9 FAM 40.21(b)
NOTES

(CT:VISA-1820; 03-14-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 40.21(b) N1 BASING INELIGIBILITY UPON CONVICTION OR ADMISSION

(CT:VISA-1008; 09-05-2008)

The Immigration Act of 1990 amended INA 212(a)(23) by converting (23)(A) into INA 212(a)(2)(A)(i)(II) and (23)(B) into INA 212(a)(2)(C). More significantly, an alien may now be found ineligible if he or she admits to committing the essential elements of a drug violation in lieu of a conviction under INA 212(a)(2)(A)(i)(II) (see 9 FAM 40.21(a) N5 for the standards that must be followed in obtaining an admission). A controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)), applies to marijuana as well as other controlled substances, which are defined in section 102 of the Controlled Substances Act and in 21 CFR 1308. For the purpose of these Notes, the term "marijuana" includes any of the various parts or products of the plant Cannabis Sativa L., such as bhang, ganga, charras, Indian hemp, dagga, hashish, and cannabis resin.

9 FAM 40.21(b) N2 JUVENILE DRUG CONVICTIONS

9 FAM 40.21(b) N2.1 Aliens Under Age 18

(TL:VISA-129; 11-09-1995)

An alien who is convicted of or who admits to having committed or who admits committing acts which constitute the essential elements of a minor drug offense(s) relating to simple possession or use of controlled substances, i.e., offenses other than those involving trafficking, importing/exporting, or manufacturing (18 U.S.C.), shall not be considered ineligible for any visa based solely upon any such conviction or admission if the acts which are the subject of the conviction or admission occurred while the alien was under the age of eighteen. Specifically excluded from such

treatment, however, are convictions or admissions relating to drug trafficking, importing/exporting, and manufacturing.

9 FAM 40.21(b) N2.2 Minors Involved in Trafficking, Importing/Exporting, or Manufacturing of Controlled Substances

(CT:VISA-1820; 03-14-2011)

If there is reasonable belief on your part that, despite having been convicted of or having admitted to only a minor drug offense, the alien was directly involved in or aided or abetted trafficking, importing/exporting, or manufacturing of a controlled substance, you may still find the alien inadmissible under INA 212(a)(2)(*A*). Likewise, after medical examination, the alien could be found inadmissible under INA 212(a)(1) for substance abuse. (See 9 FAM 40.11 N2.)

9 FAM 40.21(b) N3 "CONTROLLED SUBSTANCE" LIST AND ITS EFFECT ON INA 212(A)(2)(A)(II)

(TL:VISA-85; 10-01-1993)

The Drug Enforcement, Education and Control Act (DEECA) of 1986, also known as the Anti-Drug Abuse Act of 1986, was signed into law on October 27, 1986. DEECA broadened the scope of INA 212(a)(2)(A)(i) to encompass a conviction for any violation relating to a controlled substance as defined in section 102 of that Act rather than certain violations relating to drugs or narcotics specifically enumerated in the predecessor section to INA 212(a)(2)(A)(i)(II) or specifically listed in the statute. For example, LSD, amphetamines, barbiturates, Seconal and Phencyclidene (PCP or "Angel Dust"), which are included in the list of controlled substances, are now incorporated into INA 212(a)(2)(A)(i)(II), whereas, previously, they had not been. Moreover, the distinction between "use" and "possession" has been eliminated by the Anti-Drug Abuse Act. Furthermore, removing the phrase "guilty knowledge" from the earlier version of INA 212(a)(2)(A)(i)(II) eliminates the "Lennon" distinction. (See 9 FAM 40.21(b) N4.2.) In addition, the law applies to both foreign and domestic drug convictions.

9 FAM 40.21(b) N4 CONVICTION

(CT:VISA-1008; 09-05-2008)

A finding of inadmissibility under INA 212(a)(2)(A)(i)(II) may be based on a conviction 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.

9 FAM 40.21(b) N4.1 Determining Existence of Conviction and Evidence

(CT:VISA-1790; 12-16-2011)

Conviction defined. (See 9 FAM 40.21(a) N3.)

9 FAM 40.21(b) N4.1-1 Juvenile Delinquency

(TL:VISA-223; 12-12-2000)

The Federal provisions relating to juvenile delinquency discussed in 9 FAM 40.21(a) N9 would also relate to convictions for simple possession of controlled substances.

