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U.S. Citizenship
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Services

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SEP 07 2007

[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

[REDACTED]

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on March 29, 1990, pled guilty to and was convicted of tampering with a vehicle in violation of section 10852 of the California Vehicular Code (CVC). The applicant was sentenced to 24 months probation and 45 days in jail. On December 2, 1991, the applicant pled *nolo contendere* and was convicted of carrying a concealed weapon on his person in violation of section 12025(B) of the California Penal Code (CPC). The applicant was sentenced to 24 months of probation and 45 days in jail. On April 27, 1992, the applicant pled *nolo contendere* and was convicted of use or under the influence of a controlled substance in violation of section 11550 of the CPC. The applicant was sentenced to 24 months of probation and 90 days in jail. On June 26, 1995, the applicant pled *nolo contendere* to and was convicted of battery in violation of section 242 of the CPC. The applicant was sentenced to 24 months of probation and 30 days in jail. The applicant was apprehended by immigration officers during his detention and was placed into proceedings on June 27, 1995. On June 29, 1995, an immigration judge ordered the applicant removed from the United States. On June 30, 1995, the applicant was removed from the United States and returned to Mexico. One month later, the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant has since remained in the United States. On October 30, 1997, the applicant married his spouse, [REDACTED]. On December 15, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. On September 4, 1998, the Form I-130 was approved. On December 6, 2006, the applicant filed the Form I-212. On November 2, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) and seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to remain in the United States and reside with his U.S. citizen spouse and children.

The director determined that the applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for entering the United States without being admitted after having been removed. The director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The director denied the Form I-212 accordingly. *See Director's Decision* dated February 13, 2007.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act and that he should be granted permission to reenter the United States. *See Counsel's Brief*, dated April 2, 2007. In support of his contentions, counsel submits the referenced brief, an affidavit by the applicant, photocopies of immigration-related documentation, copies of criminal conviction records and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of

- such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.-Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or
 - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.
 - (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record reflects that [REDACTED] is a native of El Salvador who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 2002. The applicant and [REDACTED] have a 15-year old son, a 13-year old daughter, an eleven-year old daughter and a four-year old son who are all U.S. citizens by birth. The applicant and [REDACTED] are in their 30's.

The AAO notes that, on appeal, counsel contends that the director erred in finding the applicant to be inadmissible pursuant to section 212(a)(9)(C) of the Act. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he may have been ordered removed prior to April 1, 1997, must have unlawfully reentered or attempted unlawful reentry after April 1, 1997, the date of enactment of the provision. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs* dated June 17, 1997. The AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his unlawful entry into the United States occurred prior to April 1, 1997. However, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

On appeal, counsel contends that the applicant's convictions do not render him inadmissible under the Act. Counsel contends, and the AAO finds, that the applicant's conviction for tampering with a vehicle is not a crime involving moral turpitude because the crime does not reflect an offense that could be considered to be depraved or base or one that contains an element of fraud. Counsel contends, and the AAO finds, that the applicant's conviction for carrying a concealed weapon is not a crime involving moral turpitude because it is an act licensed by the state and cannot be considered to be depraved or base or one that contains an element of fraud.

On appeal, counsel contends that the applicant's conviction for use/under the influence of a controlled substance is no longer a conviction for immigration purposes because it has been expunged. Counsel contends that pursuant to the August 1, 2000 decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th 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, the AAO finds *Lujan* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).¹

The Ninth Circuit 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 removed 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

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).

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 (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* supersedes *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 would have qualified for treatment under the FFOA for his use/under the influence of a controlled substance conviction. 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 a controlled substance and that he was not previously accorded first offender treatment under any law. Finally, the applicant submitted evidence that a Los Angeles County, Superior Court of California has entered an order pursuant to section 1203.4 of the CPC, under which the use/under the influence of a controlled substance criminal proceedings against the applicant were dismissed after completion of his sentence.

Counsel has established that the applicant was not "convicted" for immigration purposes in regard to his use/under the influence of a controlled substance conviction. Thus, the applicant's use/under the influence of a controlled substance conviction does not render him inadmissible pursuant to section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) of the Act.

While the applicant's convictions for tampering with a vehicle, carrying a concealed weapon and use/under the influence of a controlled substance do not render him inadmissible under a separate ground of inadmissibility under the Act, the AAO finds all three convictions are negative factors to be given weight in the exercise of discretion in the present proceeding.

The AAO notes that, on appeal, counsel contends that *none* of the applicant's convictions make him inadmissible under the Act. Counsel, however, ignores the applicant's conviction for battery, which renders him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The applicant was convicted of battery in violation of section 242 of the CPC, which provides:

A battery is any willful and unlawful use of force or violence upon the person of another.

The record also reflects that the applicant was convicted of battery against [REDACTED] who was the mother of his children and his live-in girlfriend at the time.

On appeal, counsel contends that the director did not take into account all of the applicant's equities, specifically his evidence regarding reformation and rehabilitation and did not consider the hardship to his U.S. citizen spouse and children. Counsel asserts that the director failed to consider the emotional and economic hardship that would be visited upon the applicant's wife and children if the applicant were forced to return to Mexico alone. Counsel also asserts that the director failed to consider the applicant's compelling and ample evidence of reformation and rehabilitation from his difficult past, including evidence that he has not been convicted of a crime since June 1995, and that he has settled down and become a responsible and law-abiding family man. Counsel asserts that the director failed to consider that the applicant has been gainfully and steadily employed for many years and that almost twelve years have elapsed since his removal in June 1995. Counsel asserts that the director failed to consider that the applicant has resided in the United States for almost twenty years, since July 1987.

The applicant, in his affidavit, asserts that he first came to the United States in July 1987 and that he could not remain outside the United States after his June 1995 removal because his then live-in girlfriend, [REDACTED] was pregnant and he had two other children in the United States. He states that he saw no job prospects in Tijuana, Mexico. He states that the turning point in his life came after his 1995 conviction for battery against [REDACTED]. He states that he turned his life around by marrying [REDACTED] establishing a home and having children with her, which gave him the anchor and sense of purpose that he desperately needed. He states that he has not been arrested since 1995 and that he has also been steadily employed since his return to the United States. He states that he and his wife are able to provide a stable home to their children and that the children are doing well in school. He states that his church is affiliated with the Salvation Army and that from time to time he visits nursing homes in the area. He states that his separation from his children would have a devastating effect on him and his children. He states that, if he had to return to Mexico, the family has decided that his wife and children would remain in the United States for the sake of the children's future because there is only hardship and privation in Mexico. He states that he does not know whether his wife would be able to support the children with her part-time earnings. He states that they would eventually lose their home because his wife would be unable to meet the monthly mortgage payments. He states that without his guidance his children's futures would be in peril.

A letter from the applicant's Pastor states that, even though he did not know the applicant before his reformation, he is a changed man who is working very hard to change his past and that he deserves all the opportunities that our society and the law have to offer.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would

condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The 7th Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, the applicant's U.S. citizen children, the absence of any criminal record since 1995, his steady employment, his work in the community and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's illegal reentry into the United States after having been removed, his inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act for a crime involving moral turpitude, and his convictions for tampering with a vehicle, carrying a concealed weapon and use/under the influence of a controlled substance.

The applicant in the instant case has multiple criminal and immigration violations. The AAO finds that the applicant's marriage, the birth of his two youngest children, his steady employment, his work in the community and the approval of his immigrant petition occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from them must be accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.