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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

A2

FILE:

Office: ORLANDO FIELD FLORIDA

Date:

NOV 22 2010

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)

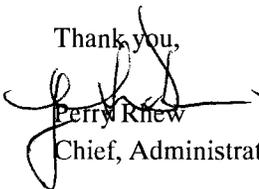
ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rife

Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Orlando, Florida, denied the application to adjust status and certified her decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the director's decision. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The director's decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Venezuela 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 has been granted lawful permanent residence classification pursuant to section 1 of the CAA. 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 her discretion and under such regulations as she 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.

A review of the record reveals the following facts and procedural history: The applicant indicated on the Form I-485, Application to Register Permanent Residence or Adjust Status, that she last entered the United States in B-2 status on March 15, 2002. A copy of her Form I-94 confirming the entry is attached to the Form I-485. On September 1, 2007, the applicant completed a Form I-9, Employment Eligibility Verification. On this form, the applicant attested, under the penalty of perjury, that she was a citizen or national of the United States. The applicant signed the Form I-9, which provides: "I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form." On May 30, 2008 in [REDACTED] the applicant married [REDACTED] a native and citizen of Cuba, who on August 17, 1995 became a lawful permanent resident pursuant to section 1 of the CAA. The applicant filed the Form I-485, on June 13, 2008 as the spouse of a Cuban citizen who had adjusted status under section 1 of the CAA.

In the January 9, 2009 notice of certification, the field office director informed the applicant that she was inadmissible to the United States under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act) for making a false claim to U.S. citizenship on the Form I-9 that she had completed on September 1, 2007. 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.

The record includes a Form I-290B, Notice of Appeal or Motion, with a box checked indicating that the applicant was filing a motion to reopen and reconsider the field office director's decision that is

date stamped as received on February 6, 2009 and is date stamped as fee paid on February 11, 2009 by the Orlando Field Office. The motion documents were not included in the record before the AAO when the AAO issued its decision on March 13, 2009. On April 9, 2009, counsel for the applicant submitted a Form I-290B directly to the AAO, checking the box indicating that the applicant was filing a motion to reopen and reconsider the AAO's decision. The AAO returned the motion to counsel on April 13, 2009, noting that the AAO does not accept fees at its offices and instructing counsel to file the motion at the appropriate office. The Form I-290B also includes a date stamp indicating that the Form I-290B was received on May 5, 2009 with fee at the Orlando Field Office.

The motion will be granted, as the applicant's initial evidence timely submitted as a motion in response to the field office director's decision was not considered on certification.

Counsel for the applicant submitted an affidavit signed by the applicant and translated on February 4, 2009 wherein the applicant declared: that she did not make a false claim to U.S. citizenship; that she remembers checking a box on the Form I-9 but did not know that it was regarding citizenship or nationality of the United States; that she barely speaks and reads English; and that her employer did not provide her instructions on how to fill out the Form I-9, so she used another Form I-9 as a template to complete her form. The petitioner declared further: that as she does not completely understand the English language, she accidentally signed the Form I-9 twice; that her employer contacted her and told her she needed to sign a new form, which she did following his instructions; and that she returned the new signed form back to him via facsimile. The applicant declared: "[t]he information on the form was due to ignorance, error or oversight and it was not done with the intention to claim to U.S. citizenship." Counsel asserts that the applicant's mistake in signing her name twice on the Form I-9 demonstrates that the applicant misunderstood the information requested on the Form I-9 due to the existence of a language barrier and that the applicant attempted to rectify her error by completing and sending a second corrected Form I-9 to her employer. Counsel contends that the applicant did not intentionally make a false claim to U.S. citizenship.

The record in this matter does not include the second Form I-9 allegedly properly signed by the applicant. Moreover, the applicant does not specifically state whether or not she checked the box indicating that she was a U.S. citizen or national on the second allegedly corrected Form I-9. The applicant's claim that she did not understand the English language sufficiently to correctly complete the Form I-9 is insufficient to establish that she did not intentionally make a false claim to U.S. citizenship. The applicant signed the Form I-9 under penalty of perjury. The record does not include evidence that the applicant attempted to rectify the claimed mistake on the Form I-9, rather the record shows that the applicant was employed and continued her employment with the private employer who required the Form I-9 for employment purposes.

Counsel also submits the minutes of an AILA/Texas Service Center liaison meeting from April 9, 2001 and asserts that the favorable adjudication of a Form I-485, even when the alien has checked the "citizen or national" block of the Form I-9, is the established policy of legacy Immigration and Naturalization Service (INS). This citation does not have precedential value. See 8 C.F.R. § 1023.4(c). An alien who makes a false claim to U.S. citizenship and the false claim was made on

or after September 30, 1996 to procure any immigration benefit under the Act or any other type of benefit under federal or state law, is inadmissible under section 212(a)(6)(C)(ii)(I) of the Act.¹

Counsel also cites *Ateka v. Ashcroft*, 384 F.3e 954 (8th Cir. 2004) in support of the proposition that absent additional specific evidence of a false claim to U.S. citizenship in addition to checking the U.S. citizen or national box on the Form I-9, the Form I-485 should be approved. Upon review, the Court of Appeals in *Ateka v. Ashcroft* held that the immigration judge's finding that the alien had intentionally made false representation of U.S. citizenship in order to procure employment and whose prior conduct made the alien inadmissible was supported by substantial evidence. The Court did not reach the question of whether an alien, in falsely representing that he was United States citizen to obtain employment by a private employer, had falsely represented that he was citizen "for any purpose or benefit under [the Immigration and Nationality Act] or any other Federal or State law," so as to be inadmissible on that basis.

In this matter, the applicant is subject to section 212(a)(6)(C)(ii)(I) of the Act. Upon review, including the applicant's personal statement, there is insufficient evidence in the record to demonstrate that the applicant's false claim to U.S. citizenship or nationality was innocent error. 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. The applicant has not met her burden. Accordingly, the field office director's decision is affirmed.

ORDER: The motion is granted. The director's decision is affirmed, and the application remains denied.

¹ See. Section 212(a)(6) of the Immigration and Nationality Act, *Illegal Entrants and Immigration Violators*, USCIS Memorandum, 24 (March 3, 2009).