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

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U.S. Citizenship and Immigration Services

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JUL 08 2009

FILE: [redacted] Office: CLEVELAND, OH Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act; 8 U.S.C. §1182(a)(9)(B).

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 application was denied by the District Director, Cleveland, Ohio 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 is 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 more than one year and seeking admission within ten years of his last departure from the United States. The applicant is the husband of a U.S. citizen. He seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) in order to reside in the United States.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the District Director,* dated November 13, 2004.

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

The record reflects that the applicant entered the United States without inspection in May 1998 and remained until May 1999, when he voluntarily departed the United States and triggered the unlawful presence provisions of the Act. *Form I-601, Application for Waiver of Ground of Excludability.* The applicant accrued unlawful presence from May 1998 until May 1999. The applicant re-entered the United States without inspection in October 1999 and again in October 2000, remaining through the present time. *Id.*; *see also Form I-485, Application to Register Permanent Residence or Adjust Status, and Memorandum for APD/CLE, dated May 2, 2002.* As such, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act for having been unlawfully present in the United States for an aggregate period of more than one year and entering the United States without being admitted.

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 does not reflect that the applicant in the present matter has 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)(II) 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(v) of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.

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[1] The AAO takes note of the preliminary injunction that was entered against the ability of the Department of Homeland Security to follow *Matter of Torres-Garcia*. *Gonzales v. DHS,* 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit Court of Appeals, 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 of Immigration Appeals' 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.*