U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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Date: OCT 0 6 2011 Office: FRESNO, CA FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rhumway

for Perry Rhew
Chief, Administrative Appeals Office

DICUSSION: The waiver application was denied by the Field Office Director, Fresno, California 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 pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is the son of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director,* dated February 22, 2008.

On appeal, counsel stated that the Field Office Director erred in finding that the applicant's parents would not suffer extreme hardship in his absence. Counsel also asserted that the applicant was not inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act as he had not been convicted of a crime involving moral turpitude. *Form I-290B, Notice of Appeal or Motion,* dated March 24, 2008.

On June 6, 2011, the AAO issued a Notice of Intent to Deny to the applicant informing him that while he was not subject to section 212(a)(2)(A)(i)(I) of the Act, he was inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act. The applicant was given 30 days in which to respond and informed that the AAO would dismiss the appeal if he failed to do so. *Notice of Intent to Deny*, dated June 6, 2011.

As of this date, the applicant has not replied to the Notice of Intent to Deny. Therefore, the AAO finds the applicant to be inadmissible pursuant to section 212(a)(9)(B) of the Act, which states 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.

On the Form I-485 he filed on May 9, 2001, the applicant stated that he had last entered the United States without inspection in 1998.[1] On July 27, 2007, the applicant filed a second Form I-485. During an interview for that application, he indicated that his last entry to the United States had taken place in March 2005 without inspection.

Although the record does not provide sufficient information for the AAO to determine the full extent of the applicant's unlawful presence in the United States, it does document that, at a minimum, he accrued unlawful presence from the date of his 1998 entry without inspection until his May 9, 2001 filing of the Form I-485, which placed him in a period of authorized stay. The applicant's departure from the United States on an unknown date prior to his March 2005 reentry triggered the unlawful presence provisions under the Act. Therefore, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The AAO also finds the applicant to be inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, which states:

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

The Form I-485, filed by the applicant on July 27, 2007, states that he last entered the United States without inspection in March 2005. As the applicant entered the United States without inspection after having been unlawfully present for more than one year, he is subject to section 212(a)(9)(C)(i)(I) of the Act.

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[1] The record additionally contains an October 31, 2001 letter from the applicant's employer who states that the applicant began full-time employment as of March 19, 1998. Although the Form I-601 filed by the applicant on July 20, 2007 also indicates that he lived in [redacted], California from May 1991 until January 1994 and in [redacted] California from January 1994 until January 2007, the record does not provide sufficient evidence to allow the AAO to determine whether the applicant may have begun accruing unlawful presence as early as April 1, 1997, the effective date of the unlawful presence provisions under the Act.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must remain outside the United States for at least ten years following his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).[2] The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, he is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(ii) of the Act.

As the applicant is not eligible for an exception from his section 212(a)(9)(C)(i) inadmissibility, the AAO finds no purpose would be served in considering the merits of his Form I-601 waiver application. The appeal will therefore be dismissed.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.

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[2]The AAO notes the preliminary injunction that was previously entered against the ability of the Department of Homeland Security to follow *Matter of* [redacted], 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. [redacted], 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board of Immigration Appeal's decision in *Matter of* [redacted] was entitled to judicial deference. [redacted], 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 # [redacted], [redacted] DHS, No. [redacted] Filed February 6, 2006). Thus, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of* [redacted]