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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

DATE:

APR 05 2013

OFFICE: BANGKOK, THAILAND

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)

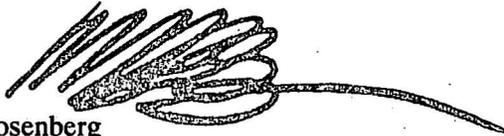
ON BEHALF OF APPLICANT:

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 with the field office or service center that originally decided your case by filing a 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 Form I-601 waiver application was denied by the field office director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cambodia who was found to be inadmissible to the United States under 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 more than one year and seeking readmission within 10 years of her last departure. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility 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 her U.S. citizen spouse and child.¹

When considering the applicant's request for waiver of these grounds of inadmissibility, the field office director determined that the applicant was also inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act for failing to attend removal proceedings and seeking admission to the United States within five years of her subsequent departure under an order of removal. *See Decision of the Field Office Director*, dated March 16, 2012. The application was accordingly denied.

On appeal, counsel asserts that the applicant had reasonable cause for failing to attend her removal proceeding on January 4, 2005 such that she should not be found inadmissible under section 212(a)(6)(B), and that the applicant's U.S. citizen spouse will suffer extreme hardship if a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is not granted. *See Form I-290B, Notice of Appeal or Motion and Counsel's Appeal Brief*, received April 17, 2012.

Section 212(a)(6)(B) of the Act states:

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.

¹ The applicant is additionally inadmissible under section 212(a)(9)(A)(ii) of the Act, as an alien ordered removed under section 240 or any other provision of law and requires the approval of a Form I-212 application for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. Counsel contends that the applicant has twice attempted to file a Form I-212 but was refused by consular officers in Phnom Penh on both November 21, 2011 and December 28, 2011. Counsel maintains that on the latter date, a consular officer accepted the applicant's Form I-601 but told her that a Form I-212 was not needed. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant has been determined by the field office director to be inadmissible under section 212(a)(6)(B) of the Act no purpose would be served in granting a Form I-212 application.

The record reflects that the applicant entered the United States with a B-2 temporary visitor visa on January 21, 2000 and was authorized to remain until July 20, 2000. Her visa was extended to July 20, 2001 after which the applicant remained in the United States without authorization. She was placed into removal proceedings on August 15, 2002. On October 26, 2002, while in removal proceedings, the applicant married a U.S. citizen, [REDACTED] who filed a Form I-130 petition on her behalf. On May 21, 2004 a notice of intent to deny the I-130 petition was issued by U.S. Citizenship and Immigration Services (USCIS) on the basis that the marriage between the parties was fraudulent and entered into solely for the purpose of gaining an immigration benefit. On June 1, 2004 a motion to continue removal proceedings was granted by the immigration judge and a new hearing date was set for January 4, 2005. On July 21, 2004 the applicant failed to attend her Form I-130 interview with USCIS. On August 16, 2004 USCIS denied the Form I-130 petition following a period of nearly three months during which no rebuttal to the notice of intent to deny was received. On January 4, 2005 the applicant failed to attend her removal proceeding and the immigration judge ordered her removed *in absentia*. [REDACTED] and the applicant subsequently divorced and the applicant married her current U.S. citizen spouse, [REDACTED] on February 24, 2010. [REDACTED] filed a Form I-130 petition on the applicant's behalf which was approved on January 28, 2011.² The applicant was taken into custody by U.S. Immigration and Customs Enforcement (ICE) on February 3, 2011 on the basis of the immigration judge's January 4, 2005 order of removal. On March 16, 2011 counsel for the applicant filed a motion to reopen and rescind the order. The immigration judge denied the applicant's motion on April 19, 2011. The applicant was released with electronic monitoring on April 7, 2011 and departed the United States voluntarily on May 4, 2011 while the order of removal was still outstanding.

The applicant accrued unlawful presence in the United States from July 21, 2000 to May 4, 2011, a period in excess of one year. As the applicant is seeking admission to the United States within 10 years of her departure, she was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). Because the applicant departed the United States while an order of removal was outstanding she is additionally inadmissible pursuant to 212(a)(9)(A)(ii) of the Act. She requires a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act and permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act. The applicant has not contested these facts. Rather, the applicant has argued that she had "reasonable cause" for failing to attend her removal proceeding and that she is not inadmissible under section 212(a)(6)(B) of the Act as a consequence.

Counsel asserts that the applicant has demonstrated reasonable cause for her failure to attend removal proceedings. However, the instant appeal relates to a Form I-601 application for a waiver

² It is noted that the applicant may also be subject to section 204(c) of the Act; 8 U.S.C. § 1154(c) which prohibits the approval of a visa petition filed on behalf of an alien who has been determined to have entered into a marriage for the purpose of evading the immigration laws. Given that the first Form I-130 petition filed on the applicant's behalf was denied following an un rebutted notice of intent to deny in which USCIS asserted that the marriage between herself and her then-spouse was entered into solely for the purpose of evading immigration laws and obtaining an immigration benefit, it appears that the Form I-130 petition filed on her behalf by her current spouse may have been approved in error.

of inadmissibility arising under sections 212(g), (h), (i) or (a)(9)(B)(v) of the Act. Inadmissibility under section 212(a)(6)(B) of the Act and the "reasonable cause" exception thereto, is not the subject of the Form I-601 and is not within the subject matter jurisdiction of the AAO to adjudicate with this appeal.

The AAO's appellate authority in this case is limited to those matters that are within the scope of the Form I-601 waiver application. 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).³ 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 8 C.F.R. § 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. 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-601,⁴ 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.

The object of the Form I-601 waiver application, in the context of an application for an immigrant visa filed at a consulate or embassy abroad, is to remove inadmissibility as a basis of ineligibility

³ 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).

⁴ <http://www.uscis.gov/files/form/i-601instr.pdf>.

for that visa. An alien is not required to file a separate waiver application for each ground of inadmissibility, but rather one application that, if approved, extends to all inadmissibilities specified in the application. However, where an alien is subject to an inadmissibility that cannot be waived, approval of the waiver application would not have the intended effect. Thus, no purpose is served in adjudicating such a waiver application, and USCIS may deny it for that reason as a matter of discretion. *Cf. Matter of J- F- D-*, 10 I&N Dec. 694 (Reg. Comm. 1963).

Counsel addresses the decision of the field office director and asserts that the applicant has shown a reasonable cause for her failure to attend her removal proceeding. As the AAO lacks jurisdiction to review the "reasonable cause" issue, we will not evaluate the facts as presented and find that no purpose is served in adjudicating the applicant's application for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis of denial of her Form I-601 waiver application.

ORDER: The appeal is dismissed.