**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals*
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

#6

[redacted]

DATE: OCT 10 2012 OFFICE: SAN SALVADOR FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); Application for Permission to Reapply for Admission into the United States after Deportation or Removal filed under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

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 in accordance with the instructions on 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,

Ellen C. Johnson

Perry Rhew, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of departure from the United States. The applicant was also found to be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), due to the removal order entered in his case on August 13, 2001 at the Immigration Court in San Antonio, Texas. Due to the applicant's failure to attend his removal proceedings he was also found to be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant seeks a Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse. He also seeks Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) pursuant to Section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

In a decision dated January 26, 2011, the Field Office Director denied the applicant's Form I-601 and Form I-212, as result of the applicant's inadmissibility under section 212(a)(6)(B) of the Act.

On appeal, counsel for the applicant does not contest the applicant's inadmissibility, but states that the applicant has established reasonable cause for failure to attend his removal hearing.

In support of the waiver application, the record includes, but is not limited to, legal briefs from counsel, statements from the applicant, a statement from the applicant's spouse, a letter from the applicant's stepdaughter, biographical information for the applicant and his spouse, biographical information for the applicant's son, letters of support, employment information, documentation of expenses, country conditions reports on El Salvador, and documentation concerning the applicant's immigration history.

The applicant was found inadmissible under Section 212(a)(9) of the Act, which provides, in pertinent part, that:

> (B) ALIENS UNLAWFULLY PRESENT.-
> (i) *In general.- Any alien (other than an alien lawfully admitted for permanent* residence) who-
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> ...
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> ...

> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record establishes that the applicant entered the United States without inspection on November 14, 1999 and was later apprehended by immigration authorities and placed into removal proceedings. The applicant was ordered removed *in absentia* by the Immigration Judge in San Antonio, Texas on August 13, 2001, but remained in the United States until his departure at his own expense on March 24, 2009. The applicant applied for and received Temporary Protected Status in the United States from July 20, 2001 through his departure. As a result of the applicant's unlawful presence in the United States from November 14, 1999 until July 19, 2001, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more. The applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is in effect for 10 years after the date of his last departure from the United States. The applicant has not disputed this finding of inadmissibility.

As a result of his removal order, the applicant was also found to be inadmissible under section 212(a)(9)(A)(ii) of the Act. Section 212(a)(9) of the Act states in pertinent part:

> (A) Certain aliens 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, or
> (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
> (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.
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> ...

The applicant is also inadmissible under section 212(a)(9)(A)(ii) of the Act for a period of 10 years from his date of departure.

As a result of the applicant's failure to attend removal proceedings, he is also inadmissible under section 212(a)(6)(B) of the Act, which provides, in pertinent part:

> (B) Failure to Attend Removal Proceeding

> Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

Based on the *in absentia* removal order, the applicant is inadmissible to the United States and remains inadmissible for a period of five years from the date of his departure from the United States. There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act.

The AAO notes that counsel for the applicant states that the applicant had "reasonable cause" for failing to attend his removal proceeding, and that he is not inadmissible under section 212(a)(6)(B) of the Act as a consequence. There is no statutory waiver available for inadmissibility under section 212(a)(6)(B), but an alien is not inadmissible if the alien can establish that there was a "reasonable cause" for failure to attend the removal proceeding. The AAO, however, lacks subject matter jurisdiction to review inadmissibility under section 212(a)(6)(B) of the Act in conjunction with its review of the denial of Form I-601 or Form I-212. The AAO's appellate authority in this case is limited to those matters that are within the scope of the Form I-601 and Form I-212. 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).[1] 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 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.

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[1] 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).

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)(6)(B) of the Act, neither the Form I-601 nor the instructions for Form I-601 list this ground of inadmissibility. This ground of inadmissibility is also not addressed by Form I-212. As such, the AAO has no authority to review the reasonable cause for the applicant's failure to appear at his hearing or his related inadmissibility under section 212(a)(6)(B) of the Act .

Because the applicant remains inadmissible under section 212(a)(6)(B) of the Act no purpose would be served at this time in adjudicating a waiver of the applicant's inadmissibility under section 212(a)(9)(B)(v) of the Act (Form I-601) or his application for permission to reapply after deportation or removal (Form I-212), the applicant's Form I-601 and Form I-212 were properly denied.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, and permission to reapply under section 212(a)(9)(A)(iii) 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.