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FILE:

Office: MIAMI, FLORIDA

Date:

OCT 30 2007

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:



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 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)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 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 June 28, 2004.

Section 212(a)(2) 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 reason 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.

The record reveals that, on June 7, 2001, the applicant was arrested by the Sheriff's Office, Collier County, Naples, Florida and charged with trafficking in cocaine. The charges against the applicant were dropped due to insufficient evidence to prove beyond a reasonable doubt. *See criminal records, Office of the State Attorney, Twentieth Judicial Circuit of Florida, Notice to the Clerk*, dated June 26, 2001. Additionally, the applicant obtained an expungement order, which notes that the applicant was not adjudicated guilty of the charges stemming from the arrest or criminal activity to which the expungement petition pertained. *See Order to Expunge Records, Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida*, dated July 1, 2002. The arrest report states that during a traffic stop, the applicant was a passenger in a vehicle rented by a friend who was driving. His friend gave consent to a Deputy Sheriff to search the vehicle. Upon searching the trunk, the Deputy Sheriff found a Nextel Cellular telephone box. Opening the Nextel Cellular telephone box, the Deputy Sheriff observed a clear plastic bag containing a white powdery substance which later tested positive for cocaine. The applicant and his friend were placed under arrest. The applicant's friend stated that he had placed the cocaine

in the Nextel box while the applicant was present, and that the applicant took the Nextel box and placed it in the trunk of the car. Additionally, the applicant identified the telephone to be his, and the telephone NUF# matched the NUF# on the Nextel box. The weight of the cocaine was 1037.5 grams. *See Arrest Report, Sheriff's Office, Collier County, Naples, Florida*, dated June 8, 2001.

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 which states that the charges against the applicant were dropped and subsequently his record was expunged. *Attorney's brief*. Counsel also contends that drug trafficking requires remuneration for the sale or distribution of the drugs. *Id.* quoting *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

The AAO finds that the District Director was correct in 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 amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *United States v. Franklin*, 728 F.2d 994 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5<sup>th</sup> Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5<sup>th</sup> Cir. 1980)(413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5<sup>th</sup> Cir. 1979)(26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8<sup>th</sup> Cir. 1978)(147 grams of cocaine).

The applicant was charged with trafficking in cocaine for the amount of 1037.5 grams. *See Arrest Report, Sheriff's Office, Collier County, Naples, Florida*, dated June 8, 2001; *Criminal records, Office of the State Attorney, Twentieth Judicial Circuit of Florida, Notice to the Clerk*, dated June 26, 2001. Based on the amount of the illicit drug, the AAO finds that trafficking may be inferred. *See Matter of Franklin, supra*. As such, the AAO finds that there is a reason to believe that the applicant was a controlled substance trafficker. He is therefore inadmissible under section 212(a)(2)(C) of the Act and no waiver is available.

The applicant is ineligible for adjustment of status to permanent residence under section 1 of the CAA of November 2, 1966. The decision of the District Director to deny the application will be affirmed. An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of



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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.

**ORDER:** The District Director's decision is affirmed.