

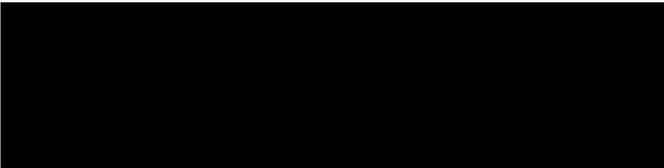
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



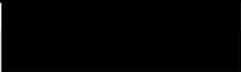
U.S. Citizenship
and Immigration
Services

H2

PUBLIC COPY



FILE:



Office: ATHENS, GREECE

Date: FEB 07 2008

IN RE:



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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Athens, Greece, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as the waiver application is moot.

The applicant, a citizen of Libya, was found inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The applicant was also found inadmissible under 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. The applicant, therefore, also seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

The applicant was born in Libya on January 1, 1966. At the age of fourteen, he moved to Oxford, England. The record indicates that he first entered the United States on January 9, 1982, at the age of sixteen, in F-1 status. The applicant met his wife two years later, and they were married on September 7, 1984 in Los Angeles, California. He was granted lawful permanent residence in the United States on November 20, 1985. The applicant and his wife have one child together: a daughter, born on September 11, 1989. The couple divorced in 1996, and the applicant moved to Libya in 2000.

The applicant remained outside the United States for a period of longer than one year and, as such, was deemed by the OIC to have abandoned his status as a lawful permanent resident of the United States. The applicant and his wife reconciled, and, on July 24, 2002, she filed a Form I-129F, Petition for Alien Fiancé(e). The Form I-129F was approved on February 6, 2003. The applicant appeared at the United States consulate in Cairo, Egypt on June 30, 2003 for a fiancé visa interview; during which time concerns arose regarding the bona fides of the engagement. The visa was not granted, and the file was sent to the OIC in Athens, Greece, on August 11, 2003. On September 22, 2003, the OIC in Athens returned the file to the California Service Center for possible revocation of the petition's approval. In a June 22, 2004 letter to the California Service Center, the applicant's wife requested expedited review of the petition.

The applicant and his wife remarried, in Cyprus, on October 29, 2004. The Form I-130, Immigrant Petition for Alien Relative, was filed in Nicosia, Cyprus on November 2, 2004. On January 27, 2005, the consulate in Nicosia notified the applicant's wife, via e-mail, that the applicant had been found inadmissible to the United States under 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, and would require a waiver of inadmissibility. The applicant filed the Form I-601 in Nicosia on February 17, 2005. The file was transferred to Athens, Greece on March 15, 2005. On September 16, 2005, the applicant's wife submitted a supplemental submission to the OIC in Athens. The OIC denied the Form I-601 on February 7, 2006.

In his denial, the OIC found that the applicant had failed to establish that his wife would suffer extreme hardship if the waiver application were denied. The OIC determined that the applicant remained inadmissible to the United States on two grounds: (1) for having been convicted of a crime involving a controlled substance; and (2) for having sought to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation.

The record establishes that the applicant pleaded guilty to possession of less than one ounce of marijuana in Los Angeles, California on December 5, 1990.¹ He was required to pay a fine of \$100 and a “penalty assessment” of \$135. The record was expunged on June 2, 2003.

Regarding the finding of misrepresentation, the OIC stated in the denial that, during his June 30, 2003 interview for the approved Form I-129F,² the applicant misrepresented his arrest record in the United States. The OIC stated that the applicant admitted to only a single arrest (the marijuana possession charge). However, the FBI fingerprint record indicates that the applicant was arrested in April 1994 and August 1999, and that there is an outstanding 1999 arrest warrant for failure to pay a traffic ticket in Los Angeles.

On appeal, counsel asserts that the OIC erred in his adjudication of the petition. Counsel asserts that a waiver of inadmissibility is unnecessary, as the applicant did not commit misrepresentation; the applicant’s marijuana conviction has been expunged; the OIC failed to consider the hardships presented; and the OIC failed to consider that over 15 years have passed since the applicants’ conviction.

Section 212(a)(6)(C) of the Act states, in pertinent part, the following:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states, in pertinent part, the following:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(2)(A)(i)(II) of the Act provides, in pertinent part:

- (1) Criminal and related grounds. —
 - (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 –

¹ One ounce is equal to approximately 28.3 grams. See <http://www.asknumbers.com/WeightConversion.aspx> (accessed January 3, 2008).

² In his denial, the OIC stated that the applicant had misrepresented his arrest record during “the previous fiancé interview in Cairo in April 2002.” However, as noted by counsel on appeal, there was no fiancé interview in April 2002, as the Form I-129F was not filed until July 2002. The OIC was in fact referring to the June 20, 2003 fiancé interview.

- (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.

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

- (h) The Attorney General [now the Secretary of Homeland Security] 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 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 [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

I. The applicant is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and is not in need of a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i)

The AAO agrees with counsel's contention that the applicant is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). As noted previously, the OIC found the applicant inadmissible under this section of the Act as a result of the applicant's misrepresentation of his arrest record while in the United States. Counsel, the applicant, and the applicant's wife deny that misrepresentation occurred. However, the AAO need not address such contentions as, even if misrepresentation did occur, it was not material.

