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U.S. Citizenship
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FILE: [REDACTED]
XVN 89 001 1065

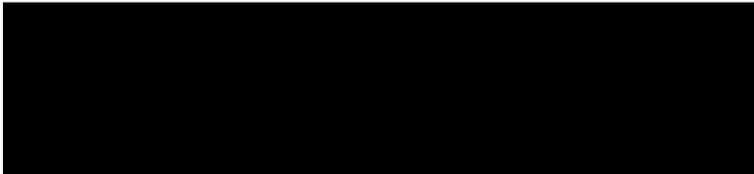
Office: California Service Center

Date: MAY 30 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center. The matter was remanded by the Administrative Appeals Office (AAO). The application was then denied by the Director, California Service Center, and is before the AAO on appeal. The appeal will be sustained.

The director denied the application because the applicant had been convicted of a crime involving a controlled substance, which rendered him inadmissible to the United States. On appeal, counsel maintains that the applicant does not stand convicted of the offense.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act.

Based on a report of the Criminal Justice Information Services Division, Federal Bureau of Investigation, the applicant was arrested on March 8, 1988 in Los Angeles for *Possess/Purchase Narcotic Controlled Substance for Sale*. The report shows the applicant was then convicted of *Possess Narcotic Controlled Substance for Sale*, section 11351 of the California Health and Safety Code (CHSC).

On appeal, counsel provides the actual court record which demonstrates that, although the original charge related to section 11351 of the CHSC, the applicant was allowed to plead to section 11350, *Possession of Controlled Substance*, case number [REDACTED] on April 5, 1988. He was sentenced to 180 days of confinement in the county jail, and three years of probation. The court record also indicates the conviction was vacated and the case dismissed pursuant to section 1203.4 of the California Penal Code on December 17, 1997.

The question remains, however, as to whether this does not constitute a conviction. It is noted that the documents mentioned above do refer to a plea and a finding of guilt. 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.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 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. Any subsequent action that overturns a conviction, other than on the merits of the

case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

Counsel contends that the applicant does not stand convicted of a controlled substance offense pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The Ninth Circuit Court of Appeals stated in that case 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.

Since this case arises in the Ninth Circuit, *Lujan* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).¹

Lujan holds that the definition of "conviction" at § 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA) or the rule that no alien may be deported based on an offense that could have been tried under the FFOA, but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute. *Lujan* at 749.

The Ninth Circuit *Lujan* decision explained that:

The [FFOA] is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. The [FFOA] allows the court to sentence the defendant in a manner that prevents him from suffering any disability imposed by law on account of the finding of guilt. Under the [FFOA], the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant's having committed the offense. The [FFOA's] ameliorative provisions apply for all purposes.

Id. at 735. To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), the Ninth Circuit rejected, on equal protection grounds, the rule that only expungements under exact state counterparts to the FFOA could be given

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*, *supra*.

effect in deportation proceedings. “[U]nder *Garberding*, persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the [FFOA] if they had been prosecuted under federal law.” *Lujan* at 738 (citing *Garberding* at 1190).

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.

In this case the applicant was found guilty of simple possession. He was not convicted of any other law relating to controlled substances, and was not previously accorded first offender treatment. Finally, the court dismissed the criminal proceedings after the completion of probation. The applicant, therefore, qualifies for first offender treatment under the state equivalent of federal law. As such, no legal consequences may be imposed as a result of the applicant’s having committed the offense, and he cannot be considered to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she is *admissible* to the United States under the provisions of section 210(c) of the Act, 8 U.S.C. § 1160, and is otherwise eligible for adjustment of status under this section. 8 C.F.R. § 210.3(b)(1). **There are no** known grounds of inadmissibility. The director shall determine if the applicant qualifies for temporary residence on account of agricultural employment, and complete the adjudication of the application.

ORDER: The appeal is sustained.