9 FAM 40.21(b) N4.1-2 Federal First Offense Judicial Actions and State Equivalents

(TL:VISA-223; 12-12-2000)

a. The Comprehensive Crime Control Act of 1984, effective October 12, 1984, repealed the Federal First Offender provisions cited as 21 U.S.C. 844(b)(1). Prior to the repeal it had been held that judicial treatment under this section did not result in a "conviction" for immigration purposes, Matter of Seda, 17 I&N Dec. 550 (Matter of Werk, 6 I&N Dec. 234). In cases involving simple possession of a controlled substance, 21 U.S.C. 844(b)(1) permitted the court to withhold a "judgment of guilt" following a "finding of guilt" (thus drawing a distinction between "a judgment" and a "finding of guilt" by a guilty plea or trial). Therefore, a withholding of a judgment of guilt by a court under the Federal First Offender Provisions did not meet the standard required for establishing that an offender had been "convicted".

b. Cases processed under 21 U.S.C. 844(b)(1) prior to its repeal of the Federal First Offender Provisions retain the favorable treatment of this procedure and, likewise, retain the benefit for visa purposes.

9 FAM 40.21(b) N4.1-3 Applying State Equivalents to 21 U.S.C. 844(b)(1)

(TL:VISA-223; 12-12-2000)

a. In general, a state expungement or other relief for controlled substance convictions will not be effective for immigration purposes. An alien "convicted" under a state statute for a drug-related offense, however, may not be subject to INA 212(a)(2)(A)(i)(II) if it can be established that he or she would have been eligible for Federal first offender treatment had the prosecution occurred under Federal law.

b. Relief can be extended to aliens prosecuted under state law who meet the following criteria:

(1) The alien is a first offender, i.e., he or she has not previously been convicted of violating any Federal or state law relating to controlled substances;

(2) The alien has pled to or been found guilty of the offense of simple possession of a controlled substance;

(3) The alien 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 alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation.

9 FAM 40.21(b) N4.1-4 Requests for Advisory Opinions

(CT:VISA-1008; 09-05-2008)

You should seek an advisory opinion (AO) from the Office of Legislation, Regulations and Advisory Opinions (CA/VO/L/A) if a visa applicant claims eligibility for an exception under the current Federal first offender criteria.

9 FAM 40.21(b) N4.1-5 *Judicial Recommendation Against Deportation (JRAD)*

(CT:VISA-1820; 03-14-2011)

See 9 FAM 40.21(a) N3.4-4.

9 FAM 40.21(b) N4.1-6 Action After Conviction

(CT:VISA-1790; 12-16-2011)

a. Expungements

In general, expungements (domestic or foreign expungements) of convictions for purposes of INA 212(a)(2)(A)(i)(II) do not remove the fact of a conviction with respect to a finding of ineligibility under that section. The one exception to this generalization is noted below:

(1) Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law No. 104-208, in which Congress provided a statutory definition for the term "conviction" at INA 101(a)(48) a full expungement of a conviction under U.S. law had been held to be equivalent in effect to a pardon granted under INA 237(a)(2)(A)(v) and served to eliminate the effect of the conviction for most immigration purposes. In light of the passage of 101(a)(48), the Board of Immigration Appeals in Matter of Roldan, 22 I & N. Dec. 512, determined that judicial expungements based on rehabilitative or ameliorative statutes (laws that allowed for expungement of a sentence by a court based on a showing that the defendant had been rehabilitated or was otherwise worthy of relief) would no longer be recognized as effective for eliminating the conviction for immigration purposes.

(2) The Ninth Circuit Court of Appeals, however, disagreed with this holding, and in a series of cases determined that state judicial expungements will be considered effective for eliminating the conviction if the alien would have been eligible for relief under the Federal First Offender Act or similar statute (see 9 FAM 40. 21(b) N4.1-2, Federal First Offense Judicial Actions and State Equivalents). The Ninth Circuit subsequently overturned these decisions in the case Nunez-Reyes v. Holder, 646 F.3d 684 (July 14, 2011), and now follows the holding in Roldan. However, this decision did not have retroactive effect, so state judicial expungements that predate this decision can still be effective for immigration purposes in the Ninth Circuit. Because of the complexity of this issue, cases that involve claims for state judicial expungement relief, shall be submitted as an advisory opinion request to the Office of Legislation, Regulations and Advisory Opinions Division (CA/VO/L/A.)

b. Pardons

No pardon of whatever kind, Executive or legislative, foreign or domestic,

has any effect with respect to inadmissibility under INA 212(a)(2)(A)(i)(II).

