

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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**

**PUBLIC COPY**

41

FILE:

MSC-06-103-15047

Office: SAN FRANCISCO

Date:

**JAN 08 2010**

IN RE:

Applicant:

APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been forwarded to the Citizenship and Immigration Services National Records Center. 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. If your appeal was sustained, or if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

Perry Rhew, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, San Francisco, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal.) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal.) February 17, 2004, (CSS/Newman Settlement Agreements). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.

The director found that the applicant entered the United States on June 30, 1979 as a nonimmigrant B-2 visitor for pleasure. The director indicated that the applicant failed to submit sufficient evidence that he violated his lawful status prior to January 1, 1982 or that his unlawful status was known to the government. The director also noted that the applicant failed to submit sufficient evidence to establish that he resided continuously in the United States throughout the entire relevant period. Finally, the director noted that on November 23, 1999, the applicant was charged with a felony, violating California Penal Code (CPC) § H&S 11350(a), *Possession of a Controlled Substance*. The director noted that the applicant was required to take classes and surrender to drug testing for 6 months and that he was then given diversion.

On appeal, the applicant states that he has established continuous unlawful residence throughout the requisite period and that he is otherwise eligible to adjust to temporary resident status. He indicates that his unlawful status was known to the government prior to January 1, 1982 because he overstayed his period of authorized stay in B-2 status following his June 30, 1979 entry and he failed to submit required address reports. He further asserts that his criminal conviction does not render him inadmissible because, pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the applicant’s successful completion of a diversion program renders him not convicted for federal immigration purposes.

On September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –

(A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

(B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

2. Enumerated Categories

- (1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.
- (2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.
- (3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of
  - a. reinstatement to nonimmigrant status;
  - b. **change of nonimmigrant status pursuant to INA § 248;**
  - c. adjustment of status pursuant to INA § 245; or
  - d. grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

NWIRP further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after her lawful entry and prior to January 1, 1982, the applicant violated the terms of her nonimmigrant status in a manner known to the government in that, for example, documents and/or the absence of required documents (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) within the records of one or more government agencies, when taken as a whole, warrant a finding that the

applicant was in an unlawful status prior to January 1, 1982 in a manner known to the government. Once the applicant makes such a showing, U.S. Citizenship and Immigration Services (USCIS) then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982.

Thus, when an NWIRP class member demonstrates that she was present in the United States in nonimmigrant status prior to 1982, the absence from her record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that she had violated her nonimmigrant status and was in unlawful status in a manner that was known to the government prior to January 1, 1982. *See* NWIRP settlement agreement, paragraph 8B. *See also*: section 265(a) of the Act as in place through December 29, 1981 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the address change and must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

The record indicates that the applicant entered the United States as a B-2 visitor for pleasure on June 30, 1979. A photocopy of the applicant's passport containing the B-2 visa issued in Tehran, and the entry stamp dated June 30, 1979 is contained in the record of proceedings. The applicant asserts that he violated his B-2 status by overstaying his period of authorized stay and by failing to submit required address updates. It is also noted that the applicant testified that he attended and graduated from Athenian High School in Danville, California beginning in Fall 1979 and continuing through his graduation in June 1982. The applicant's transcripts from Athenian High School indicating his attendance from September 1979 through May 1982 are contained in the record of proceedings. The applicant asserts that his attendance at secondary school prior to January 1, 1982 was a violation of his B-2 status.

The AAO has conducted a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In this case, the AAO finds that the applicant did violate his lawful B-2 status by attending secondary school without proper authorization. However, it is unclear whether this violation was known to the government prior to January 1, 1982.

However, the record indicates that the applicant's unlawful status was known to the government prior to January 1, 1982 because he failed to submit required address updates.

