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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services

A2

[redacted]

FILE: [redacted] Office: MIAMI, FL (ORLANDO) Date: NOV 29 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida who certified her 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 the 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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2), specifically section 212(a)(2)(A)(i) and section 212(a)(2)(C). The District Director, therefore, concluded that the applicant is ineligible for adjustment of status and denied the application accordingly. *See District Director's Decision* dated April 10, 2007.

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

> (A) Conviction of certain crimes.-
>
> (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
> >
> > (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.
>
> (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; or.....is inadmissible.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (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—
>
> (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 . . .

The record establishes that on January 13, 1997 the applicant pled nolo contendre to larceny under section 812.014(3A) of the Florida Statutes. *FBI printout report*. The applicant was sentenced to one day in jail. *Id.* On August 20, 1998 the applicant pled nolo contendre to possession of cocaine under section 893.13 of the Florida Statutes and was placed on probation for one year and ordered to pay a fine.[1] *Id.* On September 27, 2002 the applicant was arrested for burglary and carrying a concealed weapon. *Id.* The record does not specify whether the applicant was convicted of these offenses. On December 29, 2002 the applicant pled nolo contendre to petit theft under section 812.014(3) of the Florida Statutes. *See court documents, County Court of Orange County, Florida*, dated December 29, 2002. The applicant was sentenced to two days in jail, placed on probation for 178 days, ordered to perform community service and pay fines. *Id.* On September 16, 2003 the applicant was arrested for contempt of court under section 901.11 of the Florida Statutes. *FBI printout report*. The record is unclear as to whether the applicant was convicted of this offense. On October 1, 2005 the applicant was arrested for reckless driving under section 316.192 of the Florida Statutes and driving with an expired license under section 322.03 of the Florida Statutes. *FBI printout report*. The applicant pled nolo contendre to both offenses and was ordered to serve one day in jail and pay fines. *See court documents, County Court of the Ninth Judicial Circuit in and for Orange County, Florida*, dated November 17, 2005.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. The applicant did not submit any additional brief or written statement. Based on his controlled substance conviction, the AAO concurs with the District Director in finding the applicant subject to the provisions of section 212(a)(2)(A)(i)(II) of the Act and that no waiver is available.

The AAO notes that the District Director also found the applicant inadmissible under section 212(a)(2)(C) of the Act, concluding that there was a reason to believe that the applicant was engaged in the trafficking of a controlled substance. Although the applicant was not convicted of the crime, the Board, in *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, 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

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[1] The AAO notes that in this case, an adjudication of the applicant's guilt was withheld. However, as defined in section 101(a)(48), the term conviction means "a formal judgment of guilt of the alien entered y a court or, if adjudication of guilt has been withheld, where... the alien has entered a plea of guilty or nolo contendre... Accordingly, the applicant was convicted of possession of cocaine under section 893.13 of the Florida Statutes.

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).

Generally speaking, intent to distribute is established when the controlled substance is either found on the person of the accused, or in a vehicle or boat driven or occupied by the accused, or in a dwelling where the accused resided or visited frequently. It was held in *United States v. Franklin*, 728 F.2d 994 (8th Cir., 1984), that intent to distribute may be established by circumstantial evidence. Evidence that the applicant possessed a controlled substance with the requisite intent to distribute is sufficient as a matter of law, where the controlled substance is packaged in a manner consistent with distribution and/or there is evidence of paraphernalia, a large amount of cash, weapons, or other indicia of narcotics distribution. Furthermore, the overt action of actually selling a quantity of cocaine, whatever the amount, goes well beyond mere possession of a small amount.

The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. *United States v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980)(413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5th Cir. 1979)(26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978)(147 grams of cocaine).

The applicant pled nolo contendre to the charge of possession of cocaine and was convicted. *FBI printout report*. The record, however, fails to specify the amount of cocaine or provide other details regarding the applicant's conviction. Accordingly, there is nothing in the record to support the District Director's finding that there was a reason to believe that the applicant was a controlled substance trafficker. The AAO, therefore, finds that the District Director erred in concluding that the applicant was inadmissible under section 212(a)(2)(C) of the Act.

The applicant remains inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act based on his conviction for possession of cocaine. A waiver under section 212(a)(2)(A)(i)(II) of the Act is available only in instances involving possession of 30 or fewer grams of marijuana. Therefore, the applicant is statutorily ineligible for adjustment of status to permanent resident, pursuant to Section 1 of the CAA of November 2, 1966.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has not met his burden of proof in this particular case. The decision of the District Director to deny the application will be affirmed.

ORDER: The District Director's decision is affirmed.