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

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



FILE:  Office: Miami

Date: MAY 19 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:


PUBLIC COPY

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 Bureau of Citizenship and Immigration Services (Bureau) 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 of Cuba and citizen of Venezuela 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 acting district director determined that the applicant had not established that she was maintaining a residence in the United States. The acting 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 asserts that since applying for adjustment, all of the applicant's travel to and from the United States was done with an I-512 (advanced parole). He states that according to 8 C.F.R. § 245.2(a)(4)(ii)(B), travel outside of the U.S. by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application if he or she was previously granted advanced parole by the Service for such absences. Counsel contends that the applicant proved that she is a native of Cuba, she was inspected and admitted to the U.S., and she proved that she was physically present in the U.S. for one year; therefore, the applicant meets the requirements of the CAA.

8 C.F.R. § 245.2(a)(2)(ii) provides, in part:

An application for the benefits of section 1 of the Act of November 2, 1966 is not properly filed unless the applicant was inspected and admitted or paroled into the United States subsequent to January 1, 1959. An applicant is ineligible for the benefits of the Act of November 2, 1966 unless he or she has been physically present in the United States for one year.

The record reflects that the applicant originally entered the United States on December 18, 1961, with an O-1 immigrant visa (native of a Western Hemisphere country). The director noted that

on April 13, 1962, the applicant married [REDACTED] in Caracas, Venezuela, and she subsequently became a citizen of Venezuela. He further noted that from 1963 to 1973, the applicant continued to request permission to reenter the United States from Venezuela with an I-131 reentry permit. However, on October 25, 1973, a subsequent application for issuance of a permit to reenter the United States, Form I-131, was denied based on the applicant's lack of physical presence in the United States (a total of 22 days since 1963), the fact that she was gainfully employed outside of the United States, and that her spouse was also residing and working outside the United States. It was concluded that the applicant, therefore, did not appear to be a bona fide resident of the United States who intended to be temporarily absent.

The record further reflects that the applicant continuously entered the United States with a B-2 nonimmigrant visitor's visa and remained in the United States for only a few days at a time. The record contains a listing of her trips to the United States from December 6, 1989 until the date she filed her application on April 5, 2001. A calculation of this list reflects that the applicant remained in the United States for a total of 761 days (approximately 2 years aggregate) during the 11-1/2 year period that she was residing and working in Venezuela.

Counsel, on appeal, cites 8 C.F.R. § 245.2(a)(4)(ii)(B). This section, however, applies to applications under section 245 of the Act and does not apply to the applicant's case as she is applying under section 1 of the CAA. The proper section is 8 C.F.R. § 245.2(a)(4)(iii) states, in part:

If an applicant who was admitted or paroled subsequent to January 1, 1959, later departs from the United States **temporarily with no intention of abandoning his or her residence**, and is readmitted or paroled upon return, the temporary absence shall be disregarded for purposes of the applicant's "last arrival" into the United States in regard to cases filed under section 1 of the Act of November 2, 1966.

(Emphasis added.) Section 101(a)(33), 8 U.S.C. § 1101(a)(33), provides, in part:

the term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

The record reflects that the applicant was residing and working in Venezuela subsequent to her marriage to her Venezuelan husband. She was issued a Form I-131 permit to reenter the United States from 1963 to 1973, subsequent to the denial of a further issuance of an I-131 on October 25, 1973, she reentered the United States numerous times with a B-2 visitor's visa.

It is concluded that the applicant, in this case, did not depart from her residence in the United States on a temporary basis but, rather, she departed from her residence in Venezuela on a temporary basis to visit the United States during the 11-1/2 years from December 6, 1989 through April 5, 2001. The record is silent as to the applicant's activities from 1973 to December 1989.

The applicant filed an application for adjustment of her status to permanent residence, pursuant to the CAA, on April 5, 2001. She claimed on the application that she last arrived in the United States with a B-2 nonimmigrant visa on December 8, 2000. The applicant furnished with her application copies of 2000 and 2001 Form 1040 tax returns (prepared on September 26, 2002), and other documentation as evidence that she is residing in the United States. It is noted, however, that the tax returns filed by the applicant and her spouse were for taxable interest earned from a bank in the United States. This is not evidence that she is residing in the U.S. Nor is the fact that she has banking accounts in U.S. banks. The phone bills submitted are for December 1996, December 1997 and November 2000. They too, are found not to indicate a residence in the U.S. as defined in section 101(a)(33) of the Act. Furthermore, although the applicant continues to travel outside the United States with a Form I-512 (advanced parole) subsequent to the filing of her application for adjustment, this is not proof that she is residing in the United States. In fact, it strengthens the assertion that she has abandoned her residence in the U.S.

It is concluded that the applicant has not established that she did not intend to abandon her residence in the United States. Therefore, her departures cannot be disregarded for purposes of her "last arrival." As such, the applicant has not established that she was physically present in the United States for one year at the time she filed her adjustment application on April 5, 2001. The applicant is, therefore, ineligible for the benefit sought. The acting district director's decision will be affirmed.

This decision, however, is without prejudice to the filing of a new application for adjustment of status, along with supporting documentation and the appropriate fee, once the applicant is in fact residing in the United States, and has been physically present in the United States for at least one year.

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