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U.S. Citizenship  
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Services

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H<sub>2</sub>

FILE:

Office: LOS ANGELES, CA

Date:

**OCT 26 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f- Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office 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 [REDACTED] 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)(I), for having been convicted of controlled substance violations. The applicant is married to a U.S. citizen and the father of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director found that no waiver was available to the applicant and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's decision*, dated May 12, 2009.<sup>1</sup>

On appeal, counsel asserts that the Field Office Director misstates the facts of the applicant's case and that the applicant is not inadmissible based on the convictions cited by the Field Office Director. *Form I-290B, Notice of Appeal or Motion*, dated June 10, 2009.

In support of the application, the record contains, but is not limited to, counsel's brief, statements from the applicant and his spouse, letters of support, country conditions information, financial records and bills, and documentation relating to the applicant's arrests and convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

....

(II) A violation (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:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

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<sup>1</sup> The AAO notes that the Field Office Director issued two decisions, both dated May 12, 2009, relating to the applicant's waiver application. Both discuss the applicant's controlled substance convictions and note his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, but then incorrectly inform him of a section 212(6)(C)(i) inadmissibility for misrepresentation.

The Field Office Director found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act based on convictions for Use/Under the Influence of Controlled Substance under [REDACTED] and Safety Code (Cal. Health and Safety Code) § 11550 on October 3, 1984 and March 15, 1991. Counsel contends, however, that it was not the applicant who was convicted on October 3, 1984, but his co-defendant. He further asserts that the applicant's 1991 conviction was vacated on April 24, 1996 under a non-rehabilitative statute and that, as a result, the applicant is not inadmissible.

The record supports counsel's statements regarding the outcome of the applicant's April 4, 1984 arrest for Use/Under Influence Controlled Substance under Cal. Health and Safety Code § 1150. Court records from the Municipal Court of East Los Angeles Courthouse Judicial District, County of Los Angeles indicate that the applicant's case was diverted on June 28, 1984 with no admission of guilt or plea entered by the applicant and that, on April 26, 1985, the diversion was continued on the same terms and conditions. On June 27, 1985, the court ordered the period of diversion terminated and dismissed the charges against the applicant pursuant to California Penal Code (Cal. Penal Code) § 1000.3. Accordingly, the applicant was not convicted of a controlled substance violation in connection with his April 4, 1984 arrest and may not be excluded from the United States on this basis.

Subsequent to the dismissal of the above charges, the applicant was twice convicted of Use/Under the Influence Controlled Substance, Cal. Health and Safety Code § 11550, on November 14, 1990 and March 15, 1991.<sup>2</sup> The AAO notes that on April 24, 2006, the Municipal Court of East Los Angeles Courthouse Judicial District, County of Los Angeles set aside and vacated the plea of nolo contendere entered by the applicant on March 15, 1991 and dismissed the applicant's case in the furtherance of justice pursuant to Cal. Penal Code § 1385. The applicant has also filed a motion to dismiss with the Superior Court of the State of California, County of Los Angeles, Central District to dismiss his November 14, 1990 conviction. The record, however, contains no documentation to indicate that the court has vacated the applicant's second controlled substance violation.<sup>3</sup>

Counsel states that the applicant's March 15, 1991 conviction has been vacated pursuant to a non-rehabilitative statute and contends that this vacatur, if given effect as required under the jurisdiction of the Ninth Circuit Court of Appeals, eliminates this conviction as a basis of inadmissibility. In support of these claims, counsel cites to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) and *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9<sup>th</sup> Cir. 2006).

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<sup>2</sup> The applicant's November 14, 1990 controlled substance conviction was not noted by the Field Office Director in his denial. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3<sup>d</sup> Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

<sup>3</sup> The applicant has submitted his April 3, 2006 motion to dismiss his November 14, 1990 conviction, which includes a handwritten "WON" on the cover sheet. However, there is no minute order or other court document in the record that indicates that this conviction (Case [REDACTED]) has been vacated. The record does contain an April 24, 2006 minute order vacating the applicant's conviction in relation to Case [REDACTED] a number that does not appear related to any of the applicant's documented arrests and convictions.

