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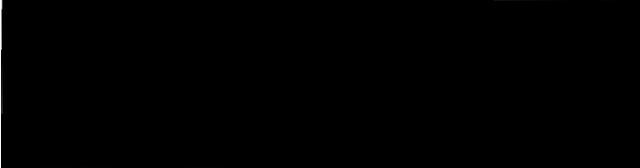
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U.S. Citizenship  
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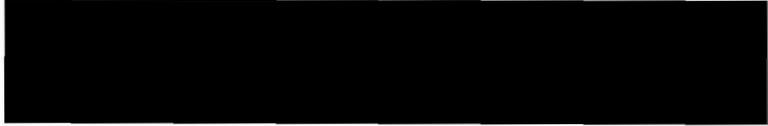
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Office: CALIFORNIA SERVICE CENTER

Date: NOV 15 2006

IN RE:

Applicant:



APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 210 of the  
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant had evidently been convicted of a crime involving a controlled substance, which rendered him inadmissible to the United States.

On appeal, counsel maintains that the applicant was not convicted of the offense, but, rather, was granted diversion.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act. An alien is also inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act, formerly section 212(a)(23) of the Act.

In response to a request from the director, counsel submitted a "Records Search Response" from the Superior Court of Pittsburg, California. This report indicates that the applicant was convicted of *Possession of Controlled Substance*, and *Driving Under the Influence of Alcohol or Drugs*, on August 30, 2001, docket number [REDACTED]. Other charges, including *Evading Peace Officer*, *Driving While License Suspended*, and *Driving with Blood Alcohol Content of .10% or More*, were dismissed on the same day.

Counsel also submitted the Clerk's Docket and Minutes of the proceedings, which also show that the applicant pled no contest and was found guilty of the same two counts. He further provided a Diversion Order under section 1000 of the California Penal Code (PC1000), which the director concluded applied to the Driving Under the Influence offense, rather than the Possession of Controlled Substance offense.

On appeal, counsel stresses that PC1000 only applies to narcotics offenses, and provides a photocopy of such section of law. It appears that counsel is correct, and that the applicant was granted diversion on the possession charge. The question remains, however, as to whether this does not constitute a conviction. It is noted that the documents mentioned above do refer to a plea and a finding of guilt. 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.

Counsel contends that the applicant has not been convicted of a controlled substance offense pursuant to applicable Ninth Circuit Court of Appeals and Board of Immigration Appeals precedent decisions. However, he fails to cite any such decisions.

Under the 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 which 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. Any subsequent action that overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Ninth Circuit Court of Appeals stated in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) 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.”

Since this case arises in the Ninth Circuit, *Lujan* is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).<sup>1</sup>

*Lujan* holds that the definition of “conviction” at § 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

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<sup>1</sup> In cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for Federal First Offender Act (FFOA) treatment. See *Matter of Salazar-Regino*, *supra*; see also *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

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 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 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 this case, the applicant has not provided any evidence or information that would establish that the crime involved only “simple” possession. Further, as pointed out by the director, the PC1000 Diversion Order in this case indicates that the matter was continued to November 29, 2001 for review. There is no indication, or even claim, that the applicant successfully completed the diversion program. Thus, even if we were to conclude that successful completion of a diversion program would result in a finding that an alien had not been convicted, we do not have evidence of completion of the program in this instance. There is, therefore, no evidence that the applicant received relief under a state law and would have been eligible for relief under the FFOA.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she is *admissible* to the United States under the provisions of section 210(c) of the Act, 8 U.S.C. § 1160, and is otherwise eligible for adjustment of status under this section. 8 C.F.R. § 210.3(b)(1). The applicant has failed to establish that the guilty plea and the granting of diversion did not constitute a conviction of an offense involving a controlled substance. Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. There is no waiver available to an alien inadmissible under that section except for a single offense of simple possession of thirty grams or less of marijuana. *See* section 210(c)(2)(B)(ii) of the Act.

**ORDER:** The appeal is dismissed. This decision constitutes a final notice of ineligibility.