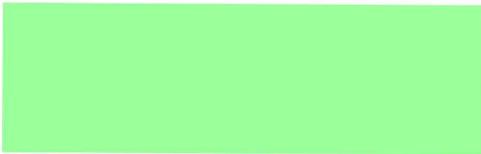


(b)(6)

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



U.S. Citizenship
and Immigration
Services

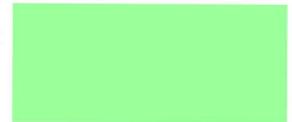


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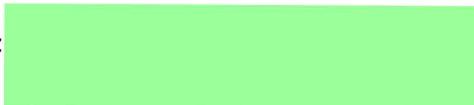
Office: NEW YORK, NY

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IN RE:

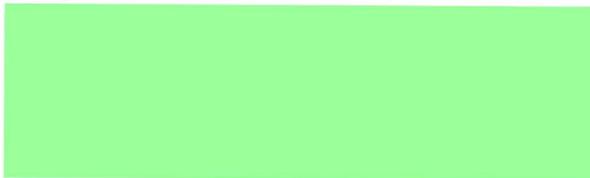
Applicant:



APPLICATION:

Application for Permanent Residence Pursuant to Section 1 of the Cuban Refugee 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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, (the director) denied the Application to Register Permanent Residence or Adjust Status (Form I-485) and certified the decision to the Administrative Appeals Office (AAO) for review. The matter will be remanded to the director for further consideration and action.

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 director determined that while the applicant was statutorily eligible for adjustment of status in the United States, he is nonetheless ineligible for this benefit as a matter of discretion. The director denied the application accordingly.

Applicable Law

Section 1 of the CAA provides, in pertinent 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.

Relevant Facts and Procedural History

The applicant, a native and citizen of Cuba, was first paroled into the United States on October 5, 1995. On January 19, 2012, the applicant filed the current Form I-485 to adjust his status under section 1 of the CAA that is before the AAO on certification. The record reflects that the applicant previously filed an application for adjustment of status under Section 1 of the CAA on August 11, 2006. The application was denied on January 4, 2007. On January 4, 2007, the director, despite finding the applicant eligible to adjust status, denied the application stating that the applicant's criminal history is a negative factor that outweighed any favorable factors in his exercise of discretion. The applicant's case was referred to the Immigration Court for a removal hearing by a Notice to Appear (NTA) dated March 21, 2007, charging the applicant with inadmissibility under Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act). On April 8, 2008, the Service filed a Form I-261, Additional Charges of Inadmissibility/Deportability, adding a charge under Section 212(a)(7)(A)(i)(II) of the Act. On October 21, 2009, the applicant filed an application for Asylum and Withholding of Removal, Form I-589 with the Immigration Court. An individual hearing was scheduled in December 2010, and then continued to February 2012 with several other continuances granted by the Immigration Judge.

On January 11, 2012, the applicant, represented by his current counsel filed a second Form I-485. Counsel submitted a brief, an affidavit from the applicant, a detailed copy of the applicant's criminal history with certificates of disposition and country condition information on Cuba in support of the application. On September 24, 2012, the applicant was interviewed before an immigration officer in connection with the adjustment of status application.

A review of the record shows the applicant's criminal history as follows:

- On May 1, 1998 the applicant was charged with violation of New York Penal Law (NYPL) 165.40, criminal possession of stolen property in the fifth degree. On June 1, 1998, the case was adjourned in contemplation of dismissal under the New York Criminal Procedure Law (CPL) section 170.55.¹ The case was dismissed on November 30, 1999 under the same provision of CPL 170.55.
- On September 13, 1998, the applicant was arrested and charged with violation of NYPL 155.30 grand larceny in the fourth degree and NYPL 195.45 CPSP in the 4th degree. On September 14, 1998, the applicant was convicted upon a plea of guilty for violation of NYPL 110/155, attempted petit larceny. On February 18, 1999, the applicant was sentenced to imprisonment for 30 days.
- On February 15, 1999, the applicant was arrested and charged with violation of NYPL 115.0 criminal facilitation in the 4th degree. On July 26, 1999, the applicant was convicted upon a plea of guilty and on December 15, 1999, he was sentenced to 3 years probation. The applicant violated the probation and on March 25, 2002, he was resentenced to imprisonment for 45 days.
- On December 12, 1999, the applicant was arrested for violation of Vehicle and Traffic Law NY VTL 511(1), aggravated unlicensed operation of a motor vehicle in the third degree, a class B misdemeanor. On December 17, 1999, the applicant pled guilty to the offense and was sentenced to a fine of \$500 and a conditional discharge for one year. On March 25, 2002, the applicant was sentenced to imprisonment for 30 days.
- On August 13, 2007, the applicant was arrested and charged with violation of NYPL sections 120.00 (assault), 205.30 (resisting arrest), 120.15 (menacing) and 240.26 (Harassment). On June 30, 2008, all the charges were dismissed under the speedy trial provisions.
- On July 7, 2009, the applicant was charged with violation of NYPL 265.01 for unlawful possession of a weapon in the fourth degree, a class A misdemeanor. On October 8, 2009, the case was adjourned in contemplation of dismissal under CPL 170.55 and 2 days of community service. The case was dismissed on April 7, 2010 under the same provision of the criminal procedure law.

¹ Section 170.55, Adjournment in Contemplation of Dismissal under New York State Criminal Procedure law states that an adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice. . .the granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. . . upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

On January 3, 2013, the director denied the Form I-485 application for adjustment of status. The director determined that although the applicant was found to be eligible for adjustment of status, the application was denied on discretion. The director stated that the applicant's criminal history in the United States and his failure to provide detailed responses when questioned about his criminal record are negative factors that rendered the applicant "unworthy" of adjustment of status. The director stated

USCIS has determined that though you have established eligibility for adjustment of status, you have not shown that you deserve a favorable exercise of discretion, the very basis for adjustment of status. It has also been determined that although you are statutorily eligible, you are not worthy of the exercise of discretion. Therefore, your application for adjustment of status pursuant to CAA, section 1 is denied as a matter of discretion.

The director certified his decision to the AAO for review and notified the applicant that he had 30 days to supplement the record with any evidence that he wished the AAO to consider. On May 1, 2013, an Immigration Judge administratively closed the removal proceedings pending appeal of the denial of the adjustment of status application.

In response to the director's notice, counsel submits a brief and additional evidence. Regarding the director's claim that the applicant was not forthcoming with details of his criminal record at his adjustment interview, counsel asserts that the applicant made a full disclosure of his criminal history in good faith because (1) the applicant testified at the interview to the six arrests, (2) provided a detailed statement, which was available to the interviewing officer, (3) provided a chart prepared by counsel summarizing each arrest and the outcome of each case and (4) provided six certificates of disposition to the officer at the interview. Counsel states that the certificates of disposition contained information about the applicant's arrests including specific dates of arrest, arraignment charges, and outcome of the cases. Counsel also states that the applicant truthfully responded to the officer's questions and that the applicant may not have fully recalled the details of the arrests that happened more than 12 years before the interview and that the applicant suffered a traumatic incident in December 1999 that may have affected his recollection of events that happened a long time ago. Regarding the applicant's criminal history, counsel asserts that the district director misread the applicant's criminal history, which resulted in error in the weighing of discretionary factors. Counsel further states that the director made numerous substantive legal and factual errors in analyzing and portraying the applicant's criminal history, which appear to have led to an overweighting of negative discretionary factors against the applicant relative to the favorable factors in this case. Counsel contends that an analysis cleansed of these errors demonstrates that the applicant is not only eligible for adjustment of status under the Cuban Adjustment Act, but also merits a favorable exercise of discretion in granting of adjustment of status.

Analysis

A review of the record shows that the director may have misinterpreted the applicant's criminal history, which led to his conclusion that the applicant did not deserve a favorable exercise of

discretion. In the January 3, 2013 decision, the director stated that the applicant was arrested twice for unlawfully using slugs in violation of NYPL 165.40. The first arrest was on May 1, 1998, and the second arrest on July 7, 2009. A copy of the applicant's RAP sheet and certificates of disposition show that NYPL 165.40 is a criminal possession of stolen property in the fifth degree. There is no evidence in the record to suggest that the underlying facts of that case involved unlawfully using slugs. The record of evidence shows that the case was adjourned in contemplation of dismissal and was later dismissed under CPL 170.55. The record further shows that on July 7, 2009, the applicant was arrested and charged with violation of NYPL 265.01, unlawful possession of a weapon in the fourth degree. The matter was adjourned and later dismissed under CPL 170.55. The director also stated that on September 13, 1998, the applicant pled guilty to petit larceny in violation of NYPL 110-155.25 and was sentenced to 30 days imprisonment. However, the actual crime the applicant pled guilty to and was convicted of was attempted petit larceny, a class B misdemeanor.