In *Lujan-Armendariz v. INS*, the Ninth Circuit Court of Appeals held that the statutory definition of “conviction” in section 101(a)(48) of the Act did not repeal or abrogate the Federal First Offender Act (FFOA), under which rehabilitative expungement of first-time simple possession drug offenses does not result in removal. The Court also stated 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. The applicant’s situation is not, however, similar to that of the respondent in *Lujan-Armendariz*.

In *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025-26 (9th Cir. 2007), the Ninth Circuit Court of Appeals addressed whether under equal protection principles an individual who had had a 1996 drug possession charge dismissed following his participation in a pretrial diversion program must have the expungement of a second drug possession conviction treated as an FFOA disposition. The Ninth Circuit determined that even in the absence of a guilty plea to the 1996 charge, the respondent was not similarly situated to a first-time offender, noting there was a sufficient factual basis to conclude that he had committed a drug offense in 1996 in that he had submitted to a diversion program, had never contended that the drug possession charge was baseless, and had been arrested for drug possession, charged, and sent to a diversion program in lieu of prosecution. The Ninth Circuit, therefore, determined that equal protection principles did not require the respondent’s participation in the 1996 diversion program to be ignored. Finding that the respondent had avoided criminal consequences for his 1996 charge and 1999 conviction, the Ninth Circuit determined that his 1999 conviction did not qualify for FFOA treatment because he “had received two bites at the ameliorative apple, instead of the one bite allowed by the FFOA.” *Id.*

Based on this reasoning, the AAO concludes that the dismissal of the applicant’s March 15, 1991 conviction is not a first-time, simple possession drug offense that falls under the purview of the FFOA.

Counsel also cites to *Nath v. Gonzales*, 467 F.3d 1185 (9<sup>th</sup> Cir 2006) to establish that the applicant’s vacated conviction no longer bars his admission to the United States, as it was vacated under Cal. Penal Code § 1385, a non-rehabilitative statute. The AAO finds *Nath* to establish that a vacated conviction ceases to be a conviction for immigration purposes if the vacatur is based on a procedural or substantive defect in the underlying criminal proceedings, rather than as a result of the individual’s rehabilitation or to avoid immigration consequences. We do not, however, find the evidence of record to demonstrate that the applicant’s March 15, 1991 conviction under Cal. Health and Safety Code § 11550 was vacated as a result of procedural or substantive defects in the criminal proceeding that resulted in his conviction.

Cal. Penal Code § 1385 states:

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

(c) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).

(2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

The record reflects that the Municipal Court of East Los Angeles dismissed the applicant's March 15, 1991 conviction "in the furth[erance] of justice per 1385 PC." "Furtherance of justice," however, is an "amorphous concept" and encompasses a broad range of relief. See *People v. Orin*, 13 Cal.3d 937, 533 P.2d 193, 120 Cal.Rptr. 65; see also *People v. Superior Court (Romero)*, 13 Cal.4<sup>th</sup> 497, 917 P.2d 628, 648; 53 Cal.Rptr.2d 789. The record does not contain the minute order as required under Cal. Penal Code § 1385 stating the reasons for the dismissal.

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any action that overturns a state conviction other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528.

In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the Board of Immigration Appeals (BIA) considered a case similar to that presented here, in that the Canadian court that had "quashed" the respondent's controlled substance conviction did not indicate the basis on which it had reached its decision. In the absence of court records to answer this question, the BIA reviewed the affidavit submitted by the respondent in support of his request that the court quash his conviction. It found the affidavit to demonstrate that the respondent was seeking relief based on the bar that a controlled substance conviction presented to permanent residence in the United States. In light of the evidence provided by the affidavit, the BIA concluded that the quashing of the respondent's conviction did not reflect the court's finding of a defect in his conviction or in the proceedings underlying his conviction but was intended solely to eliminate the bar to his adjustment. Accordingly, it found that he remained convicted for immigration purposes.

