U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PRADO, AUGUSTO

A 088-473-514

Date of this notice: 6/16/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Greer, Anne J.
Pauley, Roger

Userteam: Docket

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5107 Leesburg Pike, Suite 2000
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DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: PRADO, AUGUSTO

A 088-473-514

Date of this notice: 6/16/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Greer, Anne J.
Pauley, Roger

Userteam:

File: A088 473 514 – Los Angeles, CA

Date: JUN 16 2017

In re: AUGUSTO PRADO

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Lori B. Schoenberg, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Adjustment of status

This matter was last before the Board on February 12, 2013, when, following a remand from the United States Court of Appeals for the Ninth Circuit pursuant to a grant of the government's Unopposed Motion to Remand, we remanded the record to the Immigration Judge. The Immigration Judge issued his decision on June 24, 2014, and the respondent, a native and citizen of Brazil, has appealed.[1] The appeal will be sustained, and the record will be remanded.

As a brief history, the respondent had pled guilty in 2007 to possession of a controlled substance in violation of CALIFORNIA HEALTH AND SAFETY CODE § 11350(a) and had been sentenced to 90 days in jail and 3 years of formal probation. The conviction was vacated pursuant to California's rehabilitative statute, CALIFORNIA PENAL CODE § 1203.4, and the respondent had argued that pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the vacatur was analogous to a disposition under the Federal First Offenders Act ("FFOA") so that the conviction no longer rendered him inadmissible and thus ineligible to adjust his status. On April 8, 2011, the Immigration Judge concluded that since the respondent's 3-year sentence of probation exceeded the limit of a 1-year probationary sentence specified under the FFOA, the vacatur of the respondent's conviction was not consistent with a FFOA disposition. The Board concurred with the Immigration Judge and dismissed his appeal on October 6, 2011.

The respondent filed a petition for review with the United States Court of Appeals for the Ninth Circuit. The government, noting that the aliens who had prevailed in *Lujan-Armendariz* had been sentenced to terms of probation in excess of 1 year, sought remand for additional consideration of whether the respondent's expunged conviction is subject to FFOA treatment for immigration purposes. On February 12, 2013, we remanded the record to the Immigration Judge for consideration of that issue. We further instructed the Immigration Judge that if he determined that *Lujan-Armendariz* controlled and the respondent's expunged conviction was not a bar to relief, he

[1] To resolve any question of timeliness of the appeal, we will take the appeal on certification. 8 C.F.R. § 1003.1(c).

should then consider the respondent's application for adjustment of status, including whether the respondent is otherwise eligible for adjustment and whether the respondent warrants such relief in the exercise of discretion.

In his June 24, 2014, decision following our remand, the Immigration Judge again concluded that the respondent's conviction remained extant for immigration purposes. The Immigration Judge reasoned that the Ninth Circuit in *Lujan-Armendariz,* where the offenders had been sentenced to at least 3 years' probation, did not interpret the FFOA or address the discrepancy between the 1-year maximum term of probation specified to qualify for FFOA treatment and the longer terms of probation imposed on the offenders. Instead, the Immigration Judge noted, the Court based its decision on an equal protection analysis, and it framed the question of the offenders' eligibility for FFOA treatment as whether they *could* have received such treatment when they were charged with their offenses. In contrast, the Immigration Judge interpreted the language of the FFOA to require a determination of eligibility at the time of sentencing. Since at the time of the respondent's sentencing a term of 3 years' probation was imposed, the Immigration Judge concluded that he did not satisfy the FFOA requirements, and the respondent's expunged conviction for possession of a controlled substance remained a conviction as contemplated by section 101(a)(48) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48). Consequently, the Immigration Judge determined that the respondent was inadmissible under section 212(a)(2) and was ineligible for adjustment of status under section 245(a) of the Act.

On appeal, the respondent argues that Ninth Circuit jurisprudence developed prior to the issuance of *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011), mandates that the respondent's expunged conviction cannot be used to bar him from eligibility for adjustment of status. In *Nunez-Reyes v. Holder*, the Ninth Circuit withdrew from its position in *Lujan-Armendariz* and agreed with the Board and the other circuits having decided the issue that an expunged state conviction for a drug crime does not require equal treatment with a conviction expunged under the FFOA. However, the Court explicitly prescribed that *Nunez v. Reyes* only applies prospectively, so it does not control our determination in this case.

