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

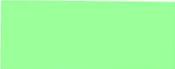


U.S. Citizenship
and Immigration
Services



Date: **APR 24 2014**

Office: BOSTON

FILE: 

IN RE: Applicant: 

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boston, Massachusetts. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case is remanded to the Field Office Director for further action and consideration.

The applicant is a native and citizen of the Dominican Republic who claims 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 admission to the United States through fraud or misrepresentation. The applicant is the spouse of a lawful permanent resident and the beneficiary of an approved Form I-130, Petition for Alien Relative, filed by his U.S. citizen daughter. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his spouse.

The Field Office Director concluded that the applicant failed to establish he is eligible to adjust his status to that of a lawful permanent resident under section 245(a) of the Act, because there was insufficient evidence to establish that the applicant ever was admitted or paroled into the United States. The Field Office Director also found that the applicant failed to establish he is eligible to adjust his status under section 245(i) of the Act, because he did not demonstrate that he falls within one of the enumerated classes of eligible individuals under that statute. Therefore, the Field Office Director concluded that the applicant had no basis to file a waiver application or adjust his status. The Field Office Director denied the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), and his Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), on the same day. *See Decisions of the Field Office Director*, dated June 19, 2013.

On appeal, counsel asserts that the applicant provided ample testimonial evidence regarding his manner of entry into the United States. Counsel also contests the Field Office Director's finding that the applicant failed to establish that he has a qualifying relative in the United States.

In addition to appealing the Form I-601 denial, the applicant also filed a motion to reopen and reconsider the denial of his Form I-485 application. *See Form I-290B, Notice of Appeal or Motion for Form I-485*, filed July 19, 2013.

The evidence of record includes, but is not limited to: a statement from the applicant; medical evidence for the applicant's spouse including a psychological evaluation; documents establishing identification and relationships; and letters of reference. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

- (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 applicant claims he entered the United States at Miami International Airport on or about September 8, 1998, using a passport and visa belonging to another person. The applicant also asserts that after he was

admitted to the United States, he mailed the passport to the person who arranged for the passport to be made available to the applicant in the Dominican Republic.

The issues counsel raises on appeal appear to concern the applicant's eligibility to file Form I-485 and adjust his status to that of lawful permanent resident based on his purported entry using fraudulent documents. A Form I-601 waiver application is viable when there is a pending Form I-485 application or immigrant visa application. The Form I-485, denied on June 19, 2013, currently has a pending motion to reopen and reconsider. Therefore, before the AAO addresses whether the applicant qualifies for a waiver, the Field Office Director must review and adjudicate the applicant's motion to reopen and reconsider the Form I-485 application.

The AAO lacks jurisdiction over denied adjustment applications filed under section 245 of the Immigration and Nationality Act. 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).

If, upon review of the applicant's motion to reopen and reconsider, the Field Office Director finds the applicant ineligible to adjust his status to lawful permanent resident under any section of the Act, then the applicant has no basis for a Form I-601 waiver application and the appeal of the Form I-601 application would be dismissed. If the Field Office Director finds that the applicant is eligible to adjust his status to lawful permanent resident after adjudicating the motion to reopen and reconsider but is inadmissible to the United States, then the Field Office Director shall issue a new decision on the Form I-601 waiver application and certify this decision to the AAO. The AAO will then adjudicate the Field Office Director's denial of the Form I-601 waiver application.

ORDER: The case is remanded to the Field Office Director, Boston, Massachusetts, to adjudicate the applicant's motion to reopen and reconsider the denial of the Form I-485 application. If the Field Office Director finds that the applicant is eligible to adjust his status to lawful permanent resident but is inadmissible, the District Director shall issue a new decision on the Form I-601 waiver application and certify this decision to the AAO for review.