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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:



Office: NEWARK, NEW JERSEY

Date:

SEP 13 2010

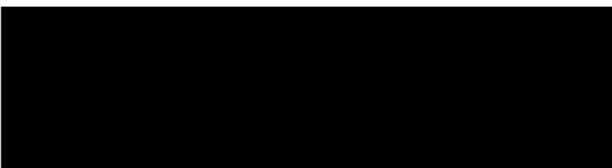
IN RE:

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:

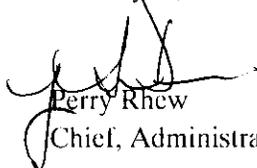


INSTRUCTIONS:

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: On September 12, 1995, the applicant was paroled into the United States from Guantanamo Bay, Cuba. On August 3, 1998, the applicant was convicted of one count of grand theft of a vehicle in violation of section 812.014(2)(c)(6) of the Florida Statute, and three counts of resisting a law enforcement officer with violence in violation of section 843.01 of the Florida Statute. The applicant was sentenced to three years of probation. On July 30, 1999, the applicant was convicted of carrying a concealed weapon in violation of section 790.01(2) of the Florida Statute.¹ The applicant was sentenced to 364 days in prison. On October 3, 2002, the applicant submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, pursuant to section 1 of the CAA. On November 18, 2005, the director denied the application, finding that the applicant had been convicted of five felonies. On May 10, 2006, the applicant filed a second I-485 application to adjust his status pursuant to section 1 of the CAA, which the director of the California Service Center denied on August 11, 2006 because the applicant had been arrested for one or more controlled substances violations. On October 20, 2006, the applicant's U.S. citizen spouse filed a Form I-130, Petition for Alien Relative, on the applicant's behalf, which was approved on November 13, 2006.

On December 26, 2006, the applicant filed a third Form I-485 application to adjust his status based upon his approved Form I-130 petition. On October 3, 2008, the director determined that the applicant was ineligible to adjust his status to that of a lawful permanent resident. The director found that the applicant was inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(1) of the Act for his 1998 convictions involving crimes of moral turpitude. The director also found the applicant inadmissible pursuant to section 212(a)(2)(C)(i) of the Act for his 1999 conviction for carrying a concealed weapon, which the director deemed had occurred while the applicant was conspiring to traffic cocaine. The director certified her decision to the AAO. Upon review, the AAO determined that the documents of record were inconclusive as to whether the applicant's conviction under section 812.014(2)(c)(6) of the Florida Statute, grand theft of a vehicle, was a crime involving moral turpitude. Similarly, the AAO determined that the documents of record were

¹ The applicant was also charged with three counts of conspiracy to traffic in cocaine; however, the applicant was not convicted on any of the counts.

inconclusive as to whether the applicant's conviction under section 843.01 of the Florida Statute, resisting a law enforcement officer with violence, was a crime involving moral turpitude. The AAO noted that the record did not include a police or arrest report detailing the circumstances of the arrest and that the applicant's explanation regarding the theft was inconsistent with the charge of a theft of a motor vehicle which belonged to a female.²

The AAO determined that regardless of the applicant's convictions in 1998 for these violations, the applicant was inadmissible for his 1999 conviction for carrying a concealed weapon. The AAO noted that the applicant was initially charged with carrying a concealed weapon along with three counts of conspiracy to traffic in cocaine; however, that the applicant only pled guilty to and was convicted of the charge of carrying a concealed weapon. Upon review, the AAO found that the applicant's statement regarding his arrest for carrying a concealed weapon and trafficking in cocaine was not entirely consistent with the police report that was prepared on the day of the arrest, August 18, 1998. The AAO acknowledged that the applicant was not convicted of a trafficking crime, but noted that an applicant may be found to be inadmissible, even lacking a conviction if an officer of United States Citizenship and Immigration Services (USCIS) "has reason to believe" that the applicant was a "knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical." In this matter, the AAO observed that the police report indicated that the applicant and a second individual were being watched during the course of a narcotics investigation and that the amount of the controlled substance the police found was quite large, two kilograms. The AAO found that there was sufficient evidence to determine that the applicant was a knowing aider, abettor, assister, conspirator or colluder with the second individual in the illicit trafficking of a controlled substance. As such, although the applicant was not convicted of the conspiracy to traffic cocaine charges filed against him the AAO determined that the applicant is subject to the provisions of section 212(a)(2)(C)(i) of the Act for which there is no waiver of inadmissibility. Based upon these determinations, the AAO issued its decision on April 6, 2009 affirming the director's ultimate decision to deny the application.

On June 5, 2009, the applicant filed a Form I-485 pursuant to section 1 of the CAA. On May 13, 2010, the field office director denied the application and determined that the applicant had been arrested three times since his entry into the United States in 1995. In addition to the two previous arrests on July 11, 1998 and on August 18, 1998, the field office director noted that the applicant had also been arrested on August 12, 1999 for petit larceny, theft and that according to the records that the applicant submitted to USCIS from the Miami-Dade County Judicial Circuit, the August 12, 1999 arrest remained open. The director found that the applicant had not submitted an arrest report or disposition for this arrest. The director found that the applicant's two arrests for theft and the one arrest for resisting arrest made the applicant inadmissible to the United States. The field office director certified her decision to the AAO for review.

