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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: SAN DIEGO, CA Date: SEP 24 2009

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 District Director, San Diego, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on October 1, 1996, appeared at the San Ysidro, California port of entry. The applicant presented an I-94 Arrival/Departure Record with an ADIT I-551 stamp bearing the name "[redacted]" The applicant was placed into secondary inspection. The applicant failed to provide immigration officers with her true identity. On October 2, 1996, the applicant was placed into immigration proceedings. On October 4, 1996, the immigration judge ordered the applicant removed from the United States under the name "[redacted]" On the same day, the applicant was removed from the United States and returned to Mexico.

On October 7, 1996, immigration officers apprehended the applicant at the San Ysidro, California port of entry after she attempted to elude inspection by concealing herself in the trunk of a vehicle. The applicant was placed into secondary inspection. The applicant failed to provide immigration officers with her true identity. On October 9, 1996, the applicant was placed into immigration proceedings. On October 11, 1996, the immigration judge ordered the applicant removed from the United States under the name [redacted]." On the same day, the applicant was removed from the United States and returned to Mexico.

The applicant reentered the United States without parole or inspection on an unknown date, but prior to December 26, 2003, the date on which she gave birth to her U.S. citizen son.

On March 18, 2006, immigration officers apprehended the applicant at the San Ysidro, California port of entry after she attempted to elude inspection by concealing herself in the trunk of a vehicle. The applicant was placed into secondary inspection. The applicant failed to provide immigration officers with her true identity and concealed her prior removals from the United States. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant without valid documentation. On March 19, 2009, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1) under the name "[redacted]"

On August 10, 2007, the applicant filed the Form I-212, indicating that she resided in Mexico. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for a period of twenty years. She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with her U.S. citizen children.

The district director determined that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-212 accordingly. *See District Director's Decision,* dated May 15, 2009.[1]

[1] The AAO notes that the district director incorrectly required the applicant to establish extreme hardship to a qualifying relative in order to qualify for permission to reapply for admission. Permission to reapply for admission, once an applicant is eligible to apply, may be granted where the applicant's favorable factors outweigh his or her negative factors and does not require a showing of extreme hardship, even though hardship to family members may be considered in

On appeal, counsel contends that the applicant submitted evidence of extreme hardship to her qualifying family members and that the Form I-212 was denied without good cause. *See Form I-290B,* dated June 15, 2009. In support of his contentions, counsel submits only the referenced Form I-290B. On the Form I-290B, counsel indicates that he will forward additional evidence and/or a brief within thirty days. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the San Diego, California district office or any other federal office. The record does not contain the brief and/or evidence that counsel indicated would be submitted to the AAO. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location. Accordingly the record is complete.

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

> (A) Certain aliens previously removed.-
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> (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
>
> (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or ***within 20 years of such date in the case of a second or subsequent removal*** or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.
>
> (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous

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determining whether a favorable exercise of discretion is warranted. The AAO, however, does note that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, and she requires a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), a waiver that requires an applicant to establish extreme hardship to his or her U.S. citizen or lawful permanent resident spouse or parents. The AAO notes that the applicant does not appear to qualify for a waiver under section 212(i) of the Act because she does not have the necessary qualifying family member.

territory, the Secretary has consented to the alien's reapplying for admission. [Emphasis added]

. . . .

(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, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The AAO notes that an exception to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on March 19, 2006, less than ten years ago.[2] The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

The AAO takes note of the preliminary injunction that had been entered against the ability of the Department of Homeland Security (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 was issued on 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 from applying the rule laid down in *Matter of Torres-Garcia.*

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.

[2] The applicant will be required to provide evidence establishing that she is currently outside the United States and has remained outside the United States for a period of ten years when she becomes eligible to apply for permission to reapply for admission.