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**U.S. Citizenship
and Immigration
Services**

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AD

FILE:



Office: MIAMI, FLORIDA

Date:

FEB 12 2004

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)

ON BEHALF OF PETITIONER:



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 District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The district director's decision will be withdrawn, and the matter will be remanded to him for further action.

The applicant is a native and citizen of Chile 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 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 acting district director found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. The district director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application. *See District Director's Decision* dated September 27, 2003.

The record reflects that on August 4, 2001 at Hialeah, Florida, the applicant married Versaida Sanchez, a native and citizen of Cuba whose immigration status was adjusted to that of a lawful permanent resident of the United States, pursuant to section 1 of the CAA. Based on that marriage, on August 23, 2001, the applicant filed for adjustment of status under section 1 of the CAA.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who -

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States is inadmissible.

.....

(v) Waiver. - The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant was admitted to the United States with a nonimmigrant visa on July 28, 1991 and was authorized to stay until August 23, 1991. He remained longer than authorized and was unlawfully present in the United States from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his application for adjustment of status was filed. A review of the documentation in the applicant's Service file confirms that his I-485 Application for Adjustment of Status (I-485), was received by the Immigration and Naturalization Service (now, Citizenship and Immigration Services, "CIS") on August 23, 2001. He thus accrued unlawful presence from April 1, 1997 to August 23, 2001, a period of more than one year, making him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record further reflects that an I-512, Authorization for Parole of an Alien into the United States (I-512), was issued to the applicant on November 19, 2001. The record indicates that the applicant departed the United States on an unknown date after the issuance of the I-512. It was this departure that triggered his unlawful presence. Pursuant to section 212(a)(9)(B)(i)(II) he was barred from seeking admission within ten years of the date of his departure. He was paroled into the United States on February 17, 2002 to continue his application for adjustment of status.

On June 24, 2002 the applicant was instructed to submit Form I-601, Application for Waiver of Grounds of Excludability, along with the appropriate fee and documentation explaining how his deportation may result in extreme hardship to his qualifying relative. In his denial letter the district director stated that the applicant failed to comply with the Service's request as he had not filed the required waiver application, and denied the application for adjustment of status.

The applicant was offered an opportunity to submit evidence in opposition to the district director's findings. In response to the notice of certification counsel submitted a copy of the Form I-601, Application for Waiver of Grounds of Excludability, a copy of receipt for the application, issued by the Miami District office and a supporting letter. The evidence submitted establishes that the applicant filed the required Form I-601 on July 31, 2003. Based on the documentation submitted by the attorney, the AAO finds that the district director erred in denying the application for adjustment of status due to the fact that the applicant failed to file an application for waiver of excludability.

Accordingly the district director's decision will be withdrawn and the record will be remanded to him in order to adjudicate the application for waiver of grounds of excludability under section 212(a)(9)(B)(i)(II) of the Act.

ORDER: The district director's decision is withdrawn. The matter is remanded to him for further action consisted with the foregoing discussion.