Federal First Offender Act

The Ninth Circuit Court of Appeals has held that an alien whose offense would have qualified for treatment under the Federal First Offender Act ("FFOA"), but who was convicted and had his conviction expunged under state or foreign law, may not be removed on account of that offense. *See Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). To qualify for treatment under the FFOA, the defendant must (1) have been found guilty of an offense described in section 404 of the Controlled Substances Act ("CSA"), 21 U.S.C. § 844; (2) have not, prior to the commission of such an offense, been convicted of violating a federal or state law relating to controlled substances; and (3) have not previously been accorded first offender treatment under any law. *See* 18 U.S.C. § 3607(a); *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

A. Expungement Under State or Foreign Law

The alien's prior conviction must have already been expunged pursuant to the state or foreign expungement statute; the possibility that the alien may request and have his conviction expunged in the future is not sufficient to avoid the consequences of removal. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1292-93 (9th Cir. 2004).

The state or foreign statute under which the conviction was expunged does not have to be an identical procedural counterpart to the FFOA. *See Garberding v. INS*, 30 F.3d 1187, 1190-1191 (9th Cir. 1994). *See also Lujan-Armendariz*, 222 F.3d at 738 n.18 ("[R]elief does not depend on whether or not the state rehabilitative statute is best understood as allowing for 'vacaturs,' 'set-asides,' 'deferred adjudications,' or some other procedure."). The Ninth Circuit has recognized expungements for FFOA purposes where the state 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." *Lujan-Armendariz*, 222 F.3d at 738 n. 18 (emphasis in original) (quoting *Matter of Manrique*, 21 I&N Dec. 58, 64 (BIA 1995)). The Ninth Circuit has not yet decided whether an alien who has received a court order deferring adjudication, but has not yet had his proceedings expunged because he has not completed his term of probation, is eligible for FFOA treatment. *See id*. at 746 n.28; *Chavez-Perez*, 386 F.3d at 1293.

B. Offenses Described in Section 404 of the Controlled Substances Act

Section 404 of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." 21 U.S.C. § 844(a). Any state or foreign possession of a controlled substances offenses, such as those set forth in sections 11350(a) and 1137 of the California Health and Safety Code ("CHSC"), are described in section 404 of the CSA and are therefore potentially eligible for FFOA treatment.

1. Possession of Drug Paraphernalia

The Ninth Circuit has recognized that "the plain language of the statute suggests that possession of drug paraphernalia should not be included as an offense described in section 844," since paraphernalia is not a controlled substance. *Cardenas-Uriarte*, 227 F.3d at 1137. Nonetheless, in *Cardenas-Uriarte*, the Ninth Circuit determined that the application of the plain meaning of the statute in that instance would lead to both an absurd result and frustrate congressional intent. See id. The petitioner had initially been charged with two counts of possession, but had pleaded guilty to the lesser offense of possession of drug paraphernalia. *Id*. The Ninth Circuit reasoned that refusing to allow the petitioner's offense to receive treatment under the FFOA would lead to an absurd result since the petitioner would have been eligible had he refused to plea guilty and been convicted, as initially charged, of the graver offense of possession. *See id.* The Ninth Circuit further determined that applying the plain meaning of the FFOA would frustrate congressional intent:

> Congress intended to allow those convicted of the least serious type of drug offenses to qualify under the Act. Congress would never have considered including possession of drug paraphernalia under this statute because no federal statute covers the crime of possession of drug paraphernalia. Where possession of drug paraphernalia is a less serious offense than simple possession of a controlled substance, therefore, congressional intent indicates that it should be included under the Act.

See id. The Ninth Circuit therefore held that the petitioner's conviction for possession of drug paraphernalia qualified for treatment under the FFOA.

2. Use or Being Under the Influence

Nor is use or being under the influence an offense described in the plain language of section 404 of the CSA. See 21 U.S.C. 844. The Ninth Circuit has not yet determined whether use or being under the influence offenses qualify for treatment under the FFOA. *See Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 984 (9th Cir. 2006) (distinguishing its holding that the petitioner's use or being under the influence was not eligible for FFOA treatment as a result of his prior controlled substance conviction from the Board's determination that the FFOA only applies to possession of a controlled substance, not to use or being under the influence offenses).

Extending the Ninth Circuit's reasoning in Cardenas-Uriarte, however, may be warranted if the application of the plain meaning of the statute frustrates congressional intent. In *Lujan-Armendariz*, 222 F.3d at 734-35, the Ninth Circuit described the FFOA as "a limited federal rehabilitative 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." Congressional intent may therefore be frustrated if the respondent is a first-time offender since "[d]rug use has generally been considered a less serious crime than possession." *Flores-Arellano v. INS*, 5 F.3d 360, 363 n.5 (9th Cir. 1993). See also *Medina v. Ashcroft*, 393 F.3d 1063, 1066 (9th Cir. 2005). Further, as in *Cardenas-Uriarte*, federal law does not penalize use or being under the influence of a controlled substance. *See* 21 U.S.C. § 801 et seq.

C. Multiple Convictions

A conviction is only eligible for FFOA treatment if the alien "has not, prior to the commission of that offense, been convicted of violating a federal or state law relating to controlled substances." 18 U.S.C. § 3607(a). The statutory language suggests that an alien who has been convicted of two controlled substance offenses will still qualify for FFOA treatment so long as the commission of his second offense predates his conviction for the first.

However, the Ninth Circuit has held that an alien who has been granted pretrial diversion—whereby the charge is dropped subsequent to the successful completion of a drug education, treatment or rehabilitation program without a plea or finding of guilt—is precluded from receiving FFOA treatment for subsequent convictions, even though he was never previously "convicted," because he is not similarly situated to a first-time offender. *See De Jesus Melendez v. Gonzales,* 503 F.3d 1019, 1025-26 (9th Cir. 2007).