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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES Date: SEP 03 2010

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The application is now before the AAO on a motion to reconsider. The motion will be denied and the previous decision of the AAO affirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having violated a law relating to a controlled substance. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his spouse, Valentina Magana, a naturalized U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his wife, their two U.S. citizen children, and his lawful permanent resident mother.

The applicant and his spouse were married in the United States on March 1, 1993. The applicant's spouse filed a Petition for Alien Relative (Form I-130) on the applicant's behalf on August 5, 1996. The petition was approved on September 3, 1997. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on August 5, 1996. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on October 17, 2003.

In a decision, dated November 10, 2005, the district director found the applicant inadmissible under section 212(a)(A)(2)(I)(i) of the Act. On his Form I-601, the applicant sought a waiver of inadmissibility for his conviction for misdemeanor Assault with a Deadly Weapon Other Than a Firearm in violation of section 245(a)(1) of the California Penal Code (C.P.C.). Although not explicitly stated in the decision, the district director apparently determined that this conviction was a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In this decision the district director also noted that the applicant was granted "diversion" of two charges (in 1988 and 1992 respectively) for Possession of a Narcotic Controlled Substance in violation of section 11350(a) of the California Health and Safety Code (C.H.S.C.), but stated that the "Service will only honor one diversion as an exception to Immigration benefits." The district director did not specify which of the two offenses would be "honored" and provided no further explanation. It appears that the district director determined that the applicant was inadmissible both for a crime involving moral turpitude (section 212(a)(2)(A)(i)(I) of the Act) and for violating a law relating to a controlled substance (section 212(a)(2)(A)(i)(II) of the Act).

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. Also, citing 8 C.F.R. § 212.7(d) and 18 U.S.C. §16(a), the district director found that the applicant's assault conviction was a "crime of violence" and noted that a favorable exercise of discretion would only be warranted if the applicant demonstrated that denial of his adjustment application would result in exceptional and extremely unusual hardship.

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

> (i) In general.— . . .[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (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 . . . 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 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 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 alien is inadmissible only under subparagraph (D)(i) or (D)(ii) [Prostitution] of such subsection or 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 State of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien had 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 . . . .

Court documents in the record reflect that on November 2, 1988, the applicant pled guilty in the Municipal Court of Compton Judicial District, Superior Court of the County of Los Angeles, California to misdemeanor Assault with a Deadly Weapon Other Than a Firearm in violation of C.P.C § 245(a)(1). (Case No. A650033). On December 7, 1988, the applicant was sentenced to 120

days incarceration, less time served, and placed on probation for a period of 36 months[1]. The applicant was also charged with Possession of a Narcotic Controlled Substance in violation of C.H.S.C. § 11350(a). The applicant's drug possession charge was diverted (judgment deferred) for a period of 12 months on the condition that the applicant cooperate with his parole officer in a plan for drug abuse education. On August 15, 1989, the court found that the applicant had violated the terms of his probation (the exact nature of the violation is not specified in the court documents on record) and sentenced him to serve 365 days in the county jail, less time previously served. The diversion of the applicant's drug possession charge was terminated. The charge was later dismissed on September 15, 1989 on the applicant's motion for lack of prosecution.

On March 26, 1992, the applicant pled no contest and was convicted in the Municipal Court of Compton Judicial District, Superior Court of the County of Los Angeles, California to misdemeanor Carrying of a Concealed Weapon in violation of C.P.C. § 12025(b). (Case No. TA015323). The imposition of sentence was suspended and the applicant was ordered to serve two days in the Los Angeles County Jail and placed on probation for a period of 12 months.

The record also reflects that the applicant was charged on February 25, 1992 with Possession of a Narcotic Controlled Substance in violation of C.H.S.C. § 11350(a), but the charge was diverted for 12 months on the condition that the applicant enroll in an approved drug treatment program. (Case No. TA017383). The charge was dismissed on November 4, 1992.

In his appeal counsel asserted that the applicant did not have two drug possession convictions as claimed by the district director, as the applicant never admitted guilt and no finding of guilt was ever made regarding his 1992 arrest for possession of a controlled substance. Citing *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000), counsel contends that the applicant is also not inadmissible because of his 1988 guilty plea because the applicant was granted diversion by the court and the charge was later dismissed. Counsel asserts that in evaluating the waiver of inadmissibility for the applicant's assault conviction, the district director erred in not applying the waiver standard found in section 212(h)(1)(A) of the Act. Counsel maintains that the applicant has nonetheless submitted sufficient evidence to demonstrate extreme hardship to qualifying relatives under section 212(h)(1)(B) of the Act.

In a decision dated November 19, 2007, the AAO found that the applicant's conviction for Assault with a Deadly Weapon Other Than a Firearm in violation of C.P.C. § 245(a)(1) was not a crime involving moral turpitude. The AAO also found that the applicant's conviction for Carrying a Concealed Weapon in violation of C.P.C. § 12025(b) was not a crime involving moral turpitude.

