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U.S. Department of Homeland Security
20 Mass. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

A2

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date:

MAR 08 2005

IN RE:

[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

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 The Acting District Director's decision was withdrawn, and the application was approved.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 Miami District Director filed a motion to reopen. The AAO granted the motion to reopen, withdrew the AAO's previous decision, and affirmed the Acting District Director's original decision. The application is now before the AAO on a motion to reconsider/reopen from counsel. The motion will be granted, the AAO's September 14, 2004 decision will be affirmed, 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 7, 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, the District Director resubmitted the arguments previously stated in his December 7, 2002, decision. In addition he submitted a report of an investigation conducted on March 10, 2004. The memorandum of investigation stated that agents of Immigration and Customs Enforcement (ICE) conducted an investigation regarding the validity of the applicant's marriage to [REDACTED]. The report stated that ICE agents interviewed [REDACTED] at the address he has on record on his probation records. During the interview [REDACTED] stated that he had been separated from the applicant since December 2002 and had 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 [REDACTED]. The applicant's father was present at this address but could not provide any information regarding the applicant's marriage to [REDACTED]. Based on

the report of the investigation the District Director concluded that the applicant and her spouse did not reside together as husband and wife.

The AAO found that in the motion to reopen the District Director provided 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, [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 did [REDACTED] statement refute this information. Based on [REDACTED] statement the AAO concluded that the applicant and her spouse did not reside together as husband and wife. See AAO's *Decision* dated September 14, 2004.

On motion, counsel contends that [REDACTED] and the applicant had a bona fide marriage, i.e. they lived together as husband and wife, until they separated in December 2003. Counsel further maintains that the April 13, 2004 stamp in the applicant's passport is evidence that she was granted lawful permanent residence. In support of the motion, counsel submitted documents related to the separation and subsequent divorce of the applicant and [REDACTED] affidavits from the applicant and [REDACTED] photographs from a holiday family reunion; phone bills from the months of November and December, 2003; and affidavits from two individuals who live in the same geographical area as [REDACTED]

The record contains a photocopy of the applicant's passport, which has been stamped with a notation indicating that the applicant was "processed for I-551, temporary evidence of lawful admission for permanent residence valid until 4/12/05." This stamp does not establish that the applicant was granted lawful permanent residence. Aside from the stamped passport, the record contains no other documents, e.g. a Memorandum of Creation of Record of Lawful Permanent Residence (Form I-181), or an I-551 Data Collection Card (I-89), indicating that the applicant was granted lawful permanent residence. A review of USCIS databases reveals no evidence that the applicant was granted lawful permanent residence. The record contains a Notice to Appear (Form I-862), which was served by mail on the applicant on October 6, 2004, placing her in Removal Proceedings.

The record indicates that the applicant and [REDACTED] were divorced by judicial decree on April 26, 2004. The applicant is not a native or citizen of Cuba, nor is she married to a Cuban citizen. 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 decision of September 14, 2004 is affirmed, and the Acting District Director's original decision is affirmed.