

PUBLIC COPY

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

A2

identifying data is filed to
prevent clearly unwarranted
invasion of personal privacy

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



FILE: 

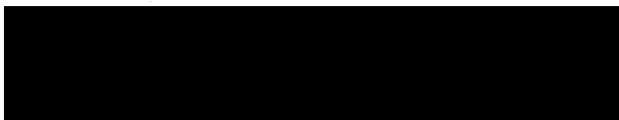
Office: Miami

Date: **DEC 15 2003**

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:



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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office for review. The acting district director's decision will be affirmed.

The applicant is a native and citizen of Colombia 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. This Act 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, 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 acting district director determined that the applicant was not eligible for adjustment of status as the spouse of a native or citizen of Cuba, pursuant to section 1 of the CAA, because her spouse died on August 11, 2002. The acting district director, therefore, denied the application.

In response to the notice of certification, counsel asserts that the applicant and her representative should not be faulted for their reasonable reliance on the Texas Service Center's instructions regarding the location of filing for Florida area CAA applications. As a direct result, the processing of the applicant's adjustment application was delayed by several critical months. The applicant's husband succumbed to congestive heart failure approximately one month before the applicant's interview. During the period of time leading up to her husband's demise, the

applicant was completely engrossed in caring and comforting her dying husband. Counsel asserts that the CIS has the authority to grant the application for adjustment of status *nunc pro tunc* in the exercise of discretion. He, therefore, requests that the application be approved. Counsel subsequently requested an additional 90 days in which to present additional evidence and/or arguments. As of this date, no additional evidence or arguments have been received. Therefore, the record is considered complete.

The record reflects that on February 15, 2001 at Miami Beach, Florida, the applicant married [REDACTED] a native and citizen of Cuba and a lawful permanent resident of the United States. Based on that marriage, on January 17, 2002, the applicant filed for adjustment of status under section 1 of the CAA. At an interview regarding her application for adjustment of status on September 12, 2002, the applicant stated that her Cuban spouse passed away on August 11, 2002. A copy of Mr. Quesada's death certificate is contained in the record of proceeding.

Although the provisions of section 1 of the Act is applicable to the spouse or child of an alien described in the Act, it has been held in *Matter of Bellido*, 12 I&N Dec. 369 (Reg. Comm. 1967), that an applicant, who is neither a native or citizen of Cuba nor is residing with the Cuban citizen spouse in the United States, is ineligible for adjustment of status pursuant to section 1 of the Act. The applicant's spouse was deceased on August 11, 2002; therefore, no petitionable relationship existed between the applicant and her spouse since his death.

Despite counsel's assertion that the CIS has the authority to grant the application for adjustment of status *nunc pro tunc*, the Board, in *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991), held that an alien must be eligible, at the time her application is acted on, for the preference category relied on when the application was filed. On August 11, 2002, prior to the adjudication of the application for adjustment of status under section 1 of the CAA, the applicant's spouse died, thus rendering the applicant ineligible for the benefit sought.

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 she is eligible for adjustment of status. She has failed to meet that burden. The decision of the acting district director to deny the application will be affirmed.

ORDER: The acting district director's decision is affirmed.