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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 2 3 2014 Office: WASHINGTON, DC FILE: [redacted]

IN RE: APPLICANT: [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
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Washington, D.C., 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 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 committed violations related to a controlled substance. The applicant is the spouse of a United States citizen and is the beneficiary of an approved Petition for Alien Relative.

The Field Office Director concluded that the applicant's 2010 conviction for possession of cocaine rendered him inadmissible, with no waiver available, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated May 21, 2014.

On appeal, counsel submits a brief. Therein, counsel asserts that the Ninth Circuit Court of Appeals has found that aliens, like the applicant, are eligible for relief under the Federal First Offenders Statute, and that consequently, the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for his 2010 disposition.

The record includes, but is not limited to: documentation of criminal proceedings; other applications and petitions, evidence of birth, marriage, death, residence, and citizenship; and financial documents. The entire record was reviewed and considered in rendering a decision on the appeal.

We will first address the applicant's admissibility and eligibility for a waiver. The applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance.

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

> (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-
> >
> > ...
> >
> > (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.

The applicant's criminal record reflects that the applicant was charged with carrying a dirk and dagger on December 18, 1998, in violation of California Penal Code § 12020(A), when he was 15 years old. The applicant was subsequently charged with use or being under the influence of a controlled substance, namely, cocaine, on September 25, 2002, in violation of California Health and Safety Code § 11550. The transcript of the criminal proceedings indicates that on 2003, the applicant pled guilty, and that the Superior Court of California, County of Los Angeles, deferred entry of judgment and suspended imposition of the applicant's sentence for 18 months. In addition, the court ordered the applicant to pay $200 in fines and fees, as well as his attorney's fees, and among other things, to cooperate with his probation officer in a plan for a drug diversion program. After two instances where the applicant failed to appear at his criminal proceedings and deserted his probation program, on 2010, the court dismissed the case for successful completion of his deferred entry of judgment pursuant to California Penal Code § 1000.3.[1]

The Field Office Director found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act based on this 2010 entry of judgment. Counsel contends, however, that the charge was dismissed pursuant to California's drug rehabilitation statute. Counsel adds that under applicable Ninth Circuit Court of Appeals law concerning the Federal First Offenders Act ("FFOA"), the applicant's dismissal cannot be counted against him in the context of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. In support of these claims, counsel cites to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

In *Lujan-Armendariz v. INS,* the Ninth Circuit Court of Appeals held that the statutory definition of "conviction" in section 101(a)(48) of the Act did not repeal or abrogate the FFOA, under which rehabilitative expungement of first-time simple possession drug offenses does not result in removal. The Court also stated 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.[2]

The applicant's conviction, however, must have been expunged to qualify for protection under the FFOA. The applicant has not provided sufficient evidence, nor has he asserted, that his conviction was in fact expunged. The 2002 charge was dismissed on 2010, pursuant to California Penal Code § 1000.3, which states, in pertinent part:

> If the defendant has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period, the criminal charge or charges shall be dismissed.

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[1] The applicant also has 2008 convictions for driving while intoxicated and driving without a license in violation of Virginia Code §§ 18.2-266 and 46.2-300.

[2] It is noted that Lujan-Armendariz and related cases have been overruled on a prospective basis by the Ninth Circuit in Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. July 14, 2011) (en banc). They now apply only to cases arising in the 9th Circuit involving convictions occurring prior to July 14, 2011.

> Prior to dismissing the charge or charges or rendering a finding of guilt and entering judgment, the court shall consider the defendant's ability to pay and whether the defendant has paid a diversion restitution fee pursuant to Section 1001.90, if ordered, and has met his or her financial obligation to the program, if any. As provided in Section 1203.1b, the defendant shall reimburse the probation department for the reasonable cost of any program investigation or progress report filed with the court as directed pursuant to Sections 1000.1 and 1000.2.

Cal. Penal Code § 1000.3 (2010). There is no indication that dismissal pursuant to California Penal Code § 1000.3 qualifies as an expungement as described in the Federal First Offenders Act, which states, in pertinent part:

> (c) Expungement of record of disposition.--If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

18 U.S.C.A. § 3607. Furthermore, there is no indication that the applicant's record was subsequently expunged. As the record does not indicate that there has been an expungement order as defined in the FFOA, or any expungement order following the January 22, 2010, dismissal of charges, we cannot find that the applicant has established he is eligible for relief under the FFOA.

We further find that the applicant's January 22, 2010, dismissal under California Penal Code § 1000.3 qualifies as a conviction for immigration purposes. Under the current 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 that 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. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any action that overturns a state conviction other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In this case, the record reflects that the applicant's 2002 charge was dismissed, pursuant to California Penal Code § 1000.3, because he "performed satisfactorily during the period in which deferred entry of judgment was granted," and not because there was a violation of constitutional or statutory rights.

Based on this reasoning, we conclude that the dismissal of the applicant's 2002 charge for violation of California Penal Code §11550 qualifies as a conviction, and that he does not qualify for protection under the FFOA. Consequently, this conviction renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense involving possession of a controlled substance. Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. The applicant in the present case has a controlled substance conviction which involved cocaine, not marijuana. Accordingly, no waiver is available to him under the Act. As no waiver is available due to his 2010 conviction, the applicant's other convictions need not be presently evaluated for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.