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**U.S. Citizenship
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FILE:

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Office: LOS ANGELES

Date:

NOV 19 2007

IN RE:

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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:

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, 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 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 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, [REDACTED] 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 her decision, the district director found the applicant inadmissible under section 212(a)(2)(I)(i) of the Act. *Decision of District Director Jane E. Arellano*, dated November 10, 2005. 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.

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." *Decision of District Director*, dated November 10, 2005. 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.

On appeal, counsel asserts that the applicant does 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.

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-

(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—

....

(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). The applicant also pled guilty to Possession of a Narcotic Controlled Substance in violation of C.H.S.C. § 11350(a). On December 7, 1988, the applicant was sentenced to 120 days incarceration, less time served, and placed on probation for a period of 36 months¹. 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.

The AAO first considers whether the applicant's conviction for Assault with a Deadly Weapon Other Than a Firearm in violation of C.P.C. § 245(a)(1) is a crime involving moral turpitude that renders the applicant inadmissible pursuant to 212(a)(2)(A)(i)(I) of the Act. Section 245(a)(1) of the C.P.C. is violated by any "person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Under California law, assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." C.P.C. § 240.

The AAO notes that the Board of Immigration Appeals ("Board") held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally

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.

not considered to be a crime involving moral turpitude.

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The Board has generally found that assault with a deadly weapon is a crime involving moral turpitude. *See, e.g., Matter of G-R-*, 2 I. & N. Dec. 733 (BIA 1946); *see also Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988). However, this case arises in the Ninth Circuit, where the Court of Appeals has held that violation of C.P.C. § 245(a)(2) (Assault *With* a Firearm) is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). Although the court in the *Carr* and *Komarenko* cases did not provide a detailed rationale for this finding, it is noted that violation of C.P.C. § 245(a)(1), which occurs when “any person . . . commits an assault upon the person of another with a firearm,” differs from violation of C.P.C. § 245(a)(2) only in the means employed to commit the assault rather than in the motive or intent of the offender. Thus, the AAO determines that the applicant’s conviction under C.P.C. § 245(a)(1) is not a crime involving moral turpitude, and no waiver of inadmissibility is necessary for this conviction.

Likewise, the AAO finds that, though not specifically discussed by the district director, the applicant’s conviction for Carrying a Concealed Weapon in violation of C.P.C. § 12025(b) also is not a crime involving moral turpitude. In *U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498, 499 (D.C.N.Y. 1930), the court found that the crime of carrying a concealed weapon lacked actual willful or wrongful intent and was thus not a crime involving moral turpitude. The AAO notes that section 12025(b) of the C.P.C. does not require a showing of intent and, accordingly, finds that violation of this section does not constitute a crime involving moral turpitude.

The AAO now considers whether the applicant’s charges for drug possession render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. A section 212(h) waiver is only available in section 212(a)(2)(A)(i)(II) cases involving a single offense of possession of 30 grams or less of marijuana. The record does not contain evidence setting forth with specificity the type and quantity of controlled substance(s) the applicant was charged with possessing in 1988 and 1992, though an FBI report based on the applicant’s fingerprints indicates that his 1992 charge was for possession of cocaine. Regardless, the AAO observes that marijuana is not one of the controlled substances for which possession constitutes a violation of C.H.C.S. § 11350(a). Therefore, if the applicant is found to be inadmissible for these offenses, a section 212(h) waiver is not available.

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 the applicant's 1992 charge for possession of a controlled substance is 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 guilty or no contest to the 1992 charge. The court documents in the record contain no description of the facts underlying the charge.

Also, it is unclear from the record what provision of California law was applied in granting the applicant diversion of the 1992 charge. It is noted that the 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). However, diversion pursuant to these statutes is generally only available to first time offenders, which the applicant was not in 1992. *See* C.P.C. § 1000(a)(1).

It appears more likely, therefore, that the applicant's 1992 drug charge was diverted under a separate provision of California law, 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). There is insufficient evidence showing that the applicant in this case has admitted committing, or has admitted committing acts which constitute the essential elements of, the drug-related offense with which he was charged in 1992. Accordingly, the AAO finds that the evidence fails to show that the applicant's 1992 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).

Nevertheless, the AAO finds that the applicant's 1988 guilty plea for possession of a controlled substance renders him inadmissible under section 212(a)(2)(A)(i)(II). Furthermore, the evidence shows that this was not an offense involving possession of 30 grams or less of marijuana for which a waiver of inadmissibility is available.

Since this case arises in the Ninth Circuit, *Lujan* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).² 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.

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. *Lujan* at 749.

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).

The Court in *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. In addition, rehabilitative laws included “deferred adjudication” laws -- where no formal judgment of conviction or guilt is entered. See *Lujan* at 735. The Ninth Circuit then re-emphasized that determining eligibility for FFOA relief was not based on whether the particular state law at issue utilized a *process* identical to that used under the federal government’s scheme, but rather by whether the petitioner would have been *eligible* for relief under the federal law, and in fact received relief under a state law. See *Lujan* at 738.

The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offenses, is applicable only in the Ninth Circuit and is a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act. The Ninth Circuit continues to hold that

² 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).

“persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law.” *Lujan* at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 813 (9th Cir. 1994)).

Although the applicant has established that he initially met the requirements for treatment under the FFOA of his 1988 drug possession offense, the record reflects 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 applicant pled guilty to simple possession of a controlled substance. The evidence in the record shows that he was not, prior to the commission of the offense, convicted of violating a federal or state law relating to controlled substances and that he was not previously accorded first offender treatment under California law. However, the record does 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.

The AAO finds, therefore, that the applicant has not met the requirements set forth in *Lujan* that would entitle him to favorable immigration treatment of his 1988 drug possession offense. Accordingly, the applicant’s 1988 guilty plea to possession of a controlled substance constitutes 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 renders the applicant inadmissible pursuant to 212(a)(2)(A)(i)(II) of the Act. In this case, the applicant’s offense was for criminal possession of a controlled substance other than marijuana. Thus, the applicant is statutorily ineligible to be considered for a section 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 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 appeal will be dismissed.

ORDER: The appeal is dismissed.