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U.S. Department of Homeland Security  
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Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

A2

[Redacted]

FILE:

[Redacted]

Office: MIAMI, FLORIDA

Date: **SEP 14 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]

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.

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 The Acting District Director's decision was withdrawn, and the application was approved. The application is now before the AAO on a Service Motion to Reopen from the Miami District. The motion to reopen will be granted, the AAO's previous decision will be withdrawn, and the Acting District Director's original decision will be affirmed.

The applicant is a native 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, (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 Act of November 2, 1966, because she had not established that her marriage was not entered into for the primary purpose of circumventing the immigration laws of the United States. *See Acting District Director's Decision* dated December 2, 2002. On review the AAO withdrew the Acting District Director's decision and approved the application. *See AAO's Decision* dated November 5, 2003.

The record reflects that on March 27, 2002, at Miami, Florida, the applicant married [REDACTED] a native and citizen of Cuba whose immigration status was adjusted to that of a lawful permanent resident of the United States, pursuant to section 1 of the CAA. Based on that marriage, on April 24, 2002, the applicant filed for adjustment of status under section 1 of the CAA.

In his motion to reopen District Director resubmits the arguments previously stated in his December 7, 2002, decision. In addition he submits a report of an investigation conducted on March 10, 2004. The memorandum of investigation states that agents of Immigration and Customs Enforcement (ICE) conducted an investigation regarding the validity of the applicant's marriage to Mr. [REDACTED]. The report states that ICE agents interviewed Mr. [REDACTED] at the address he has on record on his probation records. During the interview Mr. [REDACTED] stated that he has been separated from the applicant since December 2002 and has not seen or heard from her since. He further stated that before December 2002 he would stay at the applicant's house once in a while but that he did not really reside with her. On the same day, ICE agents proceeded to the address where the applicant claimed to reside with Mr. [REDACTED]. The applicant's father was present at this address but could not provide any information regarding the applicant's marriage to Mr. [REDACTED]. Based on the report of the investigation the District Director concluded that the applicant and her spouse do not reside together as husband and wife.

In response to the District Director's motion to reopen, counsel states that the motion to reopen resubmits the same issues previously addressed in the Acting District Director's December 7, 2002, Notice of Certification. In addition counsel states that the motion to reopen fails to provide new evidence or circumstances that were previously unavailable to the District Director and that the applicant was not informed of her right to submit a brief within 30 days after service of the motion to reopen. He also provides a statement from Mr. [REDACTED] asserting that he has only been married one time.

The AAO notes that the motion to reopen was given to the applicant and counsel on April 13, 2004, and a brief was submitted on or about May 13, 2004. Although the District Director did not inform the applicant in writing of her right to submit a brief within 30 days, he did not forward the record of proceedings to the AAO until after receiving a brief and supporting documentation from counsel, more than 30 days after the issuance of the motion to reopen.

The AAO finds that in the motion to reopen the District Director provides new information previously not available to the Acting District Director or the AAO. As stated above, during an investigation regarding the validity of the applicant's marriage, Mr. [REDACTED] stated to ICE agents that he had not been associated with or resided with the applicant since December 2002. This statement was not addressed by counsel, nor does Mr. [REDACTED] statement refute this information. Based on Mr. [REDACTED] statement it is concluded that the applicant and her spouse do not reside together as husband and wife.

Although the provisions of section 1 of the Act are 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 not a native or citizen of Cuba and is not residing with the Cuban citizen spouse in the United States, is ineligible for adjustment of status pursuant to section 1 of the CAA.

The applicant is not a native or a citizen of Cuba, nor is she residing with her Cuban citizen spouse in the United States. She is, therefore, ineligible for adjustment of status pursuant to section 1 of the CAA.

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.

**ORDER:** The AAO's previous decision is withdrawn and the Acting District Director's original decision is affirmed.