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

A2

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: NOV 18 2005

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 District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The 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. The CAA 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 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 she and her spouse are not residing together. The District Director, therefore, denied the application. *See District Director Decision* dated June 12, 2004.

The record reflects that on May 24, 2002, at the applicant married a native and citizen of Cuba. Based on that marriage, on June 24, 2002, the applicant filed for adjustment of status under section 1 of the CAA.

On September 8, 2003, the applicant's spouse stated under oath and in writing that he and the applicant do not reside together and he wishes to withdraw his petition.

Based on statement and the decision in *Matter of Bellido*, 12 I&N Dec. 369 (Reg. Comm. 1967), the District Director concluded that the applicant is ineligible for adjustment of status pursuant to section 1 of the CAA.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. In response to the notice of certification, counsel submits a brief. In his brief counsel states that it is against the CAA and the constitution not to allow the applicant the opportunity to appear for a reexamination interview in order to prove that she and lived together and resided in the United States at the time of the application and that they entered into the marriage in good faith, although at the time of their interview they were separated but still married. In addition, counsel states that the District Director wrongly applied the precedent in *Matter of supra,* because never resided in the United States. Counsel states that in the present case the applicant filed her application for adjustment of status while she and were living together. Counsel states that in this case the couple did reside together in the United States, and that the applicant should have received the opportunity to provide evidence to show that after they married they resided together. In addition, counsel states that the applicant should

have had the opportunity to prove that her union was a bona fide marriage and that her application for adjustment of status should have been granted. Furthermore, counsel states that both she and her Cuban husband lived or resided together for more than a year in the United States. Counsel does not dispute the fact that the applicant and separated before the adjustment of status interview but states that they are still married. Finally, counsel requests that the decision be reconsidered and the applicant be scheduled for an interview in order to prove that she resided together with her Cuban spouse in the United States and that they were involved in a bona fide marriage.

Counsel's statements are not persuasive. Counsel states that in *Matter of Bellido, supra,* the applicant's Cuban spouse remained in Cuba and never resided in the United States whereas in the present case the applicant has resided with her Cuban citizen spouse in the United States. In *Matter of Bellido, supra,* it was held 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 decision did not discuss the fact that the Cuban citizen spouse was never admitted in the United States. The decision makes it clear that the provisions of section 1 of CAA apply to a spouse or child who are residing with their Cuban national relative.

It is important to note that the CAA holds a very different standard than the one relating to spousal visa petition proceedings, where an applicant needs not prove marital viability, but rather the marriage was valid at its inception. *See Matter of McKee,* 17 I&N Dec. 332 (BIA 1980); *Matter of Boromand* 17 I&N Dec. 450 (BIA 1980).

The intent of section 1 of the 1966 Act, as with any statute, is to be found in the language of the statute itself. *See Mallard v. United States Dist. Ct. for South.* Dist. of Iowa, 490 U.S. 296, 300 (1989); *INS v. Phinpathya*, 464 U.S. 183 189 (1984); *Richards v. United States*, 369 U.S. 1, 9 (1962). When the statutory text is clear, it is neither necessary, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987), nor appropriate, id. at 452 (Scalia, J., concurring in the judgment), to consult any source outside the text to find the statute's purpose.

The language of the statute is clear and unambiguous. Section 1 of the CAA of November 2, 1966, states in pertinent part: ". . . the spouse and child of any alien described in this subsection, . . . who **are residing** with such alien in the United States." (Emphasis added). The key words here are "are residing", meaning in the present tense, at the time of adjustment of status, not at the time of filing the application. The adjustment of status does not take place until all requirements are meet. The applicant was not residing with her Cuban spouse at the time of the interview. She, therefore, did not meet all the requirements for adjustment of status under 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. The decision of the District Director to deny the application will be affirmed.

ORDER: The District Director's decision is affirmed.