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WAIVING GOODBYE TO UNAPPEALABLE DECISIONS: INDIRECT AAO JURISDICTION, OR WHY HAVING YOUR APPEAL DISMISSED CAN SOMETIMES BE A GOOD THING

Posted on August 5, 2013 by David Isaacson

The USCIS Administrative Appeals Office, or AAO, has administrative appellate jurisdiction over a wide variety of USCIS decisions that are not appealable to the Board of Immigration Appeals. This jurisdiction is primarily set forth in a regulatory list that has been absent from the Code of Federal Regulations since 2003, but was incorporated by reference that year into DHS Delegation 0150.1. Pursuant to that delegation, as manyAAOdecisionsstate, 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. (It has been previously pointed out by attorney Matt Cameron that a currently nonexistent jurisdictional regulation is an undesirable state of affairs for an appellate body; USCIS recently indicated in a July 2013 Policy Memorandum regarding certification of decisions that DHS intends to replace the list in the regulations in a future rulemaking.)

The regulatory list of applications over which the AAO has jurisdiction does not include Form I-485 applications for adjustment of status, with a minor exception relating to applications based on a marriage entered into during removal proceedings denied for failure to meet the bona fide marriage exemption under INA §245(e). Thus, it would appear that the AAO would not have appellate jurisdiction over denials of adjustment applications, and that one's sole administrative recourse if an adjustment application is denied would be to seek review before an immigration judge in removal proceedings, as is generally permitted (except for certain arriving aliens) by 8 C.F.R. §1245.2(a)(5)(ii). But appearances can be deceiving.

Many, although not all, of the grounds for denial of an adjustment application are potentially subject to waiver under appropriate conditions. If an application is denied because the applicant was found inadmissible under INA §212(a)(2)(A)(i) due to conviction for a crime involving moral turpitude ("CIMT"), for example, a waiver can be sought under INA §212(h) if either the criminal conduct took place more than 15 years ago, or the applicant can attempt to demonstrate that the applicant's U.S. citizen or lawful permanent resident spouse, parent, son or daughter would face extreme hardship if the applicant were not admitted. Similarly, one who is found inadmissible under INA §212(a)(6)(C)(i) due to fraud or willful misrepresentation (not involving a false claim to U.S. citizenship taking place after September 30, 1996) can seek a waiver of inadmissibility under INA §212(i) based on extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. Various other grounds of inadmissibility are waiveable as well.

While the AAO does not have jurisdiction directly over the denial of an adjustment application, the AAO does have jurisdiction over the denial of most waiver applications. And in the AAO's view, appellate jurisdiction to determine whether someone should have been granted a waiver necessarily includes jurisdiction to decide whether that applicant even needed a waiver in the first place. If the AAO finds that a waiver was unnecessary, it will dismiss the waiver appeal and remand for further processing of the adjustment application. That is, it will decide on appeal that the applicant was not, in fact, inadmissible, and thus in effect will have reviewed the denial of the underlying adjustment application even without regard to whether a waiver would be justified if one were indeed necessary. Although this process does not appear to be documented in any precedential AAO decision, comparatively few AAO precedent decisions of any sort having been published, this exercise of indirect appellate jurisdiction by the AAO occurs with some frequency in non-precedential, "unpublished" decisions that have been made available online (generally by USCIS itself, or occasionally by other sources).

Dismissal of a waiver appeal as moot can occur in the context of a §212(h) waiver, for example, where the AAO finds that the applicant's conviction was not for a CIMT (see also these additional decisionsfrom 2012; 2010; February, March, Aprilland June of 2009; 2008; and 2007). Even if the applicant does have a CIMT conviction, that AAO may conclude that the applicant's only conviction for a CIMT qualifies for the petty offense exception under INA §212(a)(2)(A)(ii)(II)

and thus does not give rise to inadmissibility (see also these decisions along the same lines from Januaryand Marchof 2009, 2008, and 2006). Dismissal of a §212(h) waiver application as moot can also occur when the AAO finds that the applicant was not convicted of a crime at all given that the official disposition of a charge was a "*Nolle prosequi*", or that an applicant who was not convicted of a crime had not given a valid admission to the elements of a crime, in accordance with the procedural safeguards required by precedent, so as to give rise to inadmissibility in the absence of a conviction. Outside the CIMT context, as well, the AAO can dismiss a §212(h) waiver appeal as moot upon a finding that no waiver is needed, such as when someone who was thought to have a waiveable conviction involving 30 grams or less of marijuana successfully points out on appeal that disorderly conduct under a statute not mentioning drugs is not an offense relating to a controlled substance.

In the context of a denial based on inadmissibility for fraud or misrepresentation, the AAO can dismiss an appeal from the denial of a §212(i) waiver as moot if it finds that the misrepresentation was not material (see also these decisions from 2010, 2009and 2007), or that an applicant who was victimized by others submitting a fraudulent application on his behalf without his knowledge did not make a willful misrepresentation, or that any misrepresentation was the subject of a timely retraction (see also this decision from 2006). AAO dismissal of a §212(i) waiver appeal as moot can also be used to vindicate the legal principle that presenting a false Form I-94 or similar false documentation to an employer to obtain employment does not give rise to inadmissibility under §212(a)(6)(C)(i), and neither does procuring false immigration documentation from a private individual more generally, because a misrepresentation under 212(a)(6)(C)(i) must be made to an authorized U.S. government official. Finally, AAO dismissal of a §212(i) waiver appeal as moot can occur where the only alleged misrepresentation occurred in the context of a legalization program which is subject to statutory confidentiality protection, such as the SAW (Special Agricultural Worker) program under INA §210 or a LULAC late legalization application or other application under INA §245A, and therefore any such misrepresentation cannot be the basis of inadmissibility under §212(a)(6)(C)(i) because of the confidentiality protection.

