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

A2

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: OCT 20 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 Chile 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 he and his spouse are not residing together. In addition, the District Director determined that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The District Director, therefore, denied the application accordingly. *See District Director's Decision* dated February 2, 2005.

The record reflects that on October 5, 2002, at Miami, Florida, the applicant married , 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 October 9, 2002, the applicant filed for adjustment of status under section 1 of the CAA.

On August 7, 2003, the applicant and his spouse, Ms. appeared before Citizenship and Immigration Services (CIS) for an interview regarding the application for permanent residence. After the interview it was decided that an investigation be conducted regarding the validity of the applicant's marriage with Ms.

The record contains a memorandum of investigation dated October 21, 2004. The memorandum shows that agents of Immigration and Customs Enforcement (ICE) conducted an investigation regarding the validity of the applicant's marriage with Ms. The report states that the agents visited the applicant's place of residence. According to the ICE agents, they asked the applicant's brother who resided at the residence and he responded that he, his brother (the applicant) and his parents were the only ones residing there. When the agent asked the applicant who resided at the residence he responded that he, his wife, Ms his brother and his parents resided there. When confronted with the discrepancy in his brother's statement the applicant admitted that he moved in with his parents a month ago, that he was not residing with his spouse, and has no intention of doing so at this address because he cannot afford to support her. Based on the investigation it was concluded that the applicant and his spouse did not reside together as husband and wife.

On notice of certification, counsel submits a brief and affidavits from the applicant and his brother. In his brief counsel states that during their interview the applicant and his spouse were treated disrespectfully and were threatened by the interviewing officer. In addition, counsel states that the interview lasted only 40 minutes, only three discrepancies were noted and the interviewing officer was unprofessional. Counsel submits an affidavit signed by both the applicant and Ms. regarding the events that occurred during their interview and the investigation. Counsel states that the applicable law in this case is section 204(c) of the Act. Furthermore counsel states that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act because the file fails to state sufficient evidence that the marriage was fraudulent. Counsel refers to case law in which it was held that a conclusion that an alien has entered into a marriage for the purpose of obtaining immigration benefits must be based on substantial and probative evidence. In addition he states that regulations require that "the evidence of the attempt or conspiracy must be contained the alien's file." Finally counsel states that the application should either be remanded or denied without fraud.

Counsel submits an affidavit signed by the applicant and his spouse in which the applicant describes the events that occurred during their interview and states that he never told the ICE agents that he was living at the apartment. According to the applicant, he only stated that he was there for about one week because he had gotten into an argument with his wife. The applicant further stated that the officers were not fluent in Spanish and he is not fluent in English and that the officers treated his family in a rude fashion, threatened to arrest them and claimed that all Spanish people were trash. The AAO notes that although Ms. signed this affidavit she was not present during the investigation conducted by ICE agents.

In an affidavit signed by the applicant's brother, he states that he never told the ICE agents that the applicant was living in the apartment. He only stated that his brother was at the apartment because he had gotten into an argument with his spouse. The applicant's brother reiterates the applicant's claim that the ICE agents were rude and threatened his family with arrest.

The proceeding in the present case is for an application for adjustment of status pursuant to section 1 of the CAA of November 2, 1966 and therefore the AAO will not discuss the applicant's allegations of mistreatment by the interviewing officer or the ICE agents.

Counsel's assertions are not persuasive. Section 204(c) of the Act refers to individuals who the Attorney General (now Secretary) has determined attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The District Director did not deny the application because the applicant entered into a marriage for the purpose of circumventing the immigration laws of the United States nor because the marriage was fraudulent as implied by counsel. The District Director denied the application because the applicant does not reside with his Cuban national spouse and therefore he is not eligible for the benefits of section 1 of the CAA of November 2, 1966. Thus section 204(c) of the Act is not applicable in this case.

In all the documentation submitted in regard to his application for adjustment of status the applicant states that he and Ms. reside at In his affidavit, he states that he does not reside at the above mentioned address but moved in there after he had an argument with his spouse. It is clear from the record of proceedings that the applicant attempted to show that he resides with his spouse at the above-mentioned address, a fact that he now disputes. Based on the above the AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for willfully misrepresenting a material fact in order to procure a benefit provided under the Act.

Neither counsel nor the applicant dispute the fact that on the day of the investigation the applicant and his spouse were not residing together as husband and wife. There is nothing in the record to indicate that this was a temporary situation or that they are currently living together.

Although the provisions of section 1 of the CAA are applicable to the spouse or child of an alien described in the CAA, 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 he residing with his Cuban citizen spouse as husband and wife. He 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 he is eligible for adjustment of status. Here, the applicant has not met that burden. Accordingly, the District Director's decision will be affirmed.

ORDER: The District Director's decision is affirmed.