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**U.S. Citizenship
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[Redacted]

FILE:

[Redacted]

Office: MIAMI

Date: SEP 09 2005

IN RE:

[Redacted]

APPLICATION:

Application for Adjustment of Status under Section 209(B)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1159(b)(3)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for adjustment of status was approved by the Acting District Director, Miami (district director), and is now before the Administrative Appeals Office (AAO) on certification. The district director's decision will be withdrawn, and the application denied.

The applicant is a forty-eight-year-old native and citizen of Cuba who is seeking adjustment of status pursuant to section 209(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1159(b)(3), as an alien who is a refugee within the meaning of section 101(a)(42)(A) of the Act or the spouse or child of such a refugee. In the applicant's case, he seeks adjustment of status by virtue of being a spouse of a refugee, i.e., his wife, [REDACTED] who was granted asylum on February 18, 1997, in Miami Florida. The applicant was included on the wife's application and was likewise granted asylum as a result of riding on her application.

The district director found that the applicant was eligible to adjust status by virtue of having been previously granted asylum. According to the district director's decision, the provisions of section 209(b)(3) of the Act, which condition the adjustment of derivative aliens on their continuing to be the spouse or child of a refugee, conflicted with the provisions of section 208(b) which provides that a spouse or child of an alien granted asylum shall also be accorded asylum status. *Decision of the District Director*, dated September 24, 2002, at pp. 4-5. The district director resolved the perceived conflict by determining that a derivative asylee, such as the applicant, could adjust status independent of the principal and without regard to the provisions of section 209. The application was approved accordingly and certified to the AAO.

On certification, the record consists solely of the record that was before the district director. Although the district director's decision notified the applicant and counsel that the case was being certified to the AAO and gave him an opportunity to submit a brief or other written statement, no such statement appears in the record. *Id. at p. 1.* The entire record was reviewed and considered in rendering a decision.

Factual Background

Before addressing the specific issues raised, the AAO will review the facts of the case. The record reflects that the applicant is a forty-eight-year-old native and citizen of Cuba. The applicant was granted asylum by the Miami Asylum Office on February 18, 1997. The applicant's wife had filed an application for asylum with the Miami district office in 1991 and included the applicant on her application. The wife's application was approved and the couple was granted asylum status.¹ The applicant subsequently applied for adjustment of status on February 19, 1998. The processing of the application began and the applicant was scheduled for an interview on May 9, 2002. The file reflects that during the interview the applicant informed the interviewer that he and his wife had divorced, and he presented a certified copy of a Final Judgement of Dissolution of Marriage, issued by the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, and dated December 18, 1997.

The district director's decision described the issue in the case as whether or not a derivative spouse of an alien granted asylum could adjust his status to that of a lawful permanent resident even though the underlying relationship had been terminated. The decision, issued on September 24, 2002, reviewed the applicable

¹ The record reflects that the applicant had filed a separate earlier application for asylum. The final disposition of the earlier application is unclear from the record.

statutes, including the adjustment provisions of section 209, and determined that a conflict existed between the provisions of section 208 and section 209, and that a derivative asylum applicant obtained independent asylum status that enabled him to adjust status regardless of the termination of the derivative's relationship with the principal. The district director's finding that the applicant had an independent ability to adjust status, resulted in the district director finding that the termination of the relationship to the principal was irrelevant. The AAO does find the termination of the applicant's relationship to the principal to be significant because, as will be discussed below, it does not accept the district director's analysis of the case as one involving a conflict between section 208 and section 209 of the Act. Consequently, the dissolution of the applicant's marriage to the principal alien is an issue that must be carefully analyzed to determine whether it adversely affects the applicant's ability to adjust his status under section 209.

The Statutory Framework

Before addressing the issues in detail, it is useful to set forth the statutes considered by the district director, i.e., section 208(b)(3) and section 209(b). Those provisions set forth the treatment of the spouse and children of principal asylum applicants and the availability of adjustment of status for such derivative aliens.

Sections 208 and 209 of the Act at issue before the district director provide as follows:

Section 208(b)(3) Treatment of Spouse and Children.—A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) [1101]) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

....

