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



U.S. Citizenship
and Immigration
Services

DATE: **MAY 05 2014**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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 (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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act in order to reside in the United States with her husband and children.

When considering the applicant's request for a waiver of this ground of inadmissibility, the 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. The application was accordingly denied.

On appeal, counsel concedes that the applicant did not attend her removal hearing on December 13, 2004, but asserts that USCIS failed to make a determination regarding whether the applicant had reasonable cause for failing to attend her hearing. Counsel requests that the AAO remand the matter to the Director to make a determination on whether or not reasonable cause has been established.

The record reflects that the applicant entered the United States without inspection in June 2004. The applicant was apprehended by border patrol agents and served with a Notice to Appear, instructing her, in Spanish, to appear before an Immigration Judge on December 13, 2004. The applicant did not attend her hearing and was ordered removed *in absentia*. The applicant remained in the United States until her departure in April 2010. The applicant has not contested these facts.

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.

There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act. However, as noted in the statute, an alien is not inadmissible under section 212(a)(6)(B) of the Act if the alien can establish that there was reasonable cause for failure to attend her removal proceeding. Although counsel asserts that neither the U.S. Consulate Chief nor the Director of the Nebraska Service Center has made a finding on reasonable cause despite being squarely presented with the issue, the record shows that by letter dated August 16, 2011, the Chief of the Immigrant Visa Branch at the U.S. Embassy explicitly found that the applicant "did

not have reasonable cause to miss her court appearance.” The Chief discussed the documentation that was submitted and explained that the applicant was given a notice to appear on June 10, 2004, indicating the exact time, date, and location of her court appointment. *Letter from Chief, Immigrant Visa Branch, U.S. Embassy, Tegucigalpa, Honduras*, dated August 16, 2011.

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 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

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>

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).

The AAO lacks jurisdiction to review the “reasonable cause” issue or to order the Director to overturn a decision by the Department of State, which has final say over the issuance of immigrant visas. The applicant has been found inadmissible under section 212(a)(6)(B) of the Act for which there is no waiver. The appeal will be dismissed as a matter of discretion as 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.

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.