U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: FRANKFURT Date: NOV 14 2005

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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 Officer in Charge, Frankfurt (OIC), and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The applicant is a thirty-three-year-old native and citizen of Switzerland who 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 a crime relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802), and under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having misrepresented material facts in connection with his entry into the United States on several occasions in order to obtain a visa or gain entry into the United States. The applicant submitted an Application for a Waiver of Grounds of Excludability (Form I-601) as the spouse of a United States citizen seeking waivers pursuant to section 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) and (i), so that he may immigrate to the United States and reside here with his spouse.

The OIC concluded that the applicant had failed to establish that he was eligible for a waiver of inadmissibility, finding that the evidence did not demonstrate that denial of the waiver would result in extreme hardship to his U.S. citizen spouse. *See Decision of the Officer in Charge,* dated January 23, 2004. Accordingly, the applicant's request for a waiver was denied.

On appeal, counsel contends that the OIC erroneously concluded that the applicant was inadmissible to the United States.[1] Counsel contests both grounds under which the applicant was found to be inadmissible. First, with regard to the ground of inadmissibility relating to his drug offense, counsel contends that the applicant's criminal proceedings involved a deferred entry of judgment and that under precedent decisions of the Ninth Circuit Court of Appeals (Ninth Circuit), and the Board of Immigration Appeals (BIA), the applicant does not stand convicted of a criminal offense, and therefore has no need for a section 212(h) waiver relating to a criminal ground of inadmissibility. *Brief in Support of Appeal,* dated April 14, 2004. Second, counsel asserts that because the applicant is not considered to have a conviction for immigration purposes, and likely received advice to the effect that he was no longer convicted, he was justified in not disclosing an arrest or conviction in his various applications for admission to the United States. *Id.* at p. 8. Consequently, counsel argues, he is not inadmissible on the basis of having committed a material misrepresentation. Finally, counsel asserts that the OIC erred in finding that the applicant had not established extreme hardship to his U.S. citizen spouse. Counsel urges that the decision of the OIC be withdrawn and the appeal sustained. *Id.*

Before addressing the merits of counsel's specific arguments on appeal, the AAO will briefly review the applicant's immigration and criminal history, as well as the procedural history underlying the waiver application. According to the record, the applicant has entered the United States under the Visa Waiver Program (VWP) on numerous occasions, beginning in July of 1995. Following one of those entries, the applicant was arrested in Anaheim, California, on June 12, 1996, for being in possession of a narcotic controlled substance, to wit, cocaine, in violation of section 11350(A) of the California criminal code. According to the applicant, he pled guilty and was required to attend rehabilitation and counseling sessions. As a result, the case was ultimately dismissed. The applicant continued to enter the United States after this time, generally under the VWP, although the record reflects that he also obtained a student visa and entered

[1] The record reflects that the applicant was unrepresented during the proceedings before the OIC, but has pursued the appeal with the assistance of counsel.

with that visa during 1998 and 1999, having enrolled in a masters program at Webster University in Irvine, California. The applicant continued to enter the United States under the VWP on various occasions, through December 2001. According to the applicant, it was during these travels that he met his future wife, Rachel Fowler, who moved to Switzerland in 2001. The couple married in Switzerland on October 24, 2001, and has been residing there since that time. The applicant's wife filed a Petition for Alien Relative (Form I-130) on June 4, 2002, which appears to have been approved on January 29, 2003, by the American Embassy in Bern, Switzerland. On the same date of the approval, the applicant filed an application for an immigrant visa with the embassy. He subsequently submitted an Application for Waiver of Inadmissibility (Form I-601) on July 17, 2003, seeking to waive the criminal and misrepresentation grounds of inadmissibility.

As previously noted, the arguments raised by counsel regarding the grounds of inadmissibility were not presented to the OIC and have been raised for the first time on appeal. Because the applicant was unrepresented at the time of the proceedings before the OIC, the AAO will consider the arguments being raised on appeal. The AAO will now review the evidence and legal arguments contained in the record and conduct its own analysis of the issue pursuant to its de novo authority. *See Spencer Enterprises, Inc. v. United States,* 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The entire record has been considered in rendering a decision on the current appeal.

Counsel's Argument that the Applicant is Not Inadmissible for Having Been Convicted of a Crime Relating to a Controlled Substance

The applicant's arrest, which gives rise to the criminal ground of inadmissibility and the subsequent request for a waiver, occurred in June of 1996, when the applicant was arrested for possession of a narcotic controlled substance, in violation of section 11350(A) of the California Health and Safety Code. According to the applicant's statement, the substance involved was cocaine, and he was "sentenced by a Judge at Fullerton Court (Orange County) to attend a rehabilitation program." *See Applicant's Statement Accompanying the Form I-601,* undated.