Section 209(a) Criteria and Procedures Applicable for Admission as Immigrant; Effect of Adjustment. —(1) Any alien who has been admitted to the United States under section 207—

- (A) whose admission has not been terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe,
- (B) who has been physically present in the United States for at least one year, and
- (C) who has not acquired permanent resident status, shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 240, and 241 [1125, 1229a, and 1231].

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

(b) Maximum Number of Adjustments; Record Keeping.—Not more than 10,000 of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

- (1) applies for such adjustment,
- (2) has been physically present in the United States for at least a year after being granted asylum,
- (3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,**
- (4) is not firmly resettled in any foreign country, and
- (5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

....

(Emphasis supplied.)

Reasoning Underlying the District's Decision Granting Adjustment of Status

In the applicant's case the district director concluded that the applicant continued to be eligible to adjust status. In reaching this conclusion, he referenced, with varying degrees of specificity, the statute, legal opinions issued by the INS' Office of the General Counsel (GENCO) [now known as the Office of Chief Counsel (OCC)], and a response from Headquarters to a query posed by the Miami District. The premise behind the district director's decision was the determination that notwithstanding the language in section 209(b) of the Act, which addresses the statutory requirements for adjustment of status for asylees, and which requires that the individual continue to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee, an applicant could, nonetheless, adjust status regardless of whether the applicant continued to be the spouse or child of the principal. The district director reasoned that the section 209(b) requirements conflict with the language in section 208(b)(3), which provides that the spouse and children of an alien granted asylum are likewise accorded asylum status. Consequently, the district director concluded that having been granted asylum, the derivative alien relatives were in a position to seek adjustment of status independent from the principal alien.

The district director's decision also referenced two legal opinions, GENCO Opinion 89-55, dated July 27, 1989, and GENCO Opinion [not numbered], dated January 11, 1994, and a guidance letter issued by the former INS dated March 20, 1984, and referenced in the 1989 legal opinion. The district director characterized the 1989 GENCO opinions as highlighting the distinction between the ability of a derivative refugee spouse to adjust status independently from the principal alien in contrast to the inability of an asylum derivative spouse to adjust status where the relationship no longer exists. The district director characterized the guidance letter as providing that derivative aliens ineligible to adjust through the principal, should pursue their own asylum applications, which, if approved, would enable them to pursue adjustment of status

independently.² Despite this interpretation, the district director, nevertheless, proceeded to find that the adjustment was authorized due to the conflict he perceived between section 209(b) of the Act, and section 208(b)(3) and his resolution of it in favor of the alien's ability to adjust on his own.

Assessment of the Miami District's Analysis Including Its Interpretation of and Reliance Upon the Legal Opinions

The district director's decision references two legal opinions addressing adjustment of status under section 209 of the Act. The district director's decision attributes to those opinions the conclusion that a spouse or child of an asylee may not adjust prior to the principal asylee's adjustment of status. Furthermore, the district director also cites the opinions as supporting a finding that asylum derivatives may not adjust their status under section 209 in those situations where the relationship with the principal no longer exists. *Decision of the District Director*, dated September 24, 2002, at p.4.

While acknowledging that the opinions taken together indicated that an asylum derivative could not adjust status where the relationship with the principal existed, the district director, nonetheless found that because of the conflict he perceived between the adjustment provisions and section 208, that the termination of the relationship did not adversely impact the derivative's ability to adjust status.

GENCO Opinion 89-55 dated July 27, 1989

The question addressed was whether a derivative asylee spouse was eligible to adjust status under section 209(b) when the marriage had been terminated by divorce. The legal opinion concluded that an alien spouse who received a divorce prior to the adjudication of an adjustment of status application would cease to be eligible for such immigration benefit. In discussing the issue, the legal opinion noted that it had been the position of the INS that alien children seeking adjustment of status would not be eligible for adjustment if they had reached the age of majority before the application was adjudicated. *See Legal Opinion at p.2, citing INS Instructions to all Field Offices, May 18, 1984.* The opinion noted that the remedy in such cases was for the derivative to file his or her own asylum application, which could be favorably considered, based upon a presumption of future persecution due to the alien's relationship to the principal. The opinion reasoned that similarly, the remedy available to a spouse who was divorced prior to the final adjudication was to seek asylum independently and, if granted, then pursue adjustment of status under section 209 of the Act.³

GENCO Opinion dated January 11, 1994

This opinion addressed the issue of whether a person admitted as the spouse of a refugee remained eligible for adjustment of status under section 209 after the death of the principal alien. The conclusion reached was that

² This particular guidance letter is not contained in the record and is not available to the AAO. Consequently, the context in which the response was provided is not entirely clear.

