



A2

U.S. Department of Justice

Immigration and Naturalization Service

~~Deleting data deleted to prevent clearly unwarranted invasion of personal privacy~~



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE:



Office: Texas Service Center

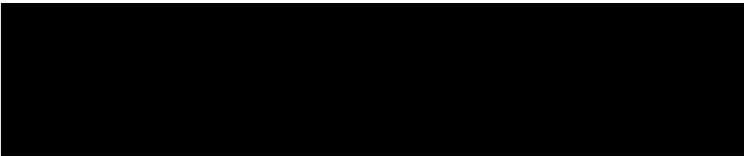
Date: **AUG 22 2002**

IN RE: Applicant:



APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, who certified his decision to the Associate Commissioner, Examinations, for review. The director's decision will be withdrawn, and the application will be approved.

The applicant is a native of Cuba and a citizen of Spain who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act of November 2, 1966. This Act states, 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, 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 director determined that the applicant was not eligible for adjustment of status because he was admitted to the United States under the Visa Waiver Program (VWP). The director, therefore, denied the application.

In response to the notice of certification, counsel asserts that the applicant is a Cuban national, and although he was admitted into the United States through the VWP pursuant to section 217 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1187, which restricts adjustment under section 245 of the Act, the Cuban Adjustment Act (CAA) contains no such restriction.

The record reflects that the applicant was born in Cuba on April 26, 1966, to Cuban nationals mother and father. It is not shown in the record when the applicant departed from Cuba to reside in Spain. The applicant entered the United States on June 18, 1999 at Miami, Florida, where he was inspected and admitted to the United States as a "WT" under the Visa Waiver Program pursuant to section 217 of the Act.

8 C.F.R. 217.3(a) states in pertinent part:

An alien admitted to the United States under this part may be admitted as a visitor for pleasure for a period not to exceed 90 days and must maintain his or her status as a visitor. An alien admitted under this part is not eligible for extension of his or her authorized period of temporary stay in the United States, is not eligible for

adjustment of his or her status to that of an alien lawfully admitted for permanent residence pursuant to section 245 of the Act, other than an immediate relative as defined in section 201(b) of the Act, 8 U.S.C. 1151(b), and is not eligible for change of nonimmigrant status pursuant to section 248 of the Act, 8 U.S.C. 1258.

The director, therefore, determined that applying for admission into the United States under the rules and regulations of the VWP prohibits the applicant from making an application to adjust status, and prohibited the applicant from staying in the United States longer than 90 days in order to achieve one year in the United States necessary for CAA adjustment. The director noted that as outlined on the I-94W, an alien admitted into the United States under the nonimmigrant class WB or WT may not apply for an adjustment of his or her status to temporary or permanent resident, and that the applicant should have been aware of these restrictions when he accepted entry under the VWP.

It is clear from Service regulations and from the statute that an alien admitted to the United States under the provisions of section 217 of the Act is not eligible for adjustment of status to that of a lawful permanent resident under section 245 of the Act. The applicant in this case is applying for adjustment of his status to permanent residence under section 1 of the Cuban Adjustment Act and not under section 245 of the Act. To be eligible for adjustment of status under section 1 of the CAA, an alien must show only that he is a native or citizen of Cuba, he was inspected and admitted or paroled into the United States, he has been physically present in the United States for at least one year, and that he is admissible to the United States for permanent residence. See also Matter of Masson, 12 I&N Dec. 699 (BIA 1968).

The applicant, in this case, was born in Cuba. He is, therefore, a native of Cuba, he was inspected and admitted into the United States subsequent to January 1, 1959, and he has been physically present in the United States for at least two years. He is, therefore, not precluded from adjustment of status under section 1 of the Cuban Adjustment Act of November 2, 1966. The director did not raise any other basis for denial, nor are there known grounds of inadmissibility.

Accordingly, the director's decision will be withdrawn, and the application will be approved.

ORDER: The director's decision is withdrawn. The application is approved.