In the brief submitted in support of the appeal, counsel requests that the AAO grant leave "to submit additional information from the Court records in Anaheim, California, when they become available to his attorney." *Brief in Support of Appeal,* dated April 14, 2002. To date, no additional documents have been received by the AAO. Further, counsel also stated that pending the receipt of the documents, the brief would describe "both aspects of the statutory scheme in California which were most likely followed in this matter." *Id.* at p. 2. According to counsel, the provisions that most likely governed the applicant's criminal proceedings were "Penal Code § 17" and "Penal Code § 1000," each of which is described below in greater detail.

According to counsel, California Penal Code § 17 sets forth the State's treatment of criminal convictions as felonies and misdemeanors. In the applicant's case, counsel contends that subsection 17(b)(4), allows an offense to be treated as a misdemeanor when the prosecuting attorney files a complaint specifying that the offense is a misdemeanor, and no objection is made to its treatment as a misdemeanor. *Id.* at pp. 2-3. Counsel further sets forth the other section that he claims was likely applied to the applicant's case as section 1000 of the California Penal Code. This provision is available for violations of various provisions of the

Health and Safety Code, including section 11350, and authorizes a prosecuting attorney, with the consent of the court and affected party, to file a motion with the court which is accompanied by a statement of the basis of the defendant's eligibility under the law, and authorizes a hearing for a deferred entry of judgment in those situations where the prosecutor asserts that the defendant qualifies under the law. *Id.* at p. 4. Counsel also quotes from section 1000(d), which he asserts provides that "[a] defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to section 1000.3."[2] *Id.* at p. 5.

In addition to referencing the provisions of law he believes to be relevant to the applicant's case, counsel also argues that that the applicant does not stand convicted of a crime for immigration purposes, based upon a precedent decision of the Ninth Circuit. Specifically, counsel asserts that consideration of the case is controlled by the Ninth Circuit's decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and its treatment of a conviction expunged pursuant to a deferred adjudication statute. The AAO takes issue with various aspects of counsel's assertion, but before addressing counsel's argument in greater detail, it is necessary to review the state of the law on deferred adjudications and other rehabilitative measures available in the course of criminal proceedings and their subsequent treatment in immigration adjudications.

The Current State of Immigration Law Regarding Expungements and Vacated Convictions

Since the time of the applicant's arrest and conviction in 1996, the law regarding the effect of post-conviction remedies and other rehabilitative measures and their effect on an individual's immigration status has evolved considerably. Congress, through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted a federal definition of conviction for immigration purposes. Prior to that time, no such definition existed, and generally the case law and Attorney General guidance treated expungements in one of two principal ways, depending upon whether or not the conviction was a narcotics related offense.[3] Generally non-narcotics offenses that were considered to be crimes involving moral turpitude and had been expunged were found not to be convictions for immigration purposes. *See In re Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967); *In re G-*, 9 I&N Dec. 159 (BIA 1960; A.G. 1961). Second, aliens who had been convicted of what then section 241(a)(11) termed "narcotics offenses," such as the distribution of marijuana, were subject to deportation even if their conviction had been expunged. *See In re A-F-*, 8 I&N Dec. 429 (BIA, A.G. 1959).[4]

More recently, the BIA decided *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999), which involved an alien who had had his guilty plea vacated pursuant to section 10-2604(1) of the Idaho code, a state rehabilitative statute. The BIA in *Roldan* rejected the alien's argument that he no longer stood convicted of a crime for immigration purposes and was therefore no longer removable, holding that, "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is

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[2] Counsel does not elaborate on the provisions of section 1000.3.

[3] The Attorney General has recently clarified that expungements is a term that, in the context of convictions for immigration purposes, encompasses the "process of clearing a defendant's record of a prior conviction." *In Re Marroquin-Garcia,* 23 I&N Dec. 205 (A.G. 2005). In this regard, the Attorney General has found that it includes both deferred adjudications of convictions such that a judgment is never entered, or situations in which a court vacates or sets aside a judgment of conviction under a rehabilitative statute. *Id.*

[4] As will be discussed in greater detail, an exception to the ineffectiveness of expungements against federal narcotics offenses for simple possession arose from the effects of the Federal First Offender Act (FFOA), through which Congress sought to ameliorate the effects of a conviction for simple drug possession offenses upon the successful completion of probation. As noted in the Attorney General's decision, under the FFOA, no consequences, including deportation, attach to the conviction following an expungement of a qualifying federal offense. *See In Re Marroquin, supra* at p. 709.

