U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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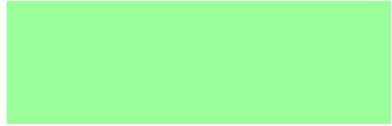
U.S. Citizenship and Immigration Services

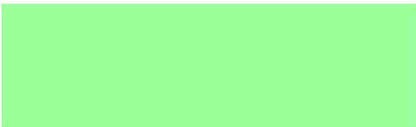


DATE: JAN 2 7 2015 OFFICE: Denver FILE:

IN RE: Applicant:

APPLICATION: Application for Status as Permanent Resident 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Denver, Colorado, certified the Application to Register Permanent Residence or Adjust Status (Form I-485) to the Administrative Appeals Office (AAO) for review. The application will be remanded to the Field Office Director for further proceedings consistent with this decision.

I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

The applicant, a native and citizen of Mexico, last entered the United States on April 15, 1997, as a B-2 visitor for pleasure, remained in the United States after her period of authorized stay, and was placed into removal proceedings on February 9, 2010.[1] On August 3, 2011, the applicant married her Cuban citizen spouse, and now seeks to adjust her status, as the spouse of a Cuban citizen, under section 1 of the Cuban Adjustment Act of 1966, Pub.L. No. 89 732, 80 Stat. 1161 (8 U.S.C. § 1255 note) (CAA). The applicant's Cuban spouse (or Cuban principal) did not, however, adjust his own status under the CAA. He entered the United States as a refugee under section 207 of the Immigration and Nationality Act, 8 U.S.C. § 1157 (the Act), and subsequently sought and obtained adjustment of status under section 209, 8 U.S.C. § 1159, the provision relating to refugee adjustment. The Field Office Director certified to the AAO his provisional decision to approve the applicant's adjustment.

The question before us is whether a non-Cuban derivative spouse may adjust status under the CAA when the Cuban principal spouse adjusted status under a provision other than the CAA, but would have been eligible to adjust status under the CAA. Upon *de novo* review, we answer that question affirmatively but remand for further development of the record.[2]

II. APPLICABLE LAW

A. The Cuban Adjustment Act

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 Attorney General [now 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

[1] In November 2013, the Immigration Judge terminated removal proceedings to allow the applicant to pursue her adjustment of status application under the CAA before the U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R § 245.2(a)(1).

[2] The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in deciding this appeal. *See* 8 C.F.R. § 103.2(b)(1).

> provisions of this Act [this note] shall be applicable to the spouse and child of *any alien described in this subsection*, regardless of their citizenship and place of birth, who are residing with such alien in the United States, ...

Pub.L. No. 89-732, 80 Stat. 1161 (8 U.S.C. § 1255 note) (emphasis added).

B. Case Law

Several prior cases provide guidance relevant to our inquiry, but none have directly addressed the scenario before us today. First, in *Matter of Milian*, 13 I&N Dec. 480 (Acting Reg. Comm. 1970), the Acting Regional Commissioner of the legacy Immigration and Naturalization Service (INS) concluded that the Nicaraguan spouse of a Cuban national was eligible to adjust status under the CAA even though she had married her Cuban spouse *after* he himself had adjusted under the CAA. Noting the CAA conferred eligibility to family members of "any alien described in this subsection," the Acting Regional Commissioner found that phrase to be defined by the CAA to include six criteria:

1. [The alien] is a native or citizen of Cuba and
2. has been inspected and admitted or paroled into the United States subsequent to January 1, 1959; and
3. has been physically present in the United States for at least two years,[3] if the alien;
4. makes an application for such adjustment; and
5. is eligible to receive an immigrant visa; and
6. is admissible to the United States for permanent residence.