Until Dec. 29, 1981, section 265 of the Act stated that any alien in the United States in “lawful temporary residence status shall” notify the Attorney General “in writing of his address at the expiration of each three-month period during which he remains in the United States, regardless of whether there has been any change in address.” *See* section 265 of the Act (1980) and PL 97-116, 1981 HR 4327(1981) which confirms that section 265 was modified, effective December 29, 1981, such that lawful non-immigrants were no longer required to file quarterly address reports regardless of whether there had been any change in address.

The applicant testified that he entered the United States in 1979 as a B-2 visitor for pleasure. He would have been required to provide written updates of his address at the expiration of each three-month period during which he remained in the United States, regardless of whether there was any change in address, from the date of his entry in 1979 until December 29, 1981. The record of proceedings is void of any address updates.

Following *de novo* review by the AAO, USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 31, 1981. In accordance with the terms of NWIRP, the AAO finds that the evidence establishes by a preponderance of the evidence that the applicant was unlawfully present in a manner known to the government prior to January 1, 1982. Consequently, the applicant has established that his unlawful status was known to the government prior to January 1, 1982.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the Immigration and Naturalization Service (INS), now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term “until the date of filing” shall mean until the date the alien was “front-desked” or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See id.* and § 245A(a)(2)(A) of the Act.

Where an applicant entered the United States in nonimmigrant status before January 1, 1982, in order to show unlawful residence throughout the requisite period, she must establish that her period of authorized stay expired prior to January 1, 1982 through the passage of time or that she fell into unlawful status and her unlawful status became known to the government prior to January 1, 1982. *See* section 245A(a)(2)(B) of the Act.

An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements has the burden to establish by a preponderance of the evidence that he or she has resided in the

United States for the requisite periods, is admissible to the United States under the provisions of Section 245A of the Act, and is otherwise eligible for adjustment of status. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence, or if that doubt leads the director to believe that the claim is probably not true, to deny the application or petition.

At issue in this proceeding is whether the applicant has established continuous unlawful residence in the United States throughout the requisite period; whether he has established that he is admissible; and whether he has established that he is otherwise eligible to adjust to temporary resident status.

The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of the following:

- undated photographs which are not verifiable or able to be authenticated;
- a copy of the applicant's B-2 nonimmigrant visa and entry stamp dated June 30, 1979;
- copies of the applicant's high school transcripts indicating that he attended Athenian High School from Fall 1979 until June 1982;
- a letter from the Office of the Registrar, University of San Francisco, dated October 14, 2005. The registrar indicates that the applicant attended the university from August 1982 until May 1984, earning 47 units.
- Unofficial transcripts from the Academy of Art University in San Francisco indicating that the applicant attended the university from January 30, 1984 until May 19, 1985;
- A Social Security Earnings Statement indicating that the applicant earned taxable wages in the United States beginning in 1990;
- A State of California, Bureau of Criminal Identification document indicating that the applicant applied for an alcohol license on December 14, 1987;
- Affidavits from [REDACTED] and [REDACTED]

The AAO has reviewed each document to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. The evidence indicates that the applicant did enter the United States in June 1979 and remained in the United States in unlawful status from that time, until May 1985. This is established by the applicant's high school and college transcripts. However, the applicant has not submitted sufficient evidence of his residence in the United States from May 1985 until the end of the relevant period.

Specifically, the applicant has submitted affidavits from his parents and three friends. All indicate that the applicant's family purchased [REDACTED] at [REDACTED] in Berkeley, California and that the family operated the restaurant for 12 years, beginning in 1984. However, the applicant has not submitted sufficient documents confirming the existence of the business during this period or his direct participation in the business. The applicant did submit a statement indicating that he tried to locate the telephone and utility records for the business from PG&E and was told that they were unavailable. The record does contain PG&E statements dated January 3, 1997 and November 2, 1995 containing the applicant's name. The record also contains Pacific Bell statements for the

address at [REDACTED] in Berkeley, California which bear the applicant's name and are dated in 1994 and 1995.

