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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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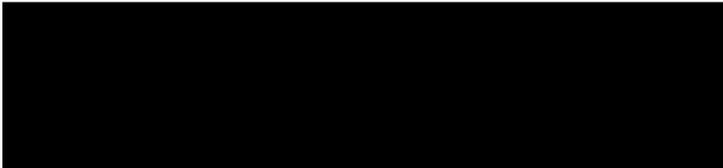
FILE: [REDACTED] Office: NEWARK, NEW JERSEY Date:

IN RE: Applicant: [REDACTED]

SEP 08 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 first entered the United States on or about July 30, 2006 at Brownsville, Texas. The record reveals that he presented his Cuban identification card and requested political asylum. The record further shows that he was found inadmissible under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act) and was paroled into the United States for one year. On March 17, 2008, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, pursuant to section 1 of the CAA. On September 18, 2009, the field office director denied the application finding that the applicant was inadmissible based on his criminal convictions and finding that the applicant had not provided evidence that he was eligible for a waiver of his inadmissibility. The field office director certified her decision to the AAO for review. On certification, counsel for the applicant asserts that the field office director provided no legal basis or determination that the crimes for which the applicant was convicted constituted crimes involving moral turpitude. Counsel contends that the behavior described in the statutes under which the applicant was convicted did not require a "vicious motive or corrupt mind," one of the criteria adopted to ascertain whether a particular crime involves moral turpitude.

The applicant's pertinent criminal history includes:

- Convicted of criminal restraint (3<sup>rd</sup> degree) on December 3, 2008 in violation of New Jersey Statute 2C:13-2 and sentenced to the custody of the Ocean County Jail for 364 days and two years probation; and
- Convicted of resisting arrest purposely (3<sup>rd</sup> degree) also on December 3, 2008 in violation of New Jersey Statute 2C:29-2A and sentenced to the custody of the Ocean County Jail for 364 days and two years probation concurrent with the above conviction.

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.

This matter arises in the Third Circuit Court of Appeals, which applies a categorical approach to determining whether or not a crime involves moral turpitude. *Jean-Louis v. Holder*, 582 F.3d 462, (3d Cir. 2009). The categorical inquiry in the Third Circuit consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a CIMT.” *Id.* at 470. Crimes involving moral turpitude require conduct that is “inherently base, vile, or depraved.” *Id.* at 465 (quoting *Knapik v. Ashcroft*, 385 F.3d 84, 89 (3d Cir. 2004)).

If the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

At the time of the applicant’s 2008 conviction for criminal restraint in violation of New Jersey Statute § 2C:13-2, the statute provided:

A person commits a crime of the third degree if he knowingly:

- a. Restrains another unlawfully in circumstances exposing the other to risk of serious bodily injury; or
- b. Holds another in a condition of involuntary servitude.

The creation by the actor of circumstances resulting in a belief by another that he must remain in a particular location shall for purposes of this section be deemed to be a holding in a condition of involuntary servitude.

In any prosecution under subsection b., it is an affirmative defense that the person held was a child less than 18 years old and the actor was a relative or legal guardian of such child and his sole purpose was to assume control of such child.

At the time of the applicant’s 2008 conviction for resisting arrest purposely in violation of New Jersey Statute § 2C:29-2A, the statute provided in pertinent part:

- a. (1) Except as provided in paragraph (3), a person is guilty of a disorderly persons

offense if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest . (2) Except as provided in paragraph (3), a person is guilty of a crime of the fourth degree if he, by flight, purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. (3) An offense under paragraph (1) or (2) of subsection a. is a crime of the third degree if the person:

(a) Uses or threatens to use physical force or violence against the law enforcement officer or another; or

(b) Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance.

In this matter, the applicant was convicted of third degree offenses in both the criminal restraint and resisting arrest purposely crimes. Both statutes are divisible, yet, the petitioner has not provided records showing under which subsection of the criminal statutes he was convicted. The petitioner bears the burden of proof to establish his admissibility, specifically, that his offenses were not crimes involving moral turpitude. As the record lacks the information establishing that the petitioner was convicted under the subsections for which the elements do not constitute a crime involving moral turpitude, the petitioner has not met his burden of proof.

In addition, the petitioner must show that he merits adjustment as a favorable exercise of discretion. In this matter, the petitioner has not provided an explanation of the circumstances of his crimes and his rehabilitation for United States Citizenship and Immigration Services (USCIS) to consider. Thus, the record also fails to demonstrate that the petitioner merits a favorable exercise of discretion to grant his adjustment of status.

On appeal, the applicant fails to overcome the director's determination that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. There is also no waiver available to the applicant for this ground of inadmissibility because the applicant does not have a qualifying U.S. citizen or lawful permanent resident relative. 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.