Citing section 101(a)(48) of the Act, the AAO found that the applicant's 1992 charge for possession of a controlled substance was not a "conviction" for immigration purposes and does not render him inadmissible. As observed by counsel on appeal, there is no evidence that the applicant ever pled

[1] Counsel contends that the applicant "was granted diversion" for violation of section 245(a)(1) of the California Penal Code, but this contention is not supported by the record.

guilty or no contest to the 1992 charge. The court documents in the record contain no description of the facts underlying the charge.

The AAO did find that given the applicant's violation of his probation which led to the termination of his diversion program related to his 1988 charge for possession of a controlled substance and his subsequent sentencing, the applicant, under the diversion program, was required to plead guilty rendering him inadmissible under section 212(a)(2)(A)(i)(II). Furthermore, the AAO found that the evidence showed that this was not an offense involving possession of 30 grams or less of marijuana because marijuana is not one of the controlled substances for which possession constitutes a violation of C.H.C.S. § 11350(a). The AAO noted that no waiver was available for this ground of inadmissibility.

In our decision, we cited to the Ninth Circuit decision in *Lujan* but found that the applicant had not met the requirements set forth in *Lujan* that would entitle him to favorable immigration treatment of his 1988 drug possession offense. 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." 222 F.3d at 738.

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 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. 222 F.3d at 749.

The AAO stated that although the applicant established that he initially met the requirements for treatment under the FFOA of his 1988 drug possession offense, the record reflected that the diversion of charge granted the applicant was terminated after he violated the terms of his probation. FFOA provides that a court may dismiss proceedings against a defendant without entering a judgment of conviction "if the person has not violated a condition of his probation." 8 U.S.C. § 3607(a)(2). If, on the other hand, a defendant violates a condition of his probation, the court may "revoke the sentence of probation and resentence the defendant . . . ." 8 U.S.C. § 3565(2). The AAO stated that the record did not show that the charge against the applicant was dismissed after the applicant successfully completed a rehabilitative program. Rather, diversion of the applicant's charge was terminated when the applicant violated the terms of his probation, and the charge was later dismissed on the applicant's motion for failure to prosecute only after the applicant was first sentenced to additional jail time because of the probation violation.

Therefore, the AAO found that the applicant had not met the requirements set forth in *Lujan* that would entitle him to favorable immigration treatment of his 1988 drug possession offense. Accordingly, the AAO found that the applicant's 1988 drug offense for possession of a controlled substance constituted a conviction (or, at the very least, an admission by the applicant that he committed a violation of a law relating to a controlled substance) and rendered the applicant inadmissible pursuant to 212(a)(2)(A)(i)(II) of the Act and statutorily ineligible to be considered for a section 212(h) waiver.

In a motion to reopen, dated February 12, 2008, counsel asserts that on November 2, 1988 the applicant did not plead guilty to the charge under C.H.S.C. § 11350(a) for Possession of a Narcotic Controlled Substance. He states that on August 15, 1989 the diversion for this charge was terminated and on September 15, 1989 a motion to dismiss for lack of prosecution was granted, but that the applicant never pled guilty to the charge nor did the court make a finding of guilt. Therefore, counsel concludes that the applicant was not convicted pursuant to the definition in section 101(a)(48) of the Act and is thus, not inadmissible.

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.

The AAO finds that although the court dispositions do not explicitly state that the applicant pled guilty or that a finding of guilt was entered by the court for a violation of C.H.S.C. § 11350(a), the record and California statutes indicate that the applicant pled guilty and a subsequent judgment of guilt was found after the termination of his diversion program. General statutory provisions allowing for diversion of drug-related offenses under California law require a guilty plea and permit a subsequent judgment of guilt and sentencing by the court if the defendant performs unsatisfactorily in his assigned diversion program. See C.P.C. § 1000.1(a)(3), 1000.3; see also People v. Orihuela, 18 Cal. Rptr.2d 427, 122 Cal.App.4th 70 (Cal. App. 3 Dist. 2004) (Court held that diversion for first-time drug offenders constitutes a guilty plea and resolution of the case in the nature of a specialized form of probation).

In the alternative, California law also provides for a charge to be diverted under C.P.C. § 1000.5, which allows for diversion of drug-related offenses without a guilty plea if the "presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender . . . agree in writing to establish and conduct a preguilty plea drug court program . . . wherein criminal proceedings are suspended without a plea of guilty for designated defendants." C.P.C. § 1000.5(a). Under C.P.C. § 1000.5, if a defendant performs unsatisfactorily in the assigned rehabilitative program, the court may only reinstate the criminal charge, rather than enter a judgment of guilt and sentence the defendant as allowed within the general diversion scheme. *See* C.P.C. § 1000.5(b).

The AAO finds that as the applicant was sentenced to 365 days in county jail after his diversion program was terminated, his drug charge must have been diverted under C.P.C. § 1000.1(a)(3),

which requires a guilty plea and allows for a subsequent judgment of guilt. Thus the applicant's 1988 charge of possession of a narcotic controlled substance is a conviction for immigration purposes and renders the applicant inadmissible under section 212(a)(2)(A)(i)(II).

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

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decision of the AAO is affirmed.

ORDER: The motion is denied and the prior decision of the AAO is affirmed.