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U.S. Citizenship and Immigration Services

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JUN 01 2007

[redacted]

FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [redacted] (Mrs. [redacted], a native and citizen of Mexico, was found to be inadmissible to the United States pursuant to 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 involving a controlled substance. She is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant filed an Application for Waiver of Ground of Inadmissibility (Form 1-601) on June 27, 2003, seeking a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen spouse (Mr. [redacted]nd four U.S. citizen children.

The District Director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act and denied her application accordingly, stating that "[t]he evidence in the file reveals that you were convicted for attempted possession of controlled substance (cocaine) in 1994." *District Director Decision,* dated March 4, 2005.

On appeal, counsel for the applicant requests time to "review [the applicant's] file and the record of her conviction to determine if the service's decision denying the waiver can be overcome via post conviction relief in the original Utah court." *Statement on Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO),* dated March 31, 2005. In support of the appeal, on June 18, 2005, counsel submitted a certified copy of a Court Order amending the 1994 charge against Mrs. [redacted] to simple possession of .05 grams of marijuana. *Order Amending Charge Nunc Pro Tunc* (Court Order), Fourth District Court, State of Utah, Juab County, May 16, 2005. Along with the Court Order, counsel submitted a letter asserting that the applicant is now eligible for a waiver under section 212(h) of the Act and additional evidence indicating that the applicant's husband and children would suffer extreme hardship if she were not granted a waiver of inadmissibility.

The preliminary issue before the AAO is therefore whether Mrs. [redacted] is eligible to apply for a waiver of inadmissibility. The underlying question is whether the Court Order amending the charge in her case changes the conviction for purposes of immigration.

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

> In General – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
> >
> > (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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

> The Attorney General [now Secretary, Homeland Security, "Secretary"] 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) if
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> (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 [now the Secretary of Homeland Security (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 record of conviction in this case[1] indicates that the applicant plead guilty and was convicted of "attempted possession of a controlled substance, class A misdemeanor" under Utah Statute 58-37-8. *Record*

[1] Although the District Director concluded that the applicant was convicted of "attempted possession of controlled substance (cocaine)," only a report from the Utah Criminal Identification Bureau, noting an "arrest charge" by the Utah Highway Police, and a police report and citation refer to cocaine. Under Utah Rules of Criminal Procedure, all criminal prosecutions must be commenced by the filing of an information before a magistrate or the return of an indictment (Rule 5). In this case there is no indication that the police citation was filed in court or was a part of official court records. The court charging document refers only to attempted possession of a controlled substance, and there is no other document admissible as part of the record of conviction as evidence that the applicant was convicted of attempted possession of cocaine. The Supreme Court has stated that the permissible documents for review in a conviction by plea are only "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 125 S.Ct. 1254, 1257 (2005); see also, *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (applying *Shepard* to immigration proceedings). Sources such as prosecutor's remarks during a hearing, police reports, complaint applications or probation reports may not be consulted. *See, e.g., Shepard, supra; Taylor v. U.S*, 495 U.S. 575 (1990); *Matter of Mena*, 7 I&N 38 (BIA 1979); *Matter of Short*, at 137-38; *Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933) (look only at record of conviction – "charge (indictment), plea, verdict and sentence" – to determine if crime involves moral turpitude). The charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales, 417 F.3rd 1022, 1028-29* (9th Cir. 2005). There is no question regarding the applicant's

of Proceedings, Fourth District Court, Juab County, State of Utah, printed April 3, 2001. There were no additional charges. *Id.*

Title 58, Chapter 37 Section 8[2] of the Utah Code states, in pertinent part:

> (2) Prohibited acts B – Penalties:
> (a) It is unlawful:
> (i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance . . .
> . . . .
> (b) Any person convicted of violating Subsection (2)(a)(i) with respect to:
> (i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;
> (ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is *guilty of a third degree felony;* or
> (iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.
> . . . .
> (7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

Eligibility for a waiver of inadmissibility

The applicant's final disposition under this broad statute does not specify whether the controlled substance was cocaine or marijuana, nor does it indicate the amount of the controlled substance at issue. Where a statute is broad enough to include various offenses, which could result in various immigration consequences, or none at all, the statute is considered "divisible" (*see, e.g., Matter of P-,* 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.,* 300 F.2d 67 (9th Cir. 1962)), and the reviewing authority may examine a limited set of documents that clearly establish that the conviction was of an offense that would trigger the immigration penalty. In this case the applicant's conviction of attempted possession of a controlled substance renders her inadmissible under section 212(a)(2)(A)(i)(II) of the Act, regardless of the specific offense, the type of controlled substance or the amount possessed. However, the question remains whether the ground of inadmissibility is now waivable under section 212(h) of the Act in light of a Court Order submitted on appeal that clarified the degree of the offense.

