

**Reaffirming the Rights of Cubans:
Strategies for Judicial Review of Common USCIS Denials***

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The Cuban Refugee Adjustment Act of 1966 (“CAA”), Pub. L. No. 89-732, 80 Stat. 1161, as amended, has been a part of the fabric of American immigration law for nearly half a century. The CAA is a very powerful form of humanitarian relief, as designed to be in response to the Castro regime’s taking over of the island. Recently, diplomatic relations have been reestablished between the United States and Cuba, and many people are concerned about what will now happen with Cuban immigrants. Throughout the negotiations, U.S. officials have raised the issue of whether Cuba will begin to accept the deportation of Cubans with outstanding orders of removal. Some politicians have even suggested repealing or amending the CAA.¹ On July 20, 2015, the Cuban flag was raised over its embassy in Washington, D.C. for the first time in decades. It was a momentous day for American history, but also a sign of worry for many in the Cuban-American community.

The procedure of the CAA starkly contrasts with the default rules for adjustment of status. Section 1 of the CAA begins by stating that one can adjust status under the statute notwithstanding the restrictions of INA § 245(c) that would normally apply to adjustments of status under section 245 of the Act.² Though the CAA requires eligibility for an immigrant visa, there is no immigrant petition that must be filed prior to applying for adjustment of status. The grounds of inadmissibility at sections 212(a)(4) (public charge), 212(a)(5) (labor certification and qualifications), and 212(a)(7)

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¹ See Weinmann, Lissa. "Scrapping The Cuban Adjustment Act." World Policy Blog, 6 July 2015. Web. 08 Sept. 2015 (discussing, *inter alia*, opposition of Senators Marco Rubio and Ted Cruz to normalization of relations); see also Piven, Ben. "Cuban Migration to US Rises amid Historic Thaw in Relations." Aljazeera America, 14 Aug. 2015. Web. 08 Sept. 2015 (discussing continuing vitality of current policies).

² Any reference to the “Act” or the “INA” refers to the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, as amended.

(documentation requirements) do not apply.³ No affidavit of support is required to adjust status. Nor is a waiver of the affidavit of support required through the submission of Form I-864W. The fee for adjustment of status may be waived through Form I-912. A Cuban national and any qualifying non-Cuban family members may request humanitarian parole at a port of entry, and those who have already entered without inspection can request parole-in-place from USCIS. Furthermore, Cuban nationals are exempted from expedited removal proceedings pursuant to INA § 235(a)(1)(F); qualifying non-Cuban family members can be given an Order of Supervision (“OSUP”) should they be ordered expeditiously removed. These are just some of the nuances of the Cuban adjustment process.

It is not uncommon that a Cuban adjustment application will be denied by USCIS multiple times without further action. Frustrated applicants may file applications repeatedly to seek a Notice to Appear (“NTA”)—in the hopes of seeking neutral review of the application—only to have USCIS exercise its discretion to not issue an NTA. Not only will the applicant be frustrated in seeking status, but they will waste a lot of time and money in the process. However, a recent decision of the United States Court of Appeals for the Eleventh Circuit opened the door for judicial review of USCIS denials of Cuban adjustment applications in United States District Court, despite the jurisdictional bar to district court review of applications for adjustment of status. Furthermore, the filing of a motion to reopen or motion to reconsider through Form I-290B is not required in order to exhaust administrative remedies prior to seeking judicial review.

This practice advisory will begin by discussing recurring scenarios that are ripe⁴ for judicial review. First, this advisory will address arguments for challenging erroneous denials of applications for Cuban adjustment and for naturalization⁵ that are premised on the participation of the applicant in the *Unión de Jóvenes Comunistas* (“UJC”), or in English, the Union of Communist Youth. Next, the focus will shift to strategies for managing issues faced by Cubans who were first admitted to the United States on a K visa. Last, this advisory will discuss the recent decision of the Eleventh Circuit regarding jurisdiction to review USCIS denials of Cuban adjustment applications in district court.