Counsel argues that the director's reliance on the "colloquy" at the interview, failing to take into consideration written evidence, and the misinterpretation of the applicant's criminal record, resulted in the director's "over-emphasized negative factors" that led to the denial of the applicant's adjustment of status. The record in this case shows that the applicant was convicted of three misdemeanors, one of which falls under the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act; one vehicular violation, an unclassified misdemeanor; and criminal facilitation, a class A misdemeanor not related to a controlled substance. These convictions do not render the applicant inadmissible to the United States.

The purpose of the Act upon which these applications are based is to provide a ready means to permit certain Cuban refugees in the United States to adjust to permanent resident status, in the discretion of the Attorney General, if they are eligible to receive an immigrant visa and are admissible for permanent residence. It is axiomatic that laws remedial in nature, such as the Act under discussion, should be construed liberally. *Matter of Mesa*, 12 I. & N. Dec. 432, Interim Decision 1788, 1967 WL 14056 (BIA)

Adjustment of status is a matter of administrative grace, not mere statutory eligibility. *Matter of Marques*, 16 I. & N. Dec. 314, 315 (BIA 1977). The applicant has the burden of demonstrating that discretion should be exercised in his favor. *Matter of Patel*, 17 I. & N. Dec. 597, 601 (BIA 1980); see also *Matter of Leung*, 16 I. & N. Dec. 12 (BIA 1976), *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). In the adjustment context, where adverse factors are present in a given application for adjustment of status under section 245, Immigration and Nationality Act, as amended, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion. *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).

A review of the totality of the evidence of record shows that the applicant is not ineligible for a grant of adjustment of status notwithstanding his three criminal convictions in the United States. The negative factors against the applicant are: (1) the criminal conviction for a class B misdemeanor, attempted petit larceny, from May 1, 1998, which, does not make him inadmissible to the United

States because the offense falls within the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act; (2) the criminal conviction for a class A misdemeanor, criminal facilitation from February 15, 1999, which does not make him inadmissible to the United States and (3) the conviction for an aggravated vehicular offense under the New York Vehicle and Traffic law, which does not make him inadmissible to the United States. It is noted that these convictions were more than 14 years ago, and the applicant has not been convicted of any crime recently. Therefore, viewed in light of their “nature, recency and seriousness,” none of these convictions should weigh very heavily against the applicant. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The positive factors in favor of the applicant are: (1) the applicant’s lack of criminal convictions since 1999; (2) the applicant’s lengthy residence in the United States – more than 18 years; (3) the applicant’s family and community ties in the United States as documented by supportive letters from his spouse, friends, neighbors, co-workers and employers; and (4) the current country condition in Cuba that severely punishes individuals who left the country illegally.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143,145 (3d Cir. 2004). Upon a *de novo* review of the record, the AAO concurs with the determination of the director that the applicant is statutorily eligible to adjust status under section 1 of the CAA because the crimes, for which the applicant was convicted, did not render him inadmissible to the United States as a matter of law. Accordingly, we will affirm the director’s decision as it relates to the applicant’s statutory eligibility for adjustment of status and will withdraw the director’s decision to deny on discretion.

Conclusion

Based on the evidence of record, the AAO determines that the applicant is eligible for adjustment of status and that the only issue to be decided in the instant matter is whether the applicant’s criminal history in the United States renders him ineligible to adjust status as a matter of discretion. Therefore, the matter is remanded to the director for issuance of a new decision.

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 met that burden.

ORDER: The director's prior decisions of January 4, 2007 and January 3, 2013 are withdrawn. The matter is remanded to the director for entry of a new decision on the Form I-485, Application for Adjustment of Status, which if adverse to the applicant shall be certified to the AAO for review.