U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

Date: APR 0 1 2014 Office: NEWARK, NJ

IN RE: Applicant:

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: SELF – REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

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.

A review of the record reveals the following facts and procedural history: The applicant was paroled into the United States on June 4, 1980. On August 20, 1986, the applicant was arrested by the and charged with four counts of: (1) possession of controlled dangerous substance, namely Cocaine, contrary to the provisions of NJS 24:21-20(a)(1); (2) possession of controlled dangerous substance, namely Cocaine, with intent to distribute or dispense the same, contrary to NJS 24:21-19(a)(1); (3) possession of controlled dangerous substance, namely Cocaine, in an amount of one ounce or more with at least 3.5 grams of the pure free base Schedule I or II narcotic drug, contrary to the provisions of NJS 24:21-20(a)(2) and (4) possession of controlled dangerous substance, namely Cocaine, in an amount of one ounce or more with intent to distribute or dispense the same, contrary to the provisions of NJS 24:21-19(a)(i) & NJS 24:21-19(b)(2). The applicant pled guilty to count 2 – possession of controlled dangerous substance, namely Cocaine, with intent to distribute or dispense the same, contrary to NJS 24:21-19(a)(1). The remaining three counts were subsequently dismissed. On December 5, 1986, the applicant was sentenced at the Superior Court of New Jersey, to a term of 6 years in prison with two years without parole eligibility. The applicant subsequently petitioned the Court to have his record expunged under N.J.S.A. 2C:52-11. On January 5, 2007, the convictions were expunged pursuant to section N.J.S.A. 2C:52-11.

On April 4, 2009, the applicant submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, pursuant to section 1 of the CAA. The applicant was interviewed on October 15, 2009 in conjunction with his Form I-485 application. Upon review of the record, the field office director determined that the applicant's conviction for possession of a controlled dangerous substance, namely Cocaine, with intent to distribute or dispense, rendered him inadmissible to the United States. The director found that the applicant was not eligible for adjustment of status because his criminal conviction made him inadmissible to the United States and that he was ineligible for a waiver of inadmissibility.

The director certified the decision to the AAO for review. The director informed the applicant that he had 30 dayd to supplement the record with any additional statement or evidence that he wished the AAO to consider. The applicant submitted no further evidence or argument on certification. The record is considered complete. The AAO will adjudicate the matter based on the evidence of record.

Section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), states, in pertinent part: "any alien convicted of . . . (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 Substance Act (21 U.S.C. 802)), is inadmissible."

This ground of inadmissibility may be established by a conviction for a controlled substance violation, the admission of the commission of such an offense, or the admission to acts that constitute the essential elements of a controlled substance offense. *Matter of Perez*, 22 I&N Dec. 689, 698 (BIA 2001). This ground of inadmissibility applies to the controlled substances that are defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802.

Section 212(h) of the Act provides 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 if –
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> > (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 . . . denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

For purposes of a section 212(h) waiver of the applications of section 212(a)(2)(A)(i)(II) of the Act, the Board has held that an adjudicator must engage in a "circumstance-specific" inquiry where the conviction record does not clearly specify that the crime is possession of 30 grams or less of marijuana:

> We conclude that section 212(h) employs the term "offense" . . . to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime. Our main reason for drawing this conclusion is that the "offense" in question is defined so narrowly, by reference to a specific type of conduct (simple possession) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

Matter of Martinez-Espinoza, 25 I&N Dec. 118, 124 (BIA 2009) (*citing Nijhawan v. Holder,* 557 U.S. 28, 33-34, 129 S.Ct. 2294, 2298-2299 (2009)); *cf. Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a "circumstance-specific" inquiry to section 237(a)(2)(B)(i) of the Act, 8

U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a "single" offense of possession).

Additionally, the Board has held that where the amount and type of a controlled substance that an alien has been convicted of possessing cannot be readily determined from the conviction record, "the alien who seeks relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved "30 grams or less or marihuana." *Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988). Otherwise, the alien will remain inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a conviction relating to a controlled substance without the possibility of applying for a section 212(h) waiver. *See id.* at 724. Therefore, immigration adjudicators are not limited by categorical considerations, but may inquire into the specific acts underlying the alien's conviction.

In this case, the record clearly shows that the applicant was arrested and charged with possession of Cocaine with intent to distribute or dispense. He pled guilty to the crime and served two years in prison. Therefore, based on the evidence of record, the applicant's offense does not fall under the discretionary waiver as provided at Section 212(h) of the Act.

Under the statutory definition of "conviction" at section 101(a)(48)(A) of the INA, no effect is to be given in immigration proceedings to a state action which purports to reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

In this case, there is no evidence in the record to suggest that the applicant's convictions were expunged because of an underlying procedural defect in the merits of the case. Therefore, the expunged convictions remain valid for immigration purposes.

The applicant in this matter is inadmissible under section 212(a)(2)(A)(i)(II) of the Act because of his conviction for possession of a controlled dangerous substance, cocaine with intention to distribute or dispense. The applicant's conviction under section 212(a)(2)(A)(i)(II) of the Act for possession of controlled dangerous substance, cocaine, with intent to distribute or dispense renders him ineligible for a waiver of his inadmissibility. As discussed above, section 212(h) of the Act provides for a discretionary waiver for an applicant for admission who has a single conviction for simple possession of 30 grams or less of marijuana and who meets the other statutory eligibility requirements. *See* Section 212(h) of the Act, 8 U.S.C. § 1182(h). The applicant in this case is not eligible for such discretionary waiver.

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. The applicant has not met his burden. Accordingly, the AAO affirms the decision of the director to deny the applicant's application to adjust status pursuant to section 1 of the CAA.

ORDER: The director's decision if affirmed. The application remains denied.