I – A Disincentive for Industrious Peoples

Section 212(a)(3)(D)(i) of the Act states that “[a]ny immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.” Clause (iii) provides an exception for visa or admission applicants who have terminated their membership for a certain number of years in certain circumstances, as long as the

³ USCIS Adjudicator’s Field Manual (AFM) ch. 23.11(f).

⁴ Ripeness is used as generally defined, and not with regard to principles of justiciability under Article III of the Constitution for the United States of America.

⁵ INA § 310(c) provides for judicial review of a naturalization application, but only after the denial of a Form N-336, Request for Hearing on a Decision in Naturalization Proceedings.

applicant is not a threat to the security of the United States. Of interest for Cuban nationals is the exception for applicants who terminated their membership or affiliation “5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date”⁶

In addition to the five-year waiting period for admissibility after the termination of Communist membership or affiliation, there is a ten-year waiting period for naturalization. Specifically, an applicant is ineligible for naturalization if the applicant was a member of or affiliated with a Communist party, *inter alia*, “within a period of ten years immediately preceding the filing of the application for naturalization or after such filing and before taking the final oath of citizenship”⁷ Thus, multiple scenarios can arise. First, an application for adjustment of status can be denied for not waiting 5 years after the termination of Communist affiliation or membership. Second, a naturalization application can be denied in the case of a Cuban national who waited five years to adjust status, but applied for naturalization before the expiration of ten years.⁸ Third, a Cuban national’s application for naturalization can be denied on the grounds of having been inadmissible at the time of adjustment of status for not waiting five years, after terminating the affiliation or membership, to apply for adjustment. Often, the UJC membership will end upon departure from Cuba. Additionally, USCIS might even allege fraud in the adjustment, if one first mentions prior UJC membership during the naturalization application process, on the theory that a material line of questioning was cut off during the adjustment.⁹

In either case, the statute provides an exception for former members or affiliates where the membership or affiliation: (1) is or was involuntary; (2) is or was solely when under 16 years of age; (3) is or was by operation of law, or; (4) is or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes.¹⁰ Additionally, though not the subject of this discussion, it is important to note that there is an inadmissibility exception for certain persons with a specified qualifying relative under INA § 212(a)(3)(D)(iv), and a naturalization ineligibility exception for certain persons who made a contribution to the national security or to the national intelligence mission of the United States under INA § 313(e).

Typically, a Cuban national would have been part of the *Comités de Defensa de la Revolución* (“CDR”), or in English, the Committees for the Defense of the Revolution. Membership in the CDR, like certain other communist groups, is mandatory in Cuba.

⁶ INA § 212(a)(3)(D)(iii)(I)(b).

⁷ INA § 313(c).

⁸ For example, this could occur in the case of a Cuban national who adjusted status as the spouse of a U.S. citizen because the waiting period for naturalization would only be three years. INA §319(a).

⁹ Should such a person be issued an NTA, absent the proper drafting of a fraud allegation, an LPR who adjusted status—as opposed to having been consular processed—can seek termination of proceedings where INA § 212(a)(7)(A)(i)(I) is the ground of inadmissibility underlying a charge of deportability under INA § 237(a)(1)(A). *Ortiz-Bouchet v. U.S. Att’y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013).

¹⁰ INA §§ 212(a)(3)(D)(ii), 313(d). Please note that there are subtle differences in language between the two sections.

As long as an applicant explains that membership in the CDR is mandatory, USCIS will apply the exception for involuntary membership. As for those who joined the UJC, the story is not so simple. Membership in the UJC is not mandatory for all Cuban citizens. In fact, because the UJC is the youth division of the Communist Party, membership is reserved for exceptional students and professionals as a stepping stone for joining the party. Though membership is not required by law in order to join a university or start certain careers, membership will often be required in practice. Thus, many Cuban nationals who choose to advance their lives and careers will have to join the UJC in order to do so.

