

PUBLIC COPY

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



**U.S. Citizenship
and Immigration
Services**

A2

FILE:

Office: MIAMI, FLORIDA

Date: **OCT 20 2005**

IN RE:

Applicant:

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:

SELF-REPRESENTED

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 District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The District Director's decision will be withdrawn, and the matter will be remanded to him for further action.

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. 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 child of a native or citizen of Cuba, pursuant to section 1 of the Act of November 2, 1966, because she is not a child as defined by section 101(b)(1) of the Immigration and Nationality Act (the Act). The District Director, therefore, denied the application accordingly. *See District Director's Decision* dated March 9, 2005.

The record reflects that on July 6, 1998, at Miami-Dade, Florida, the applicant's mother 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 November 14, 2003, the applicant filed for adjustment of status under section 1 of the CAA.

Section 101(b) of the Act provides, in pertinent part, that:

(b) As used in titles I and II-

(1) The term "child" means an unmarried person under twenty-one years of age . . .

Section 4 of the CAA states in pertinent part, that:

Except as otherwise specifically provided in this Act, the definition contained in Section 101(a) and (b) of the Act shall apply in the administration of the Act. . . .

On January 10, 2005, the applicant appeared before Citizenship and Immigration Services, (CIS) for an interview regarding the application for permanent residence. With her application for adjustment of status the applicant submitted a birth certificate that indicates that she was born on November 29, 1982, in Venezuela. Since the applicant had already turned 21 years of age on the day of the adjustment interview, the District Director determined that the applicant is no longer a "child" as defined by section 101(b)(1) of the Act and therefore she 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. No additional evidence has been entered into the record.

The record of proceedings reveals that a District Adjudications Officer (DAO) accidentally recorded the Form I-485 as approved in the CIS database. An Alien Resident Card (Form I-551) was produced and forwarded to the applicant's last known address. The DAO requested that the applicant appear at CIS in order to surrender the Form I-551. The applicant did not appear as requested.

The AAO finds that the District Director did not follow the proper procedures for rescinding lawful permanent resident status as described in 8 C.F.R. § 246.1. The applicant was issued a Form I-551 granting permanent resident status.

The regulation at 8 C.F.R. § 246.1 states:

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case, or it appears to an asylum office director that a person granted adjustment of status by an asylum officer pursuant to 8 C.F.R. § 240.70 was not in fact eligible for adjustment of status, a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

In rescission proceedings, the Government bears the burden of proving ineligibility for adjustment of status by clear, unequivocal, and convincing evidence. *Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Pereira*, 19 I&N Dec. 169 (BIA 1984).

The fact remains that the applicant was provided with a Form I-551 granting permanent resident status and the District Director must rescind this status before he can find the applicant ineligible for benefits under section 1 of the CAA of November 2, 1966. The District Director's decision will be withdrawn and the record will be remanded to him in order to comply with the regulations at 8 C.F.R. § 246.1.

ORDER: The District Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.