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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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FILE:



Office: MIAMI, FLORIDA

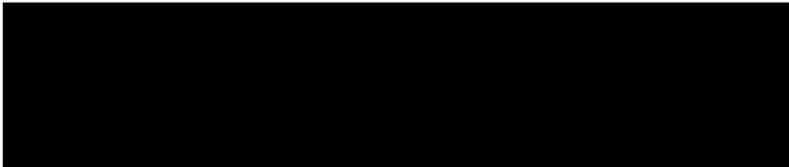
Date: SEP 10 2008

IN RE:



APPLICATION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence under Section 1 of Pub. L. 89-732 (November 2, 1966), as amended, the Cuban Adjustment Act.

ON BEHALF OF APPLICANT:



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 District Director, Miami, Florida, denied the application for adjustment of status and then certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the District Director will be withdrawn and the application will be approved.

The applicant is a native and citizen of Venezuela who was admitted to the United States on December 14, 2002 on a Venezuelan passport as a B-2 visitor valid until June 12, 2003. On February 20, 2003, the applicant changed her status to that of an H4 spouse of an H-1B nonimmigrant worker, valid until February 13, 2006. On February 5, 2004 she submitted an application to adjust status to permanent resident pursuant to Section 1 of Pub. L. 89-732 (November 2, 1966), as amended, the Cuban Adjustment Act. On her Form I-485, Application to Register Permanent Residence or Adjust Status, the applicant stated her date of birth as July 19, 1960 and her place of birth as Cuba. The applicant also submitted a Form G-325A, Biographic Information sheet, listing her place of birth as Esmeralda, Camaguey, Cuba. On January 18, 2005 during her adjustment of status interview, the applicant withdrew her Form I-485. In a sworn statement, the applicant stated the following as her reasons for the withdrawal of the petition:

I was born in Cuba on July 19, 1960. My parents left Cuba on March 1961 because of political issues. They went and established [residence] in Venezuela, and there I grew up as [a] Venezuelan. Unfortunately I don't have a Cuban passport.

On August 12, 2005 the applicant submitted a second Form I-485. In this application, she stated her date of birth as July 19, 1962 and her place of birth as Venezuela. The applicant also submitted a Form G-325A, Biographic Information sheet, listing her place of birth as Maracaibo, Venezuela.

On August 31, 2006 the District Director denied the application to adjust status under the Cuban Adjustment Act, finding that the applicant had failed to provide evidence that she was a citizen of Cuba by presenting a Certificate of Nationality or a Cuban passport. On December 3, 2007 the applicant, through counsel, submitted a Motion to Reopen, stating that the applicant was a Cuban citizen by virtue of descent, as both of her parents were Cuban nationals and the applicant had established Cuban citizenship through compliance with the formalities stipulated by the law. On February 19, 2008 the District Director found the applicant to be inadmissible to the United States under section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C), for having attempted to procure entry into the United States by fraud or willful misrepresentation. As the applicant does not have a qualifying relative, the District Director found that she was not eligible for a waiver of her inadmissibility and denied her application to adjust status under the Cuban Adjustment Act. The District Director certified her decision to the AAO.

Section 1 of the Cuban Adjustment Act states, in pertinent part:

[N]otwithstanding the provisions of section 245(c) of the [Immigration and Nationality Act] the 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 [Secretary of Homeland Security], 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 application for

such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

There is no dispute as to the relevant facts in this matter. The applicant was born in Venezuela on July 19, 1962 to a Cuban mother and a Cuban father. *See applicant's birth certificate.* Her claim to Cuban citizenship is through her Cuban parents. In order to establish eligibility under the Cuban Adjustment Act, the applicant must demonstrate that she is a Cuban citizen. In a decision adopted as binding policy on Citizenship and Immigration Services (CIS) on July 31, 2007, the AAO found:

Individuals born outside Cuba whose Cuban citizenship is not documented with a Cuban passport, may establish Cuban citizenship for the purposes of adjustment under the Cuban Adjustment Act through the submission of a Cuban birth certificate issued by the Civil Registry of Cuba in Havana, or a Cuban consular certificate documenting their birth to at least one Cuban parent within the consular district served by the consulate.

This decision was issued after the present application was filed. It resolves issues concerning the proof required to establish the Cuban citizenship of an individual born to a Cuban parent outside Cuba whose citizenship is not documented with a Cuban passport. In support of her claim to Cuban citizenship, the applicant submitted copies of her parents' Cuban birth certificates, her Cuban birth certificate stating she was born in Venezuela, and a Cuban consular certificate documenting the applicant's birth to her Cuban citizen parents. *See birth certificates for the applicant and her parents, and Cuban consular certificate.* Based on the record, the applicant has established that she is a citizen of Cuba for the purposes of adjusting status under the Cuban Adjustment Act. The applicant is a Cuban citizen who has been inspected and admitted into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year. Therefore, she is eligible for consideration under the Cuban Adjustment Act.

The AAO notes that to adjust under the Cuban Adjustment Act, an applicant must be found admissible to the United States for permanent residence. In the present case, the District Director has determined that the applicant is inadmissible under section 212(a)(6)(C) of the Act.

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:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. See *Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

In addition, *Matter of S- and B-C-* states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Although the applicant misrepresented herself, the AAO notes that had the true facts that she was born in Venezuela to Cuban parents been known, she still would have been eligible to adjust her status under the Cuban Adjustment Act. The AAO thus finds that the applicant's misrepresentation is not material to her claim. As the applicant did not willfully misrepresent a material fact or commit fraud, she is not inadmissible under section 212(a)(6)(C)(i) of the Act. The waiver filed pursuant to sections 212(i) of the Act is therefore moot.

An applicant must demonstrate by a preponderance of the evidence that she 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 met her burden of proof. The applicant is a Cuban citizen, she has been inspected and admitted into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year. Therefore, she is eligible to apply for adjustment of status under the Cuban Adjustment Act. As there is nothing in the record to show that the applicant is inadmissible and the AAO finds that the applicant warrants a favorable exercise of discretion, the application for adjustment of status will be approved.

ORDER: The District Director's decision is withdrawn. The application to adjust status to lawful permanent resident under the Cuban Adjustment Act is approved.