USCIS has taken the position that joining the UJC is a voluntary act. The theory is that the Cuban national didn't *need* to study at a university, or didn't *need* to be a doctor, banker or lawyer. One could argue that joining the UJC was necessary for the purpose of obtaining employment, but USCIS will likely retort that UJC membership is only necessary for *specific* types of employment. In Cuba, regardless of whether a citizen is employed in a specific field, or just plain old unemployed, everyone receives the same rations and income. There is some truth to saying that a UJC member's quality of life will be substantially similar to that of a Cuban national who never joined the UJC due to the resource distribution scheme in Cuba. But, what of personal fulfillment? And, what of the horrible disincentive created by this interpretation of the law?

Fortunately, there is a judicially created exception to inadmissibility—and by extension, an exception to ineligibility for naturalization—based on past communist membership or affiliation. This exception is known as the doctrine of non-meaningful participation. In *Rowoldt v. Perfetto*, the Supreme Court invalidated a deportation order because “[t]here must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness,” and the Court made it clear that situations can exist where “the dominating impulse to [an] ‘affiliation’ with [a] Communist Party may well [be] wholly devoid of any ‘political’ implications.”¹¹ In reaching its conclusion, the Court made note of the fact that Mr. Rowoldt’s membership was not “‘motivated by dissatisfaction in living under a democracy,’” and that Mr. Rowoldt testified he never thought “of overthrowing anything.”¹² Additionally, the Court pointed out that Rowoldt “testified that he never advocated change of government by force or violence and he also gave his unilluminating understanding of, and beliefs about, the principles of communism.”¹³ Rowoldt also gave testimony that he “‘joined the Communist Party in ‘the spring or summer of 1935,’ paid dues, attended meetings, and remained a member ‘until [he] got arrested (in deportation proceedings) and that was at the end of 1935.’”¹⁴ That his membership was so short-lived may have been a positive factor, but Rowoldt did run a bookstore that was “an official outlet for communist literature” while being an active worker of the party.¹⁵

¹¹ 355 U.S. 115, 120 (1957).

¹² *Id.* at 117-18.

¹³ *Id.* at 118.

¹⁴ *Id.* at 116-17.

¹⁵ *Id.* at 118.

Later on, in *Matter of Rusin*, the BIA recognized that the doctrine of non-meaningful association applies in the context of adjustment of status in 1989.¹⁶ Specifically, the Board found that the applicant met the exception in *Rusin* because “[i]t cannot be said that she in any way consciously committed herself to a Communist organization.”¹⁷ In essence, in order to be found inadmissible for having participated in a Communist party, one must have a meaningful association with the Communist party in terms of their political beliefs. A proper record would show that the applicant had no political reason in joining the UJC, and that the applicant only wanted to pursue an education and a respectable career. A savvy USCIS officer will inquire as to whether the applicant participated in any marches or speeches, or some other activity involving the spread of the word of communism. If such activities did occur, it will be important to focus on the applicant’s intentions at the time of the activity and throughout their membership in the UJC.

II – Termination of Conditional Residence, K Visas, and the CAA

Another common cause for a denial of a Cuban adjustment application concerns Cubans who were admitted as K nonimmigrants. Consider the case of a Cuban national admitted as a K-1 nonimmigrant fiancée who timely marries her petitioner. Two years after adjusting status comes time to submit an I-751 joint petition to lift the conditions from her resident status. Unfortunately, the matrimonial bonds have weakened and the once happy couple has painfully separated.

Then, the Cuban national comes to you for advice. The divorce waiver of the joint filing requirement comes to mind.¹⁸ As long as one can show a *bona fide* marriage during the period of conditional residence, along with a final judgment of divorce, everything should be fine, right? Not so much. Often, these I-751 petitions are denied for failure to meet the applicable burden of proof, even where USCIS chooses not to allege a sham marriage.¹⁹ Such a denial will also assert that your client’s conditional resident status has been terminated. Let us assume that the denial has arrived, and it asserts that your client’s status has been terminated.

