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

[redacted]

MAY 20 2005

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 APPLICANT:

[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 waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn, and the matter will be remanded to him for further action.

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 fell within the purview of sections 212(a)(2(A)(i)(I), 212(a)(2)(A)(i)(II), 212(a)(2)(B) and 212(a)(2)(C) of the Immigration and Nationality Act (the Act). The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application *See Acting District Director Decision* dated June 19, 2004.

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

> (A) Conviction of certain crimes.-
>
> (i) In general.-Except as provided in clause (ii), any 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)), is inadmissible.
>
> (B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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

> (C) Controlled substance traffickers.-
>
> any alien 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.....is inadmissible.

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 or less of marijuana.-
>
> ....
>
> (1) (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 [Secretary] 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 ....

In his decision the District Director notes the following convictions:

> November 10, 1972: Westchester County Court in New York for the offenses of Grand larceny 2nd Degree and Criminal Mischief 4th Degree.
>
> January 15, 1976: Circuit Court in and for Dade County, Florida for the offense of Robbery.
>
> January 15, 1976: Circuit Court in and for Dade County, Florida for the offenses of Robbery and False Imprisonment and sentenced to ten years imprisonment.
>
> June 2, 1989: United States District Court for the Southern District of Florida of the offenses of Conspiracy to Possess with Intent to distribute Cocaine and Possession with intent to Distribute Cocaine and sentenced to five years imprisonment.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. Counsel submits a brief and copies of the applicant's criminal record. In her brief counsel asserts that the applicant has never been arrested for nor convicted in the United States District Court for the Southern District of Florida of the offenses of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. On certification counsel states that the application for adjustment of status under section 1 of the CAA of November 2, 1966, was denied due to the applicant's ineligibility for any relief or benefit from his Form I-601. Counsel submits copies of the applicant's FBI record and copies of the court record regarding a conviction of a [redacted] with date of birth August 4, 1962. The applicant's name in the instant case is [redacted] his date of birth is July 3, 1955. The FBI records do not reveal any arrest of the applicant on or about September 18, 1988, or any conviction dated June 2, 1989, for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. In addition counsel requests that an Application for Waiver of Grounds of

Inadmissibility (Form I-601), pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), filed on April 18, 2002, be granted since the applicant does not have a conviction relating to a controlled substance.

Based on the above facts the AAO finds that the District Director erred in finding the applicant is inadmissible pursuant to sections 212(a)(2)(A)(i)(II) or the Act, for having been convicted of a violation of any law or regulation relating to a controlled substance, and 212(a)(2)(C) of the Act, for having reasons to believe that he is or has been an illicit trafficker in any controlled substance or in any listed chemical, 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.

The applicant remains inadmissible pursuant to sections 212(a)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude and 212(a)(2)(B) of the Act for having been convicted of two or more offenses for which the aggregate sentences to confinement were five years or more.

The record of proceedings reveals that the applicant filed a Form I-601, pursuant to section 212(h) of the Act. The Acting District Director concluded that the applicant was inadmissible to the United States pursuant to sections 212(a)(2(A)(i)(I), 212(a)(2)(A)(i)(II), 212(a)(2)(B) and 212(a)(2)(C) of the Act and not eligible for any relief or benefit and denied the application accordingly. *See Acting District Director Decision* dated June 10, 2003. The decision was affirmed by the AAO on appeal. *See AAO Decision,* dated May 26, 2004.

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from sections 212(a)(2(A)(i)(I) and 212(a)(2)(B) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to a qualified family member, a United States citizen or lawfully resident spouse, parent, son, or daughter of the applicant. A review of the documentation in the record reflects that applicant has the required family member and therefore his Form I-601 should have been adjudicated pursuant to section 212(h) of the Act.

Although no motion to reopen or reconsider the waiver application has been filed with the AAO this office finds that the application for adjustment of status was denied because the applicant was previously found inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act and the Form I-601 was not adjudicated pursuant to section 212(h) of the Act. Therefore the AAO finds that the application for waiver of ground of inadmissibility should be reopened and adjudicated pursuant to section 212(h) of the Act before a decision can be made on the application for adjustment of status.

Accordingly the previous decisions of the District Director and the AAO will be withdrawn and the record will be remanded to him in order to adjudicate the Form I-601 pursuant to section 212(h) of the Act.

**ORDER:** The District Director's and the AAO's previous decisions are withdrawn and the matter is remanded to the District Director for further action consistent with the foregoing discussion.