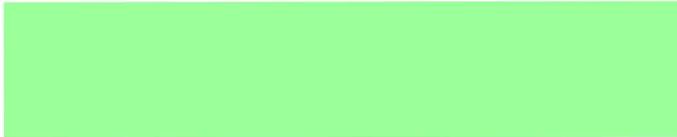




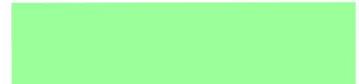
U.S. Citizenship  
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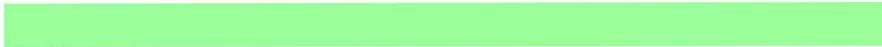


DATE: APR 01 2014

OFFICE: WASHINGTON, DC

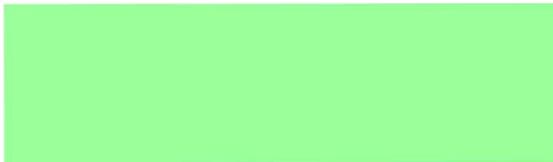


IN RE:



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:



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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, Washington, DC, who certified her decision to the Administrative Appeals Office for review. The director's decision will be affirmed.

The applicant is a native and citizen of the Dominican Republic and the spouse of a Cuban citizen 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 July 26, 2011.

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 rendering a decision on the appeal.

In a June 24, 2013 decision, the director determined that the applicant was not eligible for adjustment of status because she filed her Form I-485 less than one year after her arrival into the United States and she, therefore, did not have at least one year of aggregate physical presence in the United States before applying for benefits under section 1 of the CAA. The director also determined that the applicant was inadmissible under section 212(a)(9)(A)(ii)(II) of the Act as an alien previously removed. The director, therefore, concluded that the applicant was ineligible for adjustment of status, denied the application, and certified her decision to the AAO for review.

On appeal, counsel does not dispute that the applicant filed her Form I-485 less than one year after her arrival into the United States and did not have at least one year of aggregate physical presence in the United States before applying for benefits under section 1 of the CAA. Counsel contends, however, that the removal order was entered in error, and therefore, the applicant is not inadmissible under section 212(a)(9)(A)(i) of the Act as an alien previously removed.

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 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 provisions of this Act 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.

The regulations at 8 C.F.R. § 245.2(a)(2)(ii) provide, in part:

An application for the benefits of section 1 of the Act of November 2, 1966 is not properly filed unless the applicant was inspected and admitted or paroled into the United States subsequent to January 1, 1959. An applicant is ineligible for the benefits of the Act of November 2, 1966 unless he or she has been physically present in the United States for one year.

The record reflects that the applicant last entered the United States on October 10, 2009, as a B-2 visitor for pleasure. On October 23, 2009, the applicant married her Cuban citizen spouse, Mr. [REDACTED]. On December 11, 2009, less than one year after her entry, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, under section 1 of the Cuban Adjustment Act. The Form I-485 accompanied a Form I-130, Petition for Alien Relative, filed on behalf of the applicant by her spouse.

Consequently, the applicant was not physically present in the United States for one year at the time of filing the adjustment application as required by the regulation. She is, therefore, ineligible for the benefit sought. For this reason, the director's decision will be affirmed.

The next issue in this proceeding is whether the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien previously removed.

The record of proceedings reflects that the applicant previously entered the United States on February 2, 1996 and she remained beyond her authorized period of stay without permission. On August 15, 2001, an immigration judge ordered the applicant removed from the United States.

On appeal, counsel contends that the *in absentia* order issued by an immigration judge on August 15, 2001, that triggered inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, was improper and states that the applicant was never removed from the United States.<sup>1</sup> Counsel asserts that the AAO should disregard the removal order.

The AAO has no appellate jurisdiction over this issue. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a

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<sup>1</sup> The record reflects that on November 14, 2013, the applicant, through counsel, filed a motion to reopen the *in absentia* order of removal. The record also reflects that on December 4, 2013, an immigration judge granted the motion, and a master hearing is scheduled before the Immigration Court on July 9, 2014.

second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

- (ii) Other aliens.-Any alien not described in clause (i) who-
  - (I) has been ordered removed under section 240 or any other provision of law, or
  - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record, as constituted, establishes that an immigration judge on August 15, 2001 ordered the applicant removed from the United States. There is no evidence of record that the Secretary has consented to the alien's reapplying for admission. The applicant is consequently inadmissible under section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II). For this additional reason, the director's decision will be affirmed.

The appeal will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The director's decision is affirmed.