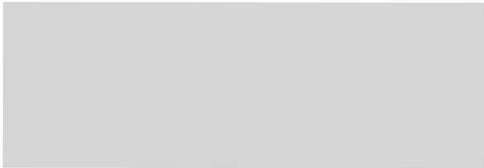




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 18 2015**

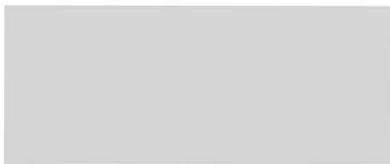
FILE #: [REDACTED]

APPLICATION RECEIPT #: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the application for a waiver of inadmissibility. 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 Honduras 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 one year or more and seeking readmission within 10 years of departure from the United States. The applicant was also found to be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B) due to the *in absentia* removal order entered in her case on August 10, 1998, by the immigration court in [REDACTED] TX. The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed by her U.S. citizen spouse. 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 spouse.¹

When considering the applicant's request for waiver of this ground of inadmissibility, the Director found that the applicant also is 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. *See Decision of Director*, dated September 5, 2014. The applicant was accordingly denied.

On appeal, the applicant, through counsel, states that the Director did not prove that the applicant is inadmissible under section 212(a)(6)(B), that the applicant was deprived of the benefits of voluntary departure, and that it was improper for the Director not to address the hardship to the applicant's qualifying relative under section 212(a)(9)(B)(v). *Form I-290B (Notice of Appeal or Motion)*, dated October 2, 2014, and *counsel's appeal brief*, dated November 3, 2014.

Section 212(a)(6)(B) of the Act, provides:

(B) 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 on March 17, 1998, U.S. Customs and Border Protection in [REDACTED] Texas, served the applicant a Form I-862, Notice to Appear (Form I-862), stating that she was to

¹ The record indicates that the applicant is also inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as a result of her removal order. The applicant filed a Form I-212, Application for Permission to Reapply for Admission after Deportation or Removal (Form I-212), indicating on that form that she "has been removed at least twice or more." Her Form I-212 was administratively closed by the Director and a separate appeal was not filed for that application. We therefore will not address assertions regarding Form I-212 in this decision.

appear on July 28, 1998, at the immigration court in [REDACTED] Texas. The I-862 indicates that the applicant was provided oral notice in Spanish of the time and place of her hearing and the consequences of failure to appear as provided in section 240(b)(7) of the Act. The record also reflects that the applicant did not attend her immigration proceedings on July 28, 1998. The immigration judge entered an *in absentia* removal order on August 10, 1998.

On appeal, the applicant states that the Director did not prove that the applicant received notice of her removal hearing. The applicant also states that the Director failed to prove the unreasonableness of the applicant's failure to attend her removal hearing.

The applicant's removal order, dated August 10, 1998, states that the applicant failed to attend her removal hearing on July 28, 1998, after receiving proper notice. As a result, the applicant is inadmissible to the United States and not eligible to apply for admission for a period of five years from the date of her departure from the United States. There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act.

An applicant is not inadmissible under section 212(a)(6)(B) of the Act, where the applicant can establish that there was a "reasonable cause" for failure to attend his or her removal proceeding. The appeal, however, 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 addressed by Form I-601 and it is not within our subject matter jurisdiction to adjudicate that ground of inadmissibility 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 by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested 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).² 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 itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st

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).

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 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 the application may be denied 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 Director has not shown how he determined that the applicant lacked reasonable cause for failing to attend her hearing. 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.

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

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