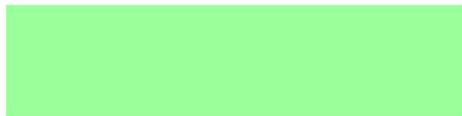


(b)(6)

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



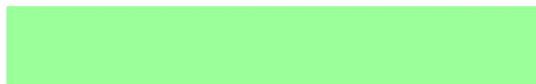
Date:

AUG 14 2013

Office: CALIFORNIA SERVICE CENTER

IN RE:

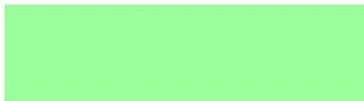
Applicant:



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

FILE:



ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

Thank you,

A handwritten signature in black ink, appearing to read "D. Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act) on April 20, 1988. On August 20, 1993, the director of the Western Service Center denied the Form I-687 application, finding the applicant to be ineligible for temporary resident status, on the basis that the applicant is excludable (now inadmissible) to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law relating to a controlled substance. The director further determined that the applicant was ineligible for temporary resident status due to his felony conviction.

On appeal, counsel contends that the applicant's successful completion of a diversion program renders him not convicted for federal immigration purposes pursuant to the Ninth Circuit Court of Appeals decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which affirmed the Ninth Circuit's prior decision in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994). Counsel contends that the director erred in finding that the applicant has been convicted of an offense involving a controlled substance, as "the expungement of the applicant's conviction removes any doubt as to his eligibility for amnesty."

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

(i) [A]ny 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.

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 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 Act.

The first issue to be determined in this proceeding is whether the applicant is ineligible for temporary resident status for violating a law relating to a controlled substance. The AAO has reviewed all of the documents in the file, including the criminal records and the statutes under which the applicant was convicted for laws relating to controlled substance offenses. The record shows that on or about April 12, 1985, the applicant was convicted in the Superior Court of California, County of Los Angeles, of two counts of possession of cocaine in violation of section 11350 of the California Health and Safety Code. For this offense, the applicant was sentenced to 90 days in

county jail with 26 days credit, was placed on probation for three years, and was ordered to pay a \$390 fine.

In denying the Form I-687 application, the director determined that the applicant's *nolo contendere* plea agreement equated to a criminal conviction for possession of a controlled substance, rendering the applicant ineligible to adjust to temporary resident status. However, the director did not 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 present case arises in the Ninth Circuit, the decisions reached in *Nunez-Perez* and *Lujan* are relevant in determining whether the applicant remains convicted of a controlled substance offense.

The Ninth Circuit Court of Appeals stated in *Lujan* that, "if (a) person's crime was a first-time drug offense, involving 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.

To qualify for first offender treatment under federal law, an applicant must show that (1) he or she has been found guilty of simple possession of a controlled substance; (2) he or she has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he or she 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 (9th Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187(9th 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*, 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 (9th Cir. 1994)).

Moreover, in *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001), the Ninth Circuit held that a state court action setting aside a theft conviction under a rehabilitative scheme was not effective in eliminating the judgment for immigration purposes. Furthermore, the holding set forth in the Ninth Circuit case, *Garcia-Gonzales v. INS*, 344 F.2d 804 (9th Cir. 1965) remains applicable to expungement cases that do not fit the limited circumstances set forth in *Lujan*. Accordingly, it can be determined from these decisions that, as the FFOA is a controlled substance sentencing provision, the *Lujan* rule is only available to individuals prosecuted for first-time simple possession of a controlled substance, but not to aliens convicted for non-controlled substance crimes.

Additionally, in the recently decided *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), the Ninth Circuit Court of Appeals overruled its holding in *Lujan-Armendariz*. 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. The Ninth Circuit held in *Nunez-Reyes*, however, that this rule would apply prospectively to all convictions rendered after July 14, 2011. *Id.* at 694.

In the present case, the applicant has established through the submission of certified court documents that he was convicted of two counts of simple possession of cocaine on April 12, 1985. As such, per the *Nunez-Reyes* prospective rule, the *Lujan* holding is applicable to his conviction and subsequent expungement pursuant to section 1203.4 of the California Penal Code. *See Nunez-Reyes*, 646 F.3d at 694.

