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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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: SAN SALVADOR, EL SALVADOR Date: NOV 15 2010

[redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and (h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and (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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 Kumway

for Perry Rhew
Chief, Administrative Appeals Office

DICUSSION: The waiver application was denied by the Field Office Director, San Salvador, El Salvador and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador 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 been convicted of a crime involving moral turpitude and section 212(a)(9)(B)(i)(II) of 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. The applicant is the husband and father of U.S. citizens. He seeks waivers of his inadmissibilities in order to reside in the United States with his family.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decisions of the Field Office Director,* dated July 20 and 21, 2009.

On appeal, the applicant's spouse states that she and the applicant's child are experiencing financial and emotional problems in his absence and that they are desperate. *Spouse's letter accompanying the Form I-290B, Notice of Appeal or Motion*, dated August 4, 2009.

The evidence of record includes, but is not limited to: statements from the applicant's spouse; medical evidence relating to the applicant's spouse; country conditions materials on El Salvador; financial documentation and evidence relating to the applicant's criminal record. The entire record was reviewed and all relevant evidence considered in reaching this decision.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude(other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) states in pertinent part that:

> (h) The Attorney General [now Secretary of Homeland Security]may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-
>
> . . . .
>
> > (1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in

> extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

The record reflects that on June 5, 2002, the applicant pled nolo contendere to the charge of robbery in the second degree under Texas Penal Code §29.02. Adjudication of guilt was deferred and the applicant was fined and placed on three years probation.[1] The AAO notes that in *U.S. ex rel. Cerami v. Uhl*, the crime of robbery in the second degree was considered a crime involving moral turpitude. 78 F.2d 698 (CA2 N.Y. 1935) Accordingly, the applicant appears inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(9)(B) 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.
> >
> > . . . .
> >
> > (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 without inspection in October 1999 and that he applied for Temporary Protected Status (TPS) on June 20, 2001. Although the applicant filed subsequent TPS applications and was granted employment authorization on the basis of these filings, the AAO notes that his original TPS application was not adjudicated until April 19, 2004, when it was denied. Thus, the AAO finds the applicant to have accrued unlawful presence from the date on which he entered the United States until he was removed from the United States on November 15, 2007. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Citizenship and Immigration Services, *Consolidation of Guidance*

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[1] The AAO notes that the Field Office Director's July 20, 2009 decision indicates that the conviction barring the applicant's admission to the United States is for aggravated assault. The AAO does not find the record to support this finding.

Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, at 38, 43-44 (May 6, 2009). As the applicant's accrued unlawful presence in excess of one year and is seeking admission to the United States within ten years of his 2007 removal, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

Beyond the Field Office Director's decision, the AAO finds that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having reentered the United States without being admitted after having been unlawfully present in the United States for more than one year and under section 212(a)(9)(C)(i)(II) of the Act for having reentered the United States without being admitted after having been ordered removed.[2]

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
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> (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....

The record indicates that on November 9, 2010, Customs and Border Protection agents apprehended the applicant near a Border Patrol checkpoint inside the King Ranch. The applicant testified that he had waded across the Rio Grande River near Hidalgo, Texas on November 3, 2010.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) or (II) of the Act, an applicant must have remained outside the United States for at least ten years since his or her

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[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).[3] The record in the present matter establishes that the applicant has not resided outside 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)(I) or (II) of the Act. As no purpose would be served in considering the merits of his Form I-601 waiver application under sections 212(a)(9)(B)(v) and 212(h) of the Act, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[3]The AAO notes the preliminary injunction that was previously 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, 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 Appeal'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*.