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

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

144

[REDACTED]

**AUG 10 2009**

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

(RELATES)

IN RE:

[REDACTED]

APPLICATION:

Application for Permission to Reapply for Admission into the United States after  
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and  
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reconsider is granted. The order dismissing the appeal will be affirmed.

The applicant appears to be represented; however applicant's counsel, [REDACTED] has been suspended from practicing before the Department of Homeland Security. Accordingly, all representations will be considered but the decision will be furnished only to the applicant.

The applicant is a native and citizen of Mexico who initially entered the United States without inspection on July 11, 1988. On November 26, 1990, the applicant was arrested for selling/transporting a controlled substance, cocaine, in violation of California Health and Safety Code (H&S) § 11352(a), and possessing for sale a controlled substance, in violation of California H&S § 11351. On January 23, 1991, the applicant was convicted of selling/transporting a controlled substance, in violation of California H&S 11352(a), and was sentenced to 180 days in jail and three (3) years probation.

On March 25, 1991, an Order to Show Cause (OSC) was issued against the applicant. On March 28, 1991, an immigration judge ordered the applicant deported from the United States, a Warrant of Deportation (Form I-205) was issued, and the applicant was deported to Mexico. On the same day, the applicant reentered the United States without inspection. On June 27, 1992, the applicant married [REDACTED], a lawful permanent resident, in California. On January 28, 1993, the Municipal Court of Los Angeles, Van Nuys Judicial District, clarified that the applicant was convicted of transporting a controlled substance for personal use, not sale, in violation of California H&S § 11352(a). On August 16, 1996, the applicant's wife became a United States citizen. On October 22, 1996, the applicant's 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 Residence or Adjust Status (Form I-485) and an Application for Waiver of Grounds of Inadmissibility (Form I-601). On February 10, 2003, the applicant's Form I-130 was approved. On April 13, 2004, the District Director, Los Angeles, California, denied the applicant's Form I-485 and Form I-601, finding that the applicant was statutorily ineligible for a waiver under section 212(h) of the Immigration and Nationality Act (the Act). The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside with his U.S. citizen wife and five children.

The director determined that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being convicted of a controlled substance trafficking offense, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating any law or regulation relating to a controlled substance. The director denied the applicant's Form I-212 accordingly. *Director's Decision*, dated March 27, 2002.

On May 30, 2008, the AAO dismissed the applicant's appeal because the applicant was convicted of a crime relating to a controlled substance and is ineligible for a waiver under section 212(h) of the Act. The AAO found that no purpose would be served in a favorable exercise of discretion in

adjudicating the Form I-212 and denied the Form I-212 accordingly. *Decision of AAO*, dated May 30, 2008.

In his motion to reconsider, counsel contends that the AAO failed to consider the Federal First Offender Act in adjudicating the applicant's appeal.<sup>1</sup> *See Counsel's Motion to Reconsider*, dated June 18, 2008. In support of his contentions, counsel submits the referenced motion to reconsider and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.-Any alien not described in clause (i) who-
  - (I) **has been ordered removed under section 240 or any other provision of law, or**
  - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

8 C.F.R. § 103.5(a) provides, in pertinent part:

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<sup>1</sup> The AAO notes that counsel wishes to motion both the dismissal of the Form I-212 and Form I-601; however, counsel only submitted one Form I-290B. Counsel must file a Form I-290B and corresponding filing fee for each application he either wishes to appeal or make a motion to reopen or reconsider. Accordingly, the AAO finds that counsel may only motion one of the applications that were dismissed by this office. The AAO will adjudicate the dismissal of the Form I-212, since it is the first application listed in part two of the Form I-290B. The AAO notes that its decision in regard to the Form I-212 is identical to the decision it would issue in regard to a motion to reconsider the dismissal of the Form I-601.

*(2) Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

*(3) Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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

(1) 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 —

- (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)(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 . . . .* (emphasis added.)

In support of his motion to reconsider, counsel contends that, under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), the applicant is eligible for treatment as a first time offender and, as such, the applicant's conviction for transportation of a controlled substance does not constitute a conviction for purposes of immigration law.

*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 (9<sup>th</sup> Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187 (9<sup>th</sup> 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).

*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. 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 (9<sup>th</sup> Cir. 1994)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9<sup>th</sup> 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 (9<sup>th</sup> 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 not established that he would have qualified for treatment under the FFOA. The applicant was not found guilty of *simple possession* of a controlled substance. Only simple possession may be eligible for treatment under the FFOA. While the record reflects that the applicant's conviction for transportation of a controlled substance was for "transportation for personal use, not sale," the statute under which the applicant was convicted clearly reflects that the applicant was not convicted of simple possession.<sup>2</sup> The AAO finds that the applicant is ineligible for treatment as a first-time offender and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime related to a controlled substance.

The Act makes it clear that a section 212(h) waiver is available only for controlled substance convictions that involve a *single* offense of *possession* of 30 grams or less of marijuana. In this case, the applicant was convicted of transportation of a controlled substance, cocaine.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(II) of the Act, which are very specific and applicable. No waiver is available to an alien who has been convicted of a controlled substance violation, other than simple possession of marijuana in an amount less than 30 grams. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. While the motion to reconsider will be granted, the order dismissing the appeal will be affirmed because the applicant is statutorily inadmissible to the United States,.

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<sup>2</sup> Additionally, the Ninth Circuit noted that it appeared that an otherwise eligible offender could only qualify for relief as a first-time offender if he received only probation as opposed to imprisonment. The Ninth Circuit declined to recognize whether this limitation constituted an acceptable interpretation of their ruling because, in practice, there are probably few, if any, first-time drug offenders found guilty of simple possession who are sentenced to imprisonment rather than probation and the case before it did not include a sentence of imprisonment. Under such a limitation the applicant would not be eligible for treatment as a first-time offender because he was sentenced to 180 days in jail as well as three years of probation.

**ORDER:** The motion to reconsider is granted. The order dismissing the appeal will be affirmed.