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



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CHARLOTTE, NC

Date: **MAR 22 2010**

IN RE:

APPLICATION:

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

ON BEHALF OF APPLICANT:

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).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Charlotte, North Carolina, and is now before the Administrative Appeals Office (AAO) on appeal. As the AAO does not have jurisdiction over the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, and determination of the issues relevant to the applicant's Form I-601, Waiver of Grounds of Inadmissibility, cannot alter the basis of the Form I-485 denial, no purpose would be served in adjudicating the appeal. The appeal will be dismissed.

The applicant is a native and citizen of Somalia who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, for attempting to procure entry to the United States by fraud or willful misrepresentation. The applicant's spouse is a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Form I-601 Decision of the Field Office Director 7-8* (February 25, 2008).

On appeal, counsel asserts that the legal test of extreme hardship has been met in this specific case. *Brief in Support of Appeal 10* (April 23, 2008).

The record includes, but is not limited to, counsel's brief, a family medical evaluation, an affidavit from counsel, a report card for one of the applicant's children, country conditions information on Somalia, and articles and reports on Wake County schools and its healthcare system. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant presented a passport that did not belong to him in order to obtain admission into the United States on October 29, 1996 at Dulles International Airport. Based on this misrepresentation, the AAO finds the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

In a decision also dated February 25, 2008, the field office director denied the applicant's Form I-485 on the basis of the applicant's inadmissibility. After the applicant filed the instant appeal, the field office director reopened that decision. On August 11, 2008, the field office director denied the applicant's Form I-485 on the basis that U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction over the application because the applicant had previously been in exclusion proceedings and USCIS has no records indicating that those proceedings have been terminated.

Form I-485 Decision of Field Office Director 2 (dated August 11, 2008). The field office director indicated that the "instant appeal will be forwarded to the Administrative Appeals Unit. . .for further consideration." *Id.* Counsel subsequently submitted a brief to the AAO arguing that USCIS does have jurisdiction over the applicant's Form I-485. *Motion to Reopen/Appeal-Response to USCIS Decision Letter Dated August 11, 2003* (September 18, 2008).

Although the AAO has jurisdiction over decisions denying Form I-601 applications, it does not have jurisdiction over decisions denying Form I-485 applications. Because the decision denying the Form I-485 was not certified to the AAO, the AAO does not have jurisdiction over that decision and cannot make a determination as to whether the basis of the denial was correct. 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).

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 at 1175, 1178 (1st Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register.

It may have been the intent of the field office director to certify the Form I-485 decision to the AAO, but the certification process described in 8 C.F.R. § 103.4 was not followed. Therefore, the AAO must accept the basis of denial of the applicant's Form I-485. The AAO finds that no purpose would be served in adjudicating the Form I-601 appeal as there is no pending Form I-485 to support an application for a waiver of inadmissibility and granting a waiver will not affect the basis of the Form I-485 denial.¹ Accordingly, the appeal will be dismissed.

¹ The AAO notes that a Form I-601 is based on a pending Form I-485. *See* 8 C.F.R. § 212.7(a)(1)(ii). If the applicant's Form I-485 had been denied based on a ground of inadmissibility that could be waived by a Form I-601 application on appeal to the AAO, then the AAO would adjudicate the Form I-601 appeal; the Form I-485 would be deemed to still be pending awaiting the AAO's finding regarding the applicant's eligibility for a waiver of inadmissibility. An application for admission or adjustment of status is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). In this case, however, a decision on the merits of the Form I-601 (which includes any determination of inadmissibility) would have no effect on the decision by the field office director to deny the Form I-485 on an eligibility ground unrelated to inadmissibility, and, therefore, no pending Form I-485 exists upon which a Form I-601 can be based.



ORDER: The appeal is dismissed.