



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

PUBLIC COPY

A2

[REDACTED]

FILE:

[REDACTED]

Office: NEWARK, NEW JERSEY

Date:

MAR 05 2009

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 Field Office Director (FOD), Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

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 first entered the United States on or about May 12, 1980 during the Mariel Boatlift. She applied for asylum and was interviewed regarding her claim on May 16, 1980. According to a Form I-566 in the record, the applicant was issued an I-94 card authorizing her parole into the United States also on May 16, 1980. On October 14, 1981, the applicant pled guilty to possession of cocaine in violation of New Jersey Criminal Statute 24-21-19a(1) then in effect. On December 7, 1981, the applicant was sentenced to three years probation for that offense. The applicant has filed five applications for adjustment of status pursuant to section 1 of the CAA, including the application that is the subject of this certification. All of the applications have been denied by the Service.

In a May 27, 2008 decision, the director determined that the applicant was not eligible for adjustment of status because her criminal history made her inadmissible to the United States. The director determined further that the applicant's "status is not immediately evident at this time" because the applicant has never provided evidence of her legal entry into the United States. The director denied the application and certified her decision to the AAO for review. The director informed the applicant that she had 30 days to supplement the record with any evidence that she wished the AAO to consider. Neither the applicant nor her attorney submitted additional evidence for consideration.¹

The AAO will first discuss the director's assertion that the applicant's "status is not immediately evident at this time."

¹ The record contains a June 29, 2008 letter from an [REDACTED] who claims that he represents the applicant. The attorney did not, however, submit a duly executed Form G-28, Notice of Appearance of Attorney or Representative. The AAO does not, therefore, recognize [REDACTED] as the applicant's current attorney of record. [REDACTED] letter discusses the applicant's eligibility for a "hardship waiver"; however, the applicant is not eligible to apply for a waiver of her ground of inadmissibility.

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 of the legacy 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 CAA. 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) of the Immigration and Nationality Act (INA).

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 AAO disagrees with the director that the applicant's status in the United States is not evident. The record shows that on May 16, 1980, the applicant was interviewed by a Service officer regarding her asylum claim and her reasons for leaving Cuba. By presenting herself to officers of legacy INS, the applicant surrendered herself into Service custody on May 16, 1980. A Form I-566 also indicates that the applicant was photographed on May 12, 1980, and subsequently released from Service custody and paroled into the United States, as she was provided with an I-94 card evidencing her parole status. Therefore, pursuant to the Commissioner's policy, the applicant has been paroled into the United States as of May 16, 1980. The director's comments regarding the ambiguity of the applicant's status will be withdrawn.

The second and final issue to discuss is the applicant's eligibility to adjust her status pursuant to section 1 of the CAA. As stated earlier in this decision, on October 14, 1981, the applicant pled guilty to possession of cocaine in violation of the New Jersey Criminal Statute 24-21-19a(1) and on December 7, 1981, she was sentenced to three years of probation for that offense.

Section 212(a)(2)(A) of the INA states:

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

* * *

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The applicant's October 1981 conviction of cocaine possession makes her inadmissible under section 212(a)(2)(A)(i)(II) of the INA, and there is no waiver 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 she is eligible for adjustment of status. The applicant has not met her burden. Accordingly, the AAO affirms the decision of the director to deny the applicant's application to adjust status pursuant to section 1 of the CAA.

ORDER: The director's decision is affirmed. The application is denied.