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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

Date: MAY 10 2013 Office: SPOKANE FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO**. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Spokane, Washington, and the Administrative Appeals Office (AAO) dismissed the applicant's subsequent appeal. The matter is now before the AAO on motion to reconsider. The applicant's motion will be dismissed and the underlying application will remain denied.

The applicant is a native and citizen of Taiwan 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 admitted to committing acts that constitute the essential elements of a violation of law relating to a controlled substance. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or willful misrepresentation of a material fact. The applicant is the husband of a U.S. citizen. The applicant seeks waivers of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) and (i), in order to remain in the United States with his U.S. citizen spouse.

In a decision dated October 5, 2011, the field office director found the applicant inadmissible for having admitted in a sworn statement to committing acts that constitute the essential elements of possession of cannabis and cocaine. The field office director also found that the applicant misrepresented a material fact on his nonimmigrant visa application, Form DS-156. The director denied the Form I-601 waiver application stating that a waiver was not available for inadmissibility related to possession of cocaine under section 212(a)(2)(A)(i)(II) of the Act.

In a decision dated January 4, 2013, the AAO found that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for having admitted to Immigration Officer to committing acts in Washington State that constituted the essential elements of cocaine possession, a crime related to a controlled substance for which there is no waiver. The AAO found that the applicant's admissions to an immigration officer complied with the three conditions governing admissions under the second and third clauses of section 212(a)(2)(A)(i) of the Act, as set forth by the Board of Immigration Appeals (Board) in *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). Consequently, the applicant's appeal was dismissed.

On motion, the applicant indicates in Part 3 of the Notice of Appeal of Motion (Form I-290B) that "[the] AAO erred in stating there is no waiver available, where it is eligible for relief under the Federal First Offender Act." No evidence was submitted in support of the motion to reopen and reconsider. *See* 8 C.F.R. § 103.5(a)(2) ("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."). As such, the applicant's filing will be treated as a motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a) governs motions and states, in pertinent part, that:

> (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.

In response to the applicant's arguments regarding the effect of an expungement under the Federal First Offender Act (FFOA), 18 U.S.C. § 3607, in cases arising under the jurisdiction of the Ninth Circuit, the Ninth Circuit Court of Appeals, in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), overruled its holding in *Lujan–Armendariz v. INS,* 222 F.3d 728 (9th Cir.2000). Accordingly, an alien convicted of simple possession of a controlled substance in the Ninth Circuit whose conviction was expunged pursuant to a state rehabilitative statute is treated as "convicted" under the definition found in section 101(a)(48)(a) of the Act. 646 F.3d at 693. In *Nunez-Reyes*, the Ninth Circuit held that this rule would apply prospectively to all convictions rendered after July 14, 2011. *Id.* at 694. Conversely, under the FFOA, a successfully expunged federal conviction "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." *See* 18 U.S.C. § 3607(b). Thus, for immigration purposes in the Ninth Circuit, expungements of state convictions for possession of controlled substances are treated differently than expungements under the FFOA.

However, neither FFOA nor the holding in *Nunez-Reyes* apply to this case as the applicant was not convicted and, thus, has not had a conviction expunged or vacated. Rather, this case concerns an alien's admission to the essential elements of a ground of inadmissibility to the United States under section 212(a)(2)(A)(i)(II) of the Act. Under the second and third clauses of that section, an alien may be found inadmissible based upon his or her admissions even where there is no conviction. In this case, the record evidence shows that the applicant admitted to all the essential elements of possession of cocaine, in violation of section 69.50.4013 of the Revised Code of Washington. Based on these facts, the AAO correctly determined that the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for having admitted to the essential elements of a state crime regarding a controlled substance. As a state offense is at issue, FFOA would not apply. Furthermore, *Lujan-Almendariz*'s holding could only apply to a conviction entered on or before July 14, 2011. Even were the AAO to treat the applicant's admissions to an immigration officer in the same manner as an expunged conviction, the applicant's admission to the essential elements of possession of cocaine in violation of section 69.50.4013 of the Revised Code of Washington occurred on August 2, 2011, after deadline set forth in *Nunez-Reyes*.

A waiver of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h). However, the Act makes it clear that a section 212(h) waiver is not available to an alien who has admitted to committing the essential elements of a crime related to a controlled substance which is more than simple possession of 30 grams of marijuana. That is, no waiver is available to an alien who has been convicted, or admits the essential elements, of a crime related to a controlled substance if the crime does not relate to the simple possession of 30 grams or less of marijuana. *See* Section 212(h) of the Act. Here, the record of proceedings conclusively demonstrates that the applicant admitted to the essential elements of possession cocaine. Consequently, he is statutorily ineligible for consideration of a section 212(h) discretionary waiver of his inadmissibility under section 212(a)(2)(A)(i)(II)of the Act, and the AAO correctly dismissed the applicant's appeal.

Lastly, the AAO notes that the applicant's admission was to the elements of a crime under state law, not a federal statute. For *Lujan-Almendariz*'s holding to apply, a conviction must have been entered on or before July 14, 2011. Even were the AAO to treat the applicant's admissions to an immigration officer in the same manner it would an expunged conviction, the applicant's admission occurred on August 2, 2011, after the Ninth Circuit's ruling in *Nunez-Reyes*.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing statutory eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met that burden. Accordingly, the applicant's motion to reconsider is dismissed and the underlying application remains denied.

ORDER: The motion is dismissed.