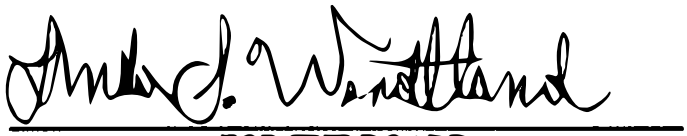
We understand the Immigration Judge's reasoning that this case is distinguishable from *Lujan-Armendariz* because the Ninth Circuit in that case found the offenders eligible for FFOA treatment without addressing the discrepancy between the FFOA's requirement that a probationary sentence not exceed 1 year, and the offenders' 3- and 5-year probationary sentences. Further, we acknowledge that the Immigration Judge draws a distinction between the Ninth Circuit's emphasis on the question of whether an offender *could* have been prosecuted under the FFOA, which the Immigration Judge interpreted to be determined as of when the offense was committed, and the language of the statute, which defines FFOA eligibility in part to include a specific probationary term that can only be determined when the sentence is imposed. However, we are not persuaded that these distinctions are sufficient to distinguish this case from *Lujan-Armendariz*, and we are bound to follow Ninth Circuit precedent as it existed at the time that the respondent was convicted and sentenced. *See Nunez-Reyes v. Holder*, *supra*, at 694 (for aliens convicted before the *Nunez-Reyes* publication date, *Lujan-Armendariz* applies); *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (the Board follows the precedent of the circuit in whch a case arises). Consequently, despite its subsequent overruling by *Nunez-Reyes v. Holder*, we must apply *Lujan-Armendariz* here and sustain the respondent's appeal, irrespective of the length of his probationary term.

Since we must conclude that the respondent's expunged conviction no longer renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, he is not barred on that basis from adjusting his status pursuant to section 245(a) of the Act. Thus, we will remand the record for the Immigration Judge to consider the respondent's application for adjustment of status, including whether the respondent is otherwise eligible for adjustment and whether the respondent warrants such relief in the exercise of discretion.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision and the entry of a new decision.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: **A 088 473 514**

In the Matter of:

PRADO, August,

Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (INA) (2011) — *remained in the United States longer than permitted*

APPLICATION: Adjustment of Status pursuant to INA § 245(a)

ON BEHALF OF RESPONDENT:
Lori B. Schoenberg, Esquire
Law Offices of Lori B. Schoenberg
611 Wilshire Boulevard, Suite 1006
Los Angeles, California 90017

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. Procedural History

August Prado (Respondent) is a native and citizen of Brazil. On February 2, 2011, the Government personally served Respondent with a Form I-862, Notice to Appear (NTA). Ex. 1. In the NTA, the Government alleged that Respondent was admitted to the United States at Los Angeles, California, on or about September 17, 1999, as a nonimmigrant visitor for business with authorization to remain in the country for a temporary period not to exceed one year, and that he remained in the United States beyond one year without authorization. Id. Accordingly, the Government charged Respondent as removable under section 237(a)(1)(B) of the INA. Id. Jurisdiction vested and removal proceedings commenced when the Government filed the NTA with this Court on February 9, 2011. 8 C.F.R. § 1003.14(a) (2011).

On March 7, 2011, Respondent appeared before the Court and, through counsel, acknowledged service of the NTA, admitted the factual allegations contained therein, and conceded the charge of removability. Based on Respondent's admissions and concession, the Court found that removability had been established by clear and convincing evidence. As relief from removal, Respondent requested adjustment of status under INA § 245(a).

On April 8, 2011, the Court issued an oral decision. In its decision, the Court denied Respondent's application for adjustment of status because he was convicted of a drug offense and therefore not entitled to the benefits of the Federal First Offender Act (FFOA). See IJ Oral Decision at 2-3 (Apr. 8, 2011). The Court also found Respondent ineligible for voluntary departure. Id. at 3.

Respondent then appealed the Court's decision to the Board of Immigration Appeals (Board). On October 6, 2011, the Board affirmed the Court's ruling with regard to Respondent's application for adjustment of status.[1] See August Prado, A88 473 514 (BIA Oct. 6, 2011).

