



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **JAN 23 2014** Office: WEST PALM BEACH, FL

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:

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 Field Office Director, West Palm Beach, Florida, denied the waiver application and 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 Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of cocaine. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act in order to reside with his wife in the United States.

The field office director found that the applicant is ineligible to apply for a waiver of inadmissibility and denied the application accordingly.

On appeal, filed on January 13, 2012 and received by the AAO on September 1, 2013, counsel contends that the applicant is eligible to apply for a waiver of inadmissibility because his conviction was pardoned by the National Parole Board in Ottawa, Ontario, Canada, and under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), the applicant does not have a "conviction" for immigration purposes. Counsel also contends the applicant established extreme hardship.

The record includes, but is not limited to, the following documents: a copy of the marriage certificate of the applicant and his wife, [REDACTED] indicating they were married on December 4, 2010; an affidavit from the applicant; a letter from [REDACTED] father; a letter from [REDACTED] physician; a psychological report; numerous letters of support; copies of criminal records; copies of photographs of the applicant and his wife; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this 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 –

- (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 802 of Title 21),

is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section 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 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 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 resident spouse, parent, son, or daughter of such alien . . . .

In this case, the field office director found, and counsel concedes, that in February 2000, the applicant was convicted in Canada of possession of cocaine and was fined \$150. The record further shows, and the applicant concedes in his adjustment application, that he was also convicted of four other offenses in Canada: theft over \$1,000 in November 1991; break, enter, and commit in September 1992; driving under the influence in December 2007, and resisting arrest in 2009. The record contains a letter from Canada's National Parole Board, Clemency and Pardons Division, showing the applicant was pardoned under the Criminal Record Act for his 1991, 1992, and 2000 convictions. *Letter from* [REDACTED] dated August 31, 2004.

Counsel contends the applicant is eligible for a waiver because his conviction for possession of a controlled substance was expunged and under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), the applicant does not have a "conviction" for immigration purposes.

Counsel's contention is unpersuasive. The Ninth Circuit Court of Appeals, sitting *en banc*, overruled *Lujan-Armendariz* in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> Cir. 2011). In *Lujan-Armendariz*, the Ninth Circuit held that a state court conviction for a simple possession drug crime that was later expunged did not constitute a "conviction" for immigration purposes. *Lujan-Armendariz*, 222 F.3d at 749. However, in *Nunez-Reyes*, the Ninth Circuit noted that the

Board of Immigration Appeals and every sister circuit to have addressed the same issue, including the Eleventh Circuit where the instant case arises, rejected the holding in *Lujan-Armendariz*. *Nunez-Reyes*, 646 F.3d at 688-89. The Ninth Circuit held that equal protection does not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the Federal First Offenders Act for immigration purposes. *Id.* at 690. Therefore, *Lujan-Armendariz* is no longer controlling law.

In addition, the instant case did not arise in the Ninth Circuit, but rather, the Eleventh Circuit, which has consistently held that “the clear language of the statute [the Act] includes state convictions expunged under state rehabilitative laws.” *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262, 1269 (11<sup>th</sup> Cir. 2004) (rejecting *Lujan-Armendariz*). To the extent counsel also relies on *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995), the Eleventh Circuit noted that *Manrique* was decided in 1995, a year before Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which codified the definition of “conviction” in section 101(a)(48)(A) of the Act. *Resendiz-Alcaraz*, 383 F.3d at 1268. As the Court stated:

The language of § 1101(a)(48)(A) [section 101(a)(48)(A) of the Act] is quite clear - an alien will be considered to have a conviction for immigration purposes if: (1) a judge or jury found the alien guilty, if the alien entered a guilty plea or a plea of nolo contendere, or if the alien admitted sufficient facts to warrant a finding of guilt; and (2) the judge ordered some form of punishment.

*Id.* Therefore, under the current statutory definition of “conviction,” 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. *Cf. Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 523 (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 this case, the facts of the applicant’s case are similar to those in *Fernandez-Bernal v. U.S. Att’y Gen.*, 257 F.3d 1304 (11<sup>th</sup> Cir. 2001). In *Fernandez-Bernal*, the Eleventh Circuit Court of Appeals found that an alien, who was convicted by a California superior court for possession of cocaine, but later had his conviction expunged, nonetheless remained inadmissible under section 212(a)(2)(A)(i)(II) of the Act, stating that he “undoubtedly committed a criminal offense covered in § 1182(a)(2).” *Fernandez-Bernal*, 257 F.3d at 1309. Similarly, in this case, it is undisputed that the applicant was convicted of possession of cocaine and was fined \$150. Therefore, (1) a judge or jury found the alien guilty, or the alien entered a guilty plea or a plea of nolo contendere, or the alien admitted sufficient facts to warrant a finding of guilt; and (2) the applicant was fined \$150, a court-ordered form of punishment. Therefore, the applicant meets the statutory definition for “conviction” under section 101(a)(48)(A) of the Act, and is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of cocaine.

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 a conviction for possession cocaine, not marijuana. Accordingly, no waiver is available to him under the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.