The AAO has reviewed the applicant's April 3, 2006 motion to dismiss his March 15, 1991 conviction and his March 27, 2006 declaration submitted in support of the motion. The applicant's declaration states the following:

2. In 1990, I pled nolo contendere to a misdemeanor violations of § 23152(A) of the Vehicle Code and 11550 of the Health & Safety Code in the above reference court.
3. I fulfilled all the terms of my probation, which has been completed.
4. I support myself and my family consisting of my wife and our son, who are both US Citizens.
5. I have been fully employed for the past ten years by the same company in the Railroad Industry. I have not been on Public Assistance of any kind or nature whatsoever.
6. I have had no convictions or other problems since 1994.
7. After attending the court ordered educational classes, I learned how dangerous my behavior was, and I have not been involved with any illegal substances since 1990.

8. I no longer consume alcoholic beverages, which was a contributing factor in the case.
9. I am attempting to become a legal resident of the United States. My immigration attorney informed me that my convictions of Section 23152(A) of the Vehicle Code and Section 11550 of the Health & Safety Code will be considered crimes of moral turpitude, which would preclude my eligibility to become a legal resident of the United States.
10. Since I am not yet a legal resident, I am constantly in fear that I could be deported. If I am deported it would be a great hardship to my family, two of whom are US Citizens.
11. I respectfully request that the court set aside my convictions and dismiss the above referenced case pursuant to Section 1385, which would allow me to be eligible to become a citizen of the United States.

The applicant's motion begins with a "Statement of Facts" that concludes with the following language:

[The applicant's] immigration attorney informed him that his conviction . . . would be considered a crime of moral turpitude, which would prevent his eligibility to achieve legal status. The Court has the discretion under Section 1385 of the Penal Code to remove this blemish from his record so that he might have the opportunity to become a legal resident and citizen of the United States."

The motion's "Conclusion" states:

In summary, the defendant herein has a good record of supporting himself and his family, has never been charged with the use of firearms, and has otherwise been a good member of society. There should therefore be no objection to the Court exercising its discretion to dismiss the charge against [REDACTED] that he may achieve eligibility to become a legal resident and citizen of the United States.

Relying on the reasoning in *Matter of Pickering*, the AAO finds that the applicant's motion to dismiss and declaration establish that his March 15, 1991 conviction was vacated for immigration purposes rather than for any procedural or substantive defect. Thus, he remains "convicted" within the meaning of section 101(a)(48)(A) of the Act based on his plea of nolo contendere to Use/Under Influence of Controlled Substance under Cal. Health and Safety Code § 11550. Further, the applicant has a second conviction under Cal. Health and Safety Code § 11550. Accordingly, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of two controlled substance violations.

The AAO also observes that neither of the applicant's controlled substance violations involved marijuana. At the time of the applicant's conviction, the language of Calif. Health and Safety Code § 1150 stated, in pertinent part, that:

[n]o person shall use, or be under the influence of any controlled substance, which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054 [of the Health and Safety Code], specified in paragraph (14), (21), (22), or (23) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055 [of the Health and Safety Code] or specified in paragraph (1) or (2) of subdivision (d) or in paragraph (3) of subdivision (e) of Section 11055, or (2) a

narcotic drug classified in Schedule III, IV, or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances.

Marijuana was not included among these substances, but, instead, was found in paragraph (13) of subdivision (d) in Section 11054.

Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. The applicant in the present case has two controlled substance convictions, neither of which involved marijuana. Accordingly, no waiver is available to him under the Act.

Having found the applicant to be ineligible for a 212(h) waiver, the AAO finds no purpose would be served in determining whether the record establishes that his spouse and/or child would suffer extreme hardship as a result of his inadmissibility. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.