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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BALTIMORE Date: SEP 01 2009

IN RE: [redacted]

APPLICATION: Application for Adjust Status to Permanent Residence under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for adjustment of status was denied by the District Director, Baltimore, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

Counsel noted on the Form I-290B Notice of Appeal (Form I-290B) that the applicant is appealing the decision of the district director dated May 17, 2007. However, the district director's decision of May 17, 2007 was a dismissal of the applicant's motion to reopen/reconsider her Form I-485 Application to Adjust Status (Form I-485), not the denial of her Form I-601 Application for a Waiver of Inadmissibility (Form I-601) as was noted in the narrative on the Form I-290B. [1]

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), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.

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 an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act. Accordingly, the appeal must be rejected.

However, even if the AAO were to consider this an appeal of the I-601 waiver application, in order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the

[1] The applicant filed her Form I-485 on March 31, 2000. On August 8, 2006 the director sent the applicant a Notice of Intent to Deny (NOID) the Form I-485, requesting, among other documents a Form I-601 to waiver her inadmissibility under section 212(a)(6)(C) of the Act due to her entry into the United States with a fraudulent passport. On October 11, 2006 the Form I-485 was denied due to abandonment as the applicant had failed to respond to the NOID. On November 9, 2006 counsel filed a Motion to Reopen (MTR) the director's decision. The MTR was dismissed on January 3, 2007. On the same date, the director denied the applicant's Form I-601. On February 1, 2007 counsel filed a second MTR. On April 2, 2007, that MTR was dismissed. On May 2, 2007 counsel filed a third MTR related to the applicant's Form I-485. That MTR was dismissed on May 17, 2007, specifically noting that is was a dismissal of the MTR related to the Form I-485.

decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the district director issued the decision on January 3, 2007. It is noted that the district director properly gave notice to the petitioner that it had 33 days to file the appeal. Counsel dated the appeal June 13, 2007, and it was received by the district director on June 15, 2007, 163 days after the decision was issued. Accordingly, the appeal was untimely filed and would be rejected for that reason as well.[2]

ORDER: The appeal is rejected due to lack of jurisdiction and untimely filing.

[2] The AAO notes that the applicant was removed from the United States on April 16, 1997. She apparently reentered the United States at some point, though when or how is unclear. If she reentered without permission she may be subject to section 212(a)(9)(C)(II) of the Act, in addition to the previous finding of inadmissibility under section 212(a)(6)(C) of the Act.