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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
and Immigration
Services

A2



FILE:



Office: ORLANDO FIELD OFFICE

Date:

SEP 13 2010

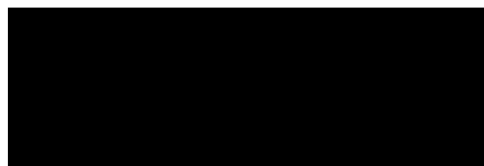
IN RE:

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.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Orlando, Florida, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the matter remanded for continued processing the applicant's Form I-485 application to adjust status.

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 208 of the Immigration and Nationality Act (the Act), as an alien who has been granted asylum. The director adjudicated the Form I-485 as if the applicant was filing for adjustment of status pursuant to section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The matter will be remanded so that the director may process the Form I-485 under the correct section of the law.

A review of the record reveals the following facts and procedural history: The applicant is a native and citizen of Cuba. The applicant first entered the United States on or about November 12, 1987 at Miami International Airport and was paroled into the United States pursuant to section 212(d)(5) of the Act. The applicant was granted asylum on May 23, 1988 in Immigration Court. On or about November 6, 1995, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, as an asylee pursuant to 8 C.F.R § 209.2. On December 2, 1996, the acting district director denied the applicant's Form I-485 for failure to appear at a scheduled interview. On January 11, 2008 an immigration judge issued an order indicating that the applicant remained an asylee pursuant to the May 23, 1988 decision. The applicant was issued a Form I-94, Departure Record, showing that the applicant had been paroled to January 19, 2008 pending 240 proceedings. On or about October 13, 2009, the applicant filed the Form I-485 that is the subject of this instant proceeding and again indicated that he was filing the application as an asylee. On July 26, 2010, the field office director denied the Form I-485, determining that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. The field office director determined that the applicant was claiming eligibility to adjust his status under section 1 of the CAA. The field office director certified her decision to the AAO for review. The field office 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 field office director denied the application based on the applicant's criminal history which includes:

- Conviction on or about August 8, 1997 in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida [REDACTED] for the offense of possession of cocaine, in violation of Florida Statute 893.13(6)(a), and for resisting an officer with violence, in violation of Florida Statute 843.01. For these offenses, the applicant was sentenced to one year probation and court costs.
- Conviction on or about March 2, 2000 in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida [REDACTED] for the offense of marijuana possession, in violation of Florida Statute 893.13. For this offense, the applicant was sentenced to six months probation and court costs.

The record includes a November 26, 2007 letter and a motion from the applicant's counsel indicating that the applicant was seeking post conviction relief in the Eleventh Judicial Circuit for the cocaine conviction. The motion indicated that the applicant was unaware of the immigration consequences of

entering his plea. Counsel's letter indicated that a hearing on the matter had been set for December 14, 2007. The record does not include the judicial court order resulting from that hearing. The record does include an April 22, 2010 printout from the Clerk of the Circuit and County Court of the Eleventh Judicial Circuit of Florida indicating that as of May 29, 2008 [REDACTED] was *nolle posequi*.

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. Here, the field office director must adjudicate the Form I-485 according to the provisions of 8 C.F.R. § 209.2. Accordingly, the AAO withdraws the director's decision and remands the matter for continued processing of the applicant's Form I-485 pursuant to 8 C.F.R. § 209.2.

ORDER: The director's decision is withdrawn and the matter remanded for continued processing of the applicant's I-485 adjustment of status application pursuant to 8 C.F.R. § 209.2.