



U.S. Department of Justice
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: BUFFALO, NEW YORK

Date: FEB 27 2003

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Buffalo, New York. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO affirmed the prior decisions on a motion to reopen and reconsider. The matter is now before the AAO on a second motion to reconsider. The motion will be granted and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Curacao and citizen of the Netherlands. The applicant was initially found to be inadmissible to the United States under sections 212(a)(2)(A)(i)(II), 212(a)(2)(C), and 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(2)(C), and 1182 (a)(6)(C), for having been convicted of possession of a controlled substance, for being one whom there is reason to believe is or has been an illicit trafficker in a controlled substance, and for having attempted to procure admission into the United States by fraud or misrepresentation. The applicant sought a waiver of these grounds of inadmissibility under sections 212(h) and (i) of the Act, 8 U.S.C. §§ 1182(h) and (i), in order to reside in the United States with his spouse and child.

The district director initially denied the section 212(h) waiver after finding the applicant inadmissible under section 212(a)(2)(C) of the Act, for which no waiver is available, and denied the section 212(i) waiver after finding that the applicant was not otherwise admissible. The district director subsequently withdrew the decision that found the applicant inadmissible under section 212(a)(2)(C) of the Act, however, the District director found the applicant still inadmissible under sections 212(a)(2)(A)(i)(II) and 212(a)(6)(C) of the Act. The district director subsequently denied both applications in separate decisions based on the applicant's failure to establish that extreme hardship would be imposed on his wife and children (in the section 212(h) decision) or that such hardship would be imposed on his wife (in the section 212(i) decision).

The AAO affirmed the district director's decision to deny the section 212(h) waiver and concluded that since the applicant was not otherwise admissible, no purpose would be served in addressing the section 212(i) waiver proceedings where the standard of extreme hardship is the same but limited due to the fact that children are not qualifying relatives.

In his motion to reopen and reconsider, the applicant, through counsel, asserted that the AAO dismissal of his appeal was erroneous as a matter of fact and law. The AAO granted the motion but affirmed the previous order dismissing the applicant's appeal. The applicant, through new counsel, now seeks reconsideration of the ground of inadmissibility asserting that the AAO decision is erroneous as a matter of law, and that he should not be considered "convicted" for immigration purposes. Counsel also asserts that even if the applicant is considered convicted, section 212(a)(2)(A)(ii)(II) of the Act excuses his marijuana conviction. Lastly, counsel asserts that the applicant has established extreme hardship.

In his present January 22, 2002 Motion to Reconsider (*Motion to Reconsider*), counsel argues that the AAO erroneously based its decision to deny section 212 (h) relief on mere

arrests and criminal charges against the applicant rather than on actual convictions against the applicant. *See Motion to Reconsider* at 2-3.

The December 21, 2001 AAO Decision (*AAO Decision*) states on page 3 that:

[T]he record reflects that the applicant was arrested on August 28, 1994, and charged with Criminal Possession of a Controlled Substance in the Third Degree (3.347 grams of cocaine), Criminal Possession of a Controlled Substance in the Seventh Degree (3.564 grams of cocaine), Criminally Using Drug Paraphernalia in the Second Degree, and Unlawful Possession of Marijuana, among other charges. On February 23, 1995, the applicant pled guilty to a violation of Section 221.05 of the Penal Law of New York (Unlawful Possession of Marijuana). He was sentenced to 'Conditional Discharge' and was fined.

AAO Decision at 3. Citing the above section, counsel argues that the basis of the applicant's inadmissibility is erroneous because he "has not admitted to committing the acts, the crimes or been convicted of several of the above charges, including the unspecified ones, which the INS opinion of December 21, 2001 confuses with convictions." *See Motion to Reconsider* at 2. Counsel provides no analysis or other facts to support his assertion, and it is unclear why counsel believes the AAO's finding of inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act is based on mere arrests and charges. Indeed, the only ground of inadmissibility analyzed by the AAO in that section relates to the applicant's conviction for unlawful possession of marijuana, a conviction counsel admits occurred, on page 3 of his *Motion to Reconsider*. The AAO Decision cites no other drug charges or arrests as a ground of inadmissibility against the applicant. *See AAO Decision* at 3.

In analyzing the applicant's inadmissibility, the AAO Decision specifically states that the applicant pled guilty to a charge of unlawful possession of marijuana. *Id.* The AAO Decision goes on to analyze the possibility of a limited waiver to the applicant's unlawful possession of marijuana conviction by stating that, "[s]ection 212(h) of the Act provides that the Attorney General may, in his discretion, waive application of subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana." The AAO Decision concludes that the applicant is statutorily ineligible for the waiver because the date of his conviction did not occur more than 15 years before the date of his application for adjustment of status, as required by Section 212(h)(1)(A) of the Act. *See AAO Decision* at 3, 6.

Counsel also states, summarily, that in its discussion of New York's Criminal Procedure Law, section 160.50(3)(k) (CPL § 160.50(3)(k)), the AAO Decision confused cocaine charges with cocaine convictions and thus incorrectly found the applicant ineligible for relief under CPL § 160.50(3)(k). *See Motion to Reconsider* at 3. Counsel does not cite the section of the AAO Decision he refers to, and no further facts or analysis are provided to clarify his argument. However, page 5 of the AAO Decision discusses CPL § 160.50(3)(k) and states:

For the purpose of subdivision one of this section (order upon termination of criminal action in favor of the accused), a criminal action or proceeding against a person shall be considered terminated in favor of such person where: (i) The accusatory instrument alleged a violation of . . . (ii) **the sole controlled substance involved is marijuana**; . . . (iv) at least three years have passed since the offense occurred.

