



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 19 2013**

OFFICE: NEBRASKA SERVICE CENTER

File: 

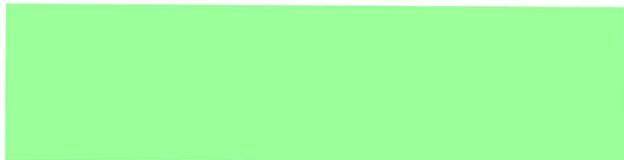
IN RE:

Applicant: 

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:

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 Form I-601 waiver application was denied by the Nebraska Service Center Director and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil 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 more than one year and seeking readmission within ten years of his last departure from the United States, and 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 record indicates that the applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). He 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), and permission to reapply for admission under section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States.

When considering the applicant's request for waiver of inadmissibility under section 212(a)(9)(B)(v), the director determined that the applicant also is inadmissible pursuant to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B) for failing to attend removal proceedings and seeking admission to the United States within five years of his subsequent departure under an outstanding order of removal. *See Decision of the Service Center Director*, dated February 1, 2013. The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was accordingly denied. The director concurrently denied the Application for Permission to Reapply for Admission (Form I-212) as a matter of discretion, because granting the permission would serve no purpose.¹

On appeal counsel asserts that it was arbitrary and capricious of the director not to consider the evidence of extreme hardship, given that "even without a waiver for inadmissibility under INA 212(a)(6)(B)," the applicant will be eligible to apply for admission after five years of his departure, i.e., on or after June 3, 2014, and that at that time a waiver of the 10-year unlawful presence bar under section 212(a)(9)(B)(v) will still be necessary. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), received February 28, 2013. Counsel further asserts, without providing evidence thereof, that an appeal of the immigration judge's April 17, 2012, order denying the applicant's motion to reopen the *in absentia* removal order has been pending before the Board of Immigration Appeals (BIA) since May 2012 and that the applicant can show reasonable cause for failure to attend his hearing because he never received notice of his removal proceedings. Counsel contends that if the BIA sustains the appeal, inadmissibility under section 212(a)(6)(B) will become moot. *Id.*

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

¹ The AAO notes that the director denied the applicant's Form I-601 and Form I-212 in separate decisions on February 1, 2013. Only the Form I-601, however, is before the AAO on appeal.

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 shows that the applicant entered the United States without inspection on June 2, 2001 and remained until June 3, 2009, when he was removed under an outstanding order of removal. The applicant accrued unlawful presence in excess of one year. As the applicant is seeking admission within 10 years of his departure, he 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). The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record shows that the applicant was apprehended by border patrol agents shortly after his arrival into the United States on June 2, 2001. On June 3, 2001 the applicant was served with a Notice to Appear (NTA) and placed into removal proceedings. On November 15, 2001 the applicant failed to attend his removal proceedings and was ordered removed by the immigration judge *in absentia*. The applicant has not contested these facts. Rather, counsel indicates that the applicant had reasonable cause for failing to attend his removal proceeding and is not inadmissible under section 212(a)(6)(B) of the Act as a consequence.

Despite counsel's assertions to the contrary, 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 removal proceeding.

Counsel asserts that the *in absentia* removal order should be rescinded because the applicant never received notice of his removal proceeding, and that an appeal concerning this issue is pending before the BIA. Counsel contends that if the appeal to the BIA is sustained, section 212(a)(6)(B) will become a moot issue. The AAO finds that counsel's filing of a Form I-212 and a Form I-601 while the applicant remains inadmissible under sections 212(a)(6)(B), 212(a)(9)(A)(ii), and 212(a)(9)(B)(i)(II) of the Act is premature, as the applicant is currently statutorily ineligible for a waiver or permission to reapply for admission. Moreover, 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).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.

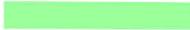
Under 8 C.F.R. § 103.1(f)(3)(iii)(F) (as in effect on February 28, 2003), the AAO has authority to adjudicate "[a]pplications for waiver of certain grounds of excludability [now inadmissibility] under § 212.7(a) of this chapter." 8 C.F.R. § 212.7(a)(1) currently provides that an alien who is inadmissible 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-601,³ 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 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 Service Center Director and suggests that the applicant has shown a reasonable cause for his failure to attend his 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.

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).

³ <http://www.uscis.gov/files/form/i-601instr.pdf>



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NON-PRECEDENT DECISION

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In application proceedings it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.