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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: NOV 29 2007

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.

Robert P. Wiemann, 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). The District Director's decision will be withdrawn. The application will be approved.

The applicant is a native and citizen of Cuba who on March 30, 2006 applied to have his immigration status adjusted to that of an alien lawfully admitted for permanent residence under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The record also reflects that the applicant was admitted to the United States on March 26, 2005, as a K-4 nonimmigrant, based on a petition filed by the applicant's stepfather, a United States citizen. 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 provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

The regulation at 8 C.F.R. § 245.1(i) 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 determined that although the applicant is a native of Cuba, he was admitted as a K-4 nonimmigrant, and his adjustment to lawful permanent resident status is thus dictated by the regulation at 8 C.F.R. § 245.1(i). Accordingly, the District Director denied the application for adjustment of status under the CAA. *See District Director's decision*, dated September 19, 2006.

Counsel asserts that as the applicant is adjusting under the CAA, the restrictions at 8 C.F.R. § 245.1(i) do not apply. *Attorney's brief*, dated April 23, 2007.

The AAO notes 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 adjustments under section 245 of the Act. The following regulatory language at 8 C.F.R. § 245.1(i) precedes that which imposes the restriction on K-4 adjustments:

> . . . An alien admitted to the United States as a K-4 under section 101(a)(15)(K)(iii) of the Act may apply for adjustment to that of permanent residence **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 parent's K-3 status . . .

The applicant in the present matter, however, is not seeking adjustment under section 245 of the Act, but under the CAA and is, therefore, 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 Citizenship and Immigration Services' 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 26, 2005 does not prevent him from benefiting from the provisions 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. The AAO has reviewed the record of proceedings. On the basis of this review, the AAO concludes that the applicant is otherwise eligible for adjustment, and also merits a favorable exercise of discretion. The application in the present case, therefore, will be approved

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 he is eligible for adjustment of status. He has met that burden. The decision of the District Director to deny the application will be withdrawn and the application will be approved.

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