

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

[REDACTED]

DATE: DEC 20 2012

Office: SANTA ANA

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is deemed to be unnecessary.

The record establishes that the applicant is a native and citizen of Peru who entered the United States in July 2003 with a valid B-2 nonimmigrant visa, with permission to remain until January 18, 2004. The applicant remained beyond the period of authorized stay. On July 8, 2010, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485)¹. In addition, in October 2010, the applicant submitted the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601). On November 26, 2010, the applicant's Form I-485 was denied based on a finding that the applicant was not eligible to adjust status under section 245(c) or 245(i) of the Act. *Decision of the Field Office Director*, dated November 26, 2010. There is no evidence in the record that the applicant has left the United States since her arrival in July 2003.

The field office director determined that the applicant was in unlawful immigration status as of January 19, 2004. The field office director further noted that the applicant is ineligible to adjust status under sections 245(c) and 245(i) of the Act. Finally, the field office director noted that no purpose would be served in waiving the applicant's inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act since the applicant is ineligible to adjust status. The Form I-601 was denied accordingly. *Decision of the Field Office Director*, dated March 10, 2011.

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

Aliens Unlawfully Present.-

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

.....

(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.

.....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an

¹ The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. See *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

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...

According to the plain language of section 212(a)(9)(B)(i) of the Act, an alien must depart the United States after accruing more than 180 days or one year of unlawful presence in order to trigger the 3-year or 10-year bar to admission. The alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to return. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

There is no evidence in the record that the applicant has left the United States since her arrival in July 2003. As noted above, section 212(a)(9)(B) of the Act requires that the applicant leave the United States before she is found to be inadmissible for unlawful presence. The applicant is not inadmissible for unlawful presence since she has not left the country. For the above reasons, the Form I-601 was improperly filed. Accordingly, the appeal will be dismissed as the underlying application for a waiver of inadmissibility is unnecessary.²

ORDER: The appeal is dismissed.

² On appeal, counsel makes numerous references to the applicant's eligibility to adjust status and obtain Parole-in-Place. 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.

The AAO does not have jurisdiction over denials of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act or any parole issues. Any evidence concerning whether the applicant is in fact eligible to adjust status or obtain parole must be submitted to the field office director in the form of a motion to reopen or reconsider the denial of Form I-485, pursuant to the laws and regulations in place.