

Identifying data deleted in  
accordance with 5 U.S.C. 552a  
provisions of personal privacy  
protection

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



U.S. Citizenship  
and Immigration  
Services

A2



FILE:



Office: MIAMI, FLORIDA

Date: AUG 10 2005

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 PETITIONER:

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 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)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more 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 December 30, 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 -

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

.....

(v) Waiver. - The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant was paroled into the United States on January 24, 1996, until January 23, 1998. The record further reflects that on January 22, 1998, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) received an Application to Register Permanent Residence or Adjust Status (Form I-485) on behalf of the applicant. The application was rejected, as being improperly filed since the applicant had not submitted the proper fee. On March 11, 1998, the applicant forwarded a check in

order to cover the filing fee. That check was not cleared for payment. The application was terminated and closed. Finally on February 15, 2002, the applicant submitted a new Form I-485 with the appropriate fee.

The regulation at 8 C.F.R. § 103.2 (a) states in pertinent part:

Applications, petitions, and other documents.

*(7) Receipt date-(i) General.* An application or petition received in a Service office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted. An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as non-payable will not retain a filing date . . .

Since the application was not filed until February 15, 2002; the applicant accrued unlawful presence from January 23, 1998, to February 15, 2002, a period in excess of one year and is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record reflects that an Authorization for Parole of an Alien into the United States (Form I-512) was issued to the applicant on September 12, 2003. The record 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 10, 2004, to continue his application for adjustment of status. It was this departure that triggered his unlawful presence. Pursuant to section 212(a)(9)(B)(i)(II) he is barred from seeking admission within ten years of the date of his departure.

As stated above, section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, a U.S. citizen or lawfully resident spouse or parent.

On October 1, 2004, the applicant appeared for an interview regarding his application for adjustment of status. After he was found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, he was asked if he had a qualifying family member 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.

On 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.

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. He has failed to meet that burden. The decision of the District Director to deny the application will be affirmed.

**ORDER:** The District Director's decision is affirmed.