U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FEB 06 2004

FILE: [redacted] Office: MIAMI, FLORIDA Date:

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida who certified his decision to the Administrative Appeals Office (AAO) for review. The acting district director's decision was affirmed. The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the district director and the AAO will be withdrawn, and the application will be approved.

The applicant is a native and citizen of Cuba 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 November 2, 1966. The CAA provides, in 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 acting district director determined that the applicant was not eligible for adjustment of status because he was not inspected and admitted or paroled into the United States. The district director, therefore, denied the application and the decision was affirmed by the AAO. *See District Director's decision* dated March 12, 2002 and *AAO decision* dated July 8, 2002. A previous application for adjustment or status was denied by the Acting District Director, Miami, Florida on August 10, 1992 and was affirmed by the AAO on January 28, 1993.

With the motion to reopen, the applicant's attorney submitted a brief asserting that the applicant had applied for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act (NACARA) rather than under section 1 of the CAA. The attorney stated that the attorney representing the applicant wrongly entered the section of law under which he was applying. As proof she submitted copies of the applicant's previously submitted G-325, Biographic Information forms, which shows NACARA as the reason for submitting the G-325 form.

By granting the motion to reopen the applicant's entire Service file was reviewed. The record reflects that the applicant entered the United States near Miami, Florida on January 1, 1983, and that he was not inspected by an officer of the Service upon entry.

When an alien enters the United States within the limits of a city designated as a port of entry, but at a point where immigration officers are not located, the applicable charge is entry without inspection. *See Matter of O-*, 1 I&N Dec. 617 (BIA 1943); *See also Matter of Estrada-Betancourt*, 12 I&N Dec. 191 (BIA 1967); *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973).

The record further reflects that on June 27, 1983 the applicant filed for asylum at the Miami, Florida district office. On July 18, 1984 the Service issued an I-94 on his behalf authorizing employment. Additionally the record reflects that the applicant appeared for an adjustment interview at the Miami, Florida district office on December 11, 1991.

On April 19, 1999, the Commissioner, Immigration and Naturalization Service, INS, issued a memorandum setting forth the Service's policy concerning the effect of an alien's having arrived in the United States at a place other than a designated port of entry on the alien's eligibility for adjustment of status under the Cuban Adjustment Act of 1966 (CAA), 8 U.S.C. § 1255. In her memorandum, the Commissioner states that this policy does not relieve the applicant of the obligation to meet all other eligibility requirements. In particular, CAA adjustment is available only to applicants who have been "inspected and admitted or paroled into the United States." An alien who is present without inspection, therefore, is not eligible for CAA adjustment unless the alien first surrenders himself or herself into Service custody and the Service releases the alien from custody pending a final determination of his or her admissibility.

The Commissioner concluded that if the Service releases from custody an alien who is an applicant for admission because the alien is present in the United States without having been admitted, the alien has been paroled. This conclusion applies even if the Service officer who authorized the release thought there was a legal distinction between paroling an applicant for admission and releasing an applicant for admission under section 236. When the Service releases from custody an alien who is an applicant for admission because he or she is present without inspection, the Form I-94 should bear that standard annotation that shows that the alien has been paroled under section 212(d)(5)(A).

In a footnote, the Commissioner added that it may be the case that the Service has released an alien who is an applicant for admission because he or she is present without inspection, without providing the alien with a parole Form I-94. In this case, the Service will issue a parole Form I-94 upon the alien's asking for one, and satisfying the Service that the alien is the alien who was released.

The applicant, in this case, presented himself to the INS on December 11, 1991 for an adjustment interview. By presenting himself to the INS the applicant surrendered himself into Service custody. The applicant was subsequently released from Service custody pending a final determination of his admissibility. Therefore, pursuant to the Commissioner's policy, the applicant has been paroled.

The applicant is eligible for adjustment of status to permanent residence pursuant to section 1 of the Act of November 2, 1966, and warrants a favorable exercise of discretion. Accordingly, the acting district director's and the AAO's decisions will be withdrawn, and the application will be approved.

ORDER: The acting district director's and AAO's decisions are withdrawn. The application is approved.