U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: JUL 07 2009
MSC 06 187 21736

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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, who certified her decision to the Administrative Appeals Office (AAO) for review. The district director's decision will be withdrawn and the matter remanded for the continued processing of the applicant's adjustment of status application.

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.

A review of the record reveals the following facts and procedural history. The applicant was admitted to the United States on March 25, 2005, as a K-4 nonimmigrant, based on an approved Form I-129F petition filed by the applicant's stepfather, a United States citizen. He filed a Form I-485, Application to Register Permanent Residence or Adjust Status on April 5, 2006, seeking to adjust his status pursuant to section 1 of the CAA.

The district director denied the application on March 29, 2007, determining that the applicant's admission into the United States as a K-4 nonimmigrant prevented him from adjusting status in any way other than as a spouse or child of the U.S. citizen who originally filed the petition for him. The district director cited the regulation at 8 C.F.R. § 256.1(i) which states in pertinent part:

> . . . An alien admitted to the U.S. as a K-3/K-4 alien may not adjust to that of permanent resident status in any way other than as a spouse or child of the U.S. citizen who originally filed the petition for that alien's K-3/K-4 status.

The district director certified her decision to the AAO for review. On certification, counsel for the applicant asserts that as the applicant is adjusting under the CAA, the restriction at 8 C.F.R. § 245.1(i) does not apply.

The AAO observes that the regulatory restriction on the adjustment of K-3/K-4 aliens found at 8 C.F.R. § 245.1(i) is imposed in the context of adjustment under section 245 of the Act. The following regulatory language at 8 C.F.R. § 245.1(i) which precedes the language that imposes the restriction on K-3/K-4 adjustments indicates:

> . . . An alien admitted to the United States as a K-3/K-4 under section 101(a)(15)(K)(iii) of the Act may apply for adjustment to that of permanent resident **pursuant to section 245 of the Act** [emphasis added] at any time following the approval of the Form I-130 petition filed on the alien' s behalf, by the same citizen who petitioned for the alien's K-3/K-4 status . . .

As the applicant in the present matter, is seeking adjustment under the CAA and not under section 245 of the Act, the applicant is not subject to the restrictions identified by the district director. In discussing the requirement that a CAA applicant have been inspected and admitted or paroled into the United States after January 1, 1959, Chapter 23.11(b)(2) of the United States Citizenship and Immigration Services' (USCIS) Adjudicator's Field Manual states that:

> Any inspection and admission or parole, **regardless of classification of admission** [emphasis added] . . . meets this requirement. *See Matter of Alvarez-Riera*, 12 I&N Dec. 112 (BIA 1967); *Matter of Rodriguez*, 12 I&N Dec. 549 (R.C. 1967); *Matter of Martinez-Monteagudo,* 12 I&N Dec. 688 (R.C. 1968).

Accordingly, the AAO finds that the applicant's K-4 admission to the United States on March 25, 2005 does not prevent him from benefiting from the provision of the CAA.

The AAO notes that the district director did not make any findings concerning whether the applicant is, otherwise, eligible for adjustment under the provisions of the CAA. Nor did the district director address whether the applicant merits a favorable exercise of discretion. Thus, the matter must be remanded for the director to address these issues. 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 she is eligible for adjustment of status. Accordingly, the AAO withdraws the district director's decision and remands the matter for continued processing of the applicant's Form I-485.

ORDER: The director's decision is affirmed. The matter is remanded for the director to continue processing the applicant's Form I-485.