U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: FEB 07 2013 Office: SANTA ANA FILE: [redacted]

IN RE: Applicant: [redacted]

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

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601), the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) and the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) were concurrently denied by the Field Office Director, Santa Ana, California, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The record establishes that the applicant is a native and citizen of Mexico who entered the United States without being admitted in 1994. She obtained V1 nonimmigrant status on August 20, 2002 and in July 2003, the applicant departed the United States and returned to Mexico. In July 2003, the applicant attempted to procure entry to the United States stating she had V1 status, but had no visa and was returned to Mexico. The applicant re-entered the United States without being admitted in August 2003 and has remained in the United States to date. *Record of Sworn Statement in Affidavit Form*, dated September 6, 2011. The applicant was found to be inadmissible to the United States under 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 more than one year. The applicant was also found to be inadmissible under 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I) based on the applicant's entry without being admitted in August 2003 after having been unlawfully present in the United States for an aggregate period of more than one year. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse and children.

The field office director noted that there was no waiver available to the applicant based on her inadmissibility under section 212(a)(9)(C)(i)(I) of the Act because she had not waited outside the United States for 10 years as required by law. The applicant's Form I-601, Application for Waiver of Grounds of Excludability (Form I-601) was denied accordingly. In addition, the applicant's Form I-485, Application to Adjust Status, and the Form I-212, Application for Permission to Reapply for Admission into the United States, were concurrently denied. *Decision of the Field Office Director*, dated December 29, 2011.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(9)(C)(i)((I) of the Act because she was never the subject of an order of expedited removal. In addition, counsel contends that the applicant is eligible to adjust status because she is the beneficiary of an approved immigrant petition with a priority date prior to April 30, 2001. *See Form I-290B, Notice of Appeal*, dated January 11, 2012.

Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > . . . .

(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 [now the Secretary of Homeland Security (Secretary)] 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 [Secretary] 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…

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

To begin, the record does not indicate that a determination was made that the applicant was subject to an order of expedited removal. The AAO concurs with the Field Office Director that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act based on her August 2003 entry to the United States without being admitted after having been unlawfully present in the United States for an aggregate period of more than one year.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of

the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and did not remain outside the United States for ten years since her last departure in 2003. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act.

As for counsel's assertion that the applicant is eligible to adjust status based on the approved Form I-1-130 with a priority date of January 26, 1998, 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.

The AAO does not have jurisdiction over denials of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act. Any evidence concerning whether the applicant is in fact eligible to adjust status must be submitted to the field office director pursuant to the laws and regulations in place.[1]

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative or whether she merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, 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. The waiver application is denied.

[1] The AAO notes that the Field Office Director issued one decision denying the applicant's Forms I-601, Form I-212, and Form I-485 and informing the applicant that an appeal could be submitted to the AAO. As there is no appeal from a denial of a Form I-485 Application to Adjust Status, the director should have issued a separate decision denying the Form I-485 and providing instructions concerning the procedure for filing of a motion to reopen with the Field Office that denied the application.