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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: [redacted] Office: BANGKOK, THAILAND FILE: [redacted]

IN RE: SEP 18 2013 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Bangkok, Thailand. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen and reconsider. The motion will be granted and the matter will be remanded to the field office director for further action consistent with this decision.

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. She is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 in the United States.

The field office director concluded that the applicant is additionally inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause, 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. Because there is no waiver of inadmissibility under section 212(a)(6)(B) of the Act, the Application for Waiver of Grounds of Inadmissibility (Form I-601) was accordingly denied. *Id.*

On appeal, the AAO found that inadmissibility under section 212(a)(6)(B) of the Act and the "reasonable cause" exception thereto, is not the subject of a Form I-601 waiver application and not within the subject matter jurisdiction of the AAO to adjudicate, and we dismissed the appeal accordingly. *See Decision of the AAO,* dated April 5, 2013.

In response, counsel for the applicant filed *Form I-290B*, Notice of Appeal or Motion (Form I-290B), indicating that she was filing a motion to reopen and a motion to reconsider by marking box F in Part 2. *See Form I-290B*, received May 9, 2013.

Counsel contends that the applicant's failure to attend her removal hearing was for reasonable cause and therefore, "submits this Motion to Reopen and Motion for Reconsideration to the Field Office Director, Bangkok Thailand, to kindly consider the facts and surrounding circumstances, including the critical supporting documents, leading to Applicant's failure to attend her scheduled deportation hearing on January 4, 2005, and to make a favorable determination and findings that Applicant's failure to attend her removal hearing was for 'reasonable cause'…, thus deeming her NOT inadmissible under 212(a)(6)(B) of the Act…" *See Counsel's Motion*, dated April 30, 2013.

Jurisdiction over motions lies with the office that made the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii). As the present motion has been filed in response to an AAO decision, the AAO has jurisdiction. While counsel requests that the field office director review the motion and adjudicate the underlying waiver application, the field office director has no jurisdiction over a motion filed in response to an AAO decision. Though counsel initially filed the motion with the

field office, once the filing and filing fee is accepted the motion and record are forwarded for adjudication to the office having jurisdiction, here the AAO. 8 C.F.R. §103.5(a)(1)(iii)(E). While the AAO has jurisdiction over the motion itself, we do not have subject matter jurisdiction over the issue of whether the applicant is excepted from inadmissibility under section 212(a)(6)(B) of the Act for having reasonable cause for failing to attend her removal proceeding.

As previously addressed in our decision on 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, which includes 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 USCIS to adjudicate in Form I-601 proceeding. The issue is properly resolved as part of the adjudication of the application for an immigrant visa, which is the jurisdiction of the Department of State. As the AAO lacks jurisdiction over whether the applicant is excepted from inadmissibility under section 212(a)(6)(B) of the Act for having reasonable cause for failing to attend her removal proceeding, we find that no purpose would be served in adjudicating her application for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act.

However, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO has determined as a result of such review that two important issues in this case were not adequately addressed previously. The first concerns whether the applicant has established reasonable cause for failing to attend her removal proceeding, the subject of counsel's motion. There is no indication in the record that the Department of State examined the applicant's inadmissibility under section 212(a)(6)(B) of the Act and whether the applicant has demonstrated reasonable cause for failing to attend her removal proceedings. The waiver application packet contained numerous supporting documents in which counsel, the applicant, and others familiar with the circumstances surrounding the applicant's failure to appear have addressed the underlying reasons in an effort to demonstrate reasonable cause.

The second issue is whether the applicant is subject to section 204(c) of the Act for having entered into a prior marriage solely for the purpose of evading immigration laws, and thus whether the form I-130 petition filed on the applicant's behalf by her current spouse was approved in error and subject to revocation. The record shows 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 I-130 interview with USCIS. On August 16, 2004 USCIS denied the 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 an I-130 petition on the applicant's behalf which was approved on January 28, 2011. 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.

Section 204(c) of the Act states:

> [N]o petition shall be approved if (1) the alien has previously . . . sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 U.S.C. § 1154(c). The corresponding regulation provides:

> Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Given that the first I-130 petition filed on the applicant's behalf was denied following an unrebutted 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 I-130 petition filed on her behalf by her current spouse may have been approved in error and subject to revocation. Pursuant to 8 C.F.R. § 205.2, the approval of an I-130 petition is revocable when the necessity for the revocation comes to the attention of the Service. As the AAO is remanding the matter for determination as to whether the applicant has demonstrated reasonable cause for failing to attend her January 2005 removal proceeding, the AAO also remands to the field office director to initiate proceedings for the revocation of the approved Form I-130. Should the Form approved I-130 be revoked, the director will issue a new decision dismissing the applicant's Form I-601 as moot. In the alternative, should it be determined that the applicant is not subject to section 204(c) of the Act, and the approved

Form I-130 is not to be revoked, and if it is determined that the applicant remains inadmissible under section 212(a)(6)(B) of the Act, then the field office director will again deny the Form I-601 for no purpose served. If, however, it is determined that the Form I-130 is not to be revoked, and that the applicant is not inadmissible under section 212(a)(6)(B) of the Act, the field office director shall issue a decision addressing the merits of the Form I-601 waiver application. If that decision is adverse to the applicant, it will be certified for review to the AAO.

ORDER: The motion is granted and the matter is remanded for further action consistent with this decision.