Generally, a misrepresentation is material only if, by the misrepresentation, the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also*

Matter of Tijam, 22 I &N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I & N Dec. 409 (BIA 1962; AG 1964); *Matter of S- and B-C-*, 9 I & N Dec. 436 (BIA 1950; AG 1961). In this particular case, any misrepresentation on the part of the applicant's did not, and could not have, resulted in a benefit being granted that should not have been. Neither the 1994 nor the 1999 arrest would have rendered the applicant inadmissible, as the charges in both cases were dropped. Had the applicant admitted to these arrests, it would not have led to a finding of inadmissibility. The arrests are not material, as they would not lead to a further finding of inadmissibility, and therefore the applicant's misrepresentation of them is not material.

While the AAO does not condone misrepresentation, it is clear that this misrepresentation does not constitute the type of *material* misrepresentation contemplated by section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Accordingly, the OIC's determination that misrepresentation on the part of the applicant regarding his 1994 and 1999 arrests renders him inadmissible must be withdrawn. The applicant, therefore, is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and is not in need of a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i). The portion of the OIC's decision indicating otherwise is withdrawn.

II. The applicant is not inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and is not in need of a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h)

The AAO also agrees with counsel that the applicant is not inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). As noted previously, the applicant pleaded guilty to possession of less than one ounce of marijuana in Los Angeles, California on December 5, 1990. He was required to pay a fine of \$100 and a "penalty assessment" of \$135. The record was expunged the Los Angeles Superior Court on June 2, 2003, pursuant to section 1203.4 of the California Penal Code.

On appeal, counsel states that, pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the expungement of the applicant's conviction record renders him not convicted for federal immigration purposes, and thus not inadmissible. Since this case arises in the Ninth Circuit, *Lujan-Armendariz* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).³

The Ninth Circuit Court of Appeals stated in *Lujan-Armendariz* 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.

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 –

³ 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).

- (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.

Lujan-Armendariz 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-Armendariz* at 749.

The court in *Lujan-Armendariz* 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).

In *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), the Ninth Circuit rejected, on equal protection grounds, the rule that only expungements under exact state counterparts to the FFOA could be given effect in deportation proceedings. “[U]nder *Garberding*, persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the [FFOA] if they had been prosecuted under federal law.” *Lujan-Armendariz* at 738 (citing *Garberding* at 1190).

Lujan-Armendariz 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-Armendariz* 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-Armendariz* at 738.

The rule set forth in *Lujan-Armendariz*, 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 “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)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit further clarified that California Penal Code section 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. See *Ramirez* at 1175. Furthermore, the holding set forth in the Ninth Circuit case, *Garcia-Gonzales v. INS*, 344 F.2d 804 (9th Cir. 1965) remains applicable to expungement cases that do not fit the limited circumstances set forth in *Lujan-Armendariz*.

In deciding whether a criminal conviction expunged pursuant to section 1203.4 of the California Penal Code remained a “conviction” for immigration purposes, the Ninth Circuit in *Garcia* analyzed Congress’ intent in enacting section 241(a)(11) of the Act as in effect in 1965, 8 U.S.C. § 1251(a)(11). See *Garcia* at 806-7. Under section 241(a)(11), an alien in the United States was deportable if the alien:

At any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of . . . any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of . . . heroin.

Garcia at 810. The Ninth Circuit in *Garcia* stated that in enacting section 241 of the Act as in effect in 1965, “Congress intended to do its own defining of ‘conviction’ rather than leave the matter to variable state statutes.” *Id.* at 807 (citing *Matter of A –F –*, 8 I&N Dec. 429, 445-46 (AG 1959)). The Ninth Circuit agreed that:

Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction. Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strengthened the deportation laws dealing with aliens involved in such traffic In the face of this clear national policy, I do not believe that the term “convicted” may be regarded as flexible enough to permit an alien to take advantage of a technical “expungement” which is the product of a state procedure wherein the merits of the conviction and its validity have no place I, therefore, regard it as immaterial for the purposes of § 241(a)(11) that the record of conviction has been cancelled by a state process such as is provided by § 1203.4 of the California Penal Code

Garcia at 809. *Lujan-Armendariz* discussed *Matter of A –F –*, stating that the case “remained the rule for all drug offenses until 1970, when Congress adopted the Federal First Offender Act . . . a rehabilitation statute that applies exclusively to first-time drug offenders who are guilty only of simple possession.” *Lujan-Armendariz* at 735. Thus, while *Lujan-Armendariz* supercedes *Garcia* in limited circumstances, the general holding that expungements do not erase “convictions” for federal immigration purposes remains valid, even in the Ninth Circuit.

In this case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant was found guilty of simple possession of less than 30 grams of marijuana. 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 any law. Finally, the applicant submitted evidence that on June 2, 2003, the Los Angeles, California Superior Court

entered an order pursuant to section 1203.4 of the California Penal Code, under which the criminal proceedings against the applicant were dismissed.

The applicant has established that he is not “convicted” for immigration purposes. He is thus not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, and is not in need of a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The portion of the OIC’s decision indicating otherwise is withdrawn

III. Conclusion

The applicant has established that he is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and is not in need of a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i). The applicant has also established that he is not inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and is not in need of a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The applicant is not inadmissible to the United States. He does not require a waiver of inadmissibility. The Form I-601 is moot.

Having found that the applicant is not in need of the waiver, no purpose would be served in discussing whether extreme hardship would accrue to his children. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed, as the waiver application is moot.