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

PUBLIC COPY

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: NOV 07 2005

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the District Director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the District Director and the AAO 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 (CAA) of November 2, 1966. The CAA provides, in part:

> [T]he 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, may be adjusted by the Attorney General, (now the Secretary of Homeland Security, (Secretary)), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and 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 because he falls within the purview of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 8 U.S.C. § 1182(a)(2)(C). The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application. *See District Director's Decision* dated September 15, 2000. The decision was affirmed by the AAO. *See AAO decision,* dated May 25, 2001.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
> >
> > (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802).
>
> . . . .
>
> (C) Controlled substance traffickers.-
>
> any aliens who the consular officer or the Attorney General knows or has reasons to believe-
>
> > (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or.....is inadmissible.

In the motion to reopen counsel submits a brief in which he states that the AAO misapplied the law and the facts as they apply to this case. Counsel asserts that based on a review of the applicant's file it was concluded that the applicant was placed on probation for simple possession of marijuana, less that (20) grams on September 7, 1984. In addition counsel states that the record does not contain a final conviction, adjudication was withheld and the applicant was not sentenced to jail time.

The AAO finds counsel's assertions to be unpersuasive. The AAO notes that counsel presented no evidence or documentation to support his assertions. The record of proceeding clearly reflects that on July 31, 1984, in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida the applicant was indicted for Count 1, unlawful possession of cannabis and Count 2, trafficking in cannabis. On September 7, 1984, Count 2, trafficking in cannabis, was reduced to possession of cannabis. The court withheld adjudication of guilt and placed the applicant on probation for a period of one year, he was required to serve six months in the Dade County Jail and fined $1,000 for two counts of possession of cannabis.

Furthermore counsel states that even if the applicant is found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, he is eligible to apply for a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D) and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relate to a single offense of simple possession of 30 grams of less of marijuana if -
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> > (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
> >
> > (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, or
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or
> >
> > (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien. . . .

Based on the applicant's two convictions of crimes relating to controlled substances, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act.

As stated above there is no waiver available to an alien found inadmissible under this section of the Act except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception since he has convicted of two counts of possession of cannabis and not a single offence of simple possession of marijuana.

Although the applicant was not convicted of the charges it is clear from the police report that the applicant was involved in the trafficking of a controlled substance and the District Director found him excludable under section 212(a)(2)(C) of the Act.

Counsel states that the applicant is not inadmissible under section 212(a)(2)(C) of the Act, because a "reason to believe" charge can only be sustained where there is proof that the applicant's inadmissibility existed at the time of entry. *Matter of Rocha* 20 I&N Dec. 944 (BIA 1995). In *Matter of Rocha* the applicant was charged with deportability under section 241(a)(1)(A) of the Act, which provides for the deportation from the United States of "any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time." The BIA based it's decision on the language of section 212(a)(2)(C) of the Act which states that if a consular officer or the Attorney General "knows or has reasons to believe . . ." The BIA further stated that ". . . the examining officer's knowledge or suspicion that an alien is a trafficker must be contemporaneous with the alien's application for admission." In *Matter of Rocha* the BIA held that "the examining officer did not "know" at the time of the respondent's entry that he was a trafficker, nor did the examining officer articulate at that time a "reason to believe" that the respondent was a trafficker." *Matter of Rocha* does not apply in the instant case since when the applicant applied for adjustment of status, which is his application for admission, the examining officer had reason to believe that the applicant had been an illicit trafficker in a controlled substance.

The issues in this matter were thoroughly discussed by the District Director and the AAO in their prior decisions. Notwithstanding the arguments on appeal, sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act are very specific and applicable. As noted above there is no waiver available to an alien found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception. In addition there is no waiver available to an alien found inadmissible under section 212(a)(2)(C) of the Act.

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.

The applicant is ineligible for adjustment of status to permanent residence, pursuant to section 1 of the CAA of November 2, 1966. Accordingly, the prior AAO decision affirming the District Director's decision will remain undisturbed.

ORDER: The order of May 25, 2001, dismissing the appeal is affirmed.