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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

A2

[redacted]

FEB 02 2011

FILE: [redacted] Office: ORLANDO FIELD OFFICE Date:

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:

SELF-REPRESENTED

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Orlando, Florida (the director). The applicant, through counsel, filed a motion to reconsider and the director certified the motion to reconsider to the Administrative Appeals Office (AAO) for review. The matter will be returned to the director for entry of a decision.

We are withdrawing the certification because the director committed a procedural error when certifying this matter to the AAO. The applicant filed a motion to reconsider the director's decision denying the application and the director failed to enter a decision on the motion. Instead, the director simply placed an undated Form I-290C, Notice of Certification, on the applicant's motion and forwarded the matter to the AAO. As noted, the Certification Notice is undated; thus it is not clear whether the Certification Notice was mailed to the applicant and her attorney of record as required pursuant to 8 C.F.R. § 103.4(a)(2).[1] For this reason, we are withdrawing the director's certification and remanding the matter for entry of a new decision.

We note the regulation at 8 C.F.R. § 103.4(a)(1), which states that a director may certify a case to the appropriate appellate authority "when the case involves an unusually complex or novel issue of law or fact." Upon review, this matter does involve a novel issue of law.

The applicant is a citizen and national of Russia 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.

The applicant was born in Cuba as demonstrated by her birth certificate and other documents issued by the Russian government. The applicant's birth certificate shows that both her mother and her father are Russian nationals. The record includes documentation showing that the applicant's birth was recorded in the Civil Registry of Playa in the providence of the City of Habana in 1987, the year of the applicant's birth. The applicant, prior to entering the United States resided in Moscow, Russian Federation, her country of nationality and citizenship. The applicant initially entered the United States in or about May 24, 2008 as a J-1 exchange visitor. On October 29, 2009, the applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, as a native of Cuba. The director denied the application, determining that the applicant was a citizen and national of Russia and was not a native or citizen of Cuba.

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[1] We note that neither the applicant nor counsel has supplemented the record with any evidence for the AAO to consider.

The issue in this matter is whether an individual born in Cuba but who has always retained her Russian citizenship and nationality is eligible to apply for lawful permanent residence in the United States under section 1 of the CAA.

The first criterion of eligibility for adjustment of status under section 1 of the CAA is that the alien be "any alien who is a native or citizen of Cuba." The applicant clearly is not and does not claim to be a citizen of Cuba. The question then is whether the term "native" in section 1 of the CAA encompasses the applicant.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in a statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Second Circuit Court of Appeals, when construing the word "native," determined that "[i]n its ordinary and natural meaning the word refers to a person's place of birth. Hence a person remains a native of the country of his birth, although he has moved away and become a citizen or subject of another nation or government."[2] *US ex rel. D'Esquiva v. Uhl*, 137 F.2d 903, 905 (2d Cir. 1943). The Board of Immigration Appeals (BIA) has determined that a man born in Cuba who was taken to [redacted] by his parents where he lived until entering the United States was a citizen of Haiti, but remained a native of Cuba. *Matter of Masson*, 12 I & N Dec. 699 (BIA 1968). The BIA determined that the exact wording of the CAA is specific, clear and unambiguous in stating that the status of any alien who is a native or citizen of Cuba and who meets the other requirements is entitled to the benefits of the Act.[3]

In this matter, the applicant has presented documents, in addition to her birth certificate, demonstrating that she was born in Cuba. Consequently, the applicant is a native of Cuba.

As the director did not enter a decision on the applicant's motion and the director did not properly notify the applicant that her case was being certified to the AAO for review, we are withdrawing the director's certification and returning the matter to the director for issuance of a decision on the applicant's motion.

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 certification and remands the matter for continued processing of the applicant's Form I-485.

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

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[2] *D-Esquiva v. Uhl* addressed the meaning of "native" in the term "all natives, citizens, denizens, or subjects of the hostile nation or government" of the Alien Enemy Act, 50 U.S.C. § 21 (1943).

[3] In *Matter of Masson*, the specific issue was whether the alien, who was a native of Cuba but who was not a refugee, was eligible to have his status adjusted under the Act of November 2, 1966. The BIA held that the alien, a native of Cuba, was so eligible.