

Identifying such a threat to prevent clearly unwarranted invasion of personal privacy

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
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FILE: [REDACTED] Office: NEWARK

Date: JUN 15 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1182(i) and (a)(9)(B)(v)

ON BEHALF OF APPLICANT:

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 Field Office Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who initially entered the United States without inspection in 1993 and departed in 1995. *Affidavit of Alien in Support of I-601 Waiver Application*, dated May 25, 2007. The applicant admits that she re-entered the United in 1999 without inspection and departed in March 2002. *Id.* She further concedes she attempted to re-enter the United States in April or May 2002 using a border crossing card belonging to someone else that she had purchased in Mexico, but was detained and refused admission. *Id.* She concedes that approximately two days later, she re-entered the United States without inspection. *Id.* The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to sections 212(i) and (a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and (a)(9)(B)(v), in order to reside with her husband and child in the United States.

The field office director terminated the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) after concluding she was ineligible for admission pursuant to section 212(a)(9)(C)(i) of the Act. *Decision of the Field Office Director*, dated December 10, 2007.

Section 212(a)(9) 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, 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.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been 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, *and* USCIS has consented to the applicant's reapplying for admission.

In the present matter, it is uncontested that the applicant was unlawfully present in the United States for an aggregate period of more than one year from 1999, when she entered without inspection, until she departed in March 2002. The applicant admits she unlawfully reentered the United States without inspection in April or May 2002, two days after an unsuccessful attempt at using another person's border crossing card, and is currently residing in the United States. *Affidavit of Alien in Support of I-601 Waiver Application*. Therefore, she has not remained outside the United States for 10 years since her last departure. Accordingly, she is currently statutorily ineligible to apply for permission to reapply for admission. As such, the field office director was correct in concluding that no purpose would be served in adjudicating the applicant's waiver application.

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*. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.