On October 11, 2012, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) granted the Government's and Respondent's joint motion to remand Respondent's case to the Board in order to reconsider whether Respondent's expunged conviction is subject to the FFOA treatment under Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). See August Prado v. Holder, Case No. 11-73380 (9th Cir. 2012). On February 12, 2013, the Board remanded Respondent's case to this Court for further proceedings consistent with the Ninth Circuit's decision. See August Prado, A88 473 514 (BIA Feb. 12, 2013).

For the following reasons, the Court denies Respondent's application for adjustment of status.

II. Law and Analysis

As a general rule, an expunged conviction qualifies as a conviction under the INA. Ramirez-Castro v. INS, 287 F.3d 1172, 1174 (9th Cir. 2002). However, the FFOA provides a limited exception to this rule in cases involving first time simple possession of narcotics. 18 U.S.C. § 3607(a) (2011). The relevant portions of the FFOA state that:

> (a) if a person found guilty of [simple possession of a controlled substance]
> (1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and
> (2) has not previously been the subject of a disposition under this subsection;
>
> The court may . . . *place him on probation for a term of not more than one year* without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

[1] Respondent did not challenge the Immigration Judge's denial of his application for voluntary departure.

18 U.S.C. § 3607(a) (emphasis added). By its terms, then, the FFOA permits a court to place an eligible drug offender, as defined by § 3607(a)(1)-(2), on probation "for a term of not more than one year . . . ." 18 U.S.C. § 3607(a). At the expiration of probation, the court "shall" dismiss the proceedings if the offender has not violated the terms of probation. Id.

Here, the Court must determine whether Lujan controls the outcome in this case. See August Prado, A88 473 514 (BIA Feb. 12, 2013). Under Lujan, "the relevant question is whether the person involved could have received relief under the [FFOA] and does receive relief under a state rehabilitative statute." 222 F.3d at 738 n.18. Accordingly, if the respondent'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." Id.

The Court notes, however, that the petitioners in Lujan were both granted probation for a period of at least *three years*. Id. at 733. A glaring discrepancy exists between the language of the FFOA (probation "for a term of not more than one year") and the lengths of probation for the Lujan petitioners. This discrepancy arose because the Lujan court did not interpret the FFOA, but rather based its decision on an equal protection analysis. The question asked was, *could* the alien have received FFOA treatment; and the question was asked at the time the alien was charged. The court did not emphasize the language of the FFOA, which required a determination of eligibility *at the time of sentencing* to find whether the alien had been sentenced to probation in excess of one year, and a determination of eligibility at the end of the probationary period to find whether there had been a probation violation.

The Ninth Circuit has since overruled Lujan. In Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011), the Ninth Circuit held that the constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA. However, this rule only applies prospectively to convictions entered after the date of the Ninth Circuit's holding in Nunez-Reyes, which was July 14, 2011. 646 F.3d at 693.

However, in Estrada v. Holder, the Ninth Circuit did analyze the FFOA and did conclude that in order for the alien to be eligible, he could not have had a probation violation. 560 F.3d 1039, 1042 (9th Cir. 2009). This holding appears to move the decision point of eligibility from that in Lujan—at the time of charging—to, as the FFOA requires, the time of sentencing, and/or the expiration of probation.

In this case, on August 2, 2007, Respondent pled guilty to California Health and Safety Code section 11350(a), possession of cocaine; the Superior Court suspended the imposition of his sentence and placed him on probation for *three years*. See Ex. 2, Tab I (Minute Order) (emphasis added); Ex. 3 (Resp't's Brief). On March 30, 2011, the Superior Court set aside and vacated Respondent's guilty plea, and dismissed the complaint. See Ex. 3. Regardless of the dismissal, however, Respondent does not meet all of the FFOA requirements because his three-year probation exceeds the maximum penalty of one year under the FFOA. See 18 U.S.C. § 3607(a). Thus, his conviction for possession of cocaine remains a conviction within the meaning of section 101(a)(48) of the INA, notwithstanding the holding in Lujan. Therefore, as Respondent stands convicted of a violation relating to a controlled substance—an offense under

section 212(a)(2) of the INA—he cannot demonstrate that he is admissible as an immigrant for purposes of adjustment of status. See INA § 245(a).

Accordingly, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for adjustment of status pursuant to section 245(a) of the INA be **DENIED**.

IT IS FURTHER ORDERED that Respondent be **REMOVED** to **BRAZIL** based on the charge contained in the NTA.

DATE: 6/27/17

John F. Walsh
Immigration Judge