

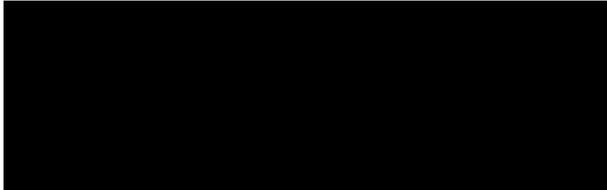
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**U.S. Citizenship  
and Immigration  
Services**

H2



FILE:

Office: VERMONT SERVICE CENTER

Date: JAN 15 2008

IN RE:



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:



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 Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada 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 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 U.S. citizen spouse. 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.

The center director observed that the applicant was convicted of simple possession of cannabis resin, or hashish. *Decision of the Center Director*, dated March 28, 2007. The center director found that cannabis resin does not constitute marijuana as contemplated by section 212(h) of the Act, and thus the applicant is not eligible for a waiver as a matter of law. *Id.* at 1.

On appeal, counsel for the applicant asserts that cannabis resin is a form of marijuana, and as the applicant's conviction involved an amount less than an equivalent of 30 grams of cannabis leaves, he is eligible for a waiver under section 212(h) of the Act. *Brief in Support of Appeal*, submitted April 27, 2007. Counsel asserts that the applicant's conviction was pardoned, and thus he is no longer inadmissible based on his conviction. *Id.* at 20. Counsel further contends that the applicant warrants a favorable exercise of discretion, as his single conviction occurred in 1974 and he has been rehabilitated. *Id.* at 5, 22.

The record contains a brief from counsel; a copy of the applicant's passport; a copy of the applicant's birth certificate; a copy of the applicant's marriage certificate; a copy of the applicant's wife's birth certificate; statements from the applicant and his wife, and; documentation in connection with the applicant's criminal conviction and pardon. The entire record was considered in rendering this decision on appeal.

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-

...

(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 . . . .

The record reflects that the applicant was convicted of possession of cannabis resin in Canada on April 3, 1974. The applicant received a fine of 200 Canadian dollars (equivalent to approximately \$200.)

The conviction record does not indicate the amount of cannabis resin in the applicant's possession, or the precise provision of the Narcotic Control Act under which he was convicted. Counsel explained that further records of the proceedings against the applicant are unavailable due to the fact that the proceedings occurred 33 years ago. The applicant submitted a detailed statement in which he assessed the amount of cannabis resin at issue in his conviction, estimated to be under three grams. *Statement from the Applicant*, at 2, dated October 12, 2006. The record contains a letter from a law firm that is retained by the Canadian Department of Justice as Drug Prosecutor that attests that a \$200 fine "would be levied on the basis that the accused was probably in possession of cannabis resin for personal use only and something less than 30 grams." *Letter from [REDACTED]*, dated September 14, 2006.

Given the applicant's detailed explanation of the quantity of cannabis resin at issue in his conviction, and lack of additional records, and the statement from [REDACTED], the AAO concludes that the applicant has shown by a preponderance of the evidence that his conviction involved a quantity of cannabis resin under three grams. As observed by counsel, the United States Sentencing Commission Guidelines Manual § 2D1.1, Schedule I, Marihuana, states that one gram of cannabis resin is equivalent to five grams of marijuana. As such, the applicant's conviction for possession of three grams or less of cannabis resin is equivalent to a conviction for 15 grams or less of marijuana.

The applicant's conviction was pardoned on March 5, 1993 by the Canadian National Parole Board. *Pardon from the Canadian National Parole Board*, dated March 5, 1993. The National Parole Board found that, since completing his sentence, the applicant was of good conduct and free from further convictions. *Id.* at 1.

Counsel asserts that the applicant's conviction was pardoned, and thus he is no longer inadmissible based on his conviction. *Brief in Support of Appeal* at 20. Since this case arises in the Ninth Circuit, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).<sup>1</sup> 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 (9<sup>th</sup> 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,

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<sup>1</sup> 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).

