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**[illegible] deleted to prevent [illegible] invasion of personal privacy**

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES, CALIFORNIA Date:

IN RE: [redacted]

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

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, Director
Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Los Angeles, California and 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 entered the United States without lawful admission in 1973. The applicant is married to a U.S. citizen and is the beneficiary of an approved petition for alien relative. The applicant was found to be inadmissible to the United States under § 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 being under the influence of a controlled substance within seven years of two or more separate convictions of being under the influence of a controlled substance. The applicant's controlled substance conviction was expunged in a Pico Rivera, California municipal court on February 13, 1996, pursuant to § 1203.4 of the California Penal Code. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his spouse and children.

The district director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility and denied his application accordingly. On appeal, counsel proposes two bases for granting the waiver application: first, that the applicant's unlawful conduct occurred over fifteen years ago, and the applicant has been rehabilitated; and second, that pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the expungement of his conviction record renders him not convicted for federal immigration purposes, and thus not inadmissible. Since this case arises in the Ninth Circuit, *Lujan* is controlling. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).[1]

The record reflects that on May 5, 1986, the applicant was convicted under California Health and Safety Code §§ 11550 and 11550(b). The former charge was for being under the influence of a controlled substance, while the latter was for being convicted of being under the influence of a controlled substance within seven years of two or more separate convictions of the same offense. The district director pointed out that, in order to qualify for a waiver pursuant to § 212(h) of the Act, the applicant must have been convicted of a single offense of simple possession of 30 grams or less of marijuana. He concluded that the Act provides for no other waivers to the applicant's ground of inadmissibility.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (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 –

[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).

> (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 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.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The § 212(h) waiver to which counsel refers in her brief on appeal is available only to individuals found inadmissible pursuant to § 212(a)(2)(A)(i)(I) of the Act. The applicant, however, was found inadmissible under § 212(a)(2)(A)(i)(II) of the Act; thus, he is ineligible for the waiver for persons whose conduct occurred over fifteen years ago.

Section 212(h) of the Act also provides, in pertinent part, that:

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and 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* . . . . (emphasis added.)

Counsel states that the applicant was convicted of a single count of possession of a controlled substance in 1986. The record reflects that this is not correct, and even if it were, "controlled substance" is not equivalent to "marijuana," which is the only substance allowed if the above waiver is to apply. The record reflects that

the applicant was convicted under California Health and Safety Code §§ 11550 and 11550(b). The latter charge, by definition, requires a finding that the applicant had been convicted on two separate previous occasions of being under the influence of a controlled substance. Thus, it cannot be concluded that the applicant committed a single crime, and the above waiver for simple possession of a small amount of marijuana does not apply.

Counsel also refers to *Lujan*. The Ninth Circuit Court of Appeals stated in *Lujan* that "if (a) person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Id.* at 738. Again, it is noted that the applicant necessarily had been convicted more than once of drug-related offenses; therefore, despite the fact that the applicant's 1986 convictions were expunged, *Lujan* does not apply to the facts in this case.

The Act makes it very clear that the § 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of more than one offense of being under the influence of an unnamed controlled substance. Thus, the district director correctly concluded that the applicant is statutorily ineligible to be considered for a § 212(h) waiver.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen wife or whether he merits the waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under § 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

**ORDER:** The appeal is dismissed.