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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: HONOLULU, HAWAII

Date: APR 13 2009

IN RE:

Applicant:

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Honolulu, Hawaii and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Chile who initially entered the United States on May 21, 1995 on a B-2 nonimmigrant visa. On October 30, 1995, the applicant departed the United States. On April 17, 1996, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on August 29, 1996. On September 17, 1996, the applicant entered the United States on a B-2 nonimmigrant visa. On October 20, 1996, the applicant was arrested for possession of cocaine, possession of drug paraphernalia, and disorderly intoxication. On January 8, 1997, the applicant was entered into a deferred prosecution program. The applicant departed the United States on February 25, 1997. On March 10, 1997, after the applicant successfully completed the deferred prosecution program, all charges were dismissed against him. Over the next five years, the applicant lawfully entered and departed the United States on numerous occasions.¹ On May 21, 2003, the applicant reentered the United States on advance parole. On November 18, 2002, the applicant's United States citizen wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On January 27, 2004, the applicant's Form I-130 was approved. On January 4, 2005, the applicant filed a Waiver of Grounds of Excludability (Form I-601). On November 28, 2005, the District Director denied the applicant's Form I-601, finding the applicant 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 violating a law relating to a controlled substance.

Section 212(a)(2) of the Act provides, in pertinent part, that:

(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 On July 16, 1997, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on July 31, 1997. On August 18, 1997, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on August 26, 1997. On September 5, 1997, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on September 9, 1997. On October 14, 1997, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on March 7, 1998. On March 28, 1998, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on April 2, 1998. On July 9, 1999, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on July 18, 1999. On October 11, 2000, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on October 17, 2000. On November 3, 2000, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on November 9, 2000. On May 7, 2001, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on March 4, 2002. On May 14, 2002, the applicant entered the United States on a B-2 nonimmigrant visa, and departed the United States on May 8, 2003.

(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 [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...

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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 established to the satisfaction of the [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...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Counsel asserts that the applicant “has not been convicted of an offense involving a controlled substance, and he has not admitted committing acts which constitute the essential elements of an offense involving a controlled substance, and therefore he is not inadmissible under INA §212(a)(2)(A)(i)(II).” *Form I-290B*, filed December 29, 2005. Counsel contends that since the applicant did not enter a plea of guilty but was entered into a deferred prosecution program, there is no controlled substance conviction. *Id.* Counsel argues that the applicant “has not been convicted of an offense as the term ‘conviction’ is defined by INA §101(a)(48)(A).” *Appeal Brief*, page 7, dated February 3, 2006.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

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 notes that even though the applicant’s criminal case arose in Florida, which is in the Eleventh Circuit, his immigration case arises in the Ninth Circuit; therefore, *Lujan-Armendariz v. INS*, 222 F.3d 740 (9th Cir. 2000), is controlling. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).²

In *Lujan-Armendariz*, the Ninth Circuit held that, the definition of “conviction” at section 101(a)(48)(A) of the Act did 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 was instead prosecuted under state law, if the findings were expunged pursuant to a state rehabilitative statute. *Lujan* at 749. “In short, if the 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.

The *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

² In cases arising outside the Ninth Circuit, a conviction that was expunged does not erase the conviction for immigration purposes, even if the alien could have been eligible for FFOA 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).

[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* at 738 (citing *Garberding* at 1190).

The *Lujan* decision 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 “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*.

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* 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* at 735. Thus, while *Lujan* 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 arrested for possession of cocaine, possession of drug paraphernalia, and disorderly intoxication; and was entered into a deferred prosecution program, which he successfully completed. 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 a Circuit Court of the Eleventh Judicial Circuit of Florida, Dade County, dismissed all charges against him.

The applicant has established that he is not “convicted” for immigration purposes. Accordingly, the AAO finds that the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, and he is not otherwise inadmissible. As such, the waiver application is moot.

ORDER: The District Director’s decision is withdrawn as it has not been established that the applicant is inadmissible, the waiver application declared moot, and the appeal dismissed. The matter is returned to the District Director for continued processing of the applicant’s Form I-485 application.