

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



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

H2

DATE: **JUN 20 2012** OFFICE: DALLAS, TX

FILE: [REDACTED]

IN RE: APPLICANT: [REDACTED]

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

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 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The I-601 waiver application and a subsequent motion to reopen were denied by the Field Office Director, Dallas, Texas, and the application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Kenya who has a conviction for fraud and misuse of visas, permits, and other documents under 8 U.S.C. § 1546. The applicant was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured documentation through fraud or misrepresentation. He was also found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. Citizen spouse and child.¹

The Field Office Director concluded that the applicant did not have a pending petition or application, and denied the application accordingly. *See Decision of Field Office Director* dated June 28, 2011. The Field Office Director denied a subsequent motion to reopen because the applicant failed to present new facts in the motion. *See Motion to Reopen Decision* dated November 8, 2011.

On appeal, counsel for the applicant contends that immigration judges may reopen proceedings pursuant to a motion to reopen based on changed circumstances, which are present in this matter. It is noted that the current proceeding is before the AAO, not an immigration judge, so the various sections of the regulations and case law related to immigration court proceedings cited to by counsel are not relevant here. Counsel asserts that the applicant has shown the existence of extreme hardship to his U.S. Citizen spouse and children, and that he merits a favorable exercise of discretion. Counsel also requests that the appeal be reviewed by a three member panel, and makes references to both the Board of Immigration Appeals (BIA) and the AAO in the brief. In doing so, counsel appears to conflate and confuse the BIA and the AAO. It is noted that the BIA and the AAO are separate entities and have jurisdiction over different matters. The BIA has jurisdiction over appeals listed in 8 C.F.R. § 1003.1(b)(1), and the AAO has jurisdiction over appeals pursuant to 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 does not have appellate jurisdiction over the denial of an application for adjustment of status. 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 her through the

¹ It is noted that after the Field Office Director's June 28, 2011 decisions denying the Forms I-601, I-212, and I-485, the applicant filed a motion to reopen the I-601 decision only. *See Form I-290B, Notice of Appeal or Motion*, dated August 11, 2011. The current Form I-290B indicates that all three decisions are being appealed. As neither the Form I-212 nor Form I-485 was included in the motion, an appeal of those decisions is beyond the 33 days allowed, is untimely and, therefore, improperly filed. *See 8 C.F.R. § 103.3(a)(2)(i).*

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 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 the denial of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act.

A Form I-601 waiver application is viable when there is a pending adjustment of status application (Form I-485) or an immigrant visa application. In this case, the applicant's Form I-485 was denied on June 28, 2011. There was no motion to reopen this application and it remains denied. The Field Office Director found that USCIS did not have jurisdiction to adjudicate the applicant's adjustment of status application. Because the applicant was found ineligible to adjust status for reasons other than his inadmissibility under sections 212(a)(6)(C) and 212(a)(2)(A)(i)(I) of the Act, no purpose would be served in reviewing the Form I-601 and examining the hardship to the applicant's wife and children. Accordingly, the appeal of waiver application must be dismissed.

ORDER: The appeal is dismissed.