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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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NOV 20 2006

FILE:



Office: NEW ORLEANS, LA (LOUISVILLE, KY)

Date:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New Orleans, Louisiana, who certified her 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 Cuba who filed an Application to Register Permanent Residence or Adjust Status (Form I-485) to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The CAA provides, in 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 District Director determined that the applicant had not been physically present in the United States for one year prior to the filing of the application. The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application. *See District Director's Decision* dated July 24, 2006.

The AAO notes that the record of proceedings does not contain a Notice of Entry of Appearance as Attorney or Representative (Form G-28) from [REDACTED]. Therefore, the AAO will not be sending a copy of the decision to [REDACTED] but this office will accept the submitted information.

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 which he states that neither the CAA nor the regulation at 8 C.F.R. § 245.2(a)(2)(A)(ii) require that an applicant be physically present in the United States for one year after admission or parole prior to applying. Counsel refers to sections of the Immigration and Naturalization Act (the Act) in which it is specified that physical presence requirements are to be fulfilled prior to the date of an application. Counsel states that the CAA makes no mention of a requirement that an applicant have accrued one year physical presence in the United States prior to application, only that he/he has accrued one year of physical presence prior to the actual adjustment. In addition, counsel states that Congress specified one set of eligibility criteria for applicants for adjustment of status under section 245(a) of the Act and/or section 209 of the Act and another for applicants seeking adjustment under the CAA. Additionally, counsel states that since the applicant arrived in the United States on January 13, 2006, and was paroled six days later, physical presence, at the time of his interview for adjustment of status on July 24, 2006, was over 18 months and, therefore, he should be deemed eligible for the benefits of the CAA. Furthermore, counsel states that, even assuming that the one year physical presence requirement must be satisfied at the time of application, the designation of November 28, 2005, as a receipt date is incorrect. Counsel states that the applicant was instructed to file a Form I-485 with the immigration court and, therefore, the proper filing date should be the date the immigration court received the Form I-485 and not the date he submitted a fee to the Service Center. Counsel refers to 8 C.F.R. § 1003.31 which states in pertinent part, that all applications that are to be filed with the immigration court, and require the payment of a fee, must be accompanied by a fee receipt from the Service or by an application for a waiver of fees. In

addition, counsel states that the regulation in 8 C.F.R. § 103.2(a)(7) does not tie a receipt date exclusively to receipt of fees. Counsel states that the applicant did not file his application with CIS on November 28, 2005, but he merely fulfilled a requirement in order to properly file his application with the immigration court. Counsel further states that the immigration court received the application on January 13, 2006. Finally, counsel requests that the AAO reverse the July 24, 2005 decision and determine that no statutory or regulatory provision be deemed to preclude the proper filing of an application for the benefits of the CAA prior to the accrual of one year's physical presence in the United States and in the alternative, to determine that the designation of November 28, 2005, as the receipt date of the application for the benefits under the CAA was improper.

The AAO agrees with counsel regarding the receipt date.

The regulation at 8 C.F.R. § 1003.31 states in pertinent part:

Filing documents and applications

(a) All documents and applications that are to be considered in a proceeding before an Immigration Judge must be filed with the Immigration Court . . .

(b) . . . all documents or applications requiring the payment of a fee must be accompanied by a fee receipt from the Service or by an application for a waiver of fees pursuant to 8 CFR 1003.24. Except as provided in § 1003.8(a) and (c), any fee relating to Immigration Judge proceedings shall be paid to, and accepted by, any Service office authorized to accept fees for other purposes pursuant to § 1103.7(a) of this chapter.

The regulation at 8 C.F.R. § 103.7 states in pertinent part:

(a) Remittances.

(1) . . . any fee relating to any Department of Justice Executive Office for Immigration Review proceeding shall be paid to, and accepted by, any BCIS office authorized to accept fees. . . . Payment of any fee under this section does not constitute filing of the document with the Board of Immigration Appeals or with the Immigration Court. The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid. The BCIS shall also return to the payer any documents, submitted with the fee, relating to any Immigration Court proceeding.

The record for proceeding reflects that the applicant was placed in removal proceedings. In order to be able to file a Form I-485 with the immigration court, the applicant submitted the required fee to the Texas Service Center on November 28, 2005. On January 13, 2006, the immigration court received his Form I-485. Therefore, pursuant to the regulations in 8 C.F.R., the AAO concludes that January 13, 2006, is the filing date of his Form I-485.

Applications for adjustment of status are regulated by title 8 U.S.C. § 1255, which states in pertinent part:

Adjustment of status of nonimmigrant to that of person admitted for permanent residence.

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States 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:

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

The requirement of one year of physical presence in the United States prior to the filing of Form I-485 is found in chapter 23.11 of the Adjudicator's Field Manual (AFM) and in the instructions on the Form I-485.

Chapter 23.11 of the AFM states in pertinent part:

(b) Eligibility. In order to be granted adjustment under the CAA, an applicant must:

- (3) Have at least one year of aggregate physical presence in the U.S. before applying for benefits under section 1 of the CAA . . .

The instructions on Form I-485 state in pertinent part:

Based on Cuban citizenship or nationality.

You may apply to adjust status if:

You are a native or citizen of Cuba, were admitted or paroled into the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year. . .

In addition, the regulation at 8 C.F.R. § 103.2(a) states in pertinent part:

Every application . . . shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations in this chapter . . .

The record reflects that the applicant was paroled into the United States on January 19, 2005. As noted above, on January 13, 2006, less than one year after being paroled into the United States, the applicant filed the application in this matter for adjustment of status under section 1 of the CAA of November 2, 1966.

Consequently, the applicant did not demonstrate prima facie edibility for adjustment of status because he was not physically present in the United States for one year at the time of filing the adjustment application and, therefore, ineligible for the benefit sought.

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 eligibility for the benefit sought. He has failed to meet that burden. Accordingly, the District Director's decision will be affirmed.

This decision, however, is without prejudice to the filing of a new application for adjustment of status, along with supporting documentation and the appropriate fee, now that the applicant has been physically present in the United States for at least one year.

ORDER: The Director's decision is affirmed.