

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 09 2013** OFFICE: GUANGZHOU

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guangzhou, China, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of China was found inadmissible under section 212(a)(3)(B)(iii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(3)(B)(iii)(II) for engaging in terrorist activities. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) as a result of the applicant's criminal convictions in the United States.¹ The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), based on extreme hardship to his U.S. citizen spouse and U.S. citizen child.

On June 9, 2011, the Field Office Director concluded that the applicant's waiver applicant must be denied as there is no waiver available for inadmissibility under section 212(a)(3)(B) of the Act.

On appeal, the applicant states that he has repented for his actions and that his spouse and children are suffering hardship as a result of his inadmissibility. The applicant does not challenge his inadmissibility on appeal.

In support of the application, the record includes, but is not limited to statements from the applicant, a statement from the applicant's spouse, employment and financial documentation for the applicant's spouse, biographical information for the applicant and his spouse, biographical information for the applicant's children, and documentation relating to the applicant's criminal and immigration history.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

As a result of the applicant's conviction on November 25, 1997 for hostage taking in violation of 18 U.S.C. § 1203(a)², the Field Office Director found the applicant to be inadmissible under section 212(a)(3)(B) of the Act, which provides, in pertinent part, that:

(3) Security and related grounds

...

¹ The AAO notes that the applicant is also inadmissible under section 212(a)(9)(A)(ii)(II) for a period of twenty years since his departure on October 27, 1998, as the result of his conviction for an aggravated felony. An application for permission to reapply for admission after deportation or removal (Form I-212) has not been filed in this case and is not under consideration on appeal.

² The applicant was also convicted of carrying firearm during/in relation to crime of violence under 18 U.S.C. § 924(c) and received an aggregate sentence of 60 months in jail for the convictions.

(B) Terrorist activities

Any alien who--

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

The applicant has not challenged this ground of inadmissibility on appeal and the AAO does not have jurisdiction over matters involving inadmissibility under section 212(a)(3)(B) of the Act, for which no waiver is available, in conjunction with its review of the denial of Form I-601. The AAO's appellate authority in this case is limited to those matters that are within the scope of the Form I-601. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).³ The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect

³ Although 8 C.F.R. § 103(f)(3)(iii), as in effect on February 28, 2003, was subsequently omitted from the Code of Federal Regulations, courts have recognized that DHS continues to delegate appellate authority to the AAO consistent with that regulation. *See U.S. v. Gonzalez & Gonzalez Bonds and Insurance Agency, Inc.*, 728 F.Supp.2d 1077, 1082- 1083 (N.D. Cal. 2010); *see also Rahman v. Napolitano*, 814 F.Supp.2d 1098, 1103 (W.D. Washington 2011).

designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register.

Under section 103.1(f)(3)(iii)(F) (as in effect on February 28, 2003), the AAO has authority to adjudicate "[a]pplications for waiver of certain grounds of excludability [now inadmissibility] under § 212.7(a) of this chapter." 8 C.F.R. § 212.7(a)(1) currently provides that an alien who is inadmissible and eligible for a waiver may apply for a waiver on a form designated by U.S. Citizenship and Immigration Services (USCIS) in accordance with the form instructions. A waiver, if granted, applies to those grounds of inadmissibility and "to those crimes, events or incidents specified in the application for waiver." 8 C.F.R. § 212.7(a). The form instructions for the Form I-601, to which 8 C.F.R. § 212.7(a) refers, further defines the classes of aliens who may file a Form I-601, and the form itself provides a list of each ground of inadmissibility that can be waived, allowing the applicant to check a box next to those grounds for which the applicant seeks a waiver. As there is no statutory basis to waive inadmissibility under section 212(a)(3)(B) of the Act, neither the Form I-601 nor the instructions for Form I-601 list this ground of inadmissibility. As such, the AAO has no authority to review this finding of inadmissibility.

Moreover, because no waiver is available to the applicant for his inadmissibility under section 212(a)(3)(B) of the Act, no purpose would be served in discussing whether the applicant has established eligibility for a waiver under section 212(h) of the Act or whether he would merit the waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.