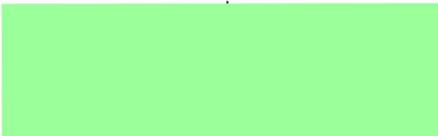




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 09 2013**

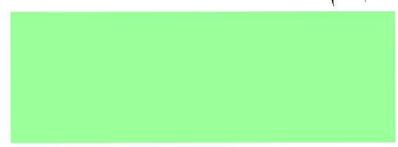
Office: NEWARK, NJ

FILE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 affirmed.

The applicant is a native and citizen of Argentina who filed this application for adjustment of status to that of a lawful permanent resident as the spouse of a Cuban national 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 Field Office Director denied the application on September 12, 2012, because the applicant was inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having misrepresented a material fact in procuring a non-immigrant visa, and under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States.

The record reflects that the applicant sought a waiver for her inadmissibility resulting from a violation of section 212(a)(6)(C)(i), and section 212(a)(9)(B)(i)(II), of the Act. In a separate decision on September 12, 2012, the field office director concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The record does not reflect an appeal of the denial of the Form I-601.

On appeal, counsel contends that the director erred in denying the application under section 1 of the CAA; in finding the applicant inadmissible under section 212(a)(6)(C)(i) and under section 212(a)(9)(B)(i)(II), as the applicant has been lawfully admitted to the United States; and, in denying the applicant's inadmissibility waiver application. Counsel submits a brief and additional evidence.

The issue in this proceeding is whether the applicant is eligible to adjust her status pursuant to section 1 of the CAA.

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 immigrant 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....

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
 - (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
- (v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record indicates that the applicant entered the United States on January 17, 2001, as a nonimmigrant under the visa waiver program, and after her authorized stay expired she remained in an unlawful status until February 2007 when she departed the United States. The record also reveals that on August 25, 2009, the applicant applied for a nonimmigrant visa at the U.S. Embassy at Buenos Aires, Argentina, and indicated on her visa application that she had been previously in the United States for 15 days in 2001, although she had been present in the United States from January 17, 2001 to February 12, 2008. The applicant last entered the United States on October 1, 2009, as a nonimmigrant.

The applicant procured entry into the United States by willful misrepresentation. The applicant is, therefore, inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for willful misrepresentation a material fact. The applicant accrued unlawful presence from the expiration of

her authorized stay in 2001 until February 2007 when she departed the United States. The applicant is attempting to seek admission into the United States within 10 years of her February 2007 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Counsel does not dispute that the applicant misrepresented a material fact to obtain a visa, and that she had accrued over one year of unlawful presence in the United States. He contends, however, that the director erred in denying the application under section 1 of the CAA by finding the applicant inadmissible under section 212(a)(6)(C)(i) and under section 212(a)(9)(B)(i)(II) as the applicant was last admitted into the United States on October 1, 2009, as a nonimmigrant. Counsel also contends that the applicant should be granted a waiver of her inadmissibility and permitted to adjust status to that of permanent residence.

Counsel's contentions are without merit. The applicant cannot avoid the inadmissibility provisions merely by having procured admission into the United States at a time when she was, if fact, inadmissible. Once triggered, the inadmissible provisions under section 212(a)(6)(C)(i), and under section 212(a)(9)(B)(i)(II), require a waiver of inadmissibility, and the applicant cannot adjust status without being granted such waiver.

As noted above, the field office director denied the Form I-601 waiver application. It is noted that the director notified the applicant that the decision to deny the Form I-601 application would be the final decision if no appeal was filed within the time allowed. We note counsel's assertions that the applicant is eligible for a waiver of her inadmissibility. The record, however, does not reflect an appeal of the denial of the waiver application.¹ Accordingly, the applicant remains inadmissible under section 212(a)(6)(C)(i), and under section 212(a)(9)(B)(i)(II), of the Act, both of which require a waiver.

The applicant is ineligible for adjustment of status to permanent residence, pursuant to section 1 of the CAA of November 2, 1966. The decision of the Field Office Director to deny the application will be affirmed.

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 his burden. Accordingly, the AAO affirms the decision of the director to deny the applicant's application to adjust status pursuant to section 1 of the CAA.

ORDER: The director's decision is affirmed. The application is denied.

¹ We will not address issues pertaining to the applicant's eligibility for a waiver of her inadmissibility as the matter is not before the AAO, on appeal.