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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date:

APR 23 2004

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]

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 (AAO) for review. The acting district director's decision will be affirmed.

The applicant is a native and citizen of Peru 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. The CAA 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, (now the Secretary of Homeland Security, (Secretary)), 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 of November 2, 1966, because the applicant had not been physically present in the United States for one year prior to the filing of the application. The acting district director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application.

The applicant was offered an opportunity to submit evidence in opposition to the acting district director's findings. No additional evidence has been entered into the record.

The record reflects that on July 10, 2000, in Miami Dade, Florida, the applicant married [REDACTED] a citizen of Cuba whose immigration status was adjusted to that of a lawful permanent resident of the United States, on January 28, 1998, pursuant to section 1 of the CAA. The record further reflects that the applicant was admitted into the United States as a B-2 nonimmigrant visitor on June 25, 2000. On October 17, 2000, less than one year from the applicant's last admission into the United States, he filed the application in this matter for adjustment of status under section 1 of the CAA.

The regulation at 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 AAO finds that the acting district director erred in denying the application based on 8 C.F.R. § 245.2(a)(2)(ii). Nevertheless, this office finds the acting district director's error to be harmless since the applicant is ineligible to adjust his status pursuant to 8 C.F.R. § 245.2(a)(4)(iii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center or district office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 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.

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 applicant in the present case has provided nothing to show that he has established a residence in the United States. It appears that he has entered the United States as early as 1996 and has made numerous trips out of the United States both before and after his application for adjustment of status. After each trip he was readmitted with a B-2 nonimmigrant visitor's visa, and remained in the United States for only short periods of time. The applicant is, therefore, ineligible for the benefit sought. He has not shown that he established a residence in the United States. 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.