Penal Code.

The applicant initially sought a waiver of the permanent bar to admission as provided under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside with his family in the United States. The applicant now seeks reconsideration of the ground of inadmissibility, arguing that he is not convicted for immigration purposes and thus not inadmissible, and that a section 212(h) waiver is not required.

On motion, the applicant argues that pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the expungement of his 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).¹

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

¹ 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).

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

In *Garberding v. INS*, 30 F.3d 1187 (9th 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 offenses, 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 (9th Cir. 1994)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th 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 (9th 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 this case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant was found guilty of simple possession of less than 30 grams of marihuana. 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 a San Francisco, California municipal court has 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. Accordingly, the applicant’s second motion to reconsider will be granted. His application for waiver, however, will be denied as moot, since he is not inadmissible.

ORDER: The application for a waiver of inadmissibility under section 212(h) of the Act is denied as moot, since the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.