considered convicted for immigration purposes." *Matter of Roldan,* at p. 528. The Ninth Circuit, took issue with the BIA's decision in *Roldan,* and according to counsel, the decision in *Lujan-Armendariz* requires that "in this Circuit, therefore, *Matter of Manrique*, Interim Decision 3250, 21 I&N Dec. 58 (BIA 1995), mandates the criteria for implementation of the policy of leniency in immigration proceedings under 18 U.S.C. § 3607 to be extended to aliens prosecuted under state law..." *Brief in Support of Appeal,* at p. 7.[5]

The BIA has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Matter of Pickering,* at p. 624.

The Attorney General simultaneously issued two precedent decisions earlier this year to discuss the effect of such expungements of criminal convictions on immigration proceedings in light of the federal definition of conviction enacted by Congress through IIRIRA, and to resolve confusion in the previous BIA caselaw through the issuance of decisions in two cases certified to the Attorney General for resolution. The principal decision, previously mentioned, is *In Re Marroquin-Garcia,* 23 I&N Dec. 205 (A.G. 2005). In that decision, the Attorney General addressed the effect of an expungement of the alien's firearms conviction pursuant to section 1203.4 of the California Penal Code. The Attorney General was reviewing the decision of the BIA in *In re Marroquin* [redacted] slip op. at 2 (BIA Feb. 21, 1997) ("*Marroquin*"). The alien in *Marroquin* had been placed in deportation proceedings on the basis of his state firearms conviction. The alien appealed his order of deportation to the BIA, and obtained, during the pendency of those proceedings, an expungement of his conviction pursuant to section 1203.4(a) of the California Penal Code. In his appeal to the BIA, Marroquin relied upon the BIA's decision *In re Luviano*, 21 I&N Dec. 235 (BIA 1996) ("*Luviano*"). In *Luviano*, which had been certified to the Attorney General and was pending at the time of the BIA's decision in *Marroquin,* the BIA held that an alien whose conviction for a non-narcotics related offense had been expunged pursuant to section 1203.4(a) of the California Penal Code had not been "convicted" for purposes of section 241(a)(2)(C) of the INA. As explained in the Attorney General's decision in *Marroquin,* the BIA chose not to await the Attorney General's decision in *Luviano,* and held that the new federal definition of conviction did not affect its prior holding on *Luviano,* and consequently, that decision was controlling in its consideration of Marroquin's case. As a result, the BIA held, consistent with *Luviano*, that Marroquin was not deportable where his firearms conviction had been expunged pursuant to state law. The BIA's decision in *Marroquin* was also certified to the Attorney General and the Attorney General issued decisions in both cases earlier this year.

During the pendency of *Luviano* and *Marroquin* before the Attorney General, the BIA decided the case of *Matter of Roldan, supra*, which addressed, in the context of a narcotics conviction, the issue of expunged convictions and whether they survived for immigration purposes in light of the new definition of conviction contained in the Act. In *Roldan,* the BIA overruled its previous decisions in both *Lujan* and *Marroquin*, and

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[5] Counsel lists the criteria as requiring that: 1) the alien is a first offender; 2) he has pled to or been found guilty of the offense of simple possession of a controlled substance; 3) the alien has not previously been accorded first offender treatment; and 4) the court has entered the order pursuant to a state rehabilitative statute under which the judgment had been deferred or the proceedings dismissed after probation. *Counsel's Brief in Support of Appeal,* at p. 7.

held that an alien would be considered to be convicted under the Act "upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." *Roldan,* at 523. The BIA made no distinction between deferred adjudications of guilt and actions to set aside the conviction through procedures to expunge or vacate the conviction. The BIA, therefore, was making a marked departure from its previous attempts to distinguish between measures intended to ameliorate the consequences of a conviction, finding that it was Congress' intention to eliminate such distinctions and have consistency in the determination of when an alien stood convicted for immigration purposes. However, subsequent to its ruling, the Ninth Circuit interposed its own views through its decision in *Lujan-Armendariz.* which is the decision that that the applicant's counsel relies upon to support his claim that his client no longer stands convicted for immigration purposes.

