

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



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

PUBLIC COPY



H5

DATE: **MAR 05 2012** OFFICE: OAKLAND PARK, FL FILE:

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 Field Office Director, Oakland Park, Florida, denied the Form I-601, Application for Waiver of Inadmissibility (Form I-601). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The record reflects that the applicant is a native and citizen of Peru. She entered the United States on August 20, 1995, as a conditional permanent resident. On August 7, 1996, U.S. Citizenship and Immigration Services (formerly Immigration and Naturalization Service) determined the applicant had obtained her conditional resident immigration status through marriage fraud, in violation of section 216(c) of the Act, 8 U.S.C. §1186a(c). The applicant's immigration status was terminated accordingly, and on November 4, 1996, the applicant was placed into deportation proceedings. The deportation proceedings were terminated on April 17, 1998, to allow the applicant to apply for a good-faith marriage-related hardship waiver under section 216(c)(4) of the Act. The record contains no evidence that the applicant applied for a hardship waiver under section 216(c)(4) of the Act. The applicant married her current husband on September 24, 1997, and filed a new Form I-485, adjustment of status application as the dependent spouse of a native and citizen of Cuba who became a lawful permanent resident under the Cuban Adjustment Act. The applicant seeks a waiver of her ground of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), so that she may remain in the U.S. with her spouse.

In a decision dated August 5, 2009, the director found the applicant 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), because she sought or procured a visa, other documentation, or admission into the United States through marriage fraud. The director determined the applicant did not meet the requirements for a waiver of her ground of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), because she failed to establish that her current husband would experience extreme hardship if she were denied admission into the United States. The director determined further that the applicant failed to establish that she merited an exercise of discretion. The waiver application was denied accordingly. The record reflects that, in addition to finding the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, the director determined in the denial of her Form I-485 adjustment of status application, that the applicant no longer resided with her spouse, and that she was therefore statutorily ineligible to adjust her status under the Cuban Adjustment Act.¹

On appeal the applicant asserts, through counsel, that evidence in the record establishes her husband will experience extreme hardship if she is denied admission into the United States. Counsel

¹ Section 1 of the Cuban Adjustment Act, Pub. L. 89-732 (November 2, 1966) provides, in pertinent part:

[T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General [now the Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. . . . The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

concludes that the waiver application should therefore be approved. Counsel does not contest the finding that the applicant engaged in marriage fraud, or that she is inadmissible under section 212(a)(6)(C)(i) of the Act.²

Section 1 of the Cuban Adjustment Act provisions apply to the spouse or child of an alien lawfully admitted for permanent residence under the Cuban Adjustment Act, regardless of their citizenship and place of birth, where the spouse or child is residing with such alien in the United States. *See also, Matter of Bellido*, 12 I&N Dec. 369, 370 (R.C. 1967) (stating, "[t]he language of the Cuban Adjustment Act clearly restricts its benefits to aliens who are natives or citizens of Cuba and to their spouses and children who are residing with them in the United States.") In the present matter, the director found that the applicant was ineligible to adjust her status under the Cuban Adjustment Act because she is not a native or citizen of Cuba, and she is not residing with her Cuban citizen husband in the United States.

The AAO, as part of its appellate jurisdiction, reviews findings of inadmissibility that necessitate the filing of a Form I-601 in the first instance. However, where the underlying adjustment application is denied on a basis other than inadmissibility that can be waived, AAO review is limited. 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 1175, 1178 (1st Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register.

As the purpose of the Form I-601 is to waive inadmissibility for purposes of establishing eligibility to adjust status, and as the applicant has been deemed ineligible and the adjustment application denied on a ground that cannot be cured by adjudication of the waiver application, the applicant's Form I-601 waiver application is moot and the appeal of the denial of the waiver application shall be dismissed.

ORDER: The waiver appeal is dismissed as moot.

² Counsel indicates on the Form I-290B, Notice of Appeal that a brief and/or additional evidence will be submitted to the AAO within 30 days. No additional brief or evidence was received, and the present decision is based on the evidence in the record.