This sort of indirect AAO jurisdiction can also be used to correct errors regarding inadmissibility for unlawful presence under INA §212(a)(9)(B), if a waiver application is filed under INA §212(a)(9)(B)(v). For example, in a 2012

decision involving an applicant who was admitted for duration of status (D/S) and had been incorrectly found to have accrued unlawful presence after failing to maintain status even absent any finding of such by USCIS or an immigration judge, contrary to the 2009 Neufeld/Scialabba/Chang USCIS consolidated guidance memorandum on unlawful presence, the AAO dismissed the appeal as moot upon finding that the applicant was not, in fact, inadmissible under §212(a)(9)(B).

The AAO's indirect appellate jurisdiction over inadmissibility determinations has even been exercised where the initial inadmissibility determination was made not by a USCIS officer in the context of an application for adjustment of status, but by a Department of State consular officer in the context of a consular application for an immigrant visa. In a 2009 decision, the AAO dismissed as moot an appeal from the denial of a §212(h) waiver by the Officer in Charge (OIC) in Manila, holding that the applicant did not require a waiver because the applicant's admission to an examining physician that he had used marijuana in the past did not give rise to inadmissibility, and that *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (finding a valid admission to the elements of a crime resulting in inadmissibility under similar circumstances) did not apply because the applicant and the office that made the decision were located in the Philippines rather than within the jurisdiction of the Ninth Circuit. The AAO ordered "the matter returned to the OIC for further processing of the immigrant visa application." It explained the source of its authority in this context as follows:

> *The Secretary of Homeland Security (and by delegation, the AAO) has final responsibility over guidance to consular officers concerning inadmissibility for visa applicants. See Memorandum of Understanding Between Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, issued September 30, 2003, at 3.*

Matter of X- (AAO June 17, 2009), at 4.

Nor was that Manila case an isolated exception, although the detailed explanation of the source of the AAO's authority in the consular context that was contained in that decision is rarer that the exercise of the authority itself. The AAO has also dismissed as moot an appeal of the denial of an application for a §212(h) waiver by the Mexico City district director in the case of an applicant who sought an immigrant visa in the Dominican Republic and had

been convicted of a firearms offense which would properly give rise to deportability but not inadmissibility; dismissed an appeal from a decision of the Frankfurt, Germany OIC denying a §212(h) waiver for an applicant whom the AAO determined had not been convicted of a CIMT; dismissed an appeal from a decision of the Vienna, Austria OIC denying a §212(h) waiver for an applicant the AAO found had only been subject to juvenile delinquency proceedings not giving rise to a conviction for immigration purposes under *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001); and dismissed another appeal from a decision of the Vienna OIC where the AAO found that the applicant's conviction qualified for the petty offense exception. Indeed, the AAO has exercised its indirect appellate jurisdiction over a consular inadmissibility determination in at least one appeal from a decision of the Mexico City district director where "the applicant did not appear to contest the district director's determination of inadmissibility" but the AAO found that neither of the crimes of which the applicant had been convicted was a CIMT. The AAO's indirect appellate jurisdiction has also been exercised in a case coming from the New Delhi, India OIC where an applicant disputed his date of departure from the United States which started the running of the ten-year bar, and the AAO found that the applicant's actual departure had been more than ten years prior and thus no §212(a)(9)(B)(v) waiver was required.

Perhaps most interestingly, it appears that the AAO will even exercise its indirect appellate jurisdiction over inadmissibility determinations in some cases where the applicant has failed to demonstrate prima facie eligibility for the relevant waiver, although the only examples that this author have been able to find of this involve the AAO's indirect jurisdiction over USCIS adjustment denials rather than consular-processing of an immigrant visa. In a 2006 decision, an applicant who had not provided any evidence that his wife was a Lawful Permanent Resident who could serve as a qualifying relative for either a §212(i) waiver or a §212(a)(9)(B)(v) waiver was found not to be inadmissible because he had made a timely retraction of any misrepresentation, and had accrued no unlawful presence due to last departing the United States in 1989. In a 2009 decision, an applicant who had pled guilty to hiring undocumented workers, and who had been found inadmissible under INA §212(a)(6)(E)(i) for alien smuggling and appealed the denial of his application for a waiver of inadmissibility under INA §212(d)(11), was found not inadmissible by the AAO, which withdrew the district director's contrary finding—even though the district

director had found that the applicant did not meet the requirements of §212(d)(11), and seems very likely to have been right about that, since §212(d)(11)applies only to an applicant who "has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law." And in 2010, the AAO declared moot a waiver application under INA §212(g) by an individual infected with HIV who apparently had not established any relationship with a qualifying relative, on the ground that in January 2010 the Centers for Disease Control had removed HIV from the official list of communicable diseases of public health significance, and therefore HIV infection was no longer a ground of inadmissibility. Some potentially difficult ethical and practical questions would need to be resolved before deliberately filing a waiver application on behalf of an applicant ineligible for such waiver in order to obtain AAO review of whether the applicant was inadmissible at all, but it is at least a possibility worthy of further analysis.

So when an application for adjustment of status, or even for a consular-processed immigrant visa, is denied, it is important to keep in mind that an appeal may be available even if it does not appear so at first glance, and that establishing the necessary hardship to a qualifying relative to support a waiver application is not necessarily the only way to win the case. If a waiver of the ground upon which the denial was based is at least theoretically available, so as to support AAO jurisdiction over the denial of that waiver, then one can leverage the waiver to seek AAO review of whether a waiver was necessary in the first place.