The Post-*Roldan* Treatment of Deferred Adjudications and Post Conviction Rehabilitative Measures Especially as to Simple Possession Drug Offenses

The Ninth Circuit, in *Lujan-Armendariz,* considered the BIA's holding in *Roldan.* The court, while expressing some doubt about whether the Act's definition of conviction had the effect of having convictions survive for immigration purposes regardless of post-conviction ameliorative measures, held that at least as to convictions entered under state equivalents of the FFOA, such convictions did not survive for immigration purposes.[6] The BIA has declined to follow *Lujan-Armendariz* in cases outside of the Ninth Circuit. For example, the BIA held in *In Re Salazar-Regino* that except for cases arising in the Ninth Circuit, it would treat first time drug possession offenses as convictions for immigration purposes. Indeed, the Attorney General in his recent decision in *In Re Marroquin,* expresses considerable doubt regarding the Ninth Circuit's decision, stating:

> Because this case does not involve a conviction for a narcotics offense and a subsequent rehabilitation either under the FFOA or state law, I do not decide whether the Ninth Circuit was correct in concluding that the new definition of conviction did not repeal the FFOA, and therefore, as the Ninth Circuit held, equal protection guarantees require that an alien with a state conviction who would have been eligible for FFOA relief had the conviction been rendered in federal court receive the same treatment as a alien with a federal conviction. I do note, however, that at least three circuits disagree with the Ninth Circuit. *See Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003)(concluding that "it seems plain that rational-basis review is satisfied here"); *Gill v. Ashcroft*, 335 F.3d 574, 579 (7th Cir. 2003) (finding Ninth Circuit's decision "untenable" and declining to follow it); *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697-99 (8th Cir. 2002) (disagreeing with Ninth Circuit and declining to address possible repeal of FFOA by IIRIRA because no equal protection violation for treating alien convicted under state law differently from alien convicted under federal law where the sentences were dissimilar and Congress could have intended to provide relief only for federal convictions, over which Congress would have control). Indeed, although the BIA acquiesces in the decision in the Ninth Circuit, it correctly declines to follow it outside of that circuit.
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> *In Re Marroquin,* at p. 717.

[6] The court's holding flowed from its determination that the FFOA had not been repealed and thus equal protection principles mandated recognition of equivalent provisions under state law.

Consequently, for the time being, *Lujan-Armendariz* remains the law within the Ninth Circuit regarding state equivalents of the FFOA. However, as has been demonstrated, the BIA and the Attorney General have expressed considerable doubt regarding the court's holding in that case.

Nevertheless, determining that *Lujan-Armendariz* controls first offender adjudications within the Ninth Circuit does not end the inquiry on the issue regarding the applicant's case, as it is necessary to determine whether counsel has established that the holding in *Lujan-Aremendariz* applies to the applicant's case both as a matter of law and fact. Before addressing those issues, it should be noted that the applicant, who is now contesting the previously made finding of inadmissibility, bears the burden of proof to demonstrate that he is, in fact, admissible. The applicant's burden is set forth in the Act as follows:

> *Whenever any person makes application for a visa* or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, *the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act,* and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, *no visa or other document required for entry shall be issued* to such person, nor shall such person be admitted to the United States *unless he establishes to the satisfaction of the Attorney General that he is not inadmissible* under any provision of this Act.

Sec. 291; 8 U.S.C. § 1361 (emphasis supplied).

Having established that the applicant bears the burden of proof to establish that he is not inadmissible due to his California narcotics offense, the AAO turns next to whether counsel is correct in asserting that the *Lujan-Armendariz* decision applies to the adjudication of the applicant's case both as to the applicability of Ninth Circuit law, and as to whether the facts in the record establish that the applicant's criminal offense received treatment under a state equivalent to the FFOA.

On the first issue, it has previously been noted that the Attorney General has questioned the holding and has indicated that it would not be applied to cases arising outside of the jurisdiction of the Ninth Circuit. *In Re Marroquin, supra,* citing *In Re Salazar, supra at* p. 233. The question then, is whether counsel has established that the case arises within the jurisdiction of the Ninth Circuit. Although the applicant's narcotics offense arose in California, it is not clear that the case is before the AAO based on an adjudication of case arising within the Ninth Circuit. The applicant's case was adjudicated in Frankfurt, Germany in the course of an overseas visa application. Counsel has not offered an argument as to why, in such a context, the adjudication of the case should be controlled by *Lujan-Armendariz.* If anything, it would appear to be an adjudication not arising within a particular circuit, arising as it does from an overseas adjudication. It would appear that such a case would be governed only by the interpretation of the BIA and the Attorney General, unaffected by the law of any particular circuit. As such, the governing case law would be *Matter of Roldan, and In Re Salazar-Regino, supra.*