The applicant has established that he would have qualified for treatment under the FFOA. The applicant entered a plea of *nolo contendere* to two counts of simple possession of cocaine in violation of section 11350 of the California Health and Safety Code. The applicant successfully completed the terms of his sentence. On March 29, 1988, pursuant to the California Penal Code, the Placer County Superior Court ordered that the applicant’s pleas of *nolo contendere* be withdrawn, that pleas of not guilty be entered to the charges, and the case be dismissed pursuant to section 1203.4 of the California Penal Code. The expungement order took effect of April 12, 1988. The evidence in the record shows that the applicant was not, prior to the commission of the offense, convicted of violating a federal law relating to a controlled substance and that he was not previously accorded first offender treatment under any law.

The applicant has therefore established that he is not “convicted” of a controlled substance offense for immigration purposes. Consequently, the applicant is not inadmissible to the United States

pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law relating to a controlled substance, and is not ineligible for temporary resident status on this basis.

However, the applicant has other criminal convictions. The record shows that on April 12, 1985, the applicant was convicted in the Superior Court of California, County of Los Angeles, of driving under the influence of alcohol or a drug, a misdemeanor in violation of section 23152(a) of the California Vehicle Code and of battery resulting in serious bodily injury, a felony, in violation of sections 242/243(d) of the California Penal Code. For these offenses, the applicant was sentenced to 90 days in county jail with 26 days credit, was placed on probation for three years, and was ordered to pay a \$390 fine. The record further shows that on April 29, 1991, the applicant was convicted in the Placer County Municipal Court in Roseville, California, of driving under the influence of alcohol in violation of section 23152(b) of the California Vehicle Code. For this offense, the applicant was sentenced to 10 days in jail and was placed on probation for four years.

Counsel for the applicant states on appeal that, as the April 12, 1985 convictions were expunged pursuant to a state rehabilitative statute, the holding in *Lujan* applies and the expungement of these two offenses is equivalent to an expungement under the FFOA. However, we note that the FFOA is a controlled substance sentencing provision available to individuals prosecuted for first-time simple possession of a controlled substance in federal court. *See* 18 U.S.C. § 3607. Moreover, in *Lujan*, the Ninth Circuit held that a first-time simple drug possession offense that is expunged by a state rehabilitative statute cannot be considered a “conviction” if first offender treatment would have been accorded under the FFOA in federal court proceedings. Subsequent to the *Lujan* decision, the Ninth Circuit held that a state court action setting aside a theft conviction (a non-controlled substance crime) under a rehabilitative statute did not eliminate the judgment for immigration purposes. *Murillo-Espinoza* 261 F.3d at 774. It would appear that the different approach adopted by the Ninth Circuit in *Murillo-Espinoza* results from the fact that the FFOA is a controlled substance sentencing provision that does not apply to aliens convicted for non-controlled substance crimes. Counsel for the applicant has not cited to any authority, by way of statutory, regulatory, or case law in support of his proposition that the holdings in *Lujan* and *Garderbing* apply to convictions for non-controlled substance offenses. In light of the foregoing, the *Lujan* holding is inapplicable to the applicant’s April 12, 1985 convictions for driving under the influence and battery resulting in bodily injury.

Under the current 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 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. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative 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; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of “conviction” at section 101(a)(48)(A) of the Act, there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceeding and those vacated because of post-conviction events).

By these standards, the AAO notes that the state court's expungements of the applicant's April 12, 1985 misdemeanor DUI and felony battery convictions under section 1203.4 of the California Penal Code do not eliminate the immigration consequences of the applicant's criminal convictions. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In general, the Ninth Circuit has consistently ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). Thus, the court's March 29, 1998 judicial order that expunged the applicant's misdemeanor DUI and felony battery convictions under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying convictions. Therefore, for immigration purposes, the applicant stands convicted of misdemeanor driving under the influence and felony battery resulting in serious bodily injury.

The AAO notes that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

As the applicant has been convicted of battery causing serious bodily injury, a felony in violation of sections 242/243(d) of the California Penal Code, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act. *See also* 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant convicted of one felony or three or more misdemeanors committed in the United States. Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.

ORDER: The director's August 20, 1993 decision is affirmed. The Form I-687 application is denied.