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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 30 Mass, 3/F
Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: [redacted] Office: Texas Service Center Date: AUG 22 2003

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

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO) for review. The case will be remanded to the director 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. This Act provides for the adjustment of 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, to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The director noted that the applicant had previously filed a Form I-485 and had already been approved adjustment of status, and that a LPR (Lawful Permanent Resident) card had been issued to the applicant. The director further noted that the applicant was paroled into the United States on September 27, 1999, and he applied for adjustment of status under section 1 of the CAA on June 20, 2000. Therefore, the applicant would not have been physically present in the United States for one year prior to the filing of the application. The director, therefore, denied the application.

A review of the record of proceeding reflects that the applicant, accompanied by his mother, entered the United States without inspection near Sunny Isles, Florida, on October 6, 1998. He was detained by the Service and subsequently placed in removal proceedings. On September 27, 1999, the applicant was paroled into the United States pursuant to the Commissioner's Service Memorandum dated April 19, 1999.[1] Based on an application

[1] On April 19, 1999, the Commissioner 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, would not be eligible for CAA adjustment unless the alien first surrendered himself or herself into Service custody and the Service released the alien from custody pending a final determination of his or her admissibility.

for adjustment of status under section 1 of the CAA, filed on or about March 21, 2000, the applicant was approved adjustment of status to permanent residence on September 18, 2000.

Subsequent to being paroled into the United States the applicant was physically present in the United States only for approximately nine months from the time of his parole until he filed his application for adjustment of status. It appears that his adjustment of status on September 18, 2000 was approved in error.[2] In *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987), the Court of Appeals held that it is absurd to suggest that the Service must treat acknowledged errors as binding precedent. The Service is not required to approve applications or petitions where eligibility has not been demonstrated. See *Matter of M-*, 4 I&N Dec. 532 (A.G. 1952; BIA 1952).

On June 20, 2000, the applicant again filed an application for adjustment of status under section 1 of the CAA. The director denied the application after determining that the applicant had not been physically present in the United States for one year after his parole on September 27, 1999 up to the date he filed this application on June 20, 2000. He also noted that the applicant had already been approved adjustment of status, and that a LPR card had already been issued.

The director is correct in his determination that the applicant had not demonstrated that, at the time of filing the adjustment application, he was physically present in the United States for one year since his parole. The applicant is, therefore, ineligible for the benefit sought.

The case, however, will be remanded in order that the director may consider two options: (1) since the applicant has been a lawful permanent resident for three years, leave the decision undisturbed; or (2) begin recision proceedings, but allow the applicant to refile now that he has been present in the United States for over one year since his parole. The director shall enter a new decision which, if adverse to the applicant, is to be certified to the AAO for review.

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[2] The attachment to the Commissioner's policy memorandum states that, "an alien may not apply for permanent residence under the 1966 Cuban Adjustment Act until at least a year has passed since the alien's admission or parole."

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.