Even assuming that the applicant had established that Ninth Circuit law governs the AAO's review of the adjudication, it is nonetheless necessary for the applicant's counsel to establish that the circumstances surrounding the applicant's conviction demonstrate that he was convicted under the California state equivalent of the FFOA. The evidence in the record is inadequate. Counsel has provided excerpts from three provisions of the California Penal Code. The first subsection, 17, is presumably offered to demonstrate

that the applicant's conviction was charged as a misdemeanor, suggesting, through the highlighted provisions, that the prosecuting attorney had filed a complaint specifying that the offense is a misdemeanor. However, assuming that under California law, to constitute a FFOA equivalent, the offense must be charged as a misdemeanor, counsel has not supplied a copy of the complaint demonstrating that the applicant was charged with a misdemeanor. The second subsection set forth by counsel is California Penal Code § 1000, which is a California statutory provision authorizing a deferred entry of judgment with respect to certain violations of law, upon the agreement of all parties and the court, and an assertion by the prosecuting attorney that the defendant qualifies. At that point, the matter may be set for a deferred entry of judgment. Again, no evidence exists in the record demonstrating that this procedure was followed in the applicant's case and that it, in fact, resulted in a deferred entry of judgment. Even if it had, however, the AAO has not been persuaded that the treatment of the applicant's case was necessarily handled through the state equivalent of the FFOA. For one thing, looking at the provision examined by the Ninth Circuit in *Lujan-Armendariz,* it appears that the statutory provision at issue in that case was an Arizona statute, thus it was not dealing with the same statutory provisions that counsel has raised, and counsel has offered no authority that demonstrates that the provisions offered have been judged to be the equivalent of the FFOA. Also, while counsel's brief sets forth the provisions of the criteria of the FFOA's provisions, it does not compare those to the provisions under which the applicant's California offense was handled. Moreover, as noted by the BIA in its decision in *In Re Salazar-Regino,* there is no right or entitlement to FFOA treatment, and the federal statute's treatment is quite generous compared to that of comparable provisions in many states. *In Re Salazar-Regino,* at p. 232. Thus, it is not necessarily the case that the applicant was convicted under a state provision comparable to the FFOA. Indeed, the California statutory provisions asserted by counsel to be applicable in the instant case are different from the statutory provision identified in *In Re Marroquin,* as being the California provisions eligible for consideration as the FFOA equivalent and thus subject to the *Lujan-Armendariz* precedent in cases arising within the Ninth Circuit[7]

Thus, even if in this case the AAO is bound by *Lujan Armendariz*, it is still necessary for counsel to persuade the AAO that the statutory provision at issue here merits similar treatment. The fact that the applicant's counsel sought leave to submit documents that were reportedly being sought from the California courts, but has failed to submit such documents causes the AAO to have further doubts about whether the facts support counsel's contention.[8] Consequently, the AAO finds that the applicant has not met his burden of establishing that he is not inadmissible owing to the fact that he has not been convicted for immigration purposes.

Counsel's Argument that the Applicant is Not Inadmissible and Did Not Make Material Misrepresentations In the Connection with his Efforts to Be Admitted to the United States

As to the material misrepresentation ground under which the applicant was found inadmissible, counsel makes an argument that is linked to his claim that the applicant does not stand convicted for immigration purposes. Counsel reasons that the applicant does not have a conviction for immigration purposes, and could not have misrepresented any past arrests or convictions, as he believed that none existed. *Brief in Support of Appeal,* at p. 8. Counsel does not offer any support for his assertion other than speculating as to what the

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[7] The statutory provision at issue in that case was section 1203.4 of the California penal code. Absent clarification from counsel that it is a successor provision to section 1000 cited in the instant case, it would appear that there are various expungement type provisions available in California, some of which may not be the state equivalent of the FFOA.

[8] Counsel contends in the brief that "upon the Superior Court granting his motion to withdraw his plea, appellant fit within all of the above criteria." *Brief in Support of Appeal,* at p. 8. However, this appears to be speculation on counsel's part both as to the alleged motion and resulting order, and as to their effect. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

applicant would have been advised pursuant to Penal Code § 1000. Counsel asserts that once the motion to withdraw the plea was granted by the court, "at that point he would have been told pursuant to Penal Code § 1000 that he did not have a conviction and would be free to answer any inquiry accordingly." *Brief in Support of Appeal,* at p. 8. The difficulty with counsel's argument is that it is not supported by any evidence in the record reflecting what advisals were given, if any, to the applicant, nor is it supported by anything in the text of California Penal Code § 1000 in support of counsel's assertions.[9]

