U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

A2

[redacted]

FILE: [redacted] Office: ORLANDO, FL Date: OCT 0 2 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Field Office Director, Orlando, Florida who certified her decision on July 23, 2007 to the Administrative Appeals Office (AAO) for review. On December 7, 2007 the AAO affirmed the Acting Field Office Director's decision. On December 20, 2007 counsel for the applicant filed a Motion to Reconsider. The AAO will sua sponte reconsider the applicant's case and affirm the Acting Field Office Director's decision to deny the application.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In the applicant's motion to reconsider, counsel states that

> [The] Applicant filed the APPEAL and BRIEF concurrently within 30 days of receipt of denial to the USCIS office that made the unfavorable decision thus it was erroneous to deny Applicant on the grounds that he "did not submit any additional brief or written statement."

The AAO did not, however, affirm the Acting Field Office Director's decision because the applicant did not submit any additional brief or written statement. The AAO notes it affirmed the Acting Field Office Director's decision on the basis of the applicant's failure to show that he was not inadmissible for alien smuggling under section 212(a)(6)(E)(i) of the Act or that he qualified for the exemption available under section 212(a)(6)(E)(ii) of the Act.

In support of the motion to reconsider, counsel submits a statement in which he notes there is insufficient evidence on the record as a whole to make a finding of inadmissibility under section 212(a)(6)(E)(i) of the Act, to wit, alien smuggling. *Statement from counsel*, dated August 21, 2007. In support of his assertion, counsel states that a review of the Executive Office for Immigration Review (EOIR) record of procedure, tape recorded EOIR deportation/exclusion proceedings, establishes that the applicant denied the charge of alien smuggling and that the Immigration Judge noted at the applicant's Master Calendar hearing that there was insufficient evidence on the record to support a charge of alien smuggling. *Id.* Counsel concludes that the denial of adjustment of status under the Cuban Adjustment Act, which denial is exclusively and solely premised on the charge of alien smuggling, is erroneous. *Id.* The AAO acknowledges the assertions made by counsel. However, it notes that the record fails to include any documentary evidence, such as a written transcript of the EOIR proceedings, to support such assertions. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The Immigration Judge's order of removal stated that he should be excluded and deported "for the reasons set forth on the charging document" which stated that the applicant was inadmissible under section 212(a)(6)(E)(i) of the Act. *Decision of the Immigration Judge*, dated January 11, 1996. If, as counsel asserts, the Immigration Judge found insufficient evidence to support an inadmissibility finding under section 212(a)(6)(E)(i), he could have amended the charges, however, he did not. As such, the applicant was ordered excluded and deported for alien smuggling under section 212(a)(6)(E)(i). Furthermore, in removal proceedings the burden of proof is on the United States government to prove that the applicant is removable, but as the applicant is now seeking admission to the United States, the burden of proof is his.

In addition to being inadmissible under section 212(a)(6)(E)(i) of the Act, the applicant has also been convicted of a crime involving moral turpitude for grand theft and has failed to demonstrate that he is not inadmissible under section 212(a)(2)(A)(I) of the Act.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has not met his burden of proof in this particular case. The decision of the AAO issued on December 7, 2007 affirming the Acting Field Office Director's decision to deny the application will be affirmed.

ORDER: The Acting Field Office Director's decision is affirmed.