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plea, in which there was no reference to any specific substance or amount of controlled substance. See also *U.S. v. Corona-Sanchez,* 291 F.3d. 1201,1211 (9th Cir. 2002) (*en banc*) (explaining that the court can consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime). Charging papers alone, however, are never sufficient. *Id.*

[2] A thorough search of Utah Statutes for 1994 failed to find section 8.12; however, the provisions of section 8 relevant to a conviction for attempted possession of a controlled substance are excerpted and were considered in this decision.

In response to the District Director's finding of inadmissibility, as noted above, counsel for the applicant submitted on appeal a copy of the Court Order amending the prior charge. *Court Order, supra.* Counsel asserts that based on the new "Information charged in this case against the Defendant," amended *nunc pro tunc* to the date of conviction, Mrs. [redacted]'s conviction is now for a waivable offense, *i.e.,* simple possession of 30 grams or less of marijuana. *Statement on Form I-290B, supra.* The AAO finds that the Court Order does not change the conviction for purposes of immigration and the applicant remains ineligible to apply for a 212(h) waiver.

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

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In this case the applicant plead guilty and was convicted of attempted possession of a controlled substance. There is no allegation that the applicant's conviction has been expunged or otherwise removed. The issue before us is instead whether the amended charge, *nunc pro tunc,* changed that conviction for immigration purposes. Although the Court Order in this case neither specifically removes a guilty plea nor specifically modifies a sentence, case law regarding such state actions is instructive and can be reviewed in light of the circumstances in this case.

Expunged convictions

In general, state actions that expunge or otherwise remove a guilty plea or conviction by operation of a state rehabilitative statute will have no effect in immigration proceedings. *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999). In *Roldan,* the BIA found that "state 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 considered convicted for immigration purposes." *Id.* at 528. However, this case arises in the Ninth Circuit, where, "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." *Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000). There is no requirement that there be a procedural or substantive defect in the underlying criminal proceeding.

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). *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. *Lujan, supra* at 735.

In this case, the record indicates that the applicant was convicted of "attempt to possess a controlled substance" and gives no indication that she has prior convictions or has been accorded first offender treatment before. What is lacking for immigration purposes is the fourth qualification under *Lujan, i.e.,* the state court did not dismiss or otherwise expunge the conviction, but rather ordered that the charges be amended. If the Court Order had been to expunge or vacate or otherwise set aside the conviction, the conviction could not be used as a basis for removal in the Ninth Circuit if the other requirements set forth in *Lujan* were met, and the applicant would not be inadmissible on that basis, regardless of the particular amount or substance involved. Although clearly a conviction remains in this case, the treatment that can be afforded in the Ninth Circuit to individuals in situations similar to the applicant's whose convictions have been expunged is instructive. In this case, the court acted to amend the charges rather than expunge the conviction. Thus the question remains as to the effect of this Court Order.

Modified Sentences

The evidence establishes that the Court Order was issued for reasons not related to the merits of the underlying criminal proceedings. No legal defect is alleged. Rather, the court ordered that the charges be amended "in the interest of justice," at the request of counsel, for immigration purposes. The Court Order amended the charges in a significant way by establishing that the underlying offense was one that was waivable under immigration law. This process is similar to state action that significantly modifies a sentence to establish that the underlying offense is no longer considered a felony or an aggravated felony, thereby rendering the individual convicted of the crime eligible for certain immigration benefits.

The BIA has distinguished the effect of expunged convictions from the effect of sentence modifications. In *Matter of Song,* 23 I & N Dec. 173 (BIA 2001), the respondent had a 1992 conviction of a theft offense for which he was sentenced to one year in prison, making it an aggravated felony; in 1999, the criminal court reduced his sentence *nunc pro tunc* to 360 days. The issue for the BIA was whether the original criminal sentence or the reduced sentence determined whether he had been convicted of an aggravated felony. The

BIA found that the reduced sentence was effective and his theft offense could no longer be considered an aggravated felony because he was no longer sentenced to a one-year term of imprisonment. The BIA also found that *Roldan, supra,* was not controlling because in *Roldan* the BIA addressed only the definition of a "conviction" set forth in section 101(a)(48)(A) of the Act; and *Song* was governed by section 101(a)(48)(B) of the Act, which defines a "term of imprisonment."

