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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

H2

FILE:

Office: MIAMI, FLORIDA

Date:

MAR 22 2010

IN RE:

Applicant:

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

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).

Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant, [REDACTED] is a native and citizen of Colombia 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 been convicted of a crime involving a controlled substance. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). In an undated decision, the director concluded that the applicant had failed to establish that he qualified for the waiver, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's convictions were for possession of marijuana of less than 30 grams and possession of drug paraphernalia, and that he is eligible for a waiver of inadmissibility. Counsel contends that as a first-time drug offense the applicant's crime is within the purview of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), a decision wherein the Ninth Circuit Court of Appeals held that a first-time conviction for simple possession that is eliminated under a state rehabilitative scheme will be deemed eliminated for immigration purposes. Counsel maintains that because the applicant was referred to and completed the Florida Advocate Program, his situation would be within the purview of the Federal First Offender Act (FFOA), 18 U.S.C. § 3607(a), and he would not be convicted for purposes of immigration law. Furthermore, counsel contends that the applicant's conviction for possession of drug paraphernalia qualifies under the FFOA. Counsel states that the Ninth Circuit in *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9<sup>th</sup> Cir. 2000), found that the legislative history and intent of FFOA support including drug paraphernalia within the provisions of FFOA. Citing to *In re Salazar Regino*, 23 I&N Dec. 223 (BIA 2002), counsel concedes that the Board of Immigration Appeals (BIA) held that *Lujan* applies only to the Ninth Circuit.

The AAO will first address the finding of inadmissibility. Section 212(a) of the Act states in pertinent part:

(2) 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 —
- (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 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 may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

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 record reflects that in 2001 for the court case [REDACTED] the applicant was charged with violation of Fla. Stat. § 893.13, possession of marijuana, and violation of Fla. Stat. § 893.147, possession of a narcotic implement.<sup>1</sup> Adjudication of the possession of marijuana charge was

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<sup>1</sup> Fla. Stat. § 893.13 provides:

(6)(b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, "cannabis" does not include the resin extracted from the plants of the genus *Cannabis*, or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

Fla. Stat. § 893.147 provides:

(1) USE OR POSSESSION OF DRUG PARAPHERNALIA.--It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

withheld and he was fined and ordered to perform community service. Adjudication was suspended for the charge of possession of a narcotic implement and the applicant was ordered to perform community service. These convictions render the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II).

Counsel's contention on appeal is that the applicant is eligible for a section 212(h) waiver based on the Ninth Circuit's holdings in *Lujan* and *Cardenas-Uriarte*. In *Lujan*, the Ninth Circuit held that a first-time conviction for simple drug possession that is eliminated under a state rehabilitative statute will be considered eliminated for immigration purposes. The Ninth Circuit in *Cardenas-Uriarte* essentially held that possession of drug paraphernalia is included as an offense in the FFOA. However, counsel's contention is not persuasive in that *Lujan* and *Cardenas-Uriarte* are Ninth Circuit cases, whereas the present case is within the jurisdiction of the Court of Appeals of the Eleventh Circuit. According to the Eleventh Circuit in *Resendez-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262 (11<sup>th</sup> Cir. 2004), a state conviction remains a conviction for immigration purposes, regardless of whether it is later expunged under a state rehabilitative statute, so long as the conviction satisfies the requirements of section 1101(a)(48)(A) of the Act. 383 F.3d at 1271. Thus, even though the record before the AAO indicates that the applicant was issued a discharge certificate for possession of marijuana and possession of drug paraphernalia, pursuant to *Resendez-Alcaraz* and BIA precedent, his convictions remain convictions for immigration purposes.

A section 212(h) waiver applies to controlled substance cases that relate to a single offense of possession of 30 grams or less of marijuana. The record of conviction shows that the applicant has two convictions under section 212(a)(2)(A)(i)(II) of the Act: simple possession of marijuana and possession of drug paraphernalia. The AAO notes that a conviction for possession of drug paraphernalia renders a person inadmissible under section 212(a)(2)(A)(i)(II) of the Act. *See Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009). Because the record of conviction does not establish that the applicant's controlled substance conviction involved a single offense of simple possession of 30 grams or less of marijuana, the applicant is not eligible for a waiver under section 212(h) of the Act. The applicant is therefore statutorily ineligible for a waiver. The convictions render the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

**ORDER:** The appeal is dismissed.