



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE: [REDACTED] Office: NEW YORK, NEW YORK Date: **MAR 12 2010**

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)

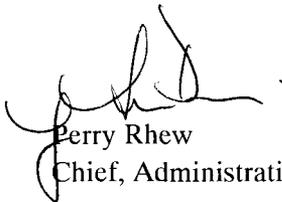
ON BEHALF OF APPLICANT:

[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.

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, New York, 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 first entered the United States on or about March 26, 1980 by plane which he boarded in Madrid, Spain. The applicant was admitted in parole status on or about March 26, 1980 for humanitarian reasons. He was issued a notice to appear before an Immigration Judge regarding his admissibility on November 16, 1992 and on December 7, 1992 he was notified that his parole status was terminated due to his criminal conviction(s). As of June 6, 1994, the legacy Immigration and Naturalization Service (INS) released the applicant from custody and placed the applicant under an order of supervision with notification to periodically report to the Buffalo New York Deportation Section. The applicant filed the Form I-485, Application to Register Permanent Resident or Adjust Status, on July 5, 2002 and was interviewed regarding the application on March 26, 2003. The applicant also filed a Form I-601 waiver application in March 2003 that was denied on October 25, 2007. The record includes the applicant's pertinent criminal history as follows:

The applicant was arrested on June 7, 1994 and was indicted by a Grand Jury in the County of New York for assault in the first degree in violation of Penal Law section 120.10(3); assault in the second degree in violation of Penal Law section 120.05(4); reckless endangerment in the first degree in violation of Penal Law section 120.25; vehicular assault in violation of Penal Law section 120.03; and operating a vehicle while under the influence of alcohol in violation of Vehicle and Traffic Law section 1192(3).

The applicant was convicted of all counts recited above on June 17, 1985.¹ The applicant was sentenced to five to fifteen years on the first degree assault count, from two and one-third to seven years on the second degree assault and reckless endangerment counts, and from one and one-half to four years on the vehicular assault count, to be served concurrently.

¹ Upon appeal, the reckless endangerment in the first degree count was dismissed as a lesser included offense of assault in the first degree under the theory charged.

The applicant was in New York State custody from June 28, 1985 until his release into INS custody on June 6, 1994 whereupon he was placed under an order of supervision as noted above.

In an April 8, 2003 decision, the director determined that the applicant was not eligible for adjustment of status because his criminal history made him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) and II, as well as 212(a)(2)(C) of the Act. The director denied the application and certified her 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.

On certification, counsel for the applicant acknowledges that the applicant's above conviction is for a crime involving moral turpitude and notes that the applicant does not contest this fact. Counsel asserts, however, that the director ignored the applicant's eligibility for a waiver based on the fact that more than 15 years had passed since the events giving rise to his being inadmissible. Counsel also contends that deporting the applicant would contravene humanitarian norms as the political and economic conditions in Cuba remain poor. Counsel submits the applicant's declaration reiterating counsel's assertions as well as country condition information regarding Cuba's current country conditions. Counsel further observes that the applicant has not been convicted of any charges or had any dealings regarding controlled substances.

Section 212(a)(2)(A) of the Immigration and Nationality Act (INA) states, in pertinent part:

(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, 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.

Section 212(a)(2)(B) of the Act states:

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:

(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

The AAO finds that the applicant's criminal history does not include a conviction for involvement with controlled substances. The director's determination to the contrary is withdrawn. However, the applicant's criminal history does include a crime or multiple crimes involving moral turpitude, and the applicant was convicted of more than two offenses for which aggregate sentences to confinement of more than five years were imposed. Accordingly, the applicant is inadmissible pursuant to sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B) of the Act.²

As stated previously, on October 25, 2007, the applicant's Form I-601 waiver application that was filed pursuant to 212(h) of the Act was denied. In that the applicant was found ineligible for a waiver of inadmissibility under section 212(h) of the Act, the applicant is ineligible for adjustment of status pursuant to section 1 of the CAA.

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 is affirmed. The application is denied.

² The AAO does observe that a crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008). When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)(citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *Matter of Silva-Trevino*, 24 I&N Dec. at 696. Upon the AAO's review of New York Penal Law section 120.10(3), this law expressly punishes certain conduct involving recklessness that evinces a depraved indifference to human life, and which thereby causes serious physical injury to another person. Upon review, a violation of this statute is a crime involving moral turpitude.