**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals*
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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

(b)(6)

[redacted]

Date: APR 14 2014 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving a controlled substance. The applicant was also found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant seeks a waiver of inadmissibility to reside in the United States with his U.S. citizen spouse.

In a decision, dated May 28, 2013, the director found that the applicant was not eligible to apply for a section 212(h) waiver of his inadmissibility under section 212(a)(2)(A)(i)(I) because he was convicted of a crime involving cocaine. Citing section 212(h) of the Act, the director found that for applicants convicted of crimes involving a controlled substance, waivers are only available when the offense is related to simple possession of 30 grams or less of marijuana. Because no waiver was available to the applicant, the director denied the application accordingly.

On appeal counsel asserts that the director erred in finding that the applicant is ineligible to seek permission to reapply for admission because he has not been outside of the United States for ten years when 8 C.F.R. § 212.2(a) specifically allows for this scenario. He also states that in accordance with *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) the applicant's drug offense is not a conviction for immigration purposes and the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The record reflects that the applicant first entered the United States without inspection in December 1996. On or around August 14, 2003 the applicant was taken into Immigration and Customs Enforcement custody and granted voluntary return. He departed the United States in 2003. The applicant then reentered the United States without inspection shortly after this departure, remaining until November 2012. The applicant is currently in Mexico. Thus, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having reentered the United States without being admitted after a period of unlawful presence.

As stated above, in addition to his inadmissibilities under section 212(a)(9)(B)(i)(II) of the Act and section 212(a)(9)(C)(i)(I) of the Act the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for an offense for which there is no waiver available. We now turn to counsel's assertions regarding the applicant's conviction for this offense not being a conviction for the purposes of immigration law.

The Ninth Circuit Court of Appeals stated in *Lujan-Armendariz v. INS* 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.[1]

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 –
>
> (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* 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 (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

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[1] *Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000)* and related cases have been overruled on a prospective basis by the Ninth Circuit in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. July 14, 2011) (*en banc*). *Lujan* will only apply to cases arising in the Ninth Circuit which involved convictions that occurred prior to July 14, 2011. The record indicates that the applicant's conviction occurred in or around 2006.

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).

*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, 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.

The current record fails to establish that the applicant's case falls under the limited circumstances of *Lujan*. The record does not contain a court disposition or record of conviction in the applicant's case. The applicant does not contest the finding of fact that he was convicted of possession of cocaine in California and the record contains documentation showing that the applicant was in a court ordered rehabilitation program in 2006 and 2007. However, this documentation alone does not establish that the applicant qualifies for the exception in *Lujan*. The applicant has not established that he would have qualified for treatment under the FFOA or that the California court entered an order pursuant to section 1203.4 of the California Penal Code, under which the criminal proceedings against the applicant were dismissed after probation. The record does not establish that the applicant completed his probation. Thus, the current record does not show that the applicant qualifies under *Lujan*. Thus, for the purposes of immigration, the applicant continues to be convicted of a controlled substance violation involving cocaine and remains inadmissible under section 212(a)(2)(A)(II) of the Act.

Section 212(a)(2)(A) states:

> (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 –
>
> . . .
>
> (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.
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> . . .

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....

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing his inadmissibility under sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act, whether he has established extreme hardship to qualifying relatives, or whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) and section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.