On certification, counsel for the applicant states that the applicant is appealing the AAO's April 6, 2009 decision. Counsel asserts that it is not conclusively clear that the applicant's convictions are for crimes involving moral turpitude and that regardless the applicant merits relief pursuant to section 212(h) of the Act to file a waiver. Counsel also contends that the AAO's April 6, 2009 decision is erroneous as there is insufficient evidence to conclude that the applicant was a "knowing

² The applicant declared that he borrowed the car from a male friend who allowed the applicant to use his vehicle to run an errand.

aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical.” Counsel disputes the AAO’s determination that the applicant’s sworn statement, dated March 7, 2007, contained inconsistencies with the August 18, 1998 police report and claims that under existing case law, the police report is insufficient to declare that the applicant conspired to traffic cocaine. Counsel contends that the AAO should have remanded the matter to the field office director for further inquiry regarding the applicant’s convictions for theft and resisting arrest and whether these crimes constituted crimes involving moral turpitude and to file a waiver with additional evidence to clarify the circumstances surrounding the arrests and convictions.

The AAO first observes that counsel has incorrectly characterized her brief as a brief in support of an appeal of the AAO’s April 6, 2009 decision. The matter before the AAO at this time is the field office director’s certification of her May 13, 2010 decision.

In this matter, the applicant has been on notice, first in the AAO’s April 6, 2009 decision and again in the field office director’s May 13, 2010 decision, that the applicant has not met his burden of proof regarding his conviction under section 812.014(2)(c)(6) of the Florida Statute, grand theft of a vehicle and his conviction under section 843.01 of the Florida Statute, resisting a law enforcement officer with violence and whether those crimes constitute crimes involving moral turpitude. The AAO observes that the applicant bears the burden of proof in establishing that he has not been convicted of a crime involving moral turpitude. The applicant has not provided a consistent statement regarding the circumstances of those crimes. In addition, as the field office director noted in the May 13, 2010 decision, the applicant was also arrested on August 12, 1999 for petit larceny, theft. The applicant has not provided a statement or evidence regarding the circumstances of this crime. As the record in this matter lacks information establishing that the Florida Statutes under which the applicant was convicted are not crimes involving moral turpitude, the petitioner has not met his burden of proof.

Beyond the decision of the field office director, the AAO once again finds that the field office director, as the representative of the Secretary of Homeland Security, had reason to believe that the applicant was a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical. *See* section 212(a)(2)(C) of the Act. The AAO has reviewed the applicant’s March 7, 2007 sworn statement and compared the applicant’s statement with the narrative of the August 18, 1998 police report. In the applicant’s sworn statement he declared that he did not know there were any illegal drugs in the car that he was riding in and noted that he had left a restaurant with a group of friends when the driver of the car he was in noticed police officers approaching and told the applicant to throw the gun that was in the glove compartment away. The AAO finds that the applicant’s action and counsel’s assertion that the applicant was attempting to explain that he was at the wrong place at the wrong time, do not sufficiently rebut the police report narrative. As the AAO previously noted, the arresting officer reported what transpired when the applicant was arrested on August 18, 1998 as follows:

During the course of a narcotics investigation the DEF [the applicant] was approached due to the fact that he was believed to be with the CO DEF [the driver of the car] who had negotiated the purchase of two (2) kilograms of cocaine. When approached the DEF removed a handgun with his right hand, throwing it under a parked vehicle. The gun was recovered and the DEF was placed under arrest.

The applicant's statement does not provide information regarding his group of friends, how he knew the driver of the car, why he would participate in trying to conceal a gun, why the police knew that the driver of the car had negotiated the purchase of two (2) kilograms of cocaine, or any further information regarding the other individuals who had been with him at the restaurant. The police narrative provides sufficient information for the field office director to believe that the applicant was a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical. The applicant's statement does not provide an adequate consistent account of the circumstances leading up to his arrest and being charged with three counts of conspiracy to traffic in cocaine. The AAO reiterates that the applicant is subject to section 212(a)(2)(C)(i) and thus is inadmissible and there is no waiver for this ground of inadmissibility.

Also beyond the decision of the director, the AAO finds that 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 USCIS review. The AAO acknowledges the applicant's length of residence in the United States, the hardship his United States citizen wife would face without the applicant's daily presence in her life, and the hardship the applicant would face if returned to Cuba. The AAO has weighed these positive factors against the applicant's criminal history and his lack of forthrightness regarding his past involvement in criminal endeavors. Upon review of these positive and negative factors, the applicant had failed to establish that he is eligible for adjustment of status and that his application merits a favorable exercise of discretion.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The applicant has not met his burden of proof in establishing that his resisting arrest and theft arrests are not crimes involving moral turpitude. The applicant is also inadmissible pursuant to Section 212(a)(2)(C)(i) of the Act and there is no waiver available to the applicant for this ground of inadmissibility. Moreover, the applicant does not merit a favorable exercise of discretion. 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.