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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-E-P-

DATE: JAN. 19, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Honduras, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The Director, Nebraska Service Center, denied the application. We dismissed a subsequent appeal. The matter is now before us on a motion to reconsider. The motion will be denied.

The Applicant 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 [REDACTED] 1998, by the immigration court in [REDACTED] Texas. 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 U.S. citizen spouse.

In a decision dated September 5, 2014, the Director determined that because the Applicant was inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act for failing to attend removal proceedings, she was barred from seeking admission to the United States within five years of her subsequent removal. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

In a decision dated June 18, 2015, we explained that an individual is not inadmissible under section 212(a)(6)(B) of the Act where the individual can establish that there was a “reasonable cause” for failure to attend his or her removal proceeding, but that the Applicant’s appeal related 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. We further noted that inadmissibility under section 212(a)(6)(B) of the Act and the “reasonable cause” exception thereto is not addressed by the Form I-601 and it was not within our subject matter jurisdiction to adjudicate that ground of inadmissibility on appeal. The appeal was dismissed accordingly.

Section 212(a)(6)(B) of the Act states:

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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.

As we noted when we dismissed the appeal, the record reflects that on [REDACTED] 1998, U.S. Customs and Border Protection in [REDACTED] Texas, served the Applicant a Form I-862, Notice to Appear, stating that she was to appear on [REDACTED] 1998, at the immigration court in [REDACTED] Texas. The Form 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 further reflects that the Applicant did not attend her immigration proceedings on [REDACTED] 1998. The record clearly establishes that the immigration judge entered an *in absentia* removal order on [REDACTED] 1998. *See Memorandum and Order*, dated [REDACTED] 1998. The record further reflects that the Applicant was removed from the United States on [REDACTED] 2011.

On motion the Applicant contends that the record is not clear about what she had been told by U.S. border patrol agents regarding an immigration court hearing or whether she was even aware of a hearing, that the 10-year bar to admission has passed, and that she had never been informed of the five-year bar to seeking admission after departing the United States if she did not attend her immigration court hearing so the five-year bar should not apply to her.

As we noted in dismissing the Applicant's appeal, our appellate authority 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 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). 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 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.

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).

In dismissing the appeal we noted that 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-601,² 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.

As we further explained in dismissing the Applicant’s appeal, 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).

On motion the Applicant has asserted that she was not aware of her removal proceedings or the consequences of not attending the hearing, thus the bar should not apply. As we lack jurisdiction to review inadmissibility under section 212(a)(6)(B) of the Act, the motion will be denied as a matter of discretion.

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, the motion to reconsider is denied.

ORDER: The motion to reconsider is denied.

Cite as *Matter of M-E-P-*, ID# 15200 (AAO Jan. 19, 2016)

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