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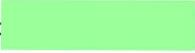


U.S. Citizenship
and Immigration
Services



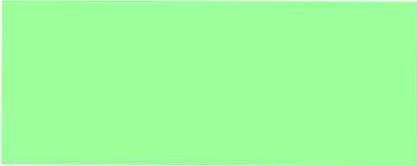
DATE: **SEP 05 2014**

OFFICE: NEBRASKA SERVICE CENTER

File: 

IN RE: 

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 (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,

A handwritten signature in black ink that reads "George Pappas for".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Director for further proceedings consistent with this decision.

The applicant, a native and citizen of Brazil, was found 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 one year or more and seeking admission within 10 years of her last departure from the United States. The applicant is the spouse of 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 with her spouse.

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, 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 her subsequent departure. *See Decision of the Director*, dated December 11, 2013. The application was accordingly denied.

On appeal, counsel asserts that the applicant has demonstrated reasonable cause for her failure to attend removal proceedings. Counsel additionally contends that U.S. Citizenship and Immigration Services (USCIS) erred as a matter of law in determining that the applicant was inadmissible under section 212(a)(6)(B) of the Act as: she timely departed the United States under a grant of voluntary departure in reopened immigration proceedings; and the immigration judge vacated the *in absentia* order, and thereby, all consequences of her prior removal proceedings were no longer in effect. *See Form I-290B, Notice of Appeal or Motion; see also Brief in Support of Appeal*, dated January 10, 2014.

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 the applicant entered the United States on June 10, 2005, without inspection by immigration officials. However, shortly after entry, border patrol officers apprehended the applicant near [REDACTED] Texas, and placed her in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a.

The record also reflects the applicant did not attend her removal proceedings on March 22, 2006, during which the immigration judge determined the applicant failed to show good cause for her absence and abandoned all claims for relief from removal. Consequently, the immigration judge ordered the applicant removed *in absentia* on March 23, 2006.

The record further reflects the applicant filed a motion to reopen her removal proceedings to seek relief in the form of voluntary departure as the beneficiary of an approved Form I-130. The immigration judge granted the motion and at a subsequent hearing granted the applicant voluntary departure, requiring her departure on or before November 19, 2012. The applicant timely complied with the voluntary-departure order and has remained outside the United States to date. The applicant does not contest these facts. Rather, through counsel, she contends that she had "reasonable cause" for failing to attend her removal proceedings, and that she is not inadmissible under section 212(a)(6)(B) of the Act as a consequence.

On appeal, counsel asserts the applicant has demonstrated reasonable cause for her failure to attend removal proceedings, as the immigration judge would not have granted her motion to reopen otherwise. In support of her assertion, counsel cites *Matter of Haim*, in which the Board of Immigration Appeals (BIA) states:

When the basis for a motion to reopen is that the immigration judge held an in absentia exclusion hearing, the alien must establish that he had "reasonable cause" for his absence from the proceedings. If the alien had reasonable cause for his failure to appear, the motion will be granted; if he did not, the motion will be denied.

Matter of Haim, 19 I&N Dec. 641, 642 (1988) (citations omitted)

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 our subject matter jurisdiction to adjudicate with this appeal.

Our 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 us by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him 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). We exercise appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).¹ We cannot exercise appellate jurisdiction over additional matters on our 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

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 us 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).

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), we have 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 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 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).

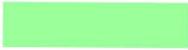
Counsel addresses the decision of the Director and asserts that the applicant has already shown an immigration judge, who reopened proceedings, that she had reasonable cause for her failure to attend her removal proceedings. As we lack jurisdiction to review the "reasonable cause" issue, we will not 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. However, we will remand the matter before us to the Director, Nebraska Service Center, for a determination on the applicant's inadmissibility under section 212(a)(6)(B) of the Act in light of the BIA's decision in *Matter of Haim*, *supra*, and a determination of her eligibility for a waiver under section 212(a)(9)(B)(v) of the Act.

If the applicant is still found to be inadmissible under section 212(a)(6)(B) of the Act upon review of *Matter of Haim*, a new decision on the waiver application shall be rendered denying the waiver application, as no purpose would be served in granting a waiver to an applicant who has other grounds of inadmissibility that cannot be waived. If the waiver application is denied for this reason, no further action will be required by us.

If the applicant is not found to be inadmissible under section 212(a)(6)(B) of the Act, a determination must be made concerning the applicant's eligibility for a waiver under 212(a)(9)(B)(v) of the Act. If

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

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NON-PRECEDENT DECISION

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the applicant is not found to be eligible for a waiver, the matter shall be returned to us in order to adjudicate the present appeal.

ORDER: The appeal is remanded for further proceedings consistent with this decision.