³ The AAO notes that the CIS Asylum Office has adopted a practice of issuing nunc pro tunc asylum grants to derivatives in such situations, with the grant of asylum relating back to the date of the asylum grant to the principal asylum applicant, or the date that the derivative's I-730 was approved for derivatives in the United States, or the date that the derivative entered the U.S. on an approved petition. This practice is intended to allow the derivative asylee to adjust status sooner than would be the case if eligibility for adjustment had to be measured from the date of his or her own grant of asylum. *See Affirmative Asylum Procedures Manual, Revised February 2003.*

the spouse remained eligible for adjustment of status. The basis of the conclusion was that although section 207 linked the admission of the non-refugee spouse to the status of the refugee spouse, the statute explicitly vested the non-refugee spouse with independent refugee status. The opinion noted that section 207(c)(2) did not condition the grant of refugee status upon a continued relationship with the original refugee and further noted that section 209(a), governing adjustment of status of refugees, likewise did not contain such a requirement. The opinion contrasted the absence of such a requirement for refugees with the requirement in section 209(b), which conditions asylee adjustment for derivatives upon the continued existence of the relationship.⁴

Consequently, it appears that the two legal opinions squarely addressed the issue of the eligibility of the derivative alien to adjust status in the event that the relationship to the principal alien no longer existed. The primary value of the legal opinions was to highlight the different requirements applicable to the derivative beneficiaries of refugees and asylees, and GENCO Opinion 89-55 addressed the precise question at issue in the applicant's case, i.e., the negative effect of a divorce on the ability of a derivative applicant to adjust status under section 209 in the case of a divorce from the principal.

Despite recognizing that the legal opinions found that asylee derivatives, unlike refugee derivatives, are ineligible to adjust their status under section 209 in situations where the original qualifying relationship with the principal no longer existed, the district director's decision simply concluded that the difference in treatment between the ability of derivatives of refugees and asylees to adjust status independent of the relationship to the principal was unfair and found that denying adjustment of status to derivative asylees conflicted with section 208(b) and therefore the applicant could adjust status independent of the principal. *See Decision of the District Director*, at Part III. Consequently, the district director found it unnecessary to reconcile this finding with the GENCO opinions, concluding, presumably that those opinions were in error.

The District Director's Conclusion that the Derivatives Remained Eligible for Adjustment of Status By Virtue of Having Obtained Status as Asylees Permitting Them to Adjust Independently

The district director's decision is premised on the belief that a derivative asylee may adjust status notwithstanding the identified basis of ineligibility for the derivative, i.e., divorce, aging out, or the failure of the principal to seek adjustment. The district director's belief is that such factors have no bearing on the ability of the derivative alien to adjust status because, having obtained asylum, the derivative is on equal footing with the principal and may adjust based on his independent status as an asylee. *See Decision of the District Director*, at Part III.

However, while recognizing that section 209 conditions the adjustment of derivatives on continuing to be the spouse or child of the refugee, the decision does not adequately explain why those restrictions do not apply. The decision simply notes that section 208 provides that the derivatives are accorded asylum status, and concludes that this means that a conflict exists between section 208 and section 209. The decision misconstrues the nature of the asylum status granted to a principal as compared to that granted a derivative beneficiary and the effects of that difference. It also misconstrues the nature of the differences between the

⁴ It appears, from the AAO's review of the opinion and the statutory provisions, that the status accorded to the spouse and children of asylees is similar in nature and that the key difference is the conditions placed on the ability of the spouse and children of asylees to adjust status which are not similarly present in the provisions addressing the adjustment of the spouse and children of refugees.

section 208 and 209 provisions as conflicts, when instead, the provisions are complementary in nature with each focusing on a different stage of the process.

