U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ST. PAUL, MN Date: MAY 27 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Paul, Minnesota and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their U.S. citizen children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated July 6, 2006.

On appeal, the applicant contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in finding that the applicant had failed to establish extreme hardship to his qualifying relative, as necessary for a waiver under 212(i) of the Act. *Form I-290B; Attorney's statement and brief.*

In support of the waiver, counsel submits a statement and a brief. The record also includes, but is not limited to, statements from the schools of the applicant's children; a statement from the applicant; medical statements and records for the applicant's children; published articles and reports on country conditions in Mexico; a statement from the applicant's spouse; employment applications for the applicant; and tax statements for the applicant and his spouse. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > . . . .
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant entered the United States in December 1992. *Form I-601, Application for Waiver of Grounds of Inadmissibility*; *Form G-325A, Biographic Information sheet, for the applicant.* The applicant departed the United States in May 1998 and re-entered on May 28, 1998 without inspection. *Form I-485 Processing Worksheet*; *Form I-485, Application to Register Permanent Residence or Adjust Status.* The applicant has not departed the United States since his May 1998 re-entry. *Form I-485, Application to Register Permanent Residence or Adjust Status.* The applicant accrued more than one year of unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until May 1998, when he departed the United States. He was, therefore, barred from seeking admission to the United States for ten years from the date of his May 1998 departure. The applicant, however, re-entered the United States without inspection that same month. Accordingly, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and must seek a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act.

Prior to addressing whether the applicant qualifies for a waiver under section 212(a)(9)(B)(v) of the Act, the AAO finds it necessary to address an additional issue of inadmissibility in this case.

The AAO notes that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act as he reentered the United States without inspection after having been unlawfully present in the United States for more than one year.

Section 212(a)(9)(C)(i) of the Act states, in pertinent part:

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
>
> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
>
> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
>
> and who enters or attempts to reenter the United States without being admitted is inadmissible.

> (ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must file for permission to reapply for admission (Form I-212). However, only those individuals who have remained outside the United States for at least ten years since their last departure are eligible for consideration. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).[1] The record establishes that the applicant in the present matter has not resided outside of the United States for the required ten years. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(i) of the Act and the AAO finds no purpose would be served in considering the merits of his Form I-601 waiver application under section 212(a)(9)(B)(v) of the Act. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[1] The AAO takes note of the preliminary injunction that had been entered against the ability of DHS to follow *Matter of Torres-Garcia*. *Gonzales v. DHS,* 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board's decision in *Matter of Torres-Garcia* was entitled to judicial deference. *Gonzales II,* 508 F.3d at 1241-42. The Ninth Circuit's mandate issued January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new preliminary injunction. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt # 59), *Gonzales v. DHS,* No. C06-1411-MJP (W.D. Wash. Filed February 6, 2006). Thus, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of Torres-Garcia.*