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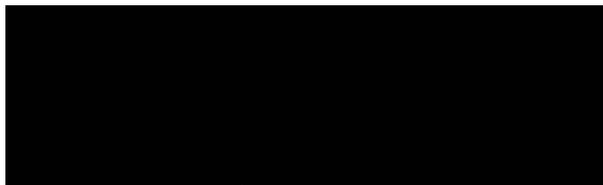
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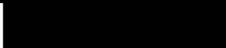
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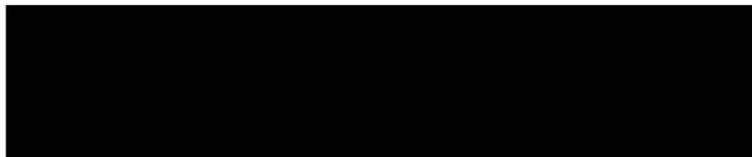
IN RE:

Applicant:



APPLICATION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence under Section 1 of the Cuban Refugee Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF APPLICANT:



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, Chief
Administrative Appeals Office

DISCUSSION: The Acting District Director, Miami, Florida, denied the application for adjustment of status and then certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn and the application for adjustment of status approved.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of Public Law 89-732, November 2, 1966, as Amended, also known as the Cuban Adjustment Act (CAA).

The director found that *section 2* of the CAA makes the applicant, who was admitted to the United States as an immigrant, with conditional permanent residence, based upon his marriage to a United States citizen, ineligible for adjustment under *section 1* of the CAA.

Counsel contends that the applicant is eligible for adjustment under *section 1* of the CAA and that *section 2* does not apply to this applicant.

The CAA provides, in pertinent part:

SEC. 1. That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act the 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, 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. Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever date is later. 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.

SEC. 2. In the case of any alien described in section 1 of this Act who, prior to the effective date thereof, has been lawfully admitted into the United States for permanent residence, the Attorney General shall, upon application, record his admission for permanent residence as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee, or a date thirty months prior to the date of enactment of this Act, whichever date is later.

....

The applicant is now divorced from his former wife who petitioned for him, and his conditional resident status based upon that marriage was terminated under the provisions of INA § 216(b)(1)(ii), 8 U.S.C 1186a(b)(1)(ii). *See, Termination of Conditional Status Letter*, February 13, 2003.

The director found that the language in section 2 of the CAA, "as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee" indicates that Congress only intended for adjustment under section 1 of the CAA to apply to an alien admitted as a nonimmigrant or parolee. The director provides no authority for his interpretation of the statute but finds the wording of section 2 of the CAA as it relates to this matter "clear." *Attachment to I-290C*, July 2, 2005.

The AAO does not agree with the director that the language of section 2, considered in its entirety and in the context in which it was written, makes the applicant ineligible for adjustment under section 1 of the CAA. When the paragraph that comprises section 2 of the CAA is considered as a whole, it is clear that Section 2 only addresses a very specific group of people. Section 2 refers only to those individuals who meet the requirements of section 1 of the CAA and who were admitted as lawful permanent residents prior to the effective date of section 1 of the CAA. Section 2 does not require that those individuals included in its purview must have arrived as nonimmigrants or been paroled into the United States. Instead, section 2 assumes, based on then-current law, that the only ways that individuals described in section 2 (those lawfully admitted to the United States who before the effective date of the CAA adjusted their status to lawful permanent resident) could have been lawfully admitted were as a nonimmigrant or parolee. If they had gained admission as an immigrant and thus as a lawful permanent resident, they could not have adjusted their status to the status they already possessed on arrival. In discussing arrival in the United States as a nonimmigrant or parolee, section 2 refers specifically to those individuals who meet the requirements of section 1 of the CAA and who subsequently became lawful permanent residents *prior* to the effective date of the statute. The applicant does not belong to the specific group of people addressed by section 2 of the CAA. Further, the condition on the resident status of immigrant spouses was only added to the INA in 1986. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537. It is not possible that Congress intended section 2 to apply to individuals admitted as conditional residents since they specified the group for whom it was intended to apply and since there was no such category of people when the statute was enacted.

While the director did not provide authority to support his decision, language used in the 1967 decision *Matter of Benguria Y Rodriguez* does add weight to his interpretation. See, *Matter of Benguria y Rodriguez*, 12 I&N Dec. 143 (Reg. Comm. 1967). *Benguria* denies adjustment of status under the CAA to an applicant who had last been admitted to the United States as a lawful permanent resident. The decision quotes sections 1 and 2 of the CAA (see above for the current version of those sections, as amended) and then states:

We believe it is evident from the above two quoted sections of the Cuban Refugee Act of November 2, 1966 that an applicant cannot be eligible for the benefits of section 2 if he first does not come within the purview of section 1 of this Act. Here the applicant has stated, and the record so shows, that his first arrival in the United States subsequent to January 1, 1959 occurred at Laredo, Texas on September 26, 1965 as described above.

