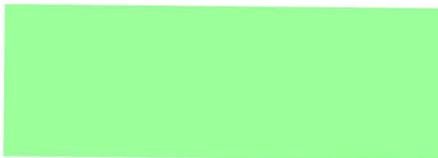




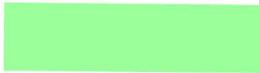
U.S. Citizenship
and Immigration
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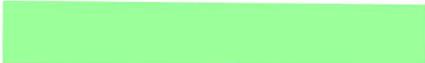
(b)(6)



Date: **SEP 27 2013**

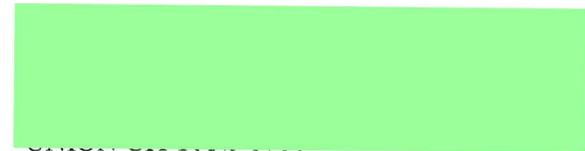
Office: NEWARK, NJ

File: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,



Ron M. Rosenberg
Chief, Administrative Appeals Office

(b)(6)

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)(I) 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

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.

AAO found that the evidence of record is insufficient to determine whether the applicant's convictions under section 812.014(2)(c)(6) of the Florida Statute, grand theft of a vehicle, was a crime involving moral turpitude and section 843.01 of the Florida Statute, resisting a law enforcement officer with violence, were crimes involving moral turpitude. The AAO noted that the record did not include a police or arrest report detailing the circumstances of the arrests and that the applicant's explanation regarding the theft was inconsistent with the charge.²

The AAO determined that regardless of the applicant's criminal convictions in 1998, he 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 further review, the AAO found that the applicant's statement regarding his arrest for carrying a concealed weapon and conspiracy to traffic 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 the 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, the AAO determined that, although the applicant was not convicted of the conspiracy to traffic cocaine charges filed against him, he is nonetheless 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 decision to deny the application.

On June 5, 2009, the applicant filed a fourth 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. The director noted that in addition to the two previous arrests on July 11, 1998 and August 18, 1998, the applicant had also been arrested on August 12, 1999 for petit larceny, 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 indicated that the applicant had not submitted an arrest report or disposition for this arrest. The director found the applicant inadmissible to the United States based on his criminal arrests and convictions. The field office director certified her decision to the AAO for review.

² The applicant stated that he borrowed the car from a male friend who allowed the applicant to use his vehicle to run an errand while the charge indicated that the vehicle belonged to a female.

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 asserts that the AAO's April 6, 2009 decision is erroneous as there is insufficient evidence to conclude 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." Counsel disputes the AAO's determination that the applicant's sworn statement, dated March 7, 2007, is inconsistent 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 for the applicant to file a waiver with additional evidence to clarify the circumstances surrounding the arrests and convictions.

Upon review of the record, the AAO noted that counsel incorrectly characterized her brief as a brief in support of an appeal of the AAO's April 6, 2009 decision while the matter before the AAO at the time is the field office director's certification of her May 13, 2010 decision. The AAO also noted that the applicant has been provided ample notice, first in the AAO's April 6, 2009 decision, then in the field office director's May 13, 2010 decision, and again in the AAO's September 13, 2010 decision that the applicant has not met his burden of proof regarding his convictions under section 812.014(2)(c)(6) of the Florida Statute, grand theft of a vehicle and section 843.01 of the Florida Statute, resisting a law enforcement officer with violence and whether these crimes constitute crimes involving moral turpitude. The AAO further noted that the applicant bears the burden of proof in establishing that he has not been convicted of a crime involving moral turpitude but that the applicant has not provided a consistent statement regarding the circumstances of these crimes. In addition, the AAO noted that the applicant did not provide a statement or evidence regarding the circumstances of his August 12, 1999 arrest for petit larceny, theft nor did he provide any information about the disposition of the crime. The AAO determined that the record lacked sufficient credible evidence or information to establish that the Florida Statutes under which the applicant was convicted are not crimes involving moral turpitude. Accordingly, the AAO found that the applicant has failed to meet his burden of proof.

The AAO indicated 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 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 determined that the applicant failed to provide consistent, credible and probative evidence to establish that the applicant

was not involved in the illicit trafficking of a controlled substance. The AAO reiterated the applicant's inadmissibility under section 212(a)(2)(C)(i) for which no waiver is available.

In addition, the AAO also found the applicant inadmissible as a matter of discretion based on the applicant's criminal history in the United States. The AAO declared "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 . . . 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."

On November 4, 2010, the applicant filed the current Form I-485 pursuant to section 1 of the CAA.³ On March 23, 2013, 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 three previous arrests on July 11, 1998, on August 18, 1998, and 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 field office director noted that the applicant had also been arrested on February 22, 2011, by the Oakland, New Jersey police. The applicant was found guilty of Theft of Movable Property (NJ 2C:20-3A0 by the Oakland Municipal Court on September 1, 2011. The director found that the applicant had not provided any additional information about this arrest or any of his previous arrests. The director found the applicant inadmissible to the United States based on being convicted of Crimes Involving Moral Turpitude, in violation of section 212(a)(2)(A)(i)(1) of the Act and for being convicted for carrying a concealed weapon while conspiring to traffic cocaine in violation of section 212(a)(2)(C)(i) of the Act. The director also found that the applicant is ineligible for a waiver of inadmissibility.

The director 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 wishes the AAO to consider. Neither counsel nor the applicant has submitted any additional evidence for the AAO to consider, and the AAO considers the record complete. The AAO will adjudicate the matter based on the evidence of record.

In this matter, the AAO in its prior decisions has discussed in great detail the applicant's inadmissibility to the United States based on his criminal history. The applicant has been provided ample opportunities to provide court dispositions or other evidence to demonstrate that he is eligible for the benefits sought, but has failed to do so. Accordingly, the AAO concurs with the director's determination that the applicant is ineligible to adjust status in the United States based on his convictions for crimes involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I) of the Act and for carrying a concealed weapon while conspiring to traffic cocaine in violation of section 212(a)(C)(i) of the Act, and there is no waiver available to the applicant for this ground of inadmissibility.

³ The AAO notes that the current Form I-485 is the 5th application filed by the applicant.

Even if the applicant were to be found eligible for a waiver of his inadmissibility, his criminal record, which includes crimes involving moral turpitude and carrying a concealed while conspiring to traffic cocaine, would warrant against a favorable exercise of discretion to grant his adjustment application.

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 remains denied.