U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: DEC 14 2005

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: SELF-REPRESENTED

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 The District Director's decision will be withdrawn, and the matter will be remanded to him for further action.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 Venezuela 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 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, (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. The District Director, therefore, denied the application. *See District Director Decision* dated June 11, 2005.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. No additional evidence has been entered into the record.

The record reflects that on May 23, 2001, the applicant's spouse, Mercedes Toledo Chaviano, adjusted her status to that of a lawful permanent resident pursuant to section 202 of the Nicaraguan Adjustment and Central American Relief Act. On July 9, 2004, at Coral Gables, Florida, the applicant married Ms. Toledo Chaviano, a native and citizen of Cuba. Based on that marriage, on November 22, 2004, the applicant filed for adjustment of status under section 1 of the CAA.

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. The spouse must meet all the requirements of section 1 of the CAA and be eligible for adjustment of status under the CAA not necessarily be admitted under the CAA. *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)).

A review of Ms [redacted] Service file [redacted] reveals that she entered the United States near El Paso, Texas, on December 30, 1987, without being inspected by a Service officer upon entry. The record

further reveals that on January 9, 1988, applied for asylum at the Miami, Florida district office. On the same date, a Contact Representative of the Immigration and Naturalization Service (now Citizenship and Immigration Service (CIS)) reviewed a copy of s birth certificate and returned the original to her. In addition, the file contains a copy of an Arrival-Departure Record (Form I-94), issued on January 9, 1988, authorizing employment.

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).

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.

In the present case, by applying for asylum and presenting herself to the INS, the applicant's spouse surrendered herself into Service custody. Ms. was subsequently released from Service custody and was issued a Form I-94 with employment authorization. Therefore, pursuant to the Commissioner's policy, the applicant's spouse has been paroled into the United States.

Based on the above, the AAO finds that the applicant's spouse is an alien described in section 1 of the CAA of November 2, 1966. Therefore, the applicant is eligible for adjustment of status to that of a lawful permanent resident under section 1 of the CAA, if no issues of inadmissibility exist.

The file contains little to establish the bona fides of the marriage and the District Director did not address that in his decision. Therefore, there is insufficient information to approve the application based on the current record. The District Director's decision will be withdrawn and the record will be remanded to him in order to make a determination on the bona fides of the relationship. The District Director will enter a new decision which, if adverse to the applicant is to be certified to the AAO.

ORDER: The District Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.