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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

MAY 12 2003

FILE: [REDACTED] Office: Los Angeles, CA

Date:

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

MAY1203-02H2212

DISCUSSION: The waiver application was denied by the Acting District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was present in the United States without a lawful admission or parole in October 1972. The applicant married a United States citizen on November 20, 1976, and he is the beneficiary of an approved petition for alien relative. The applicant was found to be inadmissible to the United States under 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 been convicted of unlawful use/being under the influence of a controlled substance. The applicant's controlled substance conviction was expunged in a Los Angeles, California municipal court on October 10, 1997, pursuant to section 1203.4 of the California Penal Code.

The applicant, through counsel, contests the ground of inadmissibility against him, arguing that he is not convicted for immigration purposes and thus not inadmissible. Alternatively, the applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

The district director concluded that, pursuant to the reasoning set forth by the Board of Immigration Appeals (BIA) in *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999), the applicant was convicted of a crime involving a controlled substance, notwithstanding a subsequent State expungement of his conviction. The district director concluded further that, based on his conviction, the applicant was statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act.

On appeal, counsel 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 expungement of the applicant's conviction record renders him not convicted for federal immigration purposes, and thus not inadmissible. Since this case arises in the Ninth Circuit, *Lujan-Armendariz, supra*, is controlling. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).¹

¹ 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-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

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.

The Ninth Circuit Court of Appeals stated in *Lujan-Armendariz*, *supra* that "if [a] person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense [was] expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Lujan-Armendariz* at 738.

The FFOA is defined in section 404 of the Controlled Substances Act (21 U.S.C. § 844), and provides that in order 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. See *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000); see also *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994).

The rule set forth in *Lujan-Armendariz*, regarding first-time simple possession of a controlled substance offenses is thus a **limited** exception to the generally recognized rule that an expunged conviction qualifies as a "conviction" under the Act.

[I]f a [state expungement] statute applies to offenders of more serious drug violations [than simple possession of a controlled substance] it will not be considered to be the state equivalent to the federal first offender statute. See *Garberding*, *supra* at 1190 (citations omitted).

The Ninth Circuit continues to hold that:

[P]ersons 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-Armendariz* at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 813 (9th Cir. 1994)).

Furthermore, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit clarified that California Penal Code section 1203.4 provided a limited expungement even under state law, and that it was reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. See *Ramirez-Castro* at 1175.

The FFOA, as defined by section 404 of the Controlled Substances Act, provides relief only in cases involving simple possession of a controlled substance. In the present case, however, the applicant was not convicted of a simple possession of a controlled substance offense. Rather, the applicant was convicted of the offense of using/being under the influence of a controlled substance, in violation of California Health and Safety Code (CHSC) section 11550(a). Section 11550 of the CHSC does not pertain to simple possession of controlled substance offenses at all, and it is clearly not a state counterpart to the FFOA. Consequently, the expungement of the applicant's conviction pursuant to section 11550 of the CHSC does not fall within the limited exception parameters set forth in *Lujan-Armendariz, supra*.

In expungement cases not controlled by *Lujan-Armendariz*, the general holding that an alien is subject to a 'conviction' as that term is defined in section 101(a)(48)(A) of the Act, notwithstanding a subsequent state action erasing the original determination of guilt, remains valid. See *Roldan-Santoyo, supra*.

In this case, the applicant was found guilty of the offense of using/being under the influence of a controlled substance. He has not established that he would have qualified for treatment under the FFOA. The applicant is thus "convicted" for immigration purposes despite the 1997 expungement of his record, and he is inadmissible to the U.S. pursuant to section 212(a)(2)(A)(i)(II) of the Act.



The applicant is additionally statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act.

Section 212(h) states, in pertinent part, that:

(h) The Attorney General may, in his discretion, waive the application of . . . subsection (a)(2) of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

. . . .

The applicant in this case was convicted of an offense relating to his using/being under the influence of a controlled substance. Because his controlled substance conviction did not relate to a single offense of simple possession of 30 grams or less of marihuana, he does not fall within the exception set forth in section 212(h) of the Act and he is statutorily ineligible to apply for a waiver of inadmissibility.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of proving eligibility remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.