¹⁶ 20 I&N Dec. 128, 132 (BIA 1989) (“We have now concluded that the ‘meaningful association’ test set forth by the Supreme Court in its cases should be applied in adjustment of status proceedings.”).

¹⁷ *Id.*

¹⁸ For guidance on this topic, see USCIS Interim Memorandum, “Revised Guidance Concerning Adjudication of Certain I-751 Petitions” (Dec. 23, 2012), *published on AILA InfoNet at Doc. No. 13010444 (posted Jan. 4, 2013)*; USCIS Memorandum, D. Neufeld, “Adjudication of Form I-751, *Petition to Remove Conditions on Residence* Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Untimely Petition or Multiple Petitions” (Oct. 9, 2009), *published on AILA InfoNet at Doc. No. 09110667 (posted Nov. 6, 2009)*; USCIS Memorandum, D. Neufeld, “I-751 Filed Prior to Termination of Marriage” (Apr. 3, 2009), *published on AILA InfoNet at Doc. No. 09072166 (posted July 21, 2009)*.

¹⁹ Had USCIS alleged a sham marriage, section 204(c) would bar the approval of any future immigrant petitions filed on the Cuban national’s behalf. However, no immigrant visa is required to adjust under the CAA. Thus, assuming eligibility for a waiver of fraud or misrepresentation under section 212(i), the Cuban national would still be eligible to adjust her status.

At this point, one may advise one's client to await a Notice to Appear because the Immigration Judge may review and possibly grant the divorce waiver. However, a Cuban national can always apply for adjustment of status under the CAA, right? That could be a simpler option. But, what happens if the NTA is never filed with the Immigration Court? Jurisdiction over the application would lay with USCIS.²⁰ After filing an application with USCIS, one may receive a denial as follows:

Because of the comprehensive nature of INA section 216, INA section 245(d) applies to a conditional resident even after the Service terminates the alien's status, and does so until the conditions are removed or until a final order of removal is entered in removal proceedings.

Section 245(d) of the Act provides, in pertinent part, that "the Attorney General may not adjust, under subsection 245(a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216." Further, the regulations provide that an alien who is already an alien lawfully admitted for permanent residence on a conditional basis pursuant to INA section 216 is ineligible for adjustment of status under INA section 245 or the CAA.

[law applied to facts]

See the CAA, section 245(d) of the Immigration and Nationality Act (INA), and Title 8, Code of Federal Regulations (8 CFR), section 245.1(c)(5).

Are there any holes to poke here? Absolutely. USCIS has erred as a matter of law for two reasons.

II(A) – Matter of Stockwell

Section 216 of the Act governs conditional permanent resident ("CPR") status. If a CPR does not timely file an I-751 petition, or said petition is denied, USCIS will issue a letter terminating the CPR's status. The first clause of section 245(d) states that, "[t]he Attorney General may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent resident status on a conditional basis under section 216." USCIS takes the position that, despite the termination letter, the person is still a CPR and cannot become an unconditional LPR until the conditions are lifted, or until the person re-adjusts after entry of a final order of removal. Presumably, USCIS expects the person to successfully seek a waiver of the joint waiver requirement before an Immigration Judge. Alternatively, USCIS impliedly expects the person to file an I-485 after entry of an order of removal. Only a respondent charged as an arriving alien could follow that route,²¹ so it's really not that helpful.

In *Matter of Stockwell*, the BIA held that the termination of a CPR's conditional status is sufficient to make the person eligible for adjustment of status.²² "[S]ection 245(d)

²⁰ 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

²¹ See USCIS Memorandum, M.L. Aytes, "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status" (Jan. 12, 2007), *posted on AILA InfoNet at Doc. No. 07030661*.

²² 20 I&N Dec. 309 (BIA 1991).

does not prohibit an alien whose conditional permanent resident status has been terminated from adjusting his status under section 245(a) of the Act.”²³ The “implementing regulation clearly applies the bar in section 245(d) only to aliens currently holding conditional permanent resident status.”²⁴ Section 245(d) is not “a perpetual bar,” and it bars adjustment “only if the alien continues to be a conditional permanent resident under section 216 of the Act.”²⁵ Of note is the fact that the respondent in *Stockwell* was granted adjustment of status during the relief stage of the deportation proceedings against him.

