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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

Public Copy

FILE: [Redacted]

Office: Miami

Date: MAR - 8 2001

IN RE: Applicant: [Redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

IN BEHALF OF APPLICANT:

[Redacted]

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

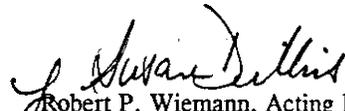
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, who certified his decision to the Associate Commissioner, Examinations, for review. The district director's decision will be affirmed.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1. of the Cuban Adjustment Act of November 2, 1966. This Act provides for the adjustment of status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The district director found the applicant 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)(C), because he had reason to believe that the applicant is or has been an illicit trafficker in a controlled substance. The district director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application.

In response to the notice of certification, counsel asserts that the facts and circumstances of the case do not support a finding of "reason to believe" the applicant was or is a drug trafficker or a person associated with drug trafficking in any shape or form. He states that the applicant has no priors or any criminal record, neither in nor outside of the United States, and that the applicant is a law-abiding, hard-working family man. Counsel further asserts that the Matter of Rico, 16 I&N Dec. 181 (BIA 1977), standard of proof for a 212(a)(2)(C) charge, namely, that such findings "must be based upon reasonable, substantial, and probative evidence" is absent in the present case.

Pursuant to section 212(a)(2)(C) of the Act, any alien who the consular officer or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible to the United States.

The record reflects that on January 28, 1986, at the Salt Lake International Airport, Utah, the applicant was arrested and charged with unlawful possession of a controlled substance with intent to distribute for value. On December 28, 1986, the case was dismissed.

Despite the fact that the applicant was not convicted of the charge and that the court subsequently dismissed the case, the district director, citing Matter of Rico, supra, and Matter of Tillighast, 27 F.2d 580 (1st Cir., 1928), determined that the applicant was inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act because he had reason to believe the applicant is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance.

The district director based his conclusion on the information or indictment filed with the Fifth Circuit Court, Salt Lake Department, Salt Lake County, Utah, which reflects that:

Affiant, a detective with the Metro Narcotics personally observed the defendant (applicant) upon arrival at the Salt Lake International Airport with a piece of carry-on luggage. After defendant consented to the search of the bag, affiant observed Scott Mark locate clear plastic baggies containing 18 ounces of a white powdery substance which appeared to be and field tested positive for cocaine. The street value of that quantity is in excess of \$100,000.00, and is in the officer's opinion more than would be possessed for personal use.

Counsel submits the "Motion to Suppress" filed with the court on April 14, 1986, by the applicant's former attorney. The attorney moved to suppress the evidence seized from the applicant on January 27, 1986, for the reasons that the search conducted by agents of Metro Narcotics was unconstitutional, specifically, the search was conducted without a warrant and outside any recognized exception to the warrant requirement.

Although the record does not contain the arrest report or the statements from the eight witnesses named in the indictment report filed with the court, the Memorandum in Support of Defendant's Motion to Suppress states, in part:

Prior to January 21, 1986, the Metropolitan Narcotics Strike Force received an anonymous tip that two individuals would be transporting a quantity of cocaine on a late flight from Miami, Florida. The informant did not provide a specific flight number, time of arrival, or carrier, but did say the individuals transporting the cocaine would be South Americans, Brazilians, or Colombians. Officers found that there was an Eastern Airlines flight which was arriving in Salt Lake City in the evening hours from Miami, Florida. They stopped the defendant at the Salt Lake International Airport after he had obtained his luggage. The defendant had met his

brother, Antonio Arencibia, and a woman at the airport. The officers spoke to the defendant only in English. Several times the officers asked the defendant and Antonio if the officer could search the bag. Ultimately, the defendant nodded his head yes. One of the bags was searched and the cocaine was found.

In a self-affidavit dated November 28, 2000, the applicant states, in part:

....When I finally arrived in Salt Lake City my brother was waiting for me at the airport in the company of a female friend of his.

The friend and I walked toward the parking lot while my brother waited to pick up my suitcase at the terminal. When we got to his car I suddenly found myself surrounded by several men who showed themselves to be police. They addressed me in English, which at the time I spoke very little. When they realized that I was not understanding them, they beckoned another man who came walking to the back of my brother's car holding a carry-on bag in his hand. They spoke to me again in English and made gestures as if asking me for permission to open the bag. At the end of this uncomfortable exchange, they speaking to me in English and I responding to them in Spanish while we both made gestures trying to convey each other's meaning, I shrugged my shoulders and reiterated that I could hardly give any kind of permission because the carry-on bag was not mine to begin with.

At that point in time my brother arrived on the spot holding my own suitcase retrieved from the baggage terminal and followed by another group of plainclothed policemen. I was asked for permission to inspect my suitcase, which I gladly gave. They searched through my suitcase and found nothing. On the other hand, when they proceeded to search the carry-on bag that I reiterated was not mine, they did find something in it and told me it was cocaine. Next thing they arrested me....

Counsel asserts that Matter of Rico, supra, is not distinguishable from the applicant's case. He states that Rico was in actual physical control of the conveyance that contained the contraband; however, the applicant in this case was never in physical control of the bag except for the statement of one of the detectives who "saw" him "arriving with it." He asserts that the applicant did not claim the bag, carry the bag, or hold the bag; it was brought by a detective into his presence.

Neither the Motion to Suppress nor the indictment report, however, reflect that the applicant was not in actual physical control or possession of the hand-carry bag where the cocaine was found. Further, while the indictment report reflects that the information was based on evidence obtained from approximately eight witnesses, neither the report of the witnesses, the police report, nor the Metro Narcotics report is contained in the record of proceeding. Without these reports as evidence to support the applicant's and counsel's claims that he was not in actual physical control of the hand-carry bag, or that the bag in fact did not belong to him, the Service is required to rely on the court record as it stands, and cannot make determinations of guilt or innocence based on that record. Furthermore, it is noted that the court did not dismiss the case based on the motion to suppress but, rather, it was dismissed, without prejudice, because "the State had the obligation to proceed forward, but was unable to do so."

It is, therefore, concluded that the evidence in the record supports the district director's conclusion that there was reason to believe the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder in the illicit trafficking in a controlled substance.

The applicant is inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act, whether or not he was actually convicted. Matter of Rico, supra. There is no waiver available to an alien found inadmissible under this section based on trafficking in a controlled substance.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. He has failed to meet that burden. Therefore, the decision of the director to deny the application will be affirmed.

ORDER: The district director's decision is affirmed.