



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEWARK, NEW JERSEY

Date:

APR 06 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director (FOD), Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The applicant is a native and citizen of The Dominican Republic 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 applicant is seeking classification as the spouse of a Cuban citizen who became a lawful permanent resident pursuant to section 1 of the CAA. 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 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.* Pub. L. 89-732 (November 2, 1966) as amended. [Emphasis added]

A review of the record reveals the following facts and procedural history for both the applicant and her present spouse¹: The applicant entered the United States on April 10, 1992 in K-1 status. The applicant married the gentleman who petitioned for her, and the applicant adjusted her status to that of a conditional resident on April 26, 1994.² The applicant was divorced on June 21, 2007. The applicant married her present spouse, [REDACTED], a native and citizen of Cuba, on August 23, 2007 in West New York, New Jersey. On November 8, 2007, the applicant submitted an application to adjust her status (Form I-485) to U.S. Citizenship and Immigration Services (USCIS). The applicant sought lawful permanent resident status as the spouse of a Cuban national described in box e of the Form I-485.

The applicant's spouse claims to have entered the United States on April 9, 1993 without inspection. On July 31, 1998, the applicant filed an application to adjust his status (Form I-485) with USCIS. On the Form I-485, the applicant indicated "NACARA" (Nicaraguan Adjustment and Central American Relief Act) as the basis for his adjustment. The applicant's Form I-485 was approved on October 31, 2000 pursuant to section 202 NACARA, not section 1 of the CAA.

In a July 30, 2008 decision, the director determined that the applicant was not eligible for adjustment of status either under section 1 of the CAA or section 202 of NACARA. Regarding the applicant's

¹ The AAO obtained the Service record of the applicant's spouse to verify how he obtained his lawful permanent resident status.

² Service records do not show that the applicant filed a Form I-751, Petition to Remove the Conditions of Residence. Service records do show that the applicant's conditional residence status was terminated on August 20, 1996.

eligibility under section 1 of the CAA, the director noted that, because the applicant's spouse did not adjust his status under section 1 of the CAA, the applicant herself could not derive lawful permanent resident status under the CAA. The director cited to a July 16, 1997 AAO decision in support of her assertions. Regarding section 202 of NACARA, the director noted that the applicant was not a Nicaraguan or Cuban national and had not been married to her spouse prior to the approval of her spouse's adjustment of status application. The director denied the application and certified her decision to the AAO for review. The director informed the applicant that she had 30 days to supplement the record with any evidence that she wished the AAO to consider.

Counsel submits a brief for consideration by the AAO. Counsel states that the applicant's husband was incorrectly issued a lawful permanent resident card under NACARA because the law did not exist in 1993, the date that his card states he became a lawful permanent resident. Counsel states: "the Service has provided no evidence to support their [sic] claim that [the applicant's spouse] adjusted status pursuant to NACARA rather, they have relied on a resident card which was issued with incorrect information."

The AAO disagrees with the director's determination that, because the applicant's spouse did not adjust his status pursuant to section 1 of the CAA, the applicant is also ineligible to adjust her status under the same statute.³

In her decision the director cited an unpublished AAO decision that indicated that per *Matter of Milian*, 13 I & N, Dec. 480 (Acting Reg. Comm. 1970) an applicant must be the spouse of an alien who has been admitted into the United States under section 1 of the Act. This is an old decision that the AAO has since withdrawn, as the interpretation of *Matter of Milian* was incorrect. The correct interpretation of *Matter of Milian* is that the spouse must meet all the requirements of section 1 of the CAA, not that he or she necessarily adjusted his or her status under the CAA.

The statute clearly states that the provisions of section 1 of the CAA of November 2, 1966, shall be applicable to the spouse and child of any alien described in this subsection. In order for the applicant to be eligible for the benefits of section 1 of the CAA, he or she must be the spouse of a native or citizen of Cuba who has been inspected and admitted or paroled into the United States, and who has been physically present in the United States for at least one year. See *Matter of Milian*, 13 I&N Dec. 480 (Acting Reg. Comm. 1970) (applying the physical presence requirement as amended by Refugee Act of 1980, Pub. L. No. 96-212, sec. 203(i), 94 Stat. 102, 108 (1980)).

Prior to denying the applicant's Form I-485, the director should have reviewed the file of the applicant's spouse to determine if the spouse met all of the requirements of section 1 of the CAA. As the director did not make such a determination, the matter must be remanded for a review of the applicant's spouse's file and the entry of a new decision on the applicant's eligibility to adjust her status pursuant to section 1 of the CAA. The director's discussion of the applicant's eligibility should include a review of section 245(d) of the Immigration and Nationality Act (the Act), which bars the applicant from

³ As the AAO is withdrawing the director's determination relating to the applicant's eligibility under section 1 of the CAA, the AAO shall not discuss the applicant's eligibility to adjust her status under section 202 of NACARA.

adjusting her status based on any ground other than marriage to the person who filed the K-1 petition on her behalf.⁴

Section 245(d) of the Act, states, in pertinent part:

[T]he Attorney General may not adjust . . . the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

The applicant initially entered the United States on April 10, 1992 as a fiancée of a United States citizen, who is not the applicant's current husband. The applicant and her former spouse were married; however, they divorced in June 2007 and the applicant's status was never changed from a conditional resident to a permanent resident based upon that marriage. Although the applicant was granted conditional residence status on April 26, 1994, there is no evidence that she submitted a Form I-751, Petition to Remove Conditions on Residence, and Service records show that her conditional resident status was terminated on August 20, 1996. As the applicant entered the United States as a K-1 fiancée, she is barred from adjusting her status other than through marriage to the U.S. citizen who sponsored her.

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 that she is eligible for adjustment of status. Although the AAO withdraws the director's bases for denying the applicant's Form I-485, the application is remanded for entry of a new decision based upon the above discussion.

ORDER: The director's decision is **withdrawn**. The matter is remanded to the director for issuance of a new decision, which if adverse to the applicant, shall be certified to the AAO for review.

⁴ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).