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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

Office: MIAMI, FLORIDA

Date: OCT 23 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 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 The District Director's decision will be withdrawn and the matter remanded to him for further action.

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 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 found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The applicant failed to show that he has a qualifying family member in order to be eligible to file for a waiver of inadmissibility under section 212(i) of the Act. The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application accordingly. *See District Director's Decision* dated November 10, 2004.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

The Attorney General (now the Secretary of Homeland Security, [Secretary]) may, in the discretion of the Secretary, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Secretary that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that on July 29, 2002, at Miami, Florida, the applicant married [REDACTED], a native and citizen of Panama. The record further reflects that on September 6, 2002, the applicant and [REDACTED] filed applications for adjustment of status under section 1 of the CAA.

On September 8, 2003, the applicant and his spouse [REDACTED] appeared before Citizenship and Immigration Services, (CIS) for an interview regarding the applications for permanent residence. The applicant and [REDACTED] were each placed under oath and questioned separately regarding their domestic life and shared experiences. Citing *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983), and *Matter of Phillis*, 15

I&N Dec. 385 (BIA 1975), the District Director maintained that when there is reason to doubt the bona fides of a marital relationship, evidence must be presented to show that the marriage was not entered into solely for the purpose of circumventing the immigration laws of the United States. The District Director determined that the discrepancies encountered at the interview, strongly suggested that the applicant and his spouse entered into a marriage for the primary purpose of circumventing the immigration laws of the United States. On November 9, 2004, the District Director denied application for adjustment of status. The decision was affirmed by the AAO.

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 Motion to Reconsider (MTR), a copy of an envelope addressed to the applicant dated April 25, 2005, and copies of documents submitted previously during the applicant's and his spouse's adjustment interview. Counsel states that the applicant did not receive the District Director's decision until May 20, 2005, because it was forwarded to the wrong address. In addition, counsel states that the applicant married [REDACTED] on July 26, 2002, and not July 26, 2001, as stated in the decision. Counsel further states that the submitted documentation shows that the applicant never had the preconceived intent to procure by fraud or by willfully misrepresenting a material fact, a benefit provided by the Act. Additionally, counsel states that the applicant has been living with his spouse since August of 2001 and they have a true, real and bona fide marriage that can be corroborated with the evidence presented. Furthermore, counsel states that any discrepancies that may have occurred during the interview do not warrant the severe hardship that will result to the applicant if he is not allowed to adjust his status. Counsel further states that the applicant has endured enormous hardship since he lived under Fidel Castro's communist regime for forty-six years. Finally, counsel asserts that based on the evidence submitted and the humanitarian grounds that exist in this case, the AAO should grant the MTR and reopen the matter in order to allow the applicant to pursue his application for permanent residence.

The AAO acknowledges that the decision was forwarded to the applicant late and it will consider counsel's MTR as a response to the notice of certification. The AAO agrees with counsel regarding the applicant's date of marriage. In his decision, the District Director stated that the applicant married [REDACTED] on July 26, 2001, when in fact the marriage occurred on July 26, 2002. The AAO finds this to be a typographical error and harmless since it does not affect the outcome of the decision.

A review of the recently submitted documentation and the documentation contained in the record of proceedings does not overcome the discrepancies that were encountered during their interview on September 8, 2003.

Before the AAO can make a decision, as to whether the applicant is eligible to file a waiver, the grounds of inadmissibility must be established. It is not clear from the record of proceedings that the applicant is inadmissible under 212(a)(6)(C) of the Act.

The principal elements of the ground of inadmissibility contained in section 212(a)(6)(C)(i) of the Act, are (1) fraud or (2) willfulness and (3) materiality. Fraud or a willful misrepresentation may be committed by the presentation of either an oral or written statement to a United States Government official. Fraud requires that the respondent know the falsity of his or her statement, intent to deceive the Government official, and succeed in this deception. *Matter of G--G--*, 7 I&N Dec. 161 (BIA 1956). In *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; A.G. 1961), the Attorney General established that a misrepresentation is considered to be material if the respondent is excludable on the true facts, and the misrepresentation tends to shut off a line of inquiry

relevant to the visa, document, or other benefit procured or sought to be procured that might have resulted in the alien's exclusion. However, a "harmless" misrepresentation that does not affect admissibility is not "material." *Matter of Martinez- Lopez*, 10 I&N Dec. 409, 414 (BIA 1962; A.G. 1964) (finding no materiality in the alien's misrepresentation of a job offer where he was not likely to become a public charge); *Matter of Mazar*, 10 I&N Dec. 80, 86 (BIA 1962) (finding no materiality in nondisclosure of involuntary communist party membership that would not have resulted in a determination of excludability).

The applicant in the present case could have been granted lawful permanent resident status based on the true facts and, therefore, his marriage to [REDACTED] did not affect the applicant's admissibility to the United States. In view of the foregoing, this office finds that the applicant is not inadmissible under section 212(a)(6)(C) of the Act.

Based on the above, this office finds that the applicant is an alien described in section 1 of the CAA of November 2, 1966, and, therefore, the applicant is eligible for adjustment of status to permanent residence if no issues of inadmissibility exist. A new interview appointment should be arranged in order for the District Director to adjudicate the applicant's application for adjustment of status. Once a new interview has been conducted and the record reviewed, a new decision shall be entered, which, if adverse to the applicant, shall be certified to the AAO for review.

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