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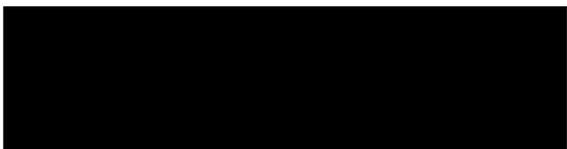
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: MSC 07 038 18622 Office: TAMPA, FLORIDA Date: **MAR 12 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:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Tampa, Florida, who certified her decision to the Administrative Appeals Office (AAO) for review. The field office 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: The applicant entered the United States on or about May 13, 1980 during the Mariel Boatlift. The record shows that the applicant was arrested on January 15, 1985 by the Sheriff's Office – Gretna on a charge of possession and distribution of cocaine. The applicant's arrest report indicates that the applicant had three ounces of cocaine in his possession at the time of his arrest. On December 2, 1985, the applicant pled guilty to a reduced charge of attempted possession of CDS: Cocaine, in violation of R.S. 40:27:967. The applicant was sentenced to two and ½ years of imprisonment at hard labor, and ordered to pay a fine of \$2,500 plus court costs. The record shows that the applicant served a sentence of approximately 10 or 11 months and was released from prison on April 15, 1988. On October 27, 1988 the applicant was issued a new I-94 indicating that he was a Cuban parolee. The record also includes a decision issued on September 18, 1989 by an immigration judge determining that the applicant was excludable under section 212(a)(20) of the Immigration and Nationality Act (the Act).

The record also includes a September 15, 1990 letter from the Department of Public Safety and Corrections, Division of Probation and Parole, indicating that the applicant had been tried and convicted for the crime of "Attempt Possession of Cocaine" and that as the applicant had completed his sentence, he met the requirements of Louisiana's automatic first offender pardon. The letter stated:

[T]his will certify and proclaim that effective November 18, 1989, [the applicant] is fully pardoned for the offense above stated and that all rights of citizenship and franchise are restored in Louisiana.

The Form I-485 that is the subject of this certification was filed on November 7, 2006. In an August 10, 2009 decision, the director determined that the applicant was not eligible for adjustment of status because "[t]he record reflects that on January 1, 1985, you were convicted in the Twenty-Fourth Judicial District Court of [the] State of Louisiana, in and for the Parish of Jefferson, of the offenses of possession of cocaine, and distribution of cocaine. Thereupon you were sentenced to two and a half year[s] in prison." The director determined that the applicant's conviction made him

inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. The director denied the application and 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 wished the AAO to consider. On certification, the applicant submits a personal letter referencing the pardon he had been granted in the State of Louisiana and contending that the pardon precluded his December 2, 1985 conviction from consideration in the adjudication of his Form I-485 application.

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

(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.

Upon review, the AAO does not find that the applicant was convicted of the offenses of possession of cocaine and distribution of cocaine; rather the applicant pled guilty to and was convicted of a reduced charge of attempted possession of CDS: Cocaine, in violation of R.S. 40:27:967. Upon further review, under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). The September 15, 1990 letter from the Department of Public Safety and Corrections, Division of Probation and Parole, indicates that the applicant's pardon was granted because he had completed his sentence and had met the requirements of Louisiana's first offender pardon. Thus, the applicant's pardon is based on the operation of Louisiana's rehabilitative statute and not on the merits of the conviction or a violation of the applicant's constitutional or statutory rights in the underlying criminal proceedings. Accordingly, the pardon is given no effect in immigration proceedings. For immigration purposes, the applicant remains convicted of a violation (or a conspiracy or attempt to violate) a law or regulation of a State, the United States, or a foreign country relating to a controlled substance.

The AAO finds that the applicant's conviction makes him inadmissible under section 212(a)(2)(A)(i)(II) of the INA (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 pursuant to section 1 of the CAA.

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