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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

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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

Office: NEWARK, NEW JERSEY

Date:

APR 06 2009

IN RE:

Applicant:

[Redacted]

APPLICATION: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to Section 209 of the Immigration and Nationality Act, 8 U.S.C. § 1159

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director (FOD), 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 209 of the Immigration and Nationality Act (the Act), as an alien who has been admitted to the United States as a refugee under section 207 of the Act.

Section 209(a) of the Act, states, in part:

(1) Any alien who has been admitted to the United States under section 207-

(A) whose admission has not been terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) who has not acquired permanent resident status, shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 240 and 241.

A review of the record reveals the following facts and procedural history: The applicant first entered the United States on or about May 7, 1980 during the Mariel Boatlift. He applied for asylum and was interviewed regarding his claim on May 8, 1980, the same date on which he was paroled into the United States as a refugee. On June 28, 1989, the applicant pled guilty to one count of cocaine possession. On September 8, 1989, the applicant was sentenced to three years of probation and ordered to pay a fine of \$1,030. The applicant filed the instant Form I-485 on June 12, 2007. In a February 11, 2009 decision, the director determined that the applicant was not eligible for adjustment of status because his criminal history made him inadmissible to the United States. The director denied the application and certified her decision to the AAO for review.¹ The 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.

¹ The director's denial letter erroneously indicates that the applicant was applying for adjustment of status pursuant to section 1 of the Cuban Adjustment Act of 1966. On the Form I-485, the applicant indicated that he was applying pursuant to section 209 of the Act as an alien who has been admitted to the United States as a refugee under section 207 of the Act. The director's error is harmless, however, because the AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(2)(A) of the Act 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-

* * *

(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.

The applicant's conviction for cocaine possession makes him inadmissible under section 212(a)(2)(A)(i)(II) of the Act (controlled substance violation). There is no waiver of inadmissibility available to the applicant. 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.

ORDER: The director's decision is affirmed. The application is denied.