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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

APR 25 2005

FILE:

Office: MIAMI, FLORIDA Date:

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 APPLICANT:

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 The District Director's decision will be withdrawn, and the matter will be remanded to him for further action.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 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 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 District Director determined that the applicant was not eligible for adjustment of status because he was not inspected and admitted or paroled into the United States. The District Director, therefore, denied the application. *See District Director's Decision* dated July 9, 2004.

The applicant has provided no statement or additional evidence on notice of certification.

A review of the record reveals that on October 5, 1987, the applicant entered the United States without inspection at or near El Paso, Texas. The record reflects that on October 23, 1987, the applicant applied for asylum at the Miami, Florida district office. On January 8, 1990, the applicant appeared for an interview at the Miami district office regarding his asylum application.

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.

The applicant, in this case, presented himself to the INS on January 8, 1990, for an asylum interview. By applying for asylum and presenting himself to the INS the applicant surrendered himself into Service custody. The applicant was subsequently released from Service custody pending a final determination of his asylum application. Therefore, pursuant to the Commissioner's policy, the applicant has been paroled into the United States.

Based on the above the AAO finds that the applicant is eligible for adjustment of status to permanent residence pursuant to section 1 of the CAA of November 2, 1966, if no other inadmissibility exists.

The record of proceedings reveals that the applicant submitted a medical examination Form I-693, dated January 19, 2004, which indicates that he suffers from a communicable disease of public significance, namely the Human Immunodeficiency Virus (HIV). The applicant may be inadmissible to the United States pursuant to section 212(a)(1)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(A)(i), for having a communicable disease of public health significance.

Section 212(a)(1)(A)(i) of the Act provides, in pertinent part, that:

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome, . . . . is inadmissible.

Section 212(g) of the Act provides, in pertinent part, that:

The Attorney General may waive the application of subsection (a)(1)(A)(i) in the case of any alien who-

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa.

As noted above section 212(g) of the Act provides for a waiver of the bar to admission resulting from section 212(a)(1)(A)(i) of the Act if the applicant has a qualifying family member. A review of the record of proceedings reveals that the applicant's father resides in the United States. The applicant may have the required family member in order to be eligible to file a waiver application under section 212(g) of the Act. Accordingly the District Director's decision will be withdrawn and the record will be remanded to him in order allow the applicant the opportunity to submit an Application for Waiver of Grounds of Inadmissibility (Form I-601) under

section 212(g) of the Act, if it is determined that he is inadmissible under section 212(a)(1)(A)(i) of the Act and that he has the qualifying family member. Once a new decision is entered if adverse to the applicant, it shall be certified to the AAO for review accompanied by a properly prepared record of proceeding.

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