Furthermore, the USCIS Adjudicator’s Field Manual (“AFM”) commands a contrary result:

Under section 245(d) of the Act, an alien who is a permanent resident on a conditional basis under section 216 of the Act is not eligible for adjustment of status under section 245(a) of the Act. The implementing regulation is 8 CFR 245.1(c)(5). In *Matter of Stockwell*, 20 I & N Dec. 309 (BIA 1991), the Board of Immigration Appeals adopted a narrow interpretation of 8 CFR 245.1(c)(5). Under this narrow interpretation, *the prohibition against adjustment of status no longer applies if USCIS has terminated the alien's conditional LPR status*. In 1996, the Attorney General proposed an amendment to the regulation, so that a conditional permanent resident would remain ineligible for adjustment of status even after termination of conditional LPR status. 61 Fed. Reg. 43,028 (1996). *Until the Department of Homeland Security publishes a final rule, and the final rule enters into force, however, USCIS officers are bound to follow Matter of Stockwell*. If an officer has a case in which an alien whose conditional LPR status has been terminated is seeking adjustment of status under section 245, the officer should consult with district or service center counsel concerning whether the 1996 proposed rule has been made a final rule.²⁶

Nearly twenty years later, the proposed regulation has yet to be published as a final rule. Thus, *Matter of Stockwell* is still binding on USCIS. The denial’s suggestion that “section 245(d) applies to a conditional resident even after the Service terminates the alien’s status, and does so until ... a final order of removal is entered in removal proceedings,” is clearly erroneous as a matter of law.

II(B) – The CAA is a Stand-Alone Basis for Adjustment of Status

The second reason that the denial is in error is that the language of section 245(d) expressly bars adjustment of status only under section 245(a). The Cuban Adjustment Act is not part of 245(a), nor is it even part of the INA.

The sample denial decision above insists that the applicant’s I-485 must be denied because the regulations provide that a conditional resident under section 216 is ineligible for adjustment of status under INA section 245 *or the CAA*. This conclusion

²³ *Id.* at 311-12.

²⁴ *Id.* at 311.

²⁵ *Id.* at 312, 314 (Heilman, concurring).

²⁶ AFM ch. 25.1(d) (emphasis added).

of law is not followed by any regulatory citation. However, in a latter portion of the denial decision, reference is made to 8 C.F.R. § 245.1(c)(5), which provides:

§ 245.1 Eligibility.

...

(c) *Ineligible aliens.* The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

...

(5) Any alien who is already an alien lawfully admitted to the United States for permanent residence on a conditional basis pursuant to section 216 or 216A of the Act, regardless of any other quota or non-quota immigrant visa classification for which the alien may otherwise be eligible;

....

Just like the statute, the regulation is expressly limited to adjustments of status under section 245(a) by its plain language.²⁷ The regulation does not mention Cuban adjustment. Nor does the broader regulation, 8 C.F.R. § 245.1. Not a single section of Part 245 ties ineligibility under the CAA to INA §§ 216, 245(d).²⁸ Furthermore, Part 245 has independent sections pertaining to adjustments of status not under section 245(a) for various classes of applicants, but not one for Cuban adjustment applicants.²⁹

Given that the Act and the regulations do not provide a legal basis for the denial's reasoning, one must turn to other sources of law. To begin with, the CAA expressly states that the bars in section 245(c) are inapplicable to its provisions.³⁰ However, this does not necessarily mean that the other bars in section 245 are applicable to Cuban Adjustment applications.

An enlightening precedent decision is *Matter of Sanabria*.³¹ In *Sanabria*, it was held that an applicant for adjustment under the CAA is not burdened by *any* limitation in

²⁷ The regulation purports to have a broader scope than the statute by barring adjustment under "section 245," but an expansive reading of the regulation would arguably be *ultra vires*.

