



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-B-A-

DATE: AUG. 31, 2016

CERTIFICATION OF RALEIGH-DURHAM, NORTH CAROLINA FIELD OFFICE DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE
OR ADJUST STATUS

The Applicant, a native and citizen of Cuba, seeks to adjust status to that of a lawful permanent resident (LPR) under the Cuban Adjustment Act (CAA). *See* Cuban Adjustment Act of 1966 (CAA), § 1, Pub. L. No. 89-732, 80 Stat. 1161 (reproduced as a historical note to 8 U.S.C. § 1255). The CAA allows certain Cuban nationals to adjust status if they were admitted or paroled into the United States and thereafter have been physically present for at least one year.

The Field Office Director, Raleigh-Durham Field Office, issued an initial decision denying the application. The Director stated that the Applicant was ineligible to adjust her status under the CAA, as she remains a LPR until an Immigration Judge issues a final administrative order of removal in her case, and that pursuant to U.S. Citizenship and Immigration Services (USCIS) policy, an application for adjustment of status made by a current lawful permanent resident must be denied.

The matter is now before us on certification. On certification, the Applicant states that USCIS terminated her previous conditional LPR status and section 245(d) of the Act does not prohibit her from adjusting to LPR status. She also states that USCIS is "unclear" and has taken a "flawed" position, because the Raleigh-Durham Field Office Director concluded she still is a LPR, while the Oakland Park Field Office Director, in an earlier decision, had terminated her status.

We will withdraw the Director's decision and remand the application to the Director for further proceedings consistent with the subsequent opinion and for the entry of a new decision, which if adverse, shall be certified to us for review.

I. LAW

Section 1 of 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 [Secretary of Homeland Security], 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: . .

CAA § 1.

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

The [Secretary of Homeland Security] may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216.

II. ANALYSIS

The Applicant seeks to adjust to LPR status under section 1 of the CAA and states that she is eligible to do so because USCIS terminated her previous LPR status based on her marriage to a U.S. citizen.

The Applicant was admitted to the United States in 2009 as a K-1 nonimmigrant. She married her fiancé within 90 days of entry and obtained conditional LPR status in 2010. The Applicant divorced her spouse in 2012. She then applied to become an LPR under the CAA but withdrew that application and instead filed a Form I-751, Petition to Remove Conditions on Residence. The Director, Oakland Park Field Office, denied her petition in 2014, stating that the Applicant did not establish that her “marriage was not entered into solely for the purpose of circumventing the immigration laws of the United States.” The Director, Oakland Park Field Office, stated to the Applicant that her LPR status was terminated as of the date of that decision and that the decision could not be appealed but could be reviewed by an Immigration Judge, citing 8 C.F.R. § 216.5(f).¹

The Applicant then filed a new Form I-485 under the CAA, and the Director, Raleigh-Durham Field Office, issued an initial decision denying the application. The Director found that the Applicant remains a LPR of the United States until her status is terminated by a final administrative order of removal, citing 8 C.F.R. § 1.2² and *Matter of Gunaydin and Kircali*, 18 I&N Dec. 326, 328 (BIA 1982) (holding that the status of a LPR who has entered the United States without inspection or committed a deportable offense terminates only when the adjudication of his deportability becomes final in administrative proceedings). In addition, the Director found that USCIS policy, as outlined

¹ The decision further noted that a “Notice to Appear before an Immigration Judge will be issued and forwarded to [the Applicant].” The record does not indicate that a Form I-862, Notice to Appear, was issued or filed with the Immigration Court in the Applicant’s case.

² This regulation defines “lawfully admitted for permanent residence” as: “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, or removal.”

in chapter 23.2(c)(2)(B) of the Adjudicator's Field Manual (AFM),³ requires denial of an application for adjustment of status filed by an individual who is presently a LPR.

We agree with the Applicant that section 245(d) of the Act does not prevent her from obtaining adjustment of status under the CAA, but for different reasons. The Applicant states that Board's decision in *Matter of Stockwell* is applicable to her case. 20 I&N Dec. 309, 311-12 (BIA 1991) (holding that section 245(d) does not prevent adjustment of status under section 245(a) of the Act where conditional permanent resident status has been terminated). The Applicant's case differs from the circumstances addressed in *Matter of Stockwell*, however, because the Applicant seeks adjustment of status under the CAA and not under section 245(a) of the Act. Because the Applicant seeks adjustment of status under section 1 of the CAA, she is not subject to the ineligibilities and restrictions to adjustment of status for individuals previously admitted to the United States as K-1 fiancées or fiancés or those admitted for permanent residence on a conditional basis pursuant to section 216 of the Act. Section 245(d) of the Act and 8 C.F.R. §§ 245.1(b) and (c), which set forth restrictions and ineligibilities and specifically refer to adjustment under section 245(a) of the Act, do not mention adjustment under the CAA.

