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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: MIAMI, FLORIDA Date:

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 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 (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 section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) for having been convicted of a violation relating to a controlled substance. The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application accordingly. *See District Director's Decision* dated February 10, 2005.

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).
>
> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> . . . .
>
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(h) states in pertinent part:

> The Attorney General 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 relates to a single offense of simple possession of 30 grams or less of marijuana. . .

The record reflects that the applicant has the following convictions:

June 12, 1975, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, the applicant was convicted of the offense of breaking and entering a building with intent to commit grand larceny. The applicant was sentenced to one-year imprisonment. On June 22, 1977, the Circuit Court suspended the imposition of the sentence and place the applicant on two years probation.

July 5, 1978, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, the applicant was convicted of the offense of possession of cannabis in an amount of five grams or less. The applicant was sentenced to six months probation.

August 16, 1982, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, the applicant was charged with the offense of possession of a controlled substance to wit: cocaine. On November 1, 1982, adjudication was withheld and the applicant was sentenced to six months probation and a $500 fine.

Based on his convictions the applicant is inadmissible pursuant to sections 212(a)(2)(A)(i)(I) and 212(a)(2)(A)(i)(II) of the Act.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. In response to the notice of certification counsel submits a brief in which she states that the applicant is eligible for the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act. Counsel states that on June 22, 1977, the Circuit Court of the Eleventh Judicial, Circuit of Florida in and for Dade County, suspended the imposition of the sentence of the applicant's conviction of breaking and entering. The applicant was placed on probation for a term of two years. Counsel refers to *Matter of Castro,* 19 I&N Dec. 692 (BIA 1988), in which the BIA found that when a court suspends the imposition of the sentence, there is no sentence actually imposed and therefore the applicant has not had a sentence imposed on him in excess of six moths for purposes of the "petty offense" exception. In addition counsel states that the applicant's conviction for unlawful possession of cannabis in an amount of five grams or less does preclude the applicant applying for a waiver of inadmissibility pursuant to section 212(h) of the Act. Furthermore counsel states that the applicant's convictions for breaking and entering and possession of cannabis occurred more than fifteen years ago and therefore the applicant is eligible for a waiver under section 212(h)(1)(A) of the Act. Counsel states that the applicant's conviction for possession of cocaine is not a conviction for immigration purposes and therefore the applicant is eligible for a waiver under section 212(h) of the Act. Finally counsel states that based on *INS v. St. Cyr*, 533 U.S. 289, (2001) the applicant is entitled to seek a waiver pursuant to section 212(c) of the Act.

Counsel states that the Ninth Circuit of Appeal in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), reversed *Matter of Roldan-Santoyo,* 22 I&N Dec. 512 (BIA 1999) in part and held that "persons who offenses would qualify under the First Offender Act, but who are convicted and have their convictions expunged under state rehabilitative laws may not be removed on account of those offenses." Counsel asserts that the applicant was convicted for simple possession of cocaine, he is eligible for rehabilitative treatment under the First Offender Act and therefore the applicant cannot be removed on account of that offense.

Counsel's assertions are not persuasive. As noted above, the exception found in section 212(a)(2)(A)(ii)(II) of the Act, applies to individuals who committed only one crime. The applicant in the present case has been convicted of three crimes. Although the Circuit Court suspended the imposition of the applicant's sentence for his conviction of breaking and entering, the applicant is not eligible for the petty offense exception as set forth in section 212(a)(2)(A)(ii)(II) of the Act.

In addition, counsel's assertion regarding the applicant's eligibility for the Federal First Offender Act (FFOA) treatment is not persuasive. To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he 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 criminal proceedings have been deferred or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). In addition, in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) it was held that in cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for FFOA treatment.

The applicant in the present case has previously been convicted twice of violating a federal or state law relating to controlled substance and therefore he does not meet the criteria for FFOA. In addition, as he does not live in the 9th Circuit *Lujan-Armendariz* is not binding.

The decision in *INS v. St. Cyr*, *supra,* is distinguishable from the case at hand in both the law and the facts. First, the Supreme Court decision specifically addressed the application of section 212(c) of the Act, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *INS v. St. Cyr, supra,* specifically relates to the settled expectations of individual aliens who enter into plea agreements with the government. As there is no evidence that the applicant in the current matter plead guilty as a result of a plea bargain, the reasoning of *St. Cyr, supra,* is not applicable to the case at hand.

Notwithstanding the arguments presented by counsel, section 212(a)(2)(A)(i)(II) of the Act is very specific and applicable. No waiver of the ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is available to an alien found inadmissible under this section except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception. As noted above the applicant has been convicted twice for violation of a law related to controlled substance and thus he does not qualify for a waiver under section 212(h) of the Act.

The applicant is ineligible for adjustment of status to permanent residence, pursuant to section 1 of the CAA of November 2, 1966. The decision of the District Director to deny the application will be affirmed.

ORDER: The District Director's decision is affirmed.