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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

A2

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: AUG 16 2001

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 PETITIONER:

[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 (AAO) for review. The District Director's decision will be affirmed.

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 District Director found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year. The District Director, therefore, concluded that the applicant was ineligible for adjustment of status and denied the application. *See District Director's Decision* dated October 12, 2004.

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 –
>
> > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, ***and again seeks admission within 3 years of the date of such aliens' departure or removal is inadmissible.*** [Emphasis added.]

In his decision the District Director states that the applicant was unlawfully present in the United States from July 30, 2000, the date his authorized stay expired until March 26, 2001, the date his Application for Adjustment of Status (Form I-485), was received by the Immigration and Naturalization Service (INS).

The AAO finds that the District Director erred in stating that the application was received on March 26, 2001. A date stamp on Form I-485 indicates that INS received the Form I-485 on March 6, 2001. This office finds the Director Director's error to be harmless.

The record reflects that the applicant was admitted to the United States with an immigrant visa on July 29, 1998, as a conditional resident based on his marriage to a U.S. citizen. The applicant failed to filed a Petition to Remove the Conditions on Residence (Form I-751), prior to the expiration of his conditional status. The record further reflects that an Authorization for Parole of an Alien into the United States (Form I-512) was

issued to the applicant on September 4, 2001. The record further indicates that the applicant departed the United States on an unknown date after the issuance of the Form I-512 and he was paroled back on January 28, 2002, to continue his application for adjustment of status. It was this departure that triggered his unlawful presence.

On September 29, 2004, the applicant appeared at a Citizenship and Immigration Services (CIS) office for an interview regarding his application for adjustment of status. After he was found inadmissible under section 212(a)(9)(B)(i)(I) of the Act, he was asked if he had a qualifying family required to file a waiver under section 212(a)(9)(B)(v) of the Act. The applicant stated he did not have a qualifying family member.

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 submits a letter stating that the applicant is presently married to a U.S. citizen, has a US. Citizen child and is therefore eligible to file a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. Counsel submits a copy of the applicant's marriage certificate indicating that he married a U.S. citizen on October 21, 2004.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from July 30, 2000, the date his authorized stay expired, until March 6, 2001, the date his Form I-485 was received by INS. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I) of the Act the applicant was barred from again seeking admission within three years of the date of his departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I & N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment from his parole status. The applicant's departure was sometime prior to January 8, 2002. It has now been more than three years since the departure that made the inadmissibility issue arise in his application. A clear reading of the law reveals that the applicant is no longer inadmissible under section 212 (a)(9)(B)(i)(I) of the Act. He, therefore, does not need a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act.

As noted above on July 29, 1998, the applicant was admitted to the United States for permanent residence as a CR-1 (spouse of a citizen of the United States, conditional status) and on March 6, 2001, he filed for adjustment of status under section 1 of the CAA.

The statute clearly states that in order for an applicant to be eligible for the benefits of section 1 of the CAA of November 2, 1966, he or she must be 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. *See Matter of Milian*, 13 I&N Dec. 480 (Acting Reg. Comm. 1970) (applying the physical presence requirement as amended by Refugee Act of 1980, Pub. L. No. 96-212, sec. 203(i), 94 Stat. 102, 108 (1980)).

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).

In this case, the applicant was not inspected and admitted as a nonimmigrant or paroled into the United States, but was admitted instead as a conditional lawful 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, however, is without prejudice to the filing of a new application for adjustment of status, along with supporting documentation and the appropriate fee, now that the applicant has been paroled in the United States, has been physically present for at least one year and no other inadmissibility exists.

ORDER: The District Director's decision is affirmed.