We also do not find that the lack of a final administrative order terminating the Applicant's LPR status prevents the Applicant from applying for LPR status under the CAA. Although an individual may seek review of the termination of their conditional LPR status before an Immigration Judge, and the loss of LPR status is not final until a final administrative order is issued,⁴ USCIS policy, in regard to a different section of the Act, has allowed for adjustment of status on an alternative basis where conditional LPR status has been properly terminated before the filing of a subsequent application for adjustment of status.⁵ The current USCIS Policy Manual does not speak in certain terms about the inability to adjust status on another basis after obtaining conditional permanent resident status.⁷ USCIS Policy Manual, *supra*, at B.7(G). Here, where the Applicant's conditional

³ The USCIS Policy Manual, Volume 7: Adjustment of Status superseded this chapter of the AFM on February 25, 2016. 7, USCIS Policy Manual, B.7(G), <https://www.uscis.gov/policymanual/HTML/PolicyManual.html>. The policy manual states, "In general, a foreign national granted permanent residence on a conditional basis is ineligible to adjust status under the provisions of [section] 245(a). Instead, conditional permanent residents must comply with the requirements for removal of the conditions on their status to obtain permanent residence unconditionally."

⁴ See Section 216 of the Act (stating that LPR status shall be terminated by the Secretary of Homeland Security but that the Applicant may seek review of such determination in removal proceedings); 8 C.F.R. § 1.2 ("[LPR] status terminates upon entry of a final administrative order of exclusion, deportation, or removal."); 8 C.F.R. § 216.5(f) (stating that if a waiver of the joint petition requirement to remove conditions on residence is denied, the applicant shall be advised of the termination of their status and instructed to surrender their LPR card, and a notice to appear in removal proceedings should be issued to the applicant); *Matter of Gunaydin and Kircali*, 18 I&N Dec. at 328 (holding that LPR status does not end upon commission of certain acts but rather upon entry of a final administrative order).

⁵ See, e.g., Memorandum from Michael Aytes, Associate Director for Operations, USCIS, HQPRD70/23.12, *Delegation of Authority to Service Center Directors to Adjudicate Form I-829, Petition by Entrepreneur to Remove Conditions; Adjudication of Form N-400, Applications for Naturalization when a Form I-829 is Still Pending*, 18 (Dec. 21, 2006), <https://www.uscis.gov/laws/policy-memoranda> (stating, in reference to entrepreneurs granted conditional permanent resident status, that if conditional resident status is properly terminated prior to filing of a subsequent application for adjustment of status, USCIS may, in its discretion, approve LPR status on new grounds where the eligibility criteria is met).

permanent resident status was properly terminated by USCIS and the Applicant is otherwise eligible for adjustment of status under the CAA, she is not barred from doing so under the Act

In this case, the evidence shows that the Applicant meets the criteria for eligibility under the CAA. She is Cuban; she was admitted into the United States after January 1, 1959; and she has been physically present in this country for more than one year. The Applicant is eligible to receive an immigrant visa and is admissible to the United States, even though she has not obtained review of the termination of her conditional permanent resident status before an immigration judge. The Applicant also has the burden of demonstrating, however, that discretion should be exercised in her favor. *Matter of Patel*, 17 I&N Dec. 597, 601 (BIA 1980); *see also Matter of Arai*, 13 I&N Dec. 494 (BIA 1970) and *Matter of Mesa*, 12 I&N Dec. 432, 438 (BIA 1967). The issue of discretion was not addressed by the Director or by the Applicant and there is not enough information in the record for us to make a determination on the matter.

III. CONCLUSION

We cannot currently conclude that the Applicant has met her burden to establish eligibility for CAA adjustment. Section 291 of the Act, 8 U.S.C. § 1361. We remand to the Field Office Director to issue a new decision on this application consistent with this opinion, which adverse, shall be certified to us for review.

ORDER: The initial decision of the Director, Raleigh-Durham Field Office, dated July 6, 2015 is withdrawn. The matter is remanded to the Director, Raleigh-Durham Field Office, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which if adverse, shall be certified to us for review.

Cite as *Matter of M-B-A-*, ID# 15520 (AAO Aug. 31, 2016)