Finally, the record contains a letter from [REDACTED] indicating that the applicant lived on his property at [REDACTED] from December 1986 until September 1988. This letter is not notarized and the declarant does not include any evidence such as a rental agreement, rental receipts or utility bills which confirm either his ownership or the applicant's lease for the relevant period.

Absent sufficient evidence of the applicant's residency in the United States for the entire relevant period, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence from 1985 throughout the end of the relevant period.

Additionally, it is noted that on November 23, 1999, the applicant was arrested and charged with a felony, violating California Penal Code (CPC) §H&S 11350(a), *Possession of a Controlled Substance*. The director noted that the applicant was required to take classes and surrender to drug testing for 6 months and that he was then given diversion.

On appeal, counsel for the applicant asserts that pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the applicant's successful completion of a diversion program renders him not convicted for federal immigration purposes.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

The term "conviction" means, with respect to an alien, 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. Section 101(a)(48)(A) of the Immigration and Nationality Act (Act).

The record contains a two page certified report dated December 15, 2005 from the Municipal Court of Berkeley-Albany Judicial District, Alameda County, California, which reflects the following information relating to the applicant's criminal history:

An arrest on November 22, 1993 by Berkeley Police Department and entered plea agreement for a deferred entry of judgment under section 1000 of the California Penal Code on November 23, 1993 in the Municipal Court for the County of Alameda, State of California for a violation of section 11350(a), Possession of a Narcotic Controlled Substance, of the California Health and Safety Code. The applicant successfully completed his diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 of the California Penal Code on January 4, 1999 (Case Number 146479).

In denying the Form I-687 application, the district director determined that the applicant's plea agreement equated to a felony criminal conviction. However, the district director failed to determine whether the applicant remained convicted for immigration purposes in light of the subsequent state action purporting to erase the original determination of guilt, as the applicant asserts on appeal. As the present case arises in the Ninth Circuit, the decision reached in *Lujan* is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).<sup>1</sup>

The Ninth Circuit Court of Appeals stated in *Lujan* 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." *Lujan*, 222 F.3d at 738.

*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*, 222 F.3d 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 pending successful completion of probation 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

---

<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) and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)

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*, 222 F.3d at 738 (citing *Garberding*, 30 F.3d 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*, 222 F.3d 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*, 222 F.3d at 738.

The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offense, 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*, 222 F.3d at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 812 (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. *Ramirez-Castro*, 287 F.3d 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-Gonzales* 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-Gonzales*, 344 F.2d at 806-7. Under former section 241(a)(11) of the Act, 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. 8 U.S.C. § 1251(a)(11)(1965).

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 *Arrellano-Flores v. Hoy*, 262 F.2d 667 (9<sup>th</sup> Cir. 1958)). 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 “expunge[ment]” 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) [of the Act] 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-Gonzales*, 344 F.2d at 809 (quoting *Matter of A-F-*, 8 I&N Dec. 429, 445-46 (AG 1959)).

*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*, 222 F.3d 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 the present case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant entered plea agreement for a deferred entry of judgment under section 1000 of the California Penal Code on November 23, 1993 in the Municipal Court for the County of Alameda, State of California for a violation of section 11350(a), *Possession of a Narcotic Controlled Substance*, of the California Health and Safety Code. The applicant successfully completed his diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 of the California Penal Code on January 4, 1999 ( [REDACTED] ).

The evidence in the record shows that he was not, prior to the commission of the offense, convicted of violating a federal or state law relating to controlled substances and that he was not previously accorded first offender treatment under any law.

The applicant has established that he is not “convicted” for immigration purposes. Consequently, the applicant is not ineligible to adjust to temporary resident status pursuant to 8 C.F.R. § 210.3(d)(3). Therefore, the applicant must be considered to have overcome this particular basis of denial put forth by the district director.

However, as stated above, absent sufficient evidence of the applicant’s residency in the United States for the entire relevant period, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period. This portion of the director’s decision will be upheld.

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