AAO Decision at 5. The AAO Decision states that, “the applicant was originally arrested and charged with Criminal Possession of a Controlled Substance in the Third Degree (cocaine). Therefore, the applicant is not eligible for relief under CPL § 160.50(3)(k).” *Id.* While there may be an argument that the applicant’s conviction has been terminated pursuant to CPL § 160.50(3)(k), counsel’s equal protection arguments that the applicant *should be* entitled to the benefits that terminating a criminal record under CPL § 160.50(3)(k) would afford to a U.S. citizen, are contrary to precedent immigration law and not persuasive.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

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.

Counsel argues that the reasoning set forth in the Ninth Circuit of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 740 (9th Cir. 2000) should be applied in the applicant’s case. *See Motion to Reconsider* at 7. The Ninth Circuit held in *Lujan* that, the definition of “conviction” at section 101(a)(48)(A) of the Act did 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 was instead prosecuted under state law, if the findings were expunged pursuant to a state rehabilitative statute. *Lujan* at 749. “In short, if the 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; *see also Motion to Reconsider* at 7.

However, the limited FFOA exception discussed in *Lujan* applies only to cases arising in the jurisdiction of the Ninth Circuit Court of Appeals. The applicant’s case is within the jurisdiction of the Second Circuit Court of Appeals. 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 FFOA treatment. *See Matter of Salazar-*

Regino, 23 I&N Dec. 223 (BIA 2002); see also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

As discussed in the previous AAO Decision,

In *Matter of Roldan-Santoyo* . . . the Board of Immigration Appeals held that the policy exception in *Matter of Manrique*, which accorded Federal First Offender treatment to certain drug offenders is superseded by the enactment of § 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). Under the statutory definition of the term ‘conviction’, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a ‘conviction’ as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

AAO Decision at 5-6. Moreover, in *Matter of Salazar-Regino*, the Board of Immigration Appeals (BIA) squarely addressed the issue of whether to apply *Lujan* on a nationwide basis. See *Matter of Salazar-Regino*, *supra* (Westlaw publication page reference not available). Initiating the Discussion section of the decision, the BIA stated:

The question before us, therefore, is whether, because of the nature of the crime, we should carve out an exception to accord special treatment to first-time drug offenders who have received rehabilitative treatment under a state law. We find that, under the plain language of section 101(a)(48)(A) of the Act, we have no authority to make such an exception. Even if we did have such authority, we are unpersuaded by the Ninth Circuit’s decision in *Lujan-Armendariz v. INS*, *supra*, that our interpretation of the statute in *Matter of Roldan* was incorrect. Accordingly, we decline to give the holding in *Lujan-Armendariz v. INS* nationwide application and will continue to apply the rule set forth in *Matter of Roland* [sic] to cases arising outside the jurisdiction of the Ninth Circuit.

Matter of Salazar-Regino (Westlaw publication page reference not available). Counsel’s argument that the reasoning set forth in *Lujan* should be applied to the applicant’s case is clearly erroneous in light of the above precedent decisions and law.

Counsel additionally argues that section 212(a)(2)(A)(ii) of the Act excuses the applicant’s possession of marijuana conviction. See *Motion to Reconsider* at 8-9. Section 212(a)(2)(A) states:

- (A) Conviction of certain crimes. –

- (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
 - (II) 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.

- (ii) Exception. – **Clause (i)(I)** shall not apply to an alien who committed only one crime if –
 - (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(a)(2)(A) of the Act (emphasis added). Counsel’s argument that section 212(a)(2)(A)(ii) of the Act applies to the applicant is clearly flawed. The exception outlined in section 212(a)(2)(A)(ii) applies only to a crime relating to moral turpitude, as outlined in clause **(i)(I)** of section 212(a)(2)(A). *Id.* The exception does not apply to the clause **(i)(II)** controlled substance crime under which the applicant was found inadmissible.

Lastly, counsel asserts that the applicant has established extreme hardship to his qualifying relatives, and is eligible for a waiver under section 212(h) of the Act. In support of his assertion, the applicant states that his “conviction resulted merely in withheld adjudication and a fine. Conditional discharge of a conviction of Unlawful Possession of Marihuana does not equate with conviction of possession of cocaine or of drug paraphernalia possession under New York or federal law.” *Motion to Reconsider at 10.* The applicant provides no other arguments or facts regarding hardship to his U.S. citizen spouse or children and he makes no reference to the analysis of hardship in the

AAO Decision. Thus, as noted in the previous AAO Decision, the applicant failed to establish the requisite degree of hardship to qualify for a waiver under sections 212(h) and (i) of the Act.

In proceedings for applications for waiver of grounds of inadmissibility under sections 212(h) and (i), the burden of establishing that the application merits approval remains entirely with the applicant. *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984). Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The AAO's order dated October 22, 1998 dismissing the appeal is affirmed.