

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

A2

DATE: OCT 01 2012

Office: NEW YORK

FILE [REDACTED]

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 OBLIGOR:

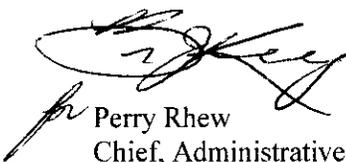
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Field Office Director, New York, New York, denied the application to adjust status and certified her decision to the Administrative Appeals Office (AAO) for review. The AAO withdraws the director's decision and remands the matter for further consideration.

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), Pub. Law No. 89-732 (Nov. 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.

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

(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, or

(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) of the Immigration and Nationality Act (INA) 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 . . . is inadmissible.

The applicant was paroled into the United States in 1970. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on June 1998.

The director, in her decision dated July 17, 2006, noted that the record indicated that the applicant had been arrested on [REDACTED] 1991, was charged with criminal possession of weapon with/intent to use and that he was sentenced to ten days imprisonment. The director, in denying the application, indicated, in pertinent part:

As it appears from the record that you are an alien who falls within the purview of Section 212(a)(2)(A)(i)(I) and (II) as well as 212(a)(2)(C) of the Act, your applicant for permanent residence pursuant to Section 1 of the Act of November 2, 1966 must be, and hereby is, denied.

The record of proceeding includes documentation from the State of New York Division of Criminal Justice Services, which outlined the applicant's criminal history from 1975 through 1993, including his arrest on [REDACTED] 1991, and a Federal Bureau of Investigation fingerprint results report, outlining some of the applicant's criminal history from 1971 to [REDACTED] 1991. These documents indicated that upon a plea of guilty the applicant was convicted of the above offense and he was sentenced to time served [REDACTED]

In his brief, the applicant's representative did not dispute this finding; however, he argues that the offense falls under the petty offense exception under section 212(a)(2)(A)(i)(I) of the Act and, therefore, is not a ground of inadmissibility.

According to New York Penal Law Article 265.01, criminal possession of weapon with intent to use is classified as a Class A misdemeanor. A sentence of imprisonment for a Class A misdemeanor shall not exceed one year. *See* New York Penal Law Article 70.15(1).

The applicant's conviction for criminal possession of weapon with intent to use constitutes a crime involving moral turpitude. The AAO finds that the misdemeanor conviction qualifies for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act, since, in New York, the maximum penalty for misdemeanor criminal possession of weapon with intent to use does not exceed imprisonment for one year and the applicant was not sentenced to a term of imprisonment in excess of six months. Therefore, this misdemeanor conviction is not grounds for denial of this application.

As noted above, the director also determined that the applicant was found to be inadmissible under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act. The director, however, did not reference the section of law that was violated and the date and place the violation was committed. The applicant, thereby, did not have an opportunity to refute the director's finding. Furthermore, the record of proceeding is devoid of an arrest report, indictment and/or court disposition to support this finding.

Accordingly, the case will be remanded to the director for the purpose of inclusion of relevant documentation to support the finding of the applicant's inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act. If said documents cannot be located, a new

decision shall be issued which specifically addresses the adverse evidence to support a finding of inadmissibility. 8 C.F.R. § 103.3(a)(1)(i). The director may request any additional evidence she deems necessary to assist in her determination. As always, the burden of proof remains with the applicant. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action and entry of a new decision consistent with the above discussion