

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



U.S. Citizenship
and Immigration
Services



H6

DATE: **OCT 15 2012** OFFICE: MOSCOW FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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:



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,

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The Field Office Director, Moscow Russia, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on motion. The motion will be granted and the waiver application will remain denied.

The applicant is a native of the former U.S.S.R. and citizen of Armenia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the 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 one year or more and seeking readmission within 10 years of departure from the United States. The applicant was also found to be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), due to the removal order entered in his case on November 20, 2003 at the Immigration Court in San Francisco, CA. Due to the applicant's failure to attend his removal proceedings he was also found to be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant seeks a Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse.

The Field Office Director denied the applicant's Form I-601 and the applicant filed a motion to reopen that decision with the Field Office Director, which was denied. The applicant then filed an appeal to the AAO, and the AAO found that the applicant appeared to be subject to section 212(a)(6)(B) of the Act, and remanded the case to the Field Office Director. The Field Office Director issued a new decision denying the application, the decision was certified to the AAO for review, and the AAO dismissed the appeal.¹ The applicant then filed a combined motion to reopen and motion to reconsider that decision, which is now before the AAO.

On motion to reopen and reconsider, counsel for the applicant presents new evidence and states that the AAO has jurisdiction to review findings of lack of reasonable cause under section 212(a)(6)(B) of the Act, that the applicant had reasonable cause for failing to attend his removal proceedings, and that the application for a waiver of inadmissibility should be approved.

In support of the waiver application, the record includes, but is not limited to, legal briefs from counsel, statements from the applicant, statements from the applicant's spouse, documentation regarding the applicant's father-in-law, medical records for the applicant, biographical information for the applicant's and his spouse's family, financial records, and documentation concerning the applicant's immigration history.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to

¹ The AAO notes that the applicant filed an intervening appeal of the Field Office Director's April 4, 2012 decision, however, that appeal was not necessary as the AAO's December 19, 2011 remand of the applicant's original appeal made clear that a decision adverse to the applicant would be certified to the AAO.

reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

The applicant was found inadmissible under Section 212(a)(9) of the Act, which provides, in pertinent part, that:

(B) 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 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record establishes that the applicant was admitted to the United States on June 11, 2001 as a J-1 visitor, he applied for asylum on June 12, 2003, he was referred to the immigration court on July 22, 2003, he was ordered removed *in absentia* on November 20, 2003, his motions to reopen his removal proceedings were denied, and he was ultimately removed from the United States on April 1, 2009. The applicant accrued one year or more of unlawful presence in the United States after the Immigration Judge's removal order in his case on November 20, 2003. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years after the date of his removal from the United States. The applicant has not disputed this finding of inadmissibility. The AAO notes that as a result of his removal order, the applicant was also found to be inadmissible under section 212(a)(9)(A)(ii) of the Act.

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

(B) Failure to Attend Removal Proceeding

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

Based on his failure to attend his removal proceedings, the applicant is inadmissible to the United States and remains inadmissible for a period of five years from the date of his departure from the United States. There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act.

The AAO notes that counsel for the applicant states that the applicant had "reasonable cause" for failing to attend his removal proceeding, and that he is not inadmissible under section 212(a)(6)(B) of the Act as a consequence. There is no statutory waiver available for inadmissibility under section 212(a)(6)(B), but an alien is not inadmissible if the alien can establish that there was a "reasonable cause" for failure to attend the removal proceeding. The AAO, however, lacks subject matter jurisdiction to review inadmissibility under section 212(a)(6)(B) of the Act in conjunction with its review of the denial of Form I-601 (or Form I-212). The AAO's appellate authority in this case is limited to those matters that are within the scope of the 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).² 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.

Under section 103.1(f)(3)(iii)(F) (as in effect on February 28, 2003), the AAO has authority to adjudicate "[a]pplications for waiver of certain grounds of excludability [now inadmissibility] under § 212.7(a) of this chapter." 8 C.F.R. § 212.7(a)(1) currently provides that an alien who is inadmissible and eligible for a waiver may apply for a waiver on a form designated by U.S.

² Although 8 C.F.R. § 103(f)(3)(iii), as in effect on February 28, 2003, was subsequently omitted from the Code of Federal Regulations, courts have recognized that DHS continues to delegate appellate authority to the AAO consistent with that regulation. See *U.S. v. Gonzalez & Gonzalez Bonds and Insurance Agency, Inc.*, 728 F.Supp.2d 1077, 1082-1083 (N.D. Cal. 2010); see also *Rahman v. Napolitano*, 814 F.Supp.2d 1098, 1103 (W.D. Washington 2011).

Citizenship and Immigration Services (USCIS) in accordance with the form instructions. A waiver, if granted, applies to those grounds of inadmissibility and “to those crimes, events or incidents specified in the application for waiver.” 8 C.F.R. § 212.7(a). The form instructions for the Form I-601, to which 8 C.F.R. § 212.7(a) refers, further defines the classes of aliens who may file a Form I-601, and the form itself provides a list of each ground of inadmissibility that can be waived, allowing the applicant to check a box next to those grounds for which the applicant seeks a waiver. As there is no statutory basis to waive inadmissibility under section 212(a)(6)(B) of the Act, neither the Form I-601 nor the instructions for Form I-601 list this ground of inadmissibility. As such, the AAO has no authority to review the reasonable cause for the applicant’s failure to appear at his hearing or his related inadmissibility under section 212(a)(6)(B) of the Act.

The AAO notes that counsel has cited unpublished AAO decisions where inadmissibility under section 212(a)(6)(B) of the Act was addressed. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not binding.

Because the applicant remains inadmissible under section 212(a)(6)(B) of the Act, no purpose would be served at this time in adjudicating a waiver of the applicant’s inadmissibility under section 212(a)(9)(B)(v) of the Act (Form I-601) and the applicant’s Form I-601 was properly denied.

The motion was granted and the evidence has been considered in the aggregate, however, there is no basis to disturb the previous decision in this case. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant. After a careful review of the record, the AAO finds that in the present motion, the applicant has not met this burden. Accordingly, the combined motion is granted and the underlying appeal is dismissed.

ORDER: The motion is granted and the waiver application remains denied.