Id. at 480-481. In *Milian*, the District Director had denied adjustment to the non-Cuban derivative spouse because the Cuban principal, having already adjusted status, was deemed no longer "eligible to receive an immigrant visa" and thus not "an alien described in [section 1 of the CAA]." *Id.* at 481. The Acting Regional Commissioner reversed this decision, concluding that only the first three criteria under section 1 "described" an eligible alien, i.e., that the individual be a Cuban native or citizen, inspected and admitted or paroled into the United States subsequent to January 1, 1959, and physically present in the United States for at least two years. The remaining three criteria, the Acting Regional Commissioner stated, were "action[s] and conditions that an alien may take and must meet." *Id.* Because the statute did not make any specific exceptions for marriages occurring after the initial adjustment, and the applicant's Cuban spouse clearly met the first three criteria, the Acting Regional Commissioner concluded that the Cuban spouse was "an alien described in [section 1]". *Id.* at 482. The applicant was therefore eligible to adjust under that section, notwithstanding the fact that her marriage was subsequent to her Cuban spouse's adjustment.

[3] The CAA initially required two years of physical presence in the United States. This was amended to a single year in the Refugee Act of 1980, Pub.L. No. 96-212, § 203(i), 94 Stat. 102, 108 (1980).

The next year, the Board of Immigration Appeals had occasion to address whether the spouse of a Cuban citizen could adjust status under the CAA when the Cuban principal himself was denied adjustment thereunder (on criminal grounds). *Matter of Quijada-Coto*, 13 I&N Dec. 740 (BIA 1971). The Board answered that question in the negative, holding without elaboration that "Congress did not intend to apply the benefits of the Act of November 2, 1966 [the CAA] to the spouse of an alien described in the Act, when the alien himself has been denied adjustment of status under the Act." *Id.* at 741.

The third decision relevant to our analysis is *Toro v. Sec'y, U.S. Dep't of Homeland Sec.*, 707 F.3d 1224 (11th Cir. 2013), in which the United States Court of Appeals for the 11th Circuit confronted the question of whether a non-Cuban spouse is eligible to self-petition for adjustment under the CAA as the battered spouse of a Cuban native or citizen when her Cuban husband himself had been denied adjustment under the CAA due to his criminal history.[4] In *Toro*, the court also first looked to the same phrase — "any alien described in this subsection" — and enumerated five statutory criteria that a Cuban principal must meet to fall under that definition: (1) inspection/admission or parole into the United States subsequent to January 1, 1959; (2) one year's physical presence; (3) making an application for such adjustment; (4) eligibility to receive an immigrant visa; and (5) admissibility to the United States for permanent residence.[5] *Id.* at 1228. The government argued that the Cuban principal failed the final criterion, because he was not "admissible to the United States for permanent residence" due to his criminal convictions. The applicant, for her part, argued that only the first two criteria, i.e., admission or parole into the United States subsequent to January 1, 1959, and physical presence for at least one year, were proper definitional requirements. The remaining three, the applicant argued, only discussed the Attorney General's discretion to adjust a Cuban citizen's status.

The court rejected the applicant's argument, reading each criterion "to be an indispensable element of 'any alien described in this subsection,' because all five clauses specify what a Cuban alien must do to qualify for adjustment." *Id.* Citing *Matter of Quijada-Coto*, the court concluded that, because the applicant's husband was ineligible for adjustment of status due to his criminal inadmissibilities, he was not "an alien described in section 1," and the applicant therefore could not self petition under the CAA.[6] *Id.* at 1229.

[4] Two subsequent statutes, relating to violence against women, amended Section 1 of the CAA. *See* Victims of Trafficking and Violence Protection Act, Pub.L. No. 106-386, § 1509, 114 Stat. 1464, 1530-31 (2000) and the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub.L. No. 109-162, § 823, 119 Stat. 2960, 3063. These provisions create an exception for the residence requirement of the CAA when the non-Cuban spouse or child have been the victims of battering or extreme cruelty, and allow for self-petitioning after the termination of the marriage to the Cuban spouse by death or termination for a two-year period thereafter (under certain conditions not at issue here).

[5] Although the Eleventh Circuit in *Toro* enumerates five criteria, and the Acting Regional Commissioner in *Matter of Milian* listed six, this is a distinction without a difference for purposes of their – and our —analyses.