Section 1 obviously refers to those Cuban refugees who were inspected and admitted as nonimmigrants or paroled into the United States. (Emphasis supplied). If this were not correct, then the provision in this section permitting adjustment of status to that of an alien lawfully admitted for permanent residence would be without purpose.

Section 2 of this Act begins with the phrase "In the case of any alien described in section 1" and goes on to include the language "... as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee ..." (Emphasis supplied). *Benguria*, at 145.

Benguria focuses on eligibility for the benefits of section 2 of the CAA.¹ So, while it is a precedent decision

¹ That is, using the earlier date of admission to the United States as the date of admission as a lawful permanent resident. An earlier date of admission as a lawful permanent resident could lead to earlier naturalization.

as it relates to applications for the benefits of section 2, statements that describe the scope of section 1 as section 1 relates to applicants who are not seeking the benefits of section 2 must be considered dicta. When the entire three paragraphs above are read as a whole, it is apparent that the logic used in *Benguria* does not apply to the instant matter. The first paragraph quoted above makes it clear that *Benguria* is focused on eligibility for benefits under section 2 of the CAA. Section 2 does not apply to the applicant in the instant matter because he did not arrive in the United States and subsequently adjust his status before November 2, 1966. Section 2 of the CAA begins by stating, [i]n the case of any alien described in section 1 of this Act," which, as the first paragraph quoted from *Benguria* above states, makes it evident that an applicant "cannot be eligible for the benefits of section 2 if he first does not come within the purview of section 1." In contrast, section 1 of the CAA does not have language that indicates that applicants for the benefits of section 1 (i.e. adjustment of status) must meet the requirements of Section 2.

The language in the third paragraph quoted above should not be read to extend *Benguria* beyond the scope allowed by section 2 of the CAA. The third paragraph above leaves out a critical portion of Section 2, that section immediately following the quoted section. Thus, "[i]n the case of any alien described in section 1," does not complete the group referred to by the phrase "as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee...." Instead, the statute reads, "[i]n the case of any alien described in section 1 of this Act **who, prior to the effective date thereof, has been lawfully admitted into the United States for permanent residence....**" (Emphasis added). The alien referred to by the phrase "as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee...." is the alien who meets the requirements of section 2 of the CAA.

The second paragraph from *Benguria* quoted above is not necessary to the decision in *Benguria*. Section 2 of the CAA allows those Cubans who arrived in the United States after fleeing the Castro revolution but before the effective date of the CAA to have their initial date of admission to the United States recognized as their date of admission as a lawful permanent resident, which would make them eligible to apply for naturalization earlier. *Benguria* stands for the principle that Section 2 was not designed to provide a way for those Cubans who were admitted as lawful permanent residents and then lost permanent resident status to have an easy path to permanent residence. *Benguria* has nothing to do with the eligibility criteria that are clearly stated in section 1, those criteria are beyond the scope of the decision. It is also noted that the second paragraph from *Benguria* is an assumption based on the law as it existed when that decision was written. In 1966 when the CAA became effective, and in 1967 when *Benguria* was published, there were no immigrants who were admitted in conditional status. The statute and the decision do not contemplate those admitted as conditional residents who divorce prior to the removal of conditional status, since conditional permanent resident status was not introduced until 1986. Thus, while there would have been no purpose in 1966 in allowing Cuban immigrants to adjust to a status that they already possessed when they were admitted, there is a purpose in allowing those Cubans admitted as conditional residents to become permanent residents after divorcing from the spouse who petitioned for them.

United States Immigration policy consistently has construed the provisions of section 1 of the CAA generously "in order to give full effect to the purpose of the CAA." See, *INS Policy on Cuban Adjustment, Memorandum For All Regional Directors, All District Directors, All Chief Patrol Agents, All Officers-In-Charge*, Doris Meissner, April 19, 1999, relying on the rationale of *Matter of Mesa*, 12 I&N Dec. 432 (INS 1967). The applicant is not asking for a generous construction in this matter, he is simply seeking adjustment under section 1 based on criteria established by that section. Section 1 of the CAA includes restrictions that would prevent those individuals Congress intended to prevent from adjusting status,

providing that, to be eligible for adjustment, the applicant must be a native or citizen of Cuba who has been physically present in the United States for at least one year, after having been inspected and admitted or paroled into the United States subsequent to January 1, 1959. The applicant must demonstrate that he meets all of these requirements. The applicant must also merit adjustment of status as a matter of discretion.

The record indicates that the applicant meets the requirements of section 1 of the CAA and is eligible for adjustment of status to lawful permanent resident. Adjustment of status is discretionary. While the applicant did not remain married to his petitioner and therefore no family unity purpose is served by his becoming a permanent resident, the record does not indicate that his admission to the United States was based on a fraudulent marriage. In any event, the CAA provides lawful residence to Cuban citizens regardless of whether they have family in the United States. There is no basis for denying this application as a matter of discretion.

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. He has met that burden. The decision of the District Director to deny the application will be withdrawn.

ORDER: The decision of the director is withdrawn and the application for adjustment of status approved.