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

U.S. Citizenship and Immigration Services

A2

FILE: [redacted] Office: ORLANDO, FLORIDA Date: APR 27 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, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The District Director's decision will be withdrawn, and the matter will be remanded to him for further action.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. 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.

The District Director determined that the applicant was not eligible for adjustment of status because he was not inspected and admitted or paroled into the United States. In addition the District Director determined that he has no jurisdiction in this case because the applicant is in deportation proceedings. The District Director therefore, denied the application. *See District Director's Decision* dated November 2, 2004.

A review of the record reveals that on October 18, 1986, the applicant entered the United States without inspection at or near San Ysidro, CA. The applicant was a dependent on an asylum application filed on October 23, 1986, by his father at the Miami, Florida district office. On the same day the Service issued an Arrival-Departure Record (Form I-94) on behalf of the applicant and authorized employment. On April 30, 1987, an Immigration Officer interviewed the applicant's father for asylum status. The application was denied and an Order to Show Cause for a hearing before an Immigration Judge was issued on September 13, 1989. On January 9, 1991, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251(a)(2)(1982), as an alien who entered the United States without inspection. The applicant failed to surrender for removal or depart from the United States and he is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

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, in this case, presented himself to the INS on April 30, 1987, for an asylum interview. By applying for asylum and presenting himself to the INS the applicant surrendered himself into Service custody. The applicant was subsequently released from Service custody and was issued a Form I-94 with employment authorization, pending a final determination of his father's asylum application. Therefore, pursuant to the Commissioner's policy, the applicant has been paroled into the United States.

Based on the above the AAO finds that the applicant is eligible for adjustment of status to permanent residence pursuant to section 1 of the CAA of November 2, 1966, if no other ground of inadmissibility exists.

As noted above, an Immigration Judge issued a final deportation order on January 9, 1991, and therefore the applicant is inadmissible pursuant to section 212(a)(9) of the Act, which states in pertinent part:

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law

. . . .

(iii) Exception. – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

The regulation at 8 C.F.R. 245.2 states in pertinent part:

(a) General --

> (1) Jurisdiction. An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and § 245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings. An arriving alien, other than an alien in removal proceedings, who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and § 245.1 shall apply to the director having jurisdiction over his or her place of arrival. . . .

The applicant is the present case is not in removal proceedings. A final order of deportation was issued on January 9, 1991, and therefore the District Director has jurisdiction over the application for adjustment of status. The applicant is eligible to seek permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii).

Accordingly, the District Director's decision will be withdrawn and the record will be remanded to him in order to allow the applicant the opportunity to submit an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). Once a new decision is entered, if adverse to the applicant, it shall be certified to the AAO for review accompanied by a properly prepared record of proceeding.

ORDER: The District Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.