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Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

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NOV 30 2004

[redacted]

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]

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 for review. The District Director's decision will be affirmed.

The applicant is a native and citizen of Argentina 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 District Director determined that the applicant did not qualify for adjustment of status as the spouse of a native or citizen of Cuba, pursuant to section 1 of the CAA, because his spouse was not paroled or admitted into the United States as a nonimmigrant. The District Director, therefore, denied the application. *See District Director Decision* dated March 4, 2004.

The applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. On certification counsel submits a brief and asserts that the District Director erred in finding the applicant ineligible for adjustment solely based on an unpublished AAO decision. In support to his assertion counsel refers to several decisions where the AAO overturned the original denial of the adjustment application. The decisions counsel refers to involve applicants who were Cuban natives, but not citizens of Cuba, and, based on section 1 of the CAA are eligible to adjust their status under section 1 of the CAA.

In support of his decision the District Director quoted an unpublished AAO decision that indicated that an applicant must be the spouse of an aliens who had been admitted into the United States under section 1 of the CAA. In his decision the District Director cited *Matter of Milian,* 13 I & N Dec. 480 (Acting Reg. Comm. 1970). The AAO has determined that the interpretation of *Matter Milian* as found in the quoted decision was incorrect. An applicant need only show that his or her Cuban spouse meets all the criteria of the CAA, not that the Cuban spouse was admitted to the United States under section 1 of the CAA.

The record reflects that on December 16, 2000, the applicant's spouse [redacted] was admitted to the United States for permanent residence as a F3-3 (child of an alien classified as F3-1). On March 31, 2003, at Miami, Florida, the applicant married Ms. [redacted] a native and citizen of Cuba. Based on that marriage, on April 11, 2003, the applicant filed for adjustment of status under section 1 of the CAA.

To be eligible for adjust of status under section 1 of the CAA an alien must show that he/she is a native or citizen of Cuba, he/she was inspected and admitted or paroled into the United States, he/she has been physically present in the United States for at least one year, and that he/she is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. *See Matter of Masson,* 12 I&N Dec. 699 (BIA 1968)

The statute clearly states that the provisions of section 1 of the CAA of November 2, 1966, shall be applicable to the spouse and child of any alien described in this subsection. In order for the applicant to be eligible for the benefits of section 1 of the CAA, he or she must be the spouse of a native or citizen of Cuba who has been inspected and admitted or paroled into the United States, and who has been physically present in the United States for at least one year. While the record shows that Ms. is a native of Cuba, and she appears to have been physically present in the United States for at least one year, she is not eligible to receive an immigration visa.

Public Law 89-732 (80 Stat. 1161), enacted November 2, 1966, added a provision to the Immigration and Nationality Act whereby the Attorney General may adjust the status of certain Cuban refugees to that of aliens lawfully admitted for permanent residence in the United States.

As noted above Ms. received an immigrant visa as a child of a married son or daughter of a U.S. citizen and was admitted for permanent resident status on December 16, 2000 and therefore is not eligible to apply for adjustment of status under section 1 of the CAA.

In reviewing the status of an alien applying for benefits under section 2 of the CAA of November 2, 1966, the Regional Commissioner determined that an applicant who had been admitted as an immigrant in possession of a valid immigrant visa had never "originally" arrived in the United States as a nonimmigrant or parolee subsequent to January 1, 1959. In reaching this conclusion, the Regional Commissioner stated that "[s]ection 1 obviously refers to those Cuban refugees who were inspected and admitted as nonimmigrants or paroled into the United States." *Matter of Benguria Y Rodriguez*, 12 I&N Dec. 143 (Reg. Comm. 1967), *reaffirmed by Matter of Baez Ayala*, 13 I&N Dec. 79 (Reg. Comm. 1968).

Section 101(a)(15) of the Immigration and Nationality Act (the Act), states in pertinent part: "The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . ." It continues to list all the nonimmigrant classifications. Individuals admitted as F3-3 are not included in the list, therefore, they are considered to be immigrants.

Notwithstanding the arguments on appeal, section 1 of the CAA is very specific and applicable. In the present case, the applicant's spouse was not inspected and admitted as a nonimmigrant or paroled into the United States, but was admitted instead as a lawful permanent resident with a valid immigrant visa. Therefore, the benefits of section 1 of the CAA are not available to the applicant.

Accordingly, the applicant is ineligible for adjustment of status to permanent residence, pursuant to section 1 of the CAA of November 2, 1966. The decision of the District Director to deny the application will be affirmed.

This decision is without prejudice to the filing of a Petition for Alien Relative (Form I-130) by the applicant's spouse on behalf of the applicant.

ORDER: The District Director's decision is affirmed.