[6] The court found *Matter of Milian* to be inapposite to Toro's situation, stating that "Toro misreads *Milian*; the case simply holds that a qualifying relationship for purposes of section 1 may be established after the Cuban alien's adjustment." 707 F.3d 1224, 1229 n.3. The court did not address *Milian*'s holding that only the first three criteria in section 1 were definitional, and the last three were not.

III. ANALYSIS

The question in all the cases discussed above and before us now, is whether a Cuban principal meets the definition of "any alien described" in section 1 of the CAA and can therefore confer CAA adjustment eligibility to a non-Cuban derivative spouse. *Matter of Milian* held that the non-Cuban spouse was eligible to adjust under that provision, despite the marriage to her Cuban spouse occurring after the spouse's own adjustment, because the Cuban spouse met the section 1 definition both before and after the marriage. 13 I&N Dec. at 482. *Matter of Quijada-Coto* and *Toro v. Sec'y, U.S. Dep't of Homeland Sec.,* both held that, if the Cuban principal's application for adjustment under the CAA was denied due to a lack of admissibility, the Cuban principal could not meet the definition of "an alien described in section 1," and hence the non-Cuban spouse could not adjust under the CAA either. *Matter of Quijada-Coto*, 13 I&N Dec. at 741; *Toro v. Secy. of U.S. Dep't of Homeland Sec.,* 707 F.3d at 1229.[7]

In this case, the evidence of record shows that the Cuban principal readily meets all but one of the criteria listed under section 1: he is Cuban; he was admitted into the United States after January 1, 1959; and he has been physically present in this country for more than one year. He is eligible to receive an immigrant visa and is admissible to the United States, having already received lawful permanent resident status. Had he applied for adjustment under the CAA, the record indicates that he would have been eligible. The remaining question, then, is whether the criterion in Section 1 that the applicant "makes an application for such adjustment" is limited strictly to adjustment *under the CAA* and not by any other means.

The CAA was enacted before many subsequent changes in U.S. immigration laws and practices, and the statutory text accordingly does not provide a ready answer to this question.[8] We conclude

[7] We note that the part of the analysis in *Matter of Milian* has been superseded by subsequent case law. If only the first three criteria delineated in that decision define aliens described under section 1, i.e., Cuban natives or citizens who enter the United States after January 1, 1959, and who have been physically present for at least one year, then the criminal spouses of the beneficiaries in *Matter of Quijada-Coto* and *Toro v. Secretary, DHS* would have been able to confer CAA benefits to their non-Cuban spouses, contrary to the holdings in those two cases. But the ultimate holding in *Matter of Milian*, that adjustment under the CAA does not cause a Cuban principal to fall outside the definition of "an alien described under [section 1]," has stood for more than four decades and continues to have general applicability.

[8] When the CAA was enacted in 1966, "... natives of any country of the Western Hemisphere, or of any adjacent island named in section 101(b) (5) of the Immigration and Nationality Act,[were] precluded from applying for adjustment to permanent resident status while in the United States." *See* H.R.Rep. No. 1978, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 3792, 3799 (letter of Douglas Macarthur II, Assistant Secretary for Congressional Relations, for the Secretary of State). This hemispheric preclusion was designed to channel most immigrant status adjudication through the overseas consular processing mechanism; that is, we required our closest neighbors to depart the United States and obtain an immigrant visa abroad to become a lawful permanent resident. Subsequently, Congress largely eliminated this geographic limitation to domestic adjustment and enacted several other adjustment-related provisions. The legislative history indicates, however, that Congress included the "eligible to receive an immigrant visa" requirement to ensure that CAA applicants would be put through "the same screening proceedings" as "anyone else who comes in on an immigrant visa . . . ." *See Federation for American Immigration Reform (FAIR) v. Meese 643 F.Supp. 983, 988 (S.D.Fla. 1986)(quoting Hearings on the Adjustment of Status for Cuban Refugees before a Subcommittee of the House Judiciary Committee,* 89th Cong.2d Sess. pp. 15–18). Even assuming that, at the time of its enactment, the CAA was unambiguous and required the principal Cuban to adjust status under

