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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**



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FILE: [REDACTED] Office: EL PASO Date:

FEB 14 2011

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for adjustment to permanent resident status was denied by the director of the El Paso office. The decision is before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director initially denied the application, finding that the applicant abandoned the application by failing to respond to a request for further evidence (RFE), requesting the applicant's arrest records and final court dispositions.¹ The applicant filed a motion to reopen and reconsider the decision, and submitted criminal dispositions regarding some of his arrests. The director denied the applicant's motion, finding the applicant was inadmissible as one who is reasonably believed to be a controlled substance trafficker. See section 212(a)(2)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(C).

On appeal, the applicant has not submitted any additional evidence.² The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.³

Title 8, Code of Federal Regulations 245a.3(b) states in part:

Eligibility. Any alien who has been lawfully admitted for temporary resident status under section 245A(a) of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien:

- (1) Applies for such adjustment anytime subsequent to the granting of temporary resident status but on or before the end of 43 months from the date of actual approval of the temporary resident application...
- (2) Establishes continuous residence in the United States since the date the alien was granted such temporary residence status...
- (3) Is admissible to the United States as an immigrant, except as otherwise provided in paragraph (g) of this section; and has not been convicted of any felony, or three or more misdemeanors; and

¹The director erred in initially denying the application based on abandonment pursuant to 8 C.F.R. § 103.2(b)(13). On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. See, *CSS v. Michael Chertoff*, [REDACTED]

² The record reveals that the applicant's FOIA request, number NRC2010061020, was processed on October 4, 2010.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

(4)(i)(A) Can demonstrate that the alien meets the requirements of section 312 of the Immigration and Nationality Act, as amended (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States)...

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Immigration and Nationality Act (Act).

Section 212(a)(2) of the Act states in pertinent part:

(A) Conviction of certain crimes.-

(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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(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(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if

(l)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO has reviewed all of the documents in the file, including the criminal records and the statutes under which the applicant was arrested and/or convicted. The record contains court documents that reveal the following criminal history:

- On May 1, 1988, the applicant was charged with a violation of the Illinois Penal Code, *Minor Drinking*. On June 28, 1988, the charge was reduced to *Minor Possession of Alcohol*, and it appears that the applicant was convicted of the charge. The AAO notes that the record does not provide any further information regarding this matter. (Chicago Police Department, case number [REDACTED])
- On December 5, 1991, the applicant was charged with a violation of the Illinois Penal Code (ILCS), section 720 ILCS 550/4 (from Ch. 56 1/2, par. 704(a)), *Possession of Cannabis*. On April 14, 1992, the charge against the applicant was withdrawn and the case was *nolle prossed*. (Circuit Court of Cook County Illinois, case number [REDACTED]).

- On April 1, 1993, the applicant was found by United States Customs and Border Patrol (USCBP), El Paso, to be in possession of 54.6 grams of marijuana. The applicant was issued a fine of \$500, and paid \$30 with \$470 remaining to be paid. The AAO notes that the record does not provide any further information regarding this matter. (Case number [REDACTED])
- On March 16, 2000, the applicant was charged with three violations of the Illinois Penal Code (ILCS) as follows: section 720 ILCS 550.0/4g, *Manu/Del cannabis >5000G*, section 720 ILCS 550/5.1a, *Cannabis Trafficking*, and section 720 ILCS 5/8-2, *Calculated Criminal Cannabis Conspiracy*. On April 11, 2000, the charges against the applicant were withdrawn and the case was *nolle prossed*. (Circuit Court of Cook County Illinois, case number [REDACTED])⁴

Regarding the applicant's 1993 possession of a controlled substance, the amount of marijuana of which the applicant was in possession was determined to be 54.6 grams, more than 30 grams. A section 212(h) waiver is available to an individual who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, only in those instances where the individual has been convicted of a simple possession of less than 30 grams of marijuana. Therefore, the applicant in the present matter appears to be ineligible for a waiver under section 212(h) of the Act. However, the applicant failed to provide the final disposition of the 1993 charge. Accordingly, he has failed to prove that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and is therefore ineligible to adjust to permanent resident status on this basis.

The record reveals that on May 1, 1995, deportation proceedings were instituted against the applicant based upon the applicant being inadmissible to the United States and excludable as one who made a false claim to United States citizenship, pursuant to Section 212(a)(6)(C)(i) of the Act.⁵ The applicant was also charged with being inadmissible and excludable as an immigrant without an immigrant visa. See Section 212(a)(7)(A)(i)(I) of the Act. On May 22, 1996, an immigration judge ordered that the deportation proceedings be terminated.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he is admissible to the United States under the provisions of section 245A of the

⁴ The record also reveals that on April 7, 1995, agents of the U.S. Drug Enforcement Agency (DEA), O'Hare Airport, seized \$9,800 from the applicant, pursuant to 21 U.S.C. Section 881, as suspected proceeds of narcotics sales. This federal civil forfeiture statute enables the U.S. Attorney's Asset Forfeiture Unit to seize property that it believes is being used to commit a felony. On appeal, the applicant has produced a copy of a civil judgment granting "claimant's" motion to dismiss in the civil case of *United States v. Funds in the Amount of \$9,800*. It is not known whether there was a related criminal charge against the applicant regarding this matter. (United States District Court for the Northern District of Illinois, Eastern Division, case number 96-C-2614).

⁵ Section 344(a) of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) created section 212(a)(6)(C)(ii) of the Act to render inadmissible any alien who falsely claims to be a U.S. citizen for any purpose or benefit under the Act or under any other Federal or State law. Pursuant to section 344(c) of IIRIRA, section 212(a)(6)(C)(ii) of the Act became effective on September 30, 1996, and only to false claims to U.S. citizenship made on or after September 30, 1996.

Page 6

Act. Based on the evidence of record, the applicant has failed to establish that he is admissible; therefore, he failed to establish he is eligible for adjustment to permanent resident status.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.