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U.S. Department of Homeland Security  
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
BCIS, AAO, 20 Mass, 3/F  
425 I Street N.W.  
Washington, D.C. 20536

*AO*

[REDACTED]

SEP 26 2003

FILE: [REDACTED]

Office: Miami

Date:

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)

ON BEHALF OF APPLICANT:

[REDACTED]

**INSTRUCTIONS:**

This is the decision 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 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 that 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 Citizenship and Immigration Services (CIS) 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.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO), 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 district director found the applicant inadmissible to the United States because he falls within the purview of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C). The district director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application.

In response to the notice of certification, counsel states that she disagrees with the director's determination that the applicant's Federal Youth Corrections Act (FYCA) conviction renders him inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act in light of *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) and *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). He asserts that *Roldan* and *Devison* are not controlling in the applicant's case because the applicant was charged pursuant to federal law and his offense was set aside pursuant to the FYCA, a federal rehabilitative statute. Counsel further asserts that the director also erred in determining that the applicant was inadmissible pursuant to section 212(a)(2)(C) of the Act as an alien who has been an illegal drug trafficker.

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 --

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(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).

\* \* \*

(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 that on March 13, 1981, in the United States District Court, District of New Jersey, Case No. CR-81-95, the applicant was indicted for Count 1, conspiracy to distribute cocaine; Count 2, possess with intent to distribute approximately 22.9 grams of heroin; Count 3, distributing approximately 22.9 grams of heroin; Count 4, possess with intent to distribute approximately 25.3 grams of cocaine; Count 5, distributing approximately 25.3 grams of cocaine; Count 6, possess with intent to distribute approximately 415.1 grams of cocaine; and Count 7, distributing approximately 415.1 grams of cocaine. On July 15, 1981, the applicant entered a plea of guilty as to Count 7, he was found guilty of Count 7, and he was sentenced to treatment and supervision pursuant to 18 U.S.C. § 5010(b), Youth Corrections Act. Counts 1 through 6 were dismissed "with prejudice so long as the plea and sentence on Count 7 remain in full force and effect." On May 10, 2000, the applicant was unconditionally discharged and his conviction was set aside.

Despite the fact that the conviction was set aside, the district director determined that the applicant remains convicted and, therefore, is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. The district director further determined that even if there were no longer a conviction, the Service still finds that there is sufficient, reasonable, substantial, and probative evidence to support a finding of inadmissibility pursuant to section 212(a)(2)(C) of the Act.

Previously, a conviction set aside under the FYCA was considered eliminated for immigration purposes. *Matter of Zingis*, 14 I&N Dec. 621 (BIA 1974). However, on September 30, 1996, section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) amended the Immigration and Nationality Act (the Act) by adding a definition of a conviction under section 101(a)(48)(A) of the Act:

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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

As cited by the district director, the Board, in *Matter of Devison, supra*, states:

The distinction between a youthful offender adjudication and an expunged conviction is further underscored by comparing the FJDA with the former Federal Youth Corrections Act, ch 1115, § 2, 64 Stat. 1086 (1950) (codified at 18 U.S.C. §§ 5005-5026 (1982) (repealed 1984) ("FYCA"). Under the FJDA there is only a finding of delinquency, whereas under the FYCA there was an actual criminal conviction. See *Matter of P-*, *supra*; see also *People v. Rivera*, 474 N.Y.S. 2d 573 (N.Y. App. Div. 1984). Accordingly, we held in *Matter of Roldan, supra*, that convictions set aside pursuant to the FYCA or a comparable state statute were sufficiently analogous to "expungements" and would no longer be given effect in immigration proceedings. Thus, our earlier holdings in *Matter of Zingis*, 14 I&N Dec. 621 (BIA 1974) (ruling that a conviction set aside under the FYCA was considered eliminated for immigration purposes), and *Matter of Andrade*, 14 I&N Dec. 651 (BIA 1974) (holding that a conviction set aside under a state statute comparable to the FYCA was considered eliminated for immigration purposes), were among the case law and administrative rulings that we found to be "no longer controlling." *Matter of Roldan, supra*, at 19.

It is, therefore, clear that the applicant's conviction under the FYCA remains a conviction within the meaning of section 101(a)(48)(A) of the Act notwithstanding the fact that he was unconditionally discharged and his conviction was set aside.

Further, the facts underlying a conviction that has been expunged under the FYCA can still be used to hold the alien inadmissible under the drug trafficking charge. *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992); *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979).

The record in this case reflects that the applicant entered a plea of guilty to distributing approximately 415.1 grams of cocaine and he was sentenced to treatment and supervision pursuant to the FYCA.

One of the factors considered by the Federal Courts in determining whether possession of a controlled substance should 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).

Based on the large amount of cocaine the applicant was convicted of distributing and the fact that he pled guilty to the crime, there is sufficient, reasonable, substantial, and probative evidence to support the director's conclusion that there is reason to believe the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder in the illicit trafficking in a controlled substance. The applicant is, therefore, inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act based on his conviction of distributing (trafficking) cocaine.

There is no waiver available to an alien inadmissible under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception.

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.