²⁸ Part 245 is codified at 8 C.F.R. §§ 245.1 – 245.24. The only mentions of Cuban adjustment in Part 245 are made in passing within section 245.2, Application, which concerns itself with procedural requirements. See 8 C.F.R. §§ 245.2(a)(2)(ii) (proper filing requires one year physical presence, and inspection or admission after January 1, 1959); 245.2(a)(3)(i), (iv) (accompaniment of Forms G-325A and I-643); 245.2(a)(4)(iii) (effect of certain departures on "last arrival" date); 245.2(a)(5)(iii) (recording of roll back date); 245.2(b) (amendment of admission date for Cuban permanent residents admitted as such prior to November 2, 1966).

²⁹ See 8 C.F.R. §§ 245.3 (A and G nonimmigrants); 245.7 (Soviet and Indochinese parolees); 245.8 (section 101(a)(27)(k) special immigrants); 245.10 (section 245(i) applicants); 245.11 (S nonimmigrants); 245.15 (HRIFA applicants); 245.18 (certain physicians); 245.21 (certain nationals of Vietnam, Cambodia, and Laos); 245.23 (T nonimmigrants); 245.24 (U nonimmigrants).

³⁰ CAA § 1; see also AFM ch. 23.11(d) ("The bars to adjustment enumerated in section 245(c) of the Act are inapplicable.")

³¹ 12 I&N Dec. 396 (R.C. 1967).

section 245 of the Act. The Cuban Adjustment application in *Sanabria* was originally denied because of the bar to adjustment for alien crewmen in former section 245(a),³² which is currently found as one of the bars in section 245(c). The rationale behind this holding is that “the Act of November 2, 1966 is not amendatory legislation to section 245 of the Immigration and Nationality Act, but rather provides a mean for granting Cuban refugees permanent residence which is *separate and distinct from section 245(a)*.”³³ “This position is further buttressed by the language of section 1 of the Act of November 2, 1966 which states that ‘ . . . the status of *any alien* who is a native or citizen of Cuba * * * may be adjusted’”³⁴ Following the logic of *Sanabria*, there is absolutely no reason to treat a bar contained in section 245(d) any differently from a bar contained in section 245(a).

Additionally, the BIA recently held in *Matter of Artigas* that “the Cuban Adjustment Act is a specific grant of authority to adjust the status of Cubans who could not fulfill the requirements of section 245 of the Act. The Cuban Adjustment Act must therefore be considered separate and apart from adjustment of status under section 245 of the Act.”³⁵ This reasoning was used to hold that an immigration judge has jurisdiction over an arriving alien’s Cuban adjustment application despite the regulation barring jurisdiction over an arriving alien’s section 245 adjustment application. Just to be sure, the BIA did supersede *Artigas* in a later case—due to a change in the regulatory scheme permitting USCIS to adjudicate adjustment applications of arriving aliens in removal proceedings—but without overruling its conclusion that the CAA is separate and apart from section 245.³⁶

In addition to applicable regulations and administrative case law, there is also agency guidance that supports the conclusion that a Cuban adjustment application is not subject to the bar in section 245(d), or to the “comprehensive nature of INA section 216.” Specifically, applicable USCIS field guidance provides that “[t]he restrictions of section 216 of the Act do not apply” to Cuban Adjustment applications.³⁷

In conclusion, the CAA created an independent basis for adjustment separate from section 245 of the Act, and free from any of the restrictions within section 245. This conclusion is supported by the regulations, BIA case law, and USCIS guidance.

II(C) – The K Nonimmigrant’s Dilemma

The core rationale of the above sample denial is that section 245(d) of the Act bars a CPR, whose status was terminated by USCIS, from readjusting under the CAA.

³² *Id.* at 398 (“[T]he restriction on crewmen contained in section 245(a) is not applicable to aliens who are eligible in every other respect for adjustment of status as Cuban refugees.”).

³³ *Id.* at 397-98 (emphasis added).

³⁴ *Id.* at 398 (emphasis and ellipses in original).