In *Matter of Cota,* 23 I&N Dec. 849 (BIA 2005) the BIA clarified and affirmed its decision in *Matter of Song, supra,* and distinguished its holding in *Matter of Pickering,* 23 Dec. 621 (BIA 2003) (if the court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings the respondent remains convicted for immigration purposes). In *Cota,* the respondent's 2001 conviction of a theft offense for which he was sentenced to 365 days in jail was reduced to 240 to avoid immigration consequences and so that he would be eligible for an immigration waiver. The issue for the BIA was whether to give effect to sentence modification under *Song* or apply *Pickering* and disregard a modification to a conviction designed to mitigate immigration hardships. The BIA gave full faith and credit to the sentence modification, thus preserving the distinction between sentence modification and expungements.

The Ninth Circuit also upheld *Song* in *Garcia-Lopez v. Ashcroft,* 334 F.3d 840, 846 (9th Cir. 2003), in which the respondent was convicted of grand theft under a "wobbler" statute (because offense can result in a range of punishment). The Ninth Circuit found that the California court's later declaration that such offense was a misdemeanor was binding on the BIA for purposes of the petty offense exception under section 212(a)(2)(A)(i)(II) of the Act. *Id.* The Ninth Circuit emphasized that "a state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence. . . [where] the state court is clearly construing the nature of the conviction pursuant to state law." *Id.* The court found that a modified conviction must be given effect in subsequent immigration proceedings. *Id.,* citing *Sandoval v. INS,* 240 F.3d 577, 582-83 (7th Cir. 2001).

As in *Garcia-Lopez, supra,* in this case the statute of conviction is also a "wobbler" statute because it can result in a range of punishments and provides for either misdemeanor or felony convictions. Similarly, the state court also later declared that the offense was for possession of a limited amount of marijuana, a misdemeanor, for purposes of a waiver of inadmissibility (for possession of 30 grams or less of marijuana) under section 212(h) of the Act.

Conclusion

In this case, the state court did not dismiss or otherwise expunge the conviction or modify a sentence. However, given precedent decisions and reasoning noted above in such circumstance, the AAO finds that the amended charge in this case has the same effect described above by the BIA and the courts in similar situations where state action expunges an offense for the express purpose of mitigating an immigration hardship. As with an expungement, the conviction in this case is controlled by section 101(a)(48)(A), the statutory definition of a conviction for immigration purposes – unlike a modified sentence which is controlled by 101(a)(48)(B). For purposes of immigration, regardless of whether an amended charge has been given effect in state court, the original conviction and original plea remain unchanged, and the state court order does not change the conviction for immigration purposes.

Moreover, the basis for amending the charge in this case was specifically to allow an immigration benefit. There is no claim by the applicant and no indication in the Court Order amending the charge that the applicant's offense was, in fact, as stated in the amended charge. Thus the applicant has offered no proof that she was convicted of, or admitted to, "possession of 30 grams or less of marijuana," as required for eligibility to apply for a waiver under section 212(h) of the Act.

It is clear that the applicant was convicted of attempted possession of a controlled substance. For the applicant to be eligible to apply for a waiver, she must prove that she was convicted of, or admitted to, possession of 30 grams or less of marijuana. The state court action in this case was expressly to allow the applicant to apply for a waiver, but failed to provide proof that she was in fact eligible for the waiver. The order to amend the charge was not based on allegations that there was any legal defect in the underlying conviction or that the order was being issued to clarify that the applicant was originally convicted under the section of the statute relating to possession of a certain quantity of marijuana. The AAO does not therefore consider the order effective for the purpose of proving that the applicant is eligible for a waiver for having been convicted, or admitting to, possession of 30 grams or less of marijuana. The original conviction remains in effect for purposes of immigration, and no waiver is available.

The AAO notes that as this case arises in the Ninth Circuit the applicant may have benefited under the holding in *Lujan, supra,* if the original conviction had been expunged under a state statute. However, *Lujan* is not controlling as the applicant's offense was not expunged and the conviction remains as a basis for inadmissibility.

Absent evidence to the contrary, Mrs [redacted] original conviction in 1994, despite the Court Order amending the charge, *nunc pro tunc*, remains unchanged for immigration purposes. Based on the record, the AAO finds that the applicant is inadmissible under section 212(a)(2)(i)(II) of the Act due to her conviction of a crime involving a controlled substance. As there is no waiver in the Act for this ground of inadmissibility, her application for a waiver under section 212(h) of the Act is moot.

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

In proceedings for an application for waiver of grounds of inadmissibility under section 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 her burden.

ORDER: The appeal is dismissed.