Section 208 of the INA contains the procedures for granting asylum to aliens in the United States. Subsection (b) sets forth the conditions that must be met before an alien qualifies for a grant of asylum. An individual seeking asylum must be a refugee within the meaning of section 101(a)(42)(A) of the Act. If such alien is determined to be a refugee and satisfies the other conditions contained in section 208, he or she may be granted asylum. In contrast, while section 208 provides an avenue for the spouse and children of an alien granted asylum to be afforded similar status, it is predicated on a very different premise; its premise is that it grants asylum status to derivative aliens in order to maintain the family unit recognized by statute, as opposed to granting the status individually to an alien who meets the definition of a refugee and has been recognized as such. While the derivatives may be granted asylum status, and may thereafter be considered to be equivalent for purposes of how they are admitted and categorized, the status is not identical to that of the principal because it was not granted due to the individual's status as a refugee, but rather because of the derivative's relationship to the principal and the desire to allow the spouse or child to join the principal as part of a family unit.

This distinction between principal and derivatives has consequences for the subsequent application for adjustment of status, and further highlights the fact that the asylum status granted to derivatives is different in nature from that granted to the principal. Section 209(b) sets forth the process by which aliens granted asylum may adjust status. Subsection (b)(3) addresses the conditions for both the principal and the derivatives and makes clear that although both enjoy asylum status, different requirements apply. The principal's ability to adjust status is dependent upon his continued status as a refugee. In contrast, the derivatives, not having acquired the status of a refugee, do not adjust based upon being a refugee, but based upon their continuing relationship to the principal as a "spouse or child of such refugee."

Therefore, reading sections 208 and 209 together, it is clear that derivative asylees have an asylum status fundamentally different from that of the principal, and which continues to be linked to the principal in terms of the continuing viability of the relationship. It is the continued existence of that relationship which enables the derivative to adjust status and its absence which prevents the adjustment.

The constraints upon the derivative asylee's ability to adjust status if no longer the spouse or child of the principal asylee are highlighted by the different manner in which refugees are treated under section 207 and 209 of the INA. Unlike the case with the requirements for adjustment by asylee derivatives, the refugee derivatives are, in fact, able to adjust status under section 209 without regard to their relationship to the principal alien.

The District Director's Conclusion that the Applicant Remained Eligible for Adjustment of Status Notwithstanding His Divorce from the Principal Asylee

Having rejected the district director's conclusion that the applicant was eligible to adjust independent of any relationship with the principal, the AAO turns next to the issue of whether the applicant was ineligible to adjust status due to having obtained a divorce from the principal alien, and was thus no longer considered a spouse under the Act, at the time of the adjudication of the application on July 11, 2002.

The term spouse is not defined in any particular manner under the Act, leading to the finding that it bears its usual definition as one who is joined in matrimony with another. As previously mentioned, section 209 of the Act, which contains the adjustment provisions requires that the alien seeking adjustment under section 209(b) continue to be a refugee. The applicant qualifies, if at all, for adjustment under the provisions of section 209(b), as the spouse of a refugee. The evidence in the record clearly reflects that while the applicant married the principal alien in 1976, and remained married to her during the pendency of the asylum application, the marriage was terminated by the divorce decree issued by the Circuit Court on December 18, 1997, two months before the applicant requested adjustment of status. Consequently, at the time of the adjudication of the application for adjustment of status, the applicant was no longer the spouse of a refugee, and thus was ineligible for adjustment of status under section 209.

Therefore, given the fact that the principal alien and the applicant have divorced, the applicant is unable to demonstrate that he continues to be the spouse of a refugee. As such, he is ineligible for adjustment of status under section 209 of the Act. The AAO notes, however, that it is possible that the applicant may be able to pursue adjustment of status through alternative avenues, such as the Cuban Adjustment Act.

ORDER: The decision of the acting district director is withdrawn and the application is denied.