

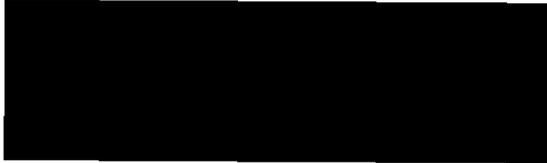
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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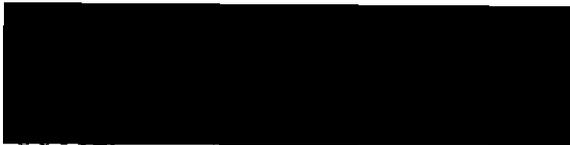
FILE: [REDACTED] Office: NEWARK FIELD OFFICE Date:

SEP 10 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence under Section 1 of the Cuban Refugee 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.

Thank you,

Jerry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, 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 The director's decision will be withdrawn and the matter remanded to the field office director for further processing of the application.

The applicant is a native and citizen of Cuba 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 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.

A review of the record reveals the following facts and procedural history: The applicant applied for admission to the United States at the Gateway Bridge in Brownsville, Texas on December 15, 2007. On the same date, the applicant was paroled into the United States to pursue an asylum application and was placed in removal proceedings. The applicant attended immigration hearings on January 22, 2008 and on May 27, 2008 and was scheduled to appear in immigration court on October 28, 2008. The applicant failed to appear at the October 28, 2008 scheduled hearing date and as a result, an immigration judge ordered the applicant removed from the United States. The applicant filed a motion to reopen her removal proceedings, which was denied on December 23, 2008.¹ On December 7, 2009 the applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, as a native or citizen of Cuba paroled into the United States after January 1, 1959 and who had been physically present in the United States for one year. The applicant was interviewed by a United States Citizenship and Immigration Services (USCIS) officer on March 31, 2010.

On May 20, 2010, the field office director denied the Form I-485 application finding that the applicant had failed to establish that she is eligible for adjustment of status and that her application merits a favorable exercise of discretion. The field office director denied the application as a matter of discretion.

The field office director found that the applicant had the following unfavorable factors in this matter including:

- An outstanding final order of removal issued against the applicant that is a "very substantial negative factor to be considered";
- A violation of the final removal order by failing to secure a travel document to facilitate removal; and

¹ The applicant filed an appeal of the immigration judge's decision which was dismissed by the Board of Immigration Appeals on March 12, 2010.

- False testimony while seeking an immigration benefit. The field office director noted that the applicant had been asked why she was seeking political asylum at the Brownsville, Texas port of entry on December 15, 2008 and that the applicant had replied “[f]reedom and unite with my husband, my son and daughter who live in New Jersey.” The field office director noted that the applicant had indicated on her Form G-325A, Biographical Form that she and her husband divorced in 2006 in Cuba. The field office director determined that the applicant lied about her marital status on December 15, 2007 to show that she had more family ties in the United States.

The field office director considered that the only positive factor in the applicant’s favor was the Cuban economy, which suffered from a lack of productivity and poor living conditions in 2009 that remained below the 1989 level, as well as the Cuban government’s incarceration of individuals for their peaceful political beliefs or activities. The field office director did not reference the applicant’s family members (her son – a lawful permanent resident) living in New Jersey as a positive factor in her case.

Upon review, the field office director appeared to determine that while the applicant seemed statutorily eligible to adjust status, the applicant’s outstanding removal order, her failure to obtain a travel document to facilitate her removal from the United States, and her statement that she wanted to join her husband in New Jersey, even though she was divorced from this individual, were adverse factors that were not outweighed by the hardship the applicant would face if returned to Cuba with its current country conditions.

On certification, counsel for the applicant submits a brief and additional documents. Counsel observes that a Cuban national may apply for adjustment of status under the CAA notwithstanding the existence of an outstanding order of removal. Counsel contends that the applicant’s outstanding removal order and failure to obtain a travel document are not adverse factors in this matter but simply underscore the field office director’s recognition of the current Cuban country conditions and the applicant’s knowledge that she would face hardship if she returned. Counsel also takes issue with the field office director’s determination that the applicant uttered a false statement when interviewed by Department of Homeland Security (DHS) officers at the border on December 15, 2007. Counsel submits documentation that shows the applicant and her former husband reside at the same residence in New Jersey, a residence purchased by their biological son and where he also resides. Counsel also references documentation in the record, wherein the applicant refers to her former husband as her partner. Counsel contends that the applicant did not intend to mislead the DHS officer by demonstrating family ties in the United States, but that the applicant’s reference to reunification with her family including her “husband/partner” was a statement of fact, notwithstanding the 2006 divorce.

Upon review of the totality of the record in this matter, the AAO finds that the adverse factors as denoted by the field office director are outweighed by the positive factors in this specific matter. The AAO finds that the information provided on certification sufficiently clarifies the applicant’s purported misstatement regarding her former husband. Moreover, while the applicant’s failure to attend her removal hearing cannot be condoned, the positive factors in her case, which include a lawful permanent resident son, outweigh any negative factors. Accordingly, we withdraw the director’s findings to the contrary.

The AAO notes that the field office director did not make any further findings regarding whether the applicant is otherwise eligible for adjustment under the provisions of the CAA. Thus, the matter must be remanded for the director to address any other issues. 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. Accordingly, the AAO withdraws the field office director's decision and remands the matter for continued processing of the applicant's Form I-485.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for entry of a new decision on the applicant's Form I-485.