c. Suspending Sentence, Probation, or Commutation

A conviction exists for the purpose of INA 212(a)(2)(A)(i)(II) even if the sentence has been suspended, reduced, mitigated, or commuted, or the alien has been granted probation or parole or has otherwise been relieved in whole or in part of the penalty imposed.

d. Appeals

A conviction does not exist when the ruling of a lower court has been overturned on appeal to a higher court. You must submit to the Department (CA/VO/L/A) for an advisory opinion (see 9 FAM 40.21(a) PN1) all cases involving a conviction pending on appeal at the time of a visa application. In addition, a review of the facts of a particular case might still allow a determination of inadmissibility under INA 212(a)(2)(C).

e. Vacating Conviction

Various jurisdictions use different terms and procedures for the act of vacating (i.e., annulling or repealing) their own prior judgments. These are not appellate actions but actions of the original court. Whatever it is called (e.g., "request to vacate" or "writ of error coram nobis" as in Matter of Sirhan, 13 I&N Dec. 592 or anything else), the vacating of a conviction by the court of original jurisdiction eradicates the conviction for the purposes of INA. However, a determination of ineligibility under INA 212(a)(2)(C) might still be appropriate.

f. Writ of error coram nobis

Definition - A writ calling the attention of the trial court to facts which do not appear on the record despite the exercise of reasonable diligence by the defendant and which if known and established at the time a judgment was rendered would have resulted in a different judgment petitioned for a writ of error coram nobis on the ground that newly discovered evidence exonerated him.

g. Dismissing "Nolle Prosequi"

The grant of a new trial by a trial judge following a conviction together with a dismissal of cause nolle prosequi eradicates the conviction for the purposes of INA. However, a determination of inadmissibility under INA 212(a)(2)(C) might still be appropriate.

9 FAM 40.21(b) N4.2 "Intent" Relating to Ineligibility Resulting From Conviction

(CT:VISA-1008; 09-05-2008)

a. Prior to its amendment under the DEECA of 1986, the former INA 212(a)(23) provided for a finding of ineligibility resulting from a conviction for the "illicit" possession of certain substances. In the Lennon case (527 F.2d 287) the term "illicit" was interpreted to mean "guilty knowledge". In order for an alien to be found ineligible as the result of a conviction for the "possession" of drugs, the statute or statutes (substantive possession, i.e. the term "illicit" or procedural) under which the alien was convicted had to have contained a requirement that the alien knew the drugs were in his or her possession, i.e., the term "illicit" was equated to an intent to possess contrary to law.

b. The current version of INA 212(a)(2)(A)(i)(II) contains no word equivalent to "illicit". Therefore, a conviction for possession or any other activity "relating to" a controlled substance will render an alien ineligible regardless of whether the statute under which the alien was convicted contains an element of guilty knowledge as a requirement for conviction and regardless of whether it is alleged that the alien did not knowingly participate in the activity.

9 FAM 40.21(b) N5 INA 212(H) WAIVER

9 FAM 40.21(b) N5.1 Principal Alien

(CT:VISA-1008; 09-05-2008)

An immigrant alien who is inadmissible under INA 212(a)(2)(A)(i)(II) insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana is eligible to apply for a waiver of inadmissibility under INA 212(h) if it is established to the satisfaction of the Attorney General that:

(1) The activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for visa;

(2) The alien's admission to the United States would not be contrary to the national welfare, safety, or security; and

(3) The alien has been rehabilitated.

9 FAM 40.21(b) N5.2 Certain Relatives of U.S. Citizens or Legal Permanent Residents (LPRs)

(CT:VISA-1008; 09-05-2008)

An alien immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or an alien lawfully admitted for permanent residence in the United States may apply for a waiver under INA 212(h) if:

(1) The principal alien was found inadmissible under INA 212(a)(2)(A)(i)(II) insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana;

(2) It is established to the Attorney General's satisfaction that the exclusion of such alien would result in extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter; and

(3) The Attorney General has consented to the alien's applying or reapplying for a visa to the United States.

9 FAM 40.21(b) N5.3 Evidence of Eligibility to apply for a Waiver

(CT:VISA-1008; 09-05-2008)

When the court records or statutes leave doubt concerning an alien's eligibility for a waiver, you must ensure that complete records and copies of all relevant portions of the statute under which the conviction was obtained are assembled, as well as any available commentary by authorities or prior judicial holdings. The post must forward these documents to Department of Homeland Security (DHS), with the waiver application, and the best available evidence (in whatever form) indicating the actual amount of marijuana. (See also 9 FAM 40.21(a) PN2.)