The OIC found the applicant inadmissible under section 212(a)(6)(C) based upon his failure to disclose, and his misrepresentation of his criminal record when applying for entry to the United States. *Decision of the Officer in Charge,* dated January 23, 2004. Although section 212(a)(6)(C) encompasses both fraud and material misrepresentation, they are distinct offenses, the principal difference being that fraud requires that the alien make a make a false representation with knowledge of its falsity with an intent to deceive and the misrepresentation must be acted upon and believed. In contrast, material misrepresentation consists of a false misrepresentation "willfully made, concerning a fact willfully made, concerning a fact which is relevant to an alien's visa entitlement. It is not necessary that an 'intent to deceive' be established by proof or that the officer believes and acts upon the false representation. *Foreign Affairs Manual 40.63 N3, citing Matter of S and B-C*, 9 I&N 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N 288 (1975).[10]

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States, 485 U.S. 759 (1988)* In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at p. 771. In making a determination as to whether a misrepresentation has been made, it is not necessary to find that the alien intended to deceive the immigration officials. Rather, what must be shown is that the alien intended to commit fraud and had the requisite mental intent, or that the alien willfully misrepresented a material fact. The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary. *Mwongera v. INS,* 187 F.3d 323 (3rd Cir. 1999).

Counsel's position in the instant case is that because he had a reasonable belief that he did not stand convicted, he could not have engaged in a material misrepresentation. However, it is not at all clear that the evidence supports counsel's assertions in this regard. First, while counsel asserts that based on the statutory provisions and the advisals provided to him, the applicant had a reasonable basis to believe that he did not stand convicted, this decision has previously determined that counsel has submitted insufficient evidence on this point. Second, an examination of the sequence of events in connection with the applicant's attempts to enter the United States, casts doubt on whether the applicant actually and reasonably believed that he did not need to disclose his arrest and conviction. As noted earlier, the applicant has made numerous entries and attempted entries into the United States, with the majority of those taking place subsequent to his June 1996 arrest. Most of those applications for admission occurred pursuant to the VWP. The applicant's statement submitted in support of the waiver indicates that he believed that he had no record whatsoever of a conviction, owing to his successful completion of a rehabilitation program. *See Statement Submitted in Support of I-601,* undated. The record reflects that on or about January 29, 2003, in connection with his immigrant visa

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[9] While the record does contain a statement from the applicant submitted in connection with his application for an immigrant visa asserting that he was assured by the judge and the public attorney that he would have no arrest or criminal record, this is unsupported by any objective evidence such as a transcript of those proceedings or a written copy of any written advisals.

[10] This case set forth the commonly referenced definition of materiality as existing in situations where: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

interview, the applicant was requested to provide the California conviction record showing the disposition of the controlled substance charges. It would seem that such records would have been submitted had they substantiated the applicant's version of events. However, the records had not been submitted as of the time of the OIC's decision a year later in January of 2004, and they have not been submitted as of the time of this decision in connection with the applicant's appeal.[11]

Furthermore, an examination of statements taken from the applicant in connection with his post-conviction VWP refusals indicates that the applicant believed that he should have disclosed his previous criminal history. The record contains documents relating to the applicant's attempt to enter the United States on February 17, 2002, under the VWP. The applicant filled out the questionnaire accompanying the Form I-94, the second question of which asked specifically whether he "had ever been arrested or convicted of an offense or crime...related to a controlled substance." The question asks applicants for admission to disclose either an arrest or a conviction. While it is somewhat unpersuasive that the applicant felt free to deny an arrest as well as a conviction given that they are two distinct acts, the applicant explained in a statement provided to the officer conducting the secondary inspection that he believed that he did not have any arrests or convictions. This belief was allegedly based on the advisals received from the judge, and therefore he no longer considered himself to have been arrested. *Statement of Fillippo Pedotti,* dated February 17, 2002. The record further reflects that following the completion of the secondary inspection and the refusal, the applicant was advised that he had been found inadmissible to the United States and that "he would need a visa for any further entries to the United States." *See Withdrawal of Application for Admission (Form I-275),* dated February 17, 2002.

Although it is plausible that the applicant had been under the impression that he no longer had a conviction for immigration purposes prior to the attempted entry on February 17, 2002, it is completely implausible that he would be under that impression after that date, yet the record reflects that the applicant thereafter attempted to enter the United States again without disclosing his criminal history, and without disclosing the fact that he had previously been refused admission to the United States. The record contains documents relating to a subsequent attempt by the applicant to enter the United States on April 14, 2002. On that date, the applicant again completed the VWP questionnaire and denied that he had ever been arrested or convicted for a controlled substance offense, (Question B); denied that he had ever been excluded from the United States, (Question C), or that he had been denied a visa or entry into the U.S. (Question F). *See I-94/VWP Questionnaire,* dated April 14, 2002. The applicant should have answered affirmatively to all three, or at the very least, two of these questions.[12] He had been refused admission under the VWP two months earlier, and that refusal was related to the ambiguity concerning his criminal violation. Furthermore, the record reflects that the applicant had applied for and was denied a visa prior the April 2002, attempted entry to the United States, a fact that the applicant did not disclose in connection with the attempt to enter under the VWP, but which was reflected in the applicant's passport and discovered by the inspecting officer. *See Statement of Fillippo Pedotti,* dated April 14, 2002; *Withdrawal of Application for Admission,* dated April 14, 2002.[13]

