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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: MIAMI, FL (SAN JUAN, PR) Date: JUN 25 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:

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, Chief
Administrative Appeals Office

DISCUSSION: The alien's lawful permanent resident status was found to be invalid by the District Director, Miami, Florida who certified her decision to the Administrative Appeals Office (AAO) for review. The District Director's decision will be withdrawn, and the matter will be remanded to the Miami District Office for further action.

The record reflects that the applicant is a native and citizen of Cuba who was included as the spouse in her husband's asylum application filed in 1989. *See Form I-589 for applicant's spouse.* While her husband's asylum application was pending, the applicant filed for asylum as a principal applicant in 1991. *See Form I-589 for the applicant.* In 1992 the applicant was granted derivative asylum status through her spouse. *See Immigration and Naturalization Service letter granting asylum, dated June 19, 1992.* On August 21, 1992 counsel for the applicant filed a Motion to Terminate the applicant's asylum application with the immigration court, as she had already been granted asylee status through her spouse. *See Motion to Terminate, Office of the Immigration Judge, Miami, Florida, dated August 19, 1992.* On October 14, 1992 the immigration judge denied the Motion to Terminate. *See Decision on a Motion, Office of the Immigration Judge, Miami, Florida, dated October 14, 1992.* On November 2, 1993 the immigration judge ordered the applicant deported in absentia, as she failed to appear for her immigration court hearing. *See Order of the Immigration Judge, Office of the Immigration Judge, Miami, Florida, dated November 2, 1993.* On March 15, 1994 the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, as the spouse of a person granted asylum by the Immigration and Naturalization Service (INS). *See Form I-485.* On June 1, 1994 the INS approved the applicant's Form I-485. *Id.*

On October 4, 2007 the District Director certified her decision to the AAO, stating that the approval of the applicant's adjustment application was improper as the applicant was in removal proceedings and the District Director did not therefore have jurisdiction. *See District Director's decision, dated October 4, 2007.* The District Director further concluded that the applicant's lawful permanent resident status is invalid. *Id.* On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. The applicant submitted a letter, dated October 15, 2007.

In *Sulit v. Schiltgen*, the court held that the INS failed to properly notify the applicants of its intent to rescind their adjustment of status, see 8 U.S.C. § 1256, or to conduct a hearing as required by the INS regulations, see 8 C.F.R. § 246.1, prior to seizing their "green cards." 213 F.3d 449 (9th Cir. 2000). The INS therefore clearly failed to follow its own procedural rules to the extent that it sought to "seize" the applicants' green cards. *Id.*

Section 246 of the Immigration and Nationality Act states:

(a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's 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 alien in the present case was granted lawful permanent resident status. That status has not been rescinded through proper procedures. The District Director's decision indicates that the status is "invalid," however the AAO finds nothing in the statutes or regulations that refers to invalid status, or any procedure other than rescission to remove permanent resident status once granted. That procedure has not been followed. The District Director's decision will be withdrawn and the matter remanded for compliance with the regulations at 8 C.F.R. § 246.1.

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