(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 0 8 2014 Office: ATHENS, GREECE FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Athens, Greece and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Lebanon and a citizen of Palestine, who was found to be inadmissible to the United States under sections 212(a)(2)(A)(i)(II), section 212(a)(9)(B)(i)(II), and 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), § 1182(a)(9)(B)(i)(II), and 1182 (a)(6)(C), for having been convicted of possession of a controlled substance, for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States, and for having attempted to procure admission into the United States by fraud or misrepresentation. The applicant sought waivers of these grounds of inadmissibility under sections 212(h), 212(a)(9)(B)(v), and (i) of the Act, 8 U.S.C. §§ 1182(h), (a)(9)(B)(v), and (i), in order to reside in the United States with his spouse.

In a decision, dated March 3, 2010, the field office director found that as a person convicted of possession of cocaine, the applicant was not eligible for a waiver of inadmissibility under section 212(h) of the Act. The field office director concluded further that *Lujan-Armendariz v. INS,* 222 F.3d 740 (9th Cir. 2000) does not apply to the applicant's case because, although the applicant's conviction occurred in California and within the jurisdiction of the Ninth Circuit Court of Appeals, the jurisdiction having authority over the applicant's case is determined by the applicant's current residence, which the record shows is in Lebanon and within the jurisdiction of the Athens, Greece field office. The field office director also concluded that if the applicant had been eligible for a waiver, the record did not establish that his spouse would suffer extreme hardship.

On appeal, counsel asserts that the applicant was not convicted of possession of cocaine because *Lujan* applies to his crime. Counsel asserts that for cases arising in California, *Lujan,* applies and that it is irrelevant that the applicant's waiver application is being adjudicated in Greece. He asserts that all of the applicant's contacts are in the United States at that the applicant's residence in the United States was and is in California, which is governed by the Ninth Circuit.

The record indicates that, for the purposes of immigration law, the applicant was convicted of possession of cocaine in violation of section 11350 of the California Health and Safety Code.

Section 212(a)(2)(A) states:

> (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 –

(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, 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.)

The record indicates that the applicant was convicted for possession of cocaine and as a result is not eligible to apply for a section 212(h) waiver.

The Ninth Circuit Court of Appeals previously held that an alien whose controlled substance offense would have qualified for treatment under the Federal First Offender Act (FFOA), but who was convicted and had his or her conviction expunged under state or foreign law, does not have a conviction for immigration purposes. *See Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In order to qualify for treatment under the FFOA, the defendant must have been found guilty of an offense described in section 404 of the Controlled Substances Act (CSA), 21 U.S.C. § 844; have not been convicted of violating a federal or state law relating to controlled substances prior to the commission of such an offense; and have not previously been accorded first offender treatment under any law. *See* 18 U.S.C. § 3607(a); *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). Section 404 of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." 21 U.S.C. § 844(a). The AAO notes that *Lujan-Armendariz v. INS* was overruled in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*); however, the ruling in *Nunez-Reyes* applies only prospectively to convictions occurring after July 14, 2011. *Id.* at 687.

However, the limited first-time drug offense exception discussed in *Lujan* applies only to cases arising in the jurisdiction of the Ninth Circuit Court of Appeals. The applicant's case is not within the jurisdiction of the Ninth Circuit Court of Appeals as it arises from an international office. In cases arising outside the Ninth Circuit, an expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for first-time drug offense treatment. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002); *see also Matter of Roldan-Santoyo,* 22 I&N Dec. 512 (BIA 1999). The applicant is not living in the Ninth Circuit. Counsel has

provided no legal justification as to why the applicant's case should be viewed under Ninth Circuit case law.

In proceedings for applications 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. *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984). Here, the applicant has not met that burden. Accordingly, no purpose would be served in discussing the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) and 212(a)(6)(C) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.