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 “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 (9<sup>th</sup> Cir. 1994)).

Upon review, the applicant has not shown by a preponderance of the evidence that his conviction for possession of cannabis resin meets the standard set by the Ninth Circuit in *Lujan*, such that it may not be used as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Specifically, the applicant has not established that a court has entered an order pursuant to a state rehabilitative statute under which his conviction was dismissed or expunged. *See Cardenas-Uriate v. INS* at 1136.

The applicant was convicted under Canadian law. He submitted documentation to show that he received a pardon by the Canadian National Parole Board on March 5, 1993. However, the applicant has not provided the section of Canadian law, or analysis thereof, under which he received the pardon. The pardon document states that it remains in effect “unless it ceases to exist or is subsequently revoked.” *Pardon from the Canadian National Parole Board* at 1. The AAO is unable to ascertain what conditions may lead to revocation of the pardon, such that it can be determined if the pardon is equivalent to expungement pursuant to a state rehabilitative statute. *See Lujan* at 749.

In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the applicant relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). As the applicant has not submitted sufficient evidence of the Canadian law that governs his pardon, he has not shown that his conviction may be treated as expunged and with no effect under the immigration laws of the United States, pursuant the standard of *Lujan*. Accordingly, the applicant has not shown that he was erroneously deemed inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The center director found that cannabis resin, or hashish, does not constitute marijuana as contemplated by section 212(h) of the Act, and thus the applicant is not eligible for a waiver as a matter of law. *Decision of the Center Director* at 1. However, the Ninth Circuit has ruled that marijuana and hashish “are derivatives of a common source,” and that, in the context of determining admissibility under U.S immigration law, “marijuana is sufficiently general in scope to include hashish.” *Hamid v. I.N.S.*, 538 F.2d 1389, 1391 (9<sup>th</sup> Cir. 1976). Accordingly, as the applicant’s conviction was for possession of an amount of cannabis resin equivalent to less than 30 grams of marijuana, he may be properly considered for a waiver of inadmissibility under section 212(h) of the Act.

The applicant’s conviction occurred over 15 years prior to his application for a visa, admission, or adjustment of status, as he was convicted on April 3, 1974, and a Form I-129F, Petition for Alien Fiancé, was filed on his behalf on April 10, 2006. Section 212(h)(1)(A)(i) of the Act. The record reflects that the applicant has not been convicted of any crimes since the 1974 conviction, nor is there any indication that the applicant poses a threat to

the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. The fact that the applicant has not been convicted of any crimes for over thirty years supports that he has been rehabilitated. The pardon document issued by the Canadian National Parole Board states that the applicant "has remained free of any conviction since completing the sentence and was of good conduct and that the conviction should no longer reflect adversely on his character." *Pardon from the Canadian National Parole Board* at 1. Thus, the AAO finds that the applicant has shown that he has been rehabilitated, as contemplated by Section 212(h)(1)(A)(iii) of the Act. Accordingly, it is within the discretion of the Secretary to grant the applicant a waiver of inadmissibility. Section 212(h) of the Act.

In determining whether the applicant has established that he warrants a favorable exercise of discretion, the AAO will consider all positive and negative factors presented.

The single negative factor in this case consists of the applicant's guilty plea to a crime involving a controlled substance.

The positive factors in this case include: the applicant is married to a U.S. citizen who would experience hardship if the present waiver application is denied; the applicant's wife reported that the applicant provides necessary assistance to her due to her illness; the applicant's conviction occurred over 30 years ago at a young age, and he has not been convicted of any crimes since 1974; the applicant has expressed remorse for his choices that led to his conviction, and; the Canadian National Parole Board has recognized the applicant's good conduct since his conviction.

The AAO finds that the positive factors in this case outweigh the negative factors. Based on the foregoing, the applicant has established that he warrants a favorable exercise of discretion.

In proceedings for an application 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

**ORDER:** The appeal is sustained.