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



H6

Date: JUN 27 2011 Office: CHARLOTTE, NC FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and Application for Adjust Status to Permanent Residence under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

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 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 waiver application was denied by the Field Office Director, Charlotte, North Carolina. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant is the daughter of a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her father in the United States.

The field office director found that the applicant filed her application to adjust status at the age of twenty-three, thereby requiring visa availability as the unmarried daughter of a permanent resident (F2B). The field office director found that the applicant filed her adjustment application on August 21, 2005, but that there was no visa number available at that time as visa number availability for F2B required a priority date of January 1, 1991. In addition, the field office found that the applicant failed to establish extreme hardship to a qualifying relative. The field office director denied the waiver application accordingly. *Decision of the Field Office Director*, dated August 26, 2008. In a separate decision, the field office director denied the applicant's adjustment application. *Decision of the Field Office Director*, dated August 26, 2008.

On appeal, counsel contends the applicant was eligible to adjust her status under the revised guidance of the Child Status Protection Act (CSPA). In addition, counsel contends the applicant established the requisite hardship.

A Form I-601 waiver application is viable when there is a pending adjustment of status application (Form I-485) or immigrant visa application. In this case, as described above, the applicant's adjustment application was denied on August 26, 2008, based on the fact that no visa number was available at the time the applicant filed her adjustment application. On the Form I-290B counsel indicated that the appeal was related to both the Form I-485 and Form I-601.

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), 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 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. Because the applicant does not have an underlying adjustment application to support the filing of her Form I-601 waiver application, no purpose would be served in examining the hardship to the applicant's father.

There is no indication in the record that the applicant has filed a motion to reopen the denial of her Form I-485 and no indication any such motion was approved. Accordingly, the waiver application must be dismissed by the AAO as moot.

ORDER: The appeal is dismissed.