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U.S. Citizenship
and Immigration
Services

A2

FILE:

Office: NEW ORLEANS, LOUISIANA

Date:

MAR 16 2009

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)

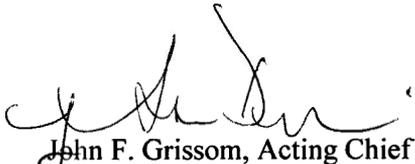
ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director (FOD), New Orleans, Louisiana, who certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the application to adjust status (Form I-485) remanded for further processing.

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 processed for entry into the United States on or about September 13, 1995 in Guantanamo Bay, Cuba. On September 21, 1995, the applicant was given a medical examination. A Form 157, Medical Examination of Applicants for United States Visas, indicates that the examining physician did not find any apparent defects, diseases or disabilities regarding the applicant. On November 2, 1995, the applicant was paroled into the United States. A December 11, 2000 letter from the Sheriff of the East Baton Rouge Parish indicates that on December 23, 1999, the applicant was charged with criminal trespassing and carrying an illegal weapon. The record, however, does not contain a disposition of these charges. The applicant filed the instant Form I-485 to adjust status on January 23, 2002. He attached to his application an April 6, 2001 letter from [REDACTED] who stated that the applicant has been diagnosed with paranoid schizophrenia; that he cannot speak English; has problems with housing and finances; takes various medications; and is unable to work and considered disabled. The applicant also submitted a statement from the Social Security Administration, which informed the applicant that he was ineligible to receive Supplemental Security Income (SSI) payments because he was not a U.S. citizen or national, or an alien described in one of the categories mentioned in the letter. In an interview with an officer of U.S. Citizenship and Immigration Services (USCIS), the applicant stated that he was homeless and unable to work due to his medical condition. Regarding the 1999 criminal charges, the applicant stated that his criminal trespassing charge was related to swimming in a private pool, and his charge for carrying an illegal weapon was for carrying a machete.

In a September 25, 2008 decision, the director determined that the applicant was not eligible for adjustment of status because he has a "mental disorder and a history of behavior associated with the disorder which has posed a threat to the property, safety and welfare of yourself and others and which is likely to recur or lead to other harmful behavior." The director also determined that the applicant had abandoned his application because he failed to appear for fingerprinting on October 3, 2007. The director denied the application and certified his decision to the AAO for review. The director informed the applicant that he had 30 days to supplement the record with any evidence that he wished the AAO to consider. The applicant has not submitted additional evidence for consideration.

The AAO will first address the director's determination that the applicant is inadmissible pursuant to section 212(a)(1)(a)(iii) of the Immigration and Nationality Act (INA), which states:

Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the [Secretary of Homeland Security]-

- (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
- (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.

The AAO disagrees with the director's determination that, based upon the record as it is presently constituted, the applicant is inadmissible under section 212(a)(1)(A)(iii)(I).or (II) of the INA. As a preliminary matter, the AAO notes that, when the applicant filed his Form I-485, he failed to submit the required Form I-693, Report of Medical Examination and Vaccination Record, and no Form I-693 has ever been requested from the applicant. A USCIS officer can only determine that a health-related inadmissibility ground exists based upon the findings of a civil surgeon's medical examination¹. During a medical examination, a civil surgeon initiates queries to ascertain the mental status of the applicant and to detect the presence of any mental disorders. Where a civil surgeon's mental status evaluation diagnoses a mental disorder and where there is evidence of harmful behavior based upon that disorder, a Class A medical condition is certified on the Form I-693 medical report. Here, the record does not contain a Form I-693 with a Class A medical condition certified on it.

The AAO acknowledges the letter in the record from [REDACTED], who states that the applicant is a paranoid schizophrenic. While the AAO does not question [REDACTED] credentials, there is no evidence that [REDACTED] has been certified by USCIS as a civil surgeon pursuant to 8 C.F.R. § 232.2. Therefore, his opinion of the applicant's mental status does not carry any weight in these proceedings, and cannot be used as a basis to find the applicant inadmissible under section 212(a)(1)(A)(iii) of the INA². Similarly, the director also cannot find the applicant inadmissible under section 212(a)(1)(A)(iii) of the INA because of the applicant's arrest in December 1999 and his claim that he was carrying a machete on that date. Again, a finding of inadmissibility

¹ A civil surgeon is a medically trained, licensed and experienced doctor practicing in the United States who is certified by USCIS. These medical professionals receive U.S. immigration-focused training in order to provide examinations as required by the CDC (Center for Disease Control and Prevention) and USCIS. Medical examinations will not be recognized if they are given by a doctor in the United States who is not a civil surgeon. 8 C.F.R. § 232.2

² The AAO also notes that the physician who performed the applicant's medical evaluation in Guantanamo, Bay, Cuba, did not certify on the Form 157 that the applicant had a Class A medical condition; he certified that the applicant had "no apparent defect, disease or disability."

under section 212(a)(1)(A)(iii) can only be made when a civil surgeon has certified a Class A medical condition on a Form I-693. More importantly, the dispositions of the criminal trespassing and carrying an illegal weapon charges have not been provided and, therefore, there is no evidence that the applicant, at any time before, during or after his arrest, posed a threat to the property, safety, or welfare of himself or others. As the director based his finding of the alien's inadmissibility on insufficient evidence, his decision on this issue is withdrawn³.

The second and final issue to discuss is the director's denial of the application because the applicant failed to appear for a biometrics capture appointment on October 3, 2007. If USCIS requires an individual to appear for biometrics capture, but the person does not appear, the application shall be considered abandoned and denied unless by the appointment time, USCIS has received a change of address or rescheduling request that the agency concludes warrants excusing the failure to appear. **8 C.F.R. § 103.2(b)(13(ii)). The record contains a July 31, 2007 appointment notice for an August 28, 2007 appointment for biometrics capture.** This notice contains a check mark in the "Request for Rescheduling" portion of the notice, which was received by the New Orleans Field Office on September 4, 2007. The record does not contain evidence that a new appointment notice was issued. There is only a hand-written note in the record which states "new appt 10/3/07." As the file does not contain evidence that a new appointment for October 3, 2007 was issued to the applicant, the application may not be denied for the applicant's failure to appear for biometrics capturing. Accordingly, this ground for denying the applicant's adjustment of status application is also withdrawn.

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 met his burden. Accordingly, the AAO withdraws the decision of the director to deny the applicant's application to adjust status pursuant to section 1 of the CAA and remands the matter for continued processing of the Form I-485 application.

ORDER: The director's decision is withdrawn. The application is remanded to the director for issuance of a Request for Evidence (RFE) and a new biometrics capture appointment notice. In the RFE, the director shall request a duly executed Form I-693 medical report, the disposition of the applicant's December 1999 arrest, and any other evidence that the director deems necessary. If the decision is adverse to the applicant, the director shall certify it to the AAO for review.

³The applicant's ground of inadmissibility may be waived pursuant to section 212(g) of the INA and, therefore, the director should have provided the applicant an opportunity to submit a waiver of inadmissibility (Form I-601) before denying the instant Form I-485.