³⁵ 23 I&N Dec. 99, 106 (BIA 2001) (citing *Cuban American Bar Ass’n v. Christopher*, 43 F.3d 1412 (11th Cir. 1996); *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984); *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).

³⁶ *Matter of Martinez-Montalvo*, 24 I&N Dec. 778 (BIA 2009).

³⁷ AFM ch. 23.11(e).

However, a CPR who was first admitted as a K nonimmigrant has another issue to consider. The second clause of section 245(d) provides the following:

The Attorney General may not adjust, *under subsection (a)*, the status of a nonimmigrant alien described in section 101(a)(15)(k) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant to the citizen who filed the petition to accord the alien's nonimmigrant status under section 101(a)(15)(k).³⁸

The standard language of the denial specifically discusses the intersection of section 245(d) with the comprehensive nature of section 216 to deduce its purported applicability to all adjustment applications. The denial wrongly incorporates an ineligibility argument simply because of the Cuban national's admission as a K nonimmigrant.

As described above, one can counter that section 245(d) is expressly limited to adjustments of status under section 245(a), and that, either way, the CAA is not subject to any restrictions in section 245 of the Act. Second, since our Cuban national in this case already adjusted to CPR status, it can be argued that she is no longer a nonimmigrant alien described in section 101(a)(15)(K), given that CPRs are immigrants as opposed to nonimmigrants. However, USCIS may not be willing to cave in so easily. In such a case, one must be wary of the restrictive language from the BIA found in *Matter of Valenzuela*,³⁹ and *Matter of Sesay*.⁴⁰

III – District Court Review of USCIS Denials

Following the discussion from above, this section of the advisory will discuss a recent development in Eleventh Circuit jurisprudence acknowledging that the CAA is a stand-alone basis for adjustment of status. The case in question, *Perez v. USCIS*,⁴¹ not only supports the prior arguments based on the CAA's independence from INA § 245, but also provides an avenue for judicial review of a USCIS denial of a Cuban adjustment application. The facts of the case will be discussed prior to analyzing the holdings.

Mr. Perez was born in Venezuela, and is a citizen of Cuba through his parents. USCIS denied his 2007 application for Cuban adjustment due to his alleged inadmissibility under INA § 212(a)(6)(C)(i), upon the accusation that Perez' Cuban birth certificate was fraudulently obtained.⁴²

USCIS also issued a Notice to Appear against Perez, charging him as an inadmissible arriving alien. The NTA alleged inadmissibility under section 212(a)(6)(C)(i) for fraud

³⁸ (emphasis added).

³⁹ 25 I&N Dec. 867, 871 (BIA 2012) (“The language of the statute clearly indicates Congress’ intent that all K visa holders can only adjust status based on a petition filed by the K visa petitioner after a bona fide marriage between that petitioner and the principal K visa beneficiary has been established.”).

⁴⁰ 25 I&N Dec. 431, 442 (BIA 2011) (“The fiancé(e) adjustment applicant can only adjust on the basis of the marriage to the fiancé(e) petitioner.”).

⁴¹ 774 F.3d 960 (11th Cir. 2014).

⁴² *Id.* at 962.

or misrepresentation, as well as under section 212(a)(7)(A)(i)(I) for lack of a valid entry document. USCIS asserted that the immigration judge sustained the fraud charge, and that Perez waived appeal before the IJ.⁴³

In 2011, Perez filed another application for Cuban adjustment with a Cuban civilian registered birth certificate showing that both his parents were born in Cuba, and a waiver of inadmissibility. He was denied for lack of evidence of extreme hardship, as required by the waiver provision. A subsequent motion to reopen or reconsider was denied for the same reason.⁴⁴

Thus, Perez filed a complaint in district court asserting a claim for relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, intending to challenge the finding of inadmissibility under section 212(a)(6)(C)(i). USCIS moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The district court granted the motion.⁴⁵

