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U.S. Department of Justice

Immigration and Naturalization Service

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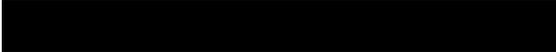
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: 

Office: Miami

Date: 15 FEB 2002

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)

IN BEHALF OF APPLICANT:



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

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 Honduras 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. Section 1 of this Act 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, 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. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

The district director determined that the applicant was not eligible for adjustment of status pursuant to section 1 of the Cuban Adjustment Act, as the spouse of a native or citizen of Cuba, because she had not fulfilled the two-year foreign residence requirement, nor had she been granted a waiver of that requirement. The district director, therefore, denied the application.

In response to the notice of certification, counsel asserts that the only requirement of the Cuban Adjustment Act (CAA) is that the alien be inspected and admitted or paroled, and that in the present case, the applicant was in fact inspected and admitted as a J-1 nonimmigrant status. Counsel further asserts that section 245(c) of the Act only prohibits the adjustment of status of an alien admitted in J-1 status if the alien is applying for adjustment pursuant to section 245(a), and that there is no such prohibition pursuant to the terms of CAA.

The record reflects that the applicant was admitted to the United States on August 15, 1996, as a J-1 foreign exchange visitor. On July 22, 2000, at Hialeah, Florida, the applicant married [REDACTED] a native and citizen of Cuba and a lawful permanent resident, having adjusted his status under the CAA. Based on that marriage, on August 29, 2000, the applicant filed for adjustment of status under section 1 of the Cuban Adjustment Act.

Section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), states, in pertinent part:

No person admitted under section 101(a)(15)(J) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, that upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency...or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child...the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest....And provided further, that...the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

The applicant was issued a J-1 visa in Honduras on July 1, 1996. The visa was annotated, "BEARER IS SUBJECT TO SECTION 212(E) TWO YEAR RULE DOES APPLY." She was admitted to the United States as a J-1 pursuant to section 101(a)(15)(J) of the Act on August 15, 1996. As determined by the district director, and as required by section 212(e), there is no evidence in the record that the

applicant has fulfilled the two-year foreign residence requirement, nor has the applicant been granted a waiver of this requirement.

Counsel asserts that the prohibition is applicable to adjustment pursuant to section 245 of the Act but that there is no prohibition for adjustment pursuant to section 1 of the Cuban Adjustment Act. Section 212(e), however, states that no person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States, or has been granted a waiver of this requirement. The two-year foreign residence requirement does not apply solely to section 245 of the Act, or to any other particular section of law, but rather to any applicant for an immigrant visa or for permanent residence. The applicant is applying for permanent residence. Because she has not met the requirements of section 212(e) of the Act, this application may not be approved.

The applicant is inadmissible to the United States pursuant to section 212(e) of the Act and 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.