



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date:

MAR 27 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DISCUSSION: The alien's lawful permanent resident status was rescinded by the District Director, Miami, Florida, who certified her decision to the Administrative Appeals Office (AAO) for review. The District Director's decision will be withdrawn, and the matter will be remanded to the Miami District Office for further action.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 alien is a native and citizen of Venezuela who was previously granted 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 pertinent 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 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.

The District Director determined that the alien was in removal proceedings at the time she applied for adjustment of status as the spouse of a native or citizen of Cuba, pursuant to section 1 of the CAA of November 2, 1966, and that Citizenship and Immigration Services (CIS) did not therefore have jurisdiction over the alien's adjustment of status application. *Decision of the District Director*, dated March 22, 2007. The District Director consequently found that the alien is not a lawful permanent resident of the United States. *Id.*

The record reflects that on January 8, 2003 the alien was admitted to the United States on a B-2 visitor visa with authorization to remain until July 7, 2003. *Form I-94*. On May 21, 2003 the alien filed a Form I-589 Application for Asylum with the Miami Asylum Office. *Form I-589*. The asylum application was referred to the immigration judge. On June 8, 2004, the alien was issued a Notice to Appear. *See Form I-862, Notice to Appear*. On April 25, 2005 the alien filed a Form I-485, Application to Register Permanent Resident or Adjust Status with the Missouri Service Center as the spouse of a Cuban eligible to adjust status under the CAA. *Form I-485*. According to counsel, the Missouri Service Center transferred the case to the California Service Center. *Attorney's brief*. On November 16, 2005 the California Service Center approved the alien's Form I-485. *Form I-485*. On February 21, 2007, after several master calendar hearings, the immigration judge terminated proceedings. *Order of the Immigration Judge, Immigration Court, Miami, Florida*, dated February 21, 2007. The government did not file an appeal.

On notice of certification, the alien 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. *Attorney's brief*. Counsel asserts that the Miami District Office did not have jurisdiction to certify this case to the AAO and, assuming that the Miami District Office has jurisdiction for certification purposes, the Miami District Office did not follow the proper legal mechanisms necessary to rescind a case. *Id.*

The regulation at 8 C.F.R. § 103.4(a)(1) states:

(a) *Certification of other than special agricultural worker and legalization cases—(1) General.* The Commissioner or the Commissioner’s delegate may direct that any case or class of cases be certified to another Service official for decision. In addition, regional commissioners, regional service center directors, district directors, officers in charge in district 33 (Bangkok, Thailand), 35 (Mexico City, Mexico), and 37 (Rome, Italy), and the Director, National Fines Office, may certify their decisions to the appropriate appellate authority (as designated in this chapter) when the case involves an unusually complex or novel issue of law or fact.

Counsel interprets the word “their” referred to in the regulation to mean that each office only has the authority to certify its own decisions. *Attorney’s brief.* Thus, the officers in charge in district 33 may only certify decisions rendered in district 33, the regional service center directors may only certify decisions rendered by their own regional service centers, and the district directors may only certify decisions rendered by their own district offices. Accordingly, the Miami District Office does not have the legal authority or jurisdiction to certify the applicant’s case to the AAO because the California Service Center rendered the decision granting the applicant lawful permanent resident status. *Id.* While the AAO acknowledges counsel’s interpretation, it disagrees. The Miami District Office is certifying its own decision to rescind the alien’s lawful permanent resident status to the AAO, not the decision of the California Service Center to approve the alien’s adjustment of status application. As the alien resides in the Miami district, the Miami District Director has the authority to commence a proceeding which may ultimately result in rescission of the alien’s lawful permanent residence status. *See* 8 C.F.R. § 246.1. As such, the Miami District Office has the legal authority to certify this case to the AAO

Counsel also asserts that the Miami District Office did not follow the proper legal mechanisms necessary to rescind a case. *Attorney’s brief.* The AAO concurs with counsel’s assertion regarding the proper procedures for rescinding lawful permanent resident status and finds that the District Director did not follow the procedures described in 8 C.F.R. § 246.1.

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 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.