U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

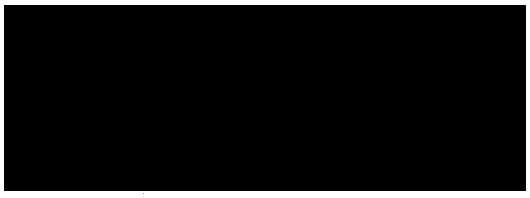
A2

FILE: [redacted] Office: TAMPA, FLORIDA Date: [illegible]

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:



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 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 § 1182(a)(2)(C). 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 December 10, 2004.

> Section 212(a)(2) of the Act states in pertinent part, that:
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> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> . . . .
>
> > (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 of 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.

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 and a copy of the applicant's criminal record. In his brief counsel states that on November 17, 2004, the applicant was requested to submit copies of his criminal record and was given until February 17, 2005, to submit the required documentation. Counsel states that although the applicant was given until February 17, 2005, the District Director denied the application on December 10, 2004, because he found the applicant inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, as an alien who has been convicted of a controlled substance violation and who the officer has reasons to believe is or has been a drug trafficker. In addition, counsel states that the District Director abused his discretion in denying the application without explaining to the applicant his determination of inadmissibility. Counsel states that the applicant should have been informed of the charges and given the opportunity to refute them. Furthermore, counsel states that the District Director made the finding of inadmissibility without all the evidence. Finally counsel requests that the application be remanded to the District Director for another interview in order to give the applicant the opportunity to present certified court records and present arguments to refute the section 212(a)(2)(C) of the Act, reason to believe, charge.

The AAO agrees partially with counsel. The District Director should have waited until February 17, 2005, or until the applicant submitted the required documentation before he issued a decision regarding the application for adjustment of status. The AAO does not find that the District Director abused his discretion in denying the application without informing the applicant first.

The regulation at 8 C.F.R. § 103.4 states in pertinent part:

> Certifications.
>
> (a) Certification of other than special agricultural worker and legalization cases--
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> . . . .
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> (2) Notice to affected party. When a case is certified to a Service officer, the official certifying the case shall notify the affected party using a Notice of Certification (Form I-290C). The affected party may submit a brief to the officer to whom the case is certified within 30 days after service of the notice. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

In addition, the regulation at 8 C.F.R. § 245 - Adjustment of status to that of person admitted for permanent residence, states in pertinent part:

> Sec. 245.2 Application.
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> . . . .
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> (5) Decision -
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> (i) General. The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial.

There is nothing in the statute or regulations that requires the District Director to issue a notice of intent to deny. The record of proceeding and the documentation provided by counsel reflects that the applicant has the following convictions:

March 6, 1966, in the Superior Court of the State of California, County of Los Angeles, the applicant was convicted for receiving stolen property and was sentenced to 60 days imprisonment and three years probation.

January 31, 1967, in the Superior Court of the State of California, County of Los Angeles, he was convicted for selling, furnishing and giving away a controlled substance to wit: marijuana

The record of proceeding further reveals that the applicant's convictions were dismissed pursuant to section 3200 of the Welfare and Institutions Code.

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003).

The record of proceeding does not reflect that the court's decision to vacate the applicant's conviction was based on a defect in the conviction or in the proceedings underlying the conviction. Thus this office finds that the applicant has a "conviction" within the meaning of section 101(a)(48)(A) of the Act.

One of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *Matter of Franklin,* 728 F.2d 994 (8th Cir. 1984).

The record of proceedings in the present case does not reveal specific details as to the amount of marijuana involved in the applicant's conviction for selling, furnishing and giving away a controlled substance. The AAO finds that the information in the record of proceedings does not support a finding of inadmissibility under section 212(a)(2)(C) of the Act, as being an illicit trafficker. Nevertheless, this office finds that the applicant is clearly inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a violation of any law or regulation relating to a controlled substance.

The applicant is inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, based on his violation of any law relating to a controlled substance. 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.

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.