



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 25 2013

OFFICE: SAN SALVADOR, EL SALVADOR

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

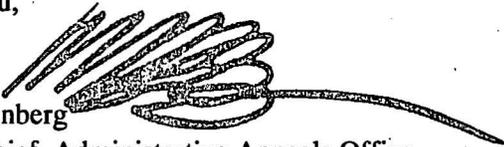
[REDACTED]

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 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, San Salvador, El Salvador and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality 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 from the United States. The applicant is additionally inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien ordered removed under section 240 or any other provision of law. The applicant does not contest inadmissibility and the record supports the findings that she is inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(A)(ii) of the Act. The applicant is the spouse of a U.S. citizen and 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 her U.S. citizen and lawful permanent resident children.

Counsel indicates on an undated table of contents titled "I-212 Waiver application and supporting documents," that a Form I-212, Application for Permission to Reapply for Admission into the United States is being submitted, and counsel indicates on two separate Forms G-28, Notice of Entry of Appearance as Attorney, dated April 20, 2011 and May 27, 2011 respectively, that his appearance as attorney concerns the applicant's form numbers "I-601/I-212." The AAO notes that while all other documents listed on the undated table of contents have been received, the record does not contain a Form I-212 application and there is no record of its receipt or the receipt of the required filing fee.

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 removal and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated September 14, 2011.

On appeal, counsel asserts that the applicant has demonstrated reasonable cause for her failure to attend removal proceedings and that extreme hardship will be suffered by a qualifying relative if a waiver is not granted. *See Form I-290B, Notice of Appeal or Motion*, dated October 6, 2011.

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.

The record reflects that the applicant entered the United States without inspection on or about April 27, 2005 and was apprehended shortly thereafter by Customs and Border Protection agents. The applicant was served on April 28, 2005 with a Notice to Appear (NTA), charging her with being removable pursuant to section 212(a)(6)(A)(i) of the Act for being present in the United States without being admitted or paroled. The charging document contains a section titled "Failure to appear," which specifies, *inter alia*, that the applicant is required to provide to the Department of Homeland Security (DHS) and the Court a full mailing address to which hearing notices will be sent. The record shows that the consequences for failing to appear for any scheduled hearing were explained to the applicant in her native Spanish language. The record shows that the applicant signed the NTA but failed to provide an address in the United States at which she could be contacted. According to section 242B(c)(2) of the Act, 8 U.S.C. §125B(c)(2), where under such circumstances an applicant fails to provide her address, no hearing notice is required. Accordingly, the Court did not send her a notice of hearing reflecting her hearing date of July 26, 2005. When the applicant did not attend her July 26, 2005 removal proceeding, the Immigration Judge ordered her removed *in absentia*.

On March 9, 2009 the applicant through counsel, filed a motion to reopen (rescind) the *in absentia* order. While the Court accepted the filing more than three years after the 180-day time limit for motions, the Immigration Judge determined that the applicant failed to demonstrate that her failure to appear at her July 26, 2005 removal proceeding was through no fault of her own. The Immigration Judge found that: the applicant was informed in her native Spanish language of the consequence of failing to appear at her removal hearing; while claiming to have had someone with knowledge of the English language fill out a change of address form for her and mail it to the Court the applicant admitted she never received a notice of the hearing; the applicant provided no evidence showing that she mailed a change of address form to the Court; and she submitted no affidavit from the person who allegedly filled out and assisted her in mailing the change of address form. Based on the foregoing, the Immigration Judge found that the applicant did not fulfill her obligation to apprise the Court of her mailing address and that her failure to appear was not excused by exceptional circumstances or a lack of proper notice. Accordingly, in an order dated May 6, 2009, the Immigration Judge denied the applicant's motion to reopen and denied her request for voluntary departure in lieu of removal.

The applicant appealed the Immigration Judge's order to the Board of Immigration Appeals (BIA). The BIA dismissed the appeal on July 7, 2010 finding that: (1) in view of the applicant's failure to provide her address, no notice for a hearing was necessary; (2) the record contains no EOIR-33 change of address form of record or any other evidence to establish the applicant's address at the time; (3) the applicant failed to submit an affidavit from the individual who allegedly assisted her with her change of address form; and (4) though the applicant requested that her case be remanded for further fact-finding she failed to provide any evidence that would indicate that further fact-finding is necessary. The record shows that the applicant was subsequently removed from the United States to El Salvador on November 1, 2010.

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.

There is no statutory waiver available for inadmissibility arising under section 212(a)(6)(B) of the Act. However, an alien is not inadmissible under section 212(a)(6)(B) of the Act if the alien can establish that there was a "reasonable cause" for failure to attend his or her removal proceeding.

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 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).¹ 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-601,² 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

¹ 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).

² <http://www.uscis.gov/files/form/i-601instr.pdf>

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 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)(i)(II) 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. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.