On appeal, the only issue was “the judge’s determination he lacked jurisdiction over Perez’s claim under the APA, because of Perez’s failure to exhaust available administrative remedies.”⁴⁶ The court of appeals noted, “[i]mmigration regulations provide ‘[n]o appeal lies from’ denial by USCIS of an application to adjust status under the CAA.”⁴⁷ The court held that, with regard to these regulations, “the term ‘appeal’ applies only to internal agency appellate review, given (1) appeals from USCIS decisions generally lie in the AAO, ... and (2) a complaint filed in district court under the APA is not an appeal but an independent action”⁴⁸ Interestingly, this suggests that the motion to reopen or reconsider was unnecessary in order to exhaust administrative remedies. Additionally, the court of appeals noted that “the IJ lacked jurisdiction to adjudicate or to readjudicate Perez’s application for adjustment of status under the CAA, regardless of whether the IJ may have purported to have done so.”⁴⁹ This was due to Perez’ “status as an ‘arriving alien.’”⁵⁰ Thus, the IJ’s finding of fraud had “no preclusive effect in this proceeding.”⁵¹

The Court’s inquiry then shifted focus to the jurisdictional bars in section 242 of the Act. Section 242(a)(2)(B)(ii) bars judicial review of any decision or action committed to the discretion of the Attorney General or the Secretary of the DHS under Title II of the INA, except with regard to asylum applications. This bar applies to decisions or actions made in or outside of removal proceedings. Clearly, Perez’ challenge to USCIS’ inadmissibility determination seeks review of a determination of an issue of law, not a discretionary denial. However, section 242(a)(2)(B)(i) bars judicial review of *any*

⁴³ *Id.*

⁴⁴ *Id.* at 963.

⁴⁵ *Id.* at 963-64.

⁴⁶ *Id.* at 964.

⁴⁷ *Id.* at 966 (*citing* 8 C.F.R. §§ 245.2(a)(5)(iii), 1245.2(a)(5)(iii)) (alteration in original).

⁴⁸ *Id.* at 967.

⁴⁹ *Id.* at 966.

⁵⁰ *Id.*

⁵¹ *Id.* at 968 (citation omitted).

judgment regarding the granting of relief under section 245(a), *inter alia*. Also, the exception for review of legal claims under section 242(a)(2)(D) is limited to issues raised upon a petition for review filed with a United States Court of Appeals, seeking review of a BIA decision.

Thus, the issue was whether the outright bar to judicial review of an application for adjustment of status under section 245(a)—outside the context of legal issues in a petition to review—applied to applications for adjustment under the CAA. As the court framed the issue, “[i]f the CAA is not part of § [245], then § [242](a)(2)(B)(i) does not bar judicial review of this determination.”⁵² The court “defer[red] to the BIA’s determination that the CAA is not part of § [245].”⁵³ Adjustment of status under the CAA is so different from adjustment of status under section 245 that not even the jurisdiction-stripping provisions of the INA are applicable. Therefore, a district court has jurisdiction to review a USCIS denial of a Cuban adjustment application via a claim for injunctive and declaratory relief under 5 U.S.C. §§ 702, 706(2)(A). Aggrieved applicants no longer need to seek an NTA in order to have their applications reviewed by a neutral arbiter.

Conclusion

It is common for a Cuban adjustment application to be denied due to prior UJC membership, or due to an overly expansive reading of section 216 of the Act. Arguments have been presented to counter such denials from USCIS. The author hopes that practitioners can resolve these matters without the need to invoke the jurisdiction of the judiciary.

However, should the need to file a complaint arise, the *Perez* decision establishes that applicants for Cuban adjustment are no longer subject to the whims of USCIS without any opportunity for recourse. Should USCIS erroneously deny a Cuban adjustment application, an applicant does not have to wait for the initiation of removal proceedings. Rather, an APA action can be filed in a United States District Court in order to seek prompt resolution of the matter without having to linger in perpetual limbo.

⁵² *Id.*

⁵³ *Id.* (after discussing *Matter of Artigas* and *Matter of Martinez-Montalvo*).