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[11] Although it appears that the applicant did obtain and submit a criminal record check from the State of California Department of Justice, that record check simply shows a disposition of the charges being dismissed in the furtherance of justice and does not speak to the issue of the manner in which the case was disposed of, i.e., whether it was a deferred adjudication that was a FFOA equivalent, or whether it was some of other type of rehabilitative measure that is not an FFOA equivalent. It also does not provide information as to the type of advisals, if any, that the applicant claims to have been given that caused him to deny the existence of an arrest and conviction.

[12] It is somewhat understandable that the applicant might equate an exclusion from the United States with a refusal of entry to the United States encompassed by questions B and C. However, he should have reflected the VWP refusal two months earlier in one of these categories, in addition to reflecting that he had a previous arrest.

[13] The applicant indicated in his statement of April 14, 2002, that he had requested a visa from the American Embassy in Bern, Switzerland, but they had sent his passport back without a visa. Although the applicant indicated that when he inquired, he was informed that he did not require a visa, upon further questioning from the immigration inspector he admitted that he had not disclosed his prior refusal and arrest, when asking whether he required a visa.

Therefore, there appears to be ample evidence that the applicant has been guilty of misrepresentations in connection with his attempts to enter the United States. While the applicant maintains that he had a good faith belief that he did not stand convicted of any offense, the record reflects that the applicant has a history of being less than forthcoming in connection with his applications for admission to the United States. On those occasions when he was thwarted in his attempt to secure admission or a visa, he simply accepts the refusal, returns to Switzerland and seeks admission at a later time. It is possible that the February 2002 application for admission may have been attributable to a misunderstanding, the same cannot be said of the subsequent attempt to secure admission as his previous encounters with immigration and embassy officials had clearly placed him on notice regarding his inadmissibility. Consequently, the AAO finds that the applicant has not established that he is admissible, and that the evidence demonstrates that the applicant is inadmissible on the basis of misrepresentation of a material fact.

Counsel's Argument that the OIC Erred in Finding that the Evidence Failed to Demonstrate Extreme Hardship to the Applicant's United States Citizen Spouse

The final contention made by counsel is that the OIC erred in not granting the applicant's request for a waiver of inadmissibility.[14] The AAO notes that rather than arguing that the applicant had established extreme hardship to his U.S. citizen spouse, counsel appears to be arguing that the OIC should have balanced the equities presented by the applicant against the "harmless and mistaken repeated misstatement made in failing to disclose the previous arrest. *Counsel's Brief in Support of Appeal,* at p. 9. Counsel seems to equate the denial of the waiver, which found that extreme hardship was not shown, to a thinly veiled attempt to punish the applicant's U.S. citizen spouse due to the OIC's disagreement with the legal interpretation of the Ninth Circuit on the issue of the applicant's conviction. *Id.* However, there is no evidence that the OIC's failure to find that extreme hardship was shown was based upon any inappropriate considerations. Although counsel asserts that the evidence in the record demonstrates that the applicant merits a favorable exercise of discretion when balancing the negative factors against the favorable factors, he has not made a convincing argument, or really any argument, that the OIC failed to find extreme hardship in the face of a convincing showing of such hardship.

The OIC, after briefly reviewing the evidence submitted in support of a finding of extreme hardship, determined that the applicant "does not provide evidence that his inadmissibility to the United States will result in hardship beyond the normal difficulties caused by such a bar" and found that the hardship "cannot be considered extreme, and the application must be denied." *Decision of the Officer in Charge,* at p. 4.

