U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CHARLOTTE, NORTH CAROLINA Date: JUL 2 9 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, Atlanta, Georgia, who certified her decision to the Administrative Appeals Office (AAO) for review. The District Director's decision will be withdrawn, and the application will be approved.

The applicant is a native and citizen of Cuba who filed an application for adjustment of status to that of a lawful permanent resident on April 3, 2000.

The District Director adjudicated the Application to Register Permanent Residence of Adjust Status (Form I-485) under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966, and 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 September 3, 2002.

On appeal the applicant states the District Director erred in denying his application under CAA because he was applying for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). In addition he states that he filed his application on March 30, 2000, and submits a copy of a U.S. Postal Service, Certified Mail Receipt, dated March 30, 2000.

A review of the record of proceeding reveals that the applicant checked box "e" on Form I-485, which states:

> I am a native or citizen of Cuba admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least 1 year.

The AAO notes that nowhere in the record of proceeding is it noted that the applicant submitted the Form I-485 with the intention of applying for adjustment of status under section 202 of NACARA.

Section 202 of NACARA states in pertinent part:

> (a) Adjustment of Status.-
>
> > (1) In General.- Notwithstanding section 245(c) of the Immigration and Nationality Act, the status of any alien described in subsection (b) shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if the alien--
> >
> > > (A) applies for such adjustment before April 1, 2000; and
> > >
> > > (B) is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence, except in determining such admissibility the grounds for inadmissibility specified in paragraphs (4), (5), (6)(A), and (7)(A) of section 212(a) of the Immigration and Nationality Act shall not apply.

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 . . .

According to the record of proceeding the applicant entered the United States on or about November 10, 1986, and applied for asylum on December 15, 1986. On March 30, 2000, he mailed a Form I-485 to the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) that was received by the Texas Service Center on April 3, 2000. Since the application was not properly filed prior to April 1, 2000, the applicant is not eligible for adjustment of status under section 202 of NACARA.

As noted above the District Director adjudicated the application pursuant to section 1 of the CAA of November 2, 1966, and denied it because the applicant was not inspected and admitted or paroled into the United States.

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.

A review of the record reveals that on or about November 10, 1986, the applicant entered the United States without inspection by crossing the Rio Grande River. The record reflects that on November 11, 1986, the applicant was apprehended by U.S. Border patrol agents, was served with an Order to Show Cause (OSC) for a hearing before an Immigration Judge and he was released on his own recognizance.

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 was apprehended by Border patrol agents on November 11, 1986, and therefore he was in Service custody. He was subsequently released from Service custody pending a hearing before an Immigration Judge. Therefore, pursuant to the Commissioner's policy, the applicant has been paroled into the United States.

The applicant is eligible for adjustment of status to permanent residence pursuant to section 1 of the CAA of November 2, 1966, and warrants a favorable exercise of discretion. Accordingly, the District Director's decision will be withdrawn, and the application will be approved.

ORDER: The District Director's decision is withdrawn. The application is approved.