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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [redacted] Office: Miami Date: JAN 18 2002

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, who certified his decision to the Associate Commissioner, Examinations, for review. The district director's decision will be affirmed.

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 of November 2, 1966. This Act provides for the adjustment of 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, to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The director found the applicant inadmissible to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(C), because he had reason to believe that the applicant is or has been an illicit trafficker in a controlled substance. The director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application.

In response to the notice of certification, counsel asserts that the applicant provided to the Service all of the documents to prove that, in fact, the case had been dismissed and that there had been no finding of guilt or a withhold of adjudication against him as to the charges which could possibly affect his eligibility to apply for benefits. He further asserts that it would not only be a miscarriage of justice to now make the applicant prove his innocence before an immigration officer, but it would in fact be violative of the Constitution of the United States.

Section 212(a)(2) of the Act, 8 U.S.C. 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

> (A)(i) 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).
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> (C) Any alien who the consular officer or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is

> or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible.

The record reflects the following:

1. On May 23, 1990, in Dade County, Florida, Case No. [redacted] the applicant was arrested and charged with Count 1, aggravated assault on a police officer, and Count 2, fleeing a police officer. The case was transferred to the County Court under Case No. 88612 and the applicant was indicted for the reduced charge of fleeing or attempting to elude a police officer. On May 25, 1990, the applicant was found guilty of the reduced charge and adjudication of guilt was withheld. The court record does not reflect what sentence was imposed on the applicant.

The arrest report in this case shows that the arresting officers attempted to stop the defendant (applicant) who was driving a 4-door grey Plymouth. The applicant who had just been involved in a narcotic transaction was attempting to flee the area. The applicant entered a dead-end townhouse development and was attempting to exit. The officers activated the overhead "red and blue" prior to entering the development, at which time the applicant and vehicle emerged from around the corner coming hard on toward the officers. The officers took evasive action to avoid a collision. The vehicle failed to stop for the officers who were in a marked police vehicle with its overhead red and blue lights activated. The applicant was subsequently stopped and placed under arrest.

2. On May 23, 1990, in Dade County, Florida, Case No. [redacted] the applicant was arrested and charged with conspiracy to traffic cocaine. On June 8, 1990, the court entered a "no information" on the case.

The arrest report in this case shows that on May 23, 1990, the applicant and a co-defendant conspired to sell two kilograms of cocaine to an agent of the Metro-Dade Police Department. The applicant was subsequently arrested (see paragraph 1 above).

Despite the fact that the applicant was not convicted of conspiracy to traffic cocaine (paragraph 2 above), the district director, citing Matter of Rico, 16 I&N Dec. 181 (BIA 1977), and Matter of Tillighast, 27 F.2d 580 (1st Cir., 1928), determined that the applicant was inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act because he had reason to believe the applicant is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance.

The Board held in Matter of Rico that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, one of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. Matter of Franklin, 728 F.2d 994 (8th Cir., 1984).

The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. United States v. Koua Thao, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); United States v. DeLeon, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); United States v. Grayson, 625 F.2d 66 (5th Cir. 1980) (413.1 grams of 74% pure cocaine); United States v. Love, 559 F.2d 107 (5th Cir. 1979) (26 pounds of marijuana); United States v. Muckenthaler, 584 F.2d 240 (8th Cir. 1978) (147 grams of cocaine).

The circumstances surrounding the arrest and the fact that the applicant fled the scene, and the large amount of cocaine the applicant had conspired to sell to the undercover agent (2 kilograms), are sufficient factors to support the director's conclusion that there was reason to believe the applicant is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance.

The applicant is, therefore, inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act even though the record in this matter indicates that the applicant was not convicted of the criminal charge in paragraph 2 above. Matter of Rico, supra. There is no waiver available to an alien found inadmissible under section 212(a)(2)(C) of the Act based on trafficking in a controlled substance.

Counsel asserts that the case in issue was dismissed, which obviously indicates that either the State Attorney's office or the judge thought that there was no basis for bringing such charges against the applicant; in fact, the reason that the charges were dismissed was that the wrong person had been arrested. Counsel claims that it is a violation of the due process clause of the Constitution to now deny the applicant the right to obtain his residency pursuant to the Cuban Adjustment Act because of a prior mistake made by the State of Florida.

There is no evidence in the record, however, that the charges against the applicant were dismissed based on a wrongful arrest and

that a mistake was made by the State of Florida. Statements by counsel are not evidence. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, an applicant for adjustment of status who meets the objective prerequisites is merely eligible to apply for adjustment of status. He is in no way entitled to adjustment. See Matter of Tanahan, 18 I&N Dec. 339 (Reg. Comm. 1981). Therefore, no violation of the due process rights of the applicant can be found.

The applicant is ineligible for adjustment of status to permanent residence pursuant to section 1 of the Act of November 2, 1966. The decision of the district director to deny the application will be affirmed.

ORDER: The district director's decision is affirmed.