Although counsel has not explained how the evidence in the record demonstrated extreme hardship, the AAO will review the evidence in the record. The principal evidence consists of statements from the applicant and his spouse. That evidence indicates that he met his spouse sometime during 1995, during one of his many stays in the United States, and visited her periodically thereafter. The couple married in Switzerland in 2001, "in order to seal our relationship and to make as easy as possible our immigration procedure once we decided to pursue the process." *Statement of Fillippo Pedotti,* dated September 17, 2002. The applicant's spouse states that she has resided in Switzerland since March of 2000, although her original plan in moving to Switzerland was not to live there permanently, but rather, to reside with her spouse and work for two to three years while she learned Italian, her spouse's native language. *Statement of Rachel Fowler Pedotti,* dated

[14] The AAO notes that its previous finding that the applicant remains inadmissible due to his drug possession offense renders the applicant ineligible for a waiver of inadmissibility. *See* Section 212(h) of the Act, 8 U.S.C. § 1182(h). However, the AAO will address counsel's final contention of error in regard to the OIC's adjudication of the waiver in order to address those arguments and in the event of future proceedings relating to this case.

August 26, 2001.[15] The couple asserts that their plan was never to reside permanently in Switzerland, but rather to reside in the United States in order that the applicant's spouse can maintain her ties to her family to whom she is close. The applicant's spouse expresses her pain at the possibility of having to choose between her husband on the one hand and her family and country on the other. She states that she fears never experiencing the American dream of owning a home and raising a family in the United States. The applicant's spouse also states that she will experience hardship on account of not being able to have a wedding in the United States in the presence of her family and her pastor. *Id.* The record also contains evidence, in the form of a letter to the applicant's spouse, of an offer of employment that she has received from her previous employer in the United States. The author of that letter states that he has extended her an offer of employment with his company, Nations First. He anticipates that she would help him to expand the company, but states that she is unable to accept the offer of employment due to the uncertainty of her husband's immigration situation. *See Letter from David B. Mihalczo,* dated October 17, 2003. Presumably, the letter is presented in order to identify additional hardship to the applicants' spouse due to her inability to pursue a possible career advancement. No other evidence has been offered on the issue of extreme hardship to the applicant's spouse.

A waiver of the bar to admission to the United States is dependent upon the alien's showing that the bar imposes an extreme hardship on a qualifying family member. Congress provided this waiver but limited its application. By this limitation, it is evident that Congress did not intend that a waiver be granted merely due to the fact that a qualifying relationship exists. The key term in the provision is "extreme." Therefore, only in cases of great actual or prospective injury to the United States citizen or permanent resident will the bar be removed. Common results of the bar, such as separation, financial difficulties, and such, in themselves are insufficient to warrant approval of an application unless combined with more extreme impacts. *See Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien had established extreme hardship. The factors included the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. In *Matter of Ige,* 20 I&N Dec. 880, 882, (BIA 1994), the BIA held that "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

The only evidence in the record supporting the applicant's request for a waiver consists of the statements submitted by the couple which note the spouse's family ties in the United States and her strong desire to be able to reside in the United States with her spouse and fulfill her dreams of raising her family in her native country. Counsel is presumably asserting that the evidence offered supports the claim that the applicant's spouse would experience extreme hardship. The AAO finds the evidence to be insubstantial and unconvincing. While the AAO has no reason to question any of the assertions contained in the couple's

[15] It appears that the applicant's spouse has, in fact, been employed in Switzerland by a company named HBSC Republic, located in Zurich, Switzerland, as evidenced by her use of facsimile cover sheets from that company which indicates her company e-mail address.

statements, those assertions are insufficient to demonstrate extreme hardship. There are no unique circumstances set forth which would indicate that the hardship that that the applicant may encounter would be considered extreme. If anything, the applicant's spouse appears to have been able to adapt very well to a life with her husband in Switzerland. She has taken steps to learn her husband's native language and has secured employment. She appears to have sufficient skills in her chosen career that she has been offered employment in the United States with the hope of the present owner of that business that she will assist in expanding the company. Although she may not be able to pursue her preferred employment in the United States if she chooses to remain with her husband in Switzerland, the record reflects that she has been able to adapt both personally and professionally to life outside of the United States. While the applicant's spouse does express some distress at being unable to reside close to her family in the United States, and the difficulty of having to choose between a life with her family in the United States, and a life with her husband in Switzerland, this is not the type of hardship that is considered extreme. Separation from family is the type of hardship that is a common result of deportation or exclusion. Moreover, the fact remains that as a United States citizen, the applicants' spouse is free to remain in Switzerland, or she is free to reside in the United States. There is also no restriction on her ability to travel freely between the two countries. Thus, while she may obviously prefer to reside in the United States with both her husband and her other family members, her situation is not one that reflects extreme hardship.

U.S. court decisions have repeatedly held, however, that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the record, when considered in its totality, reflects that the applicant has failed to show that his spouse would suffer extreme hardship if his waiver of inadmissibility application were denied. Having found the applicant ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.