that the best reading of the statute does not limit eligibility in these circumstances to adjustment *under* the CAA. Absent any textual signposts or legislative history regarding the timing or form-equivalence of derivative adjustment under the CAA, we conclude that Congress, in drafting section 1, likely contemplated that derivative spouses and children would typically apply along with their qualifying Cuban family member for adjustment under the CAA. The CAA does not, however, explicitly limit derivative CAA eligibility to contemporaneous adjustment with the Cuban family member and only under the CAA. *Milian* settled in 1970 that contemporaneous adjustment of derivatives is not required, and Congress is presumed to have adopted its interpretation, having amended the statute more than once since that decision without disturbing its holding. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citations omitted); *see also Federation for American Immigration Reform (FAIR) v. Meese*, 643 F. Supp. 983, 988 ("In 1980, Congress continued to acknowledge the viability of the [CAA] by reducing the physical presence prerequisite from two years to one. Basic principles of statutory construction dictate that subsequent enactments can be used to interpret pre-existing legislation.").

To date, case law has only limited non-Cuban spousal adjustment under the CAA to instances in which the Cuban principal was or would be denied adjustment under that provision, and hence cannot meet the definition of "any alien described" in section 1. This is not the case here; the applicant's spouse could have adjusted under the CAA, but instead adjusted pursuant to section 209 of the Act, the proper course for individuals entering the United States as refugees. If he could have adjusted under the CAA, it follows that he was an "alien described in this subsection," and thus his non-Cuban spouse may be eligible to adjust her status as a derivative under the terms of the CAA.

Our interpretation of the term "such adjustment" as including adjustment under provisions other than the CAA is consistent with both the CAA legislative history as well as long-standing U.S. policy regarding Cuban migration. With respect to the legislative history, then Deputy Attorney General, Ramsey Clark, recommended that Congress permit non-Cuban spouses and children to derive adjustment from the Cuban principal to "maintain the unity of the family[.]" Congress clearly acceded. *See* H.R. Rep. No. 1978, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 3792, 3799 (letter of Deputy Attorney General Ramsey Clark). With respect to U.S. migration policy, the United States consistently has endeavored to promote safe, legal, and orderly Cuban migration. *See United States-Cuba Agreement of September 1994* [the September 9, 1994 Joint Communiqué] ("The United States and the Republic of Cuba are committed to directing Cuban migration into safe, legal, and orderly channels[.]"); *United States/Republic of Cuba Joint Statement* (White House, Office of the Press Secretary, May 2, 1995) ("These steps build upon the September 9, 1994 agreement and seek to address safety and humanitarian concerns and to ensure that migration between the countries is safe, legal, and orderly"). DHS routinely adjusts, under the

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the CAA itself (because no other avenue existed for natives of our fair hemisphere), subsequent amendments to the INA's adjustment provisions now create ambiguity in the CAA's pertinent text.

CAA, Cuban nationals (as well as their non-Cuban derivatives) who were paroled into the United States after irregular and dangerous travel. Were we today to decline similar derivative adjustment to the family of a Cuban principal, lawfully admitted and later adjusted as a refugee under sections 207 and 209 of the Act, we would unfairly penalize those who pursued safe, legal, and orderly channels of migration promoted by the United States as an alternative to dangerous maritime and border crossings.

While we hold as a matter of law that the specific provision under which a Cuban principal adjusts status does not impact a non-Cuban derivative's eligibility for CAA adjustment, we find the factual record in this case lacks documentation to establish a valid marriage to the Cuban principal. Although the record contains a copy of the applicant's marriage certificate to the Cuban principal, it also indicates that he was previously married. The applicant, however, has not submitted a divorce decree to show the termination of that prior marriage. In addition, the record reflects multiple addresses existed for the applicant during the duration of her marriage that differ from her spouse's, calling into question whether the applicant was residing with him during this time, a requirement under the plain language of the CAA. Absent a valid marriage, and residence with the Cuban spouse, the applicant is ineligible for adjustment under the CAA.

IV. 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 determine in the first instance the bona fides of the applicant's marriage and cohabitation.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.