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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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FILE: [redacted] Office: MIAMI, FLORIDA Date: NOV 18 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 affirmed.

The applicant is a native and citizen of Peru 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 June 5, 2005.

The AAO notes that the record contains a Notice of Entry of Appearance as Attorney or Representative (Form G-28) that is signed by the applicant's spouse and not by the applicant. Therefore the AAO will not be sending a copy of the decision to the individual mentioned on the Form G-28.

In his decision the District Director cited an unpublished AAO decision that indicated that per *Matter of Milian*, 13 I & N, Dec. 480 (Acting Reg. Comm. 1970) an applicant must be the spouse of an alien who has been admitted into the United States under section 1 of the Act. This is an old decision that the AAO has since withdrawn, as the interpretation of *Matter of Milian* was incorrect. The correct interpretation of Matter of Milian is that the spouse must meet all the requirements of section 1 of the CAA, not that he or she necessarily was admitted under the CAA.

On notice of certification, the applicant was offered an opportunity to submit evidence in opposition to the District Director's findings. In response to the notice of certification the applicant submits a letter and a copy of a Certificate of Naturalization issued on March 23, 2004, on behalf of his spouse. In the letter the applicant states that during his interview at the Miami District office he was told that he could not apply for "naturalization" because his spouse was not under the Cuban adjustment act. In addition he states that they were told that after his spouse became a citizen of the United States he could apply again. Furthermore he states that they have submitted a Petition for Alien Relative (Form I-130) to CIS.

The record reflects that on September 8, 1995, the applicant's spouse [redacted] was admitted to the United States for permanent residence as a F4-3 (a child of a sibling of a U.S. citizen). On August 4, 2002, at Miami, Florida, the applicant married [redacted] a native and citizen of Cuba. Based on that marriage, on August 6, 2002, 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. *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).

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 F4-3 are not included in the list, therefore, they are considered to be immigrants.

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.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. Here, the applicant has not met that burden. Accordingly, the District Director's decision will be affirmed. This decision is without prejudice to any determination made on applications for adjustment of status through other sections of the Act.

ORDER: The District Director's decision is affirmed.