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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**

H2
H6

[Redacted]

FILE:

[Redacted]

Office: EL PASO, TX

Date: MAY 03 2010

IN RE:

[Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

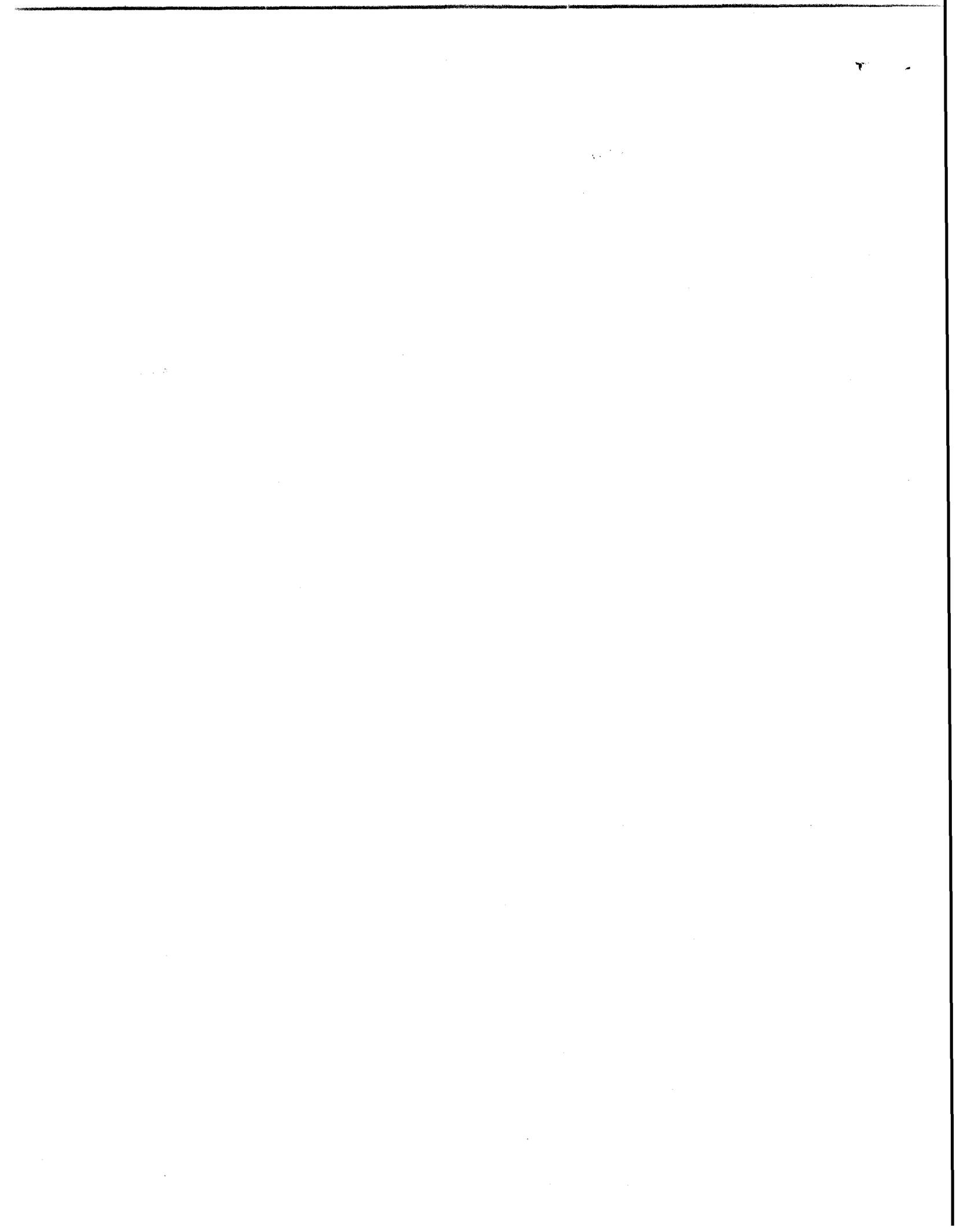
ON BEHALF OF APPLICANT:

[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.

Perry Rhew
Chief, Administrative Appeals Office



DISCUSSION: The waiver application was denied by the Field Office Director, El Paso, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Venezuela who filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, based on an overstay and employment without authorization. The field office director found that the applicant was not inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), as he had not departed the United States subsequent to his entry on May 6, 1996 and the Form I-601 was not required. *Decision of the Field Office Director*, at 1-2, dated February 20, 2009. The field office director denied the Form I-601 as a matter of law. *Id.* at 2.

On appeal, counsel asserts that the field office director abused his discretion by ignoring the applicant's claim for exemption under 8 U.S.C. Section 1255(c) and 8 C.F.R. Section 1245.1(d)(2). *Form I-290B*.

The record contains, but is not limited to, counsel's brief. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's **departure or removal**, . . . is inadmissible.

...

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's **departure or removal** from the United States, is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides:

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien



lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

As the applicant has not departed or been removed from the United States, he is not inadmissible under section 212(a)(9)(B)(i)(I) or 212(a)(9)(B)(i)(II) of the Act. Therefore, he does not require a waiver under section 212(a)(9)(B)(v) of the Act and his waiver application is moot.

The AAO notes counsel's claims regarding 8 U.S.C. Section 1255(c) and 8 C.F.R. Section 1245.1(d)(2). However, the AAO does not have jurisdiction over these issues, which relate to adjustment of status under section 245 of the Act.¹

The applicant's appeal will be dismissed as the waiver application is moot. The applicant is not inadmissible under section 212(a)(9)(B) of the Act.

ORDER: The appeal is dismissed as the waiver application is moot.

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 her 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." [REDACTED] 965 F.2d at 1178. All substantive or legislative rule making requires notice and comment in the Federal Register.

