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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  
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H<sub>2</sub>

FILE: [REDACTED]

Office: SAN FRANCISCO (FRESNO)

Date: OCT 26 2009

IN RE: Applicant: [REDACTED]

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

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Mexico, attempted to procure entry to the United States in December 2001 by presenting a Form I-586, Border Crossing Card, belonging to another individual. *See Record of Sworn Statement in Proceedings*, dated December 21, 2001. Consequently, she was ordered removed in December 2001 and was removed from the United States on December 21, 2001. *See Notice and Order of Expedited Removal*, dated December 21, 2001 and *Notice to Alien Ordered and Removed/Departure Verified*, dated December 21, 2001. The applicant subsequently re-entered the United States without inspection "within days..." *Declaration of* [REDACTED] dated January 31, 2007.

The district director found the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud and/or willful misrepresentation in December 2001. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her lawful permanent resident spouse.

The district director concluded that "since the applicant's I-485 adjustment of status application has been denied for being inadmissible under 212(a)(9)(C)(i)(II) of the Act, there is no statutory basis for the I-601 waiver. Accordingly, the application for the waiver of inadmissibility must be denied." *Decision of the District Director*, dated May 31, 2006.

In support of the appeal, counsel for the applicant submits a brief, dated July 27, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides, in pertinent part, that:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act, 8 U.S.C. § 1182(i), provides that:

(1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), 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 AAO concurs with the district director that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud and/or misrepresentation when attempting to procure entry to the United States in December 2001, and under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(II), for entering the United States without being admitted after having been ordered removed.<sup>1</sup>

The AAO finds that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I). The AAO's additional finding of inadmissibility in the instant case is based on the applicant's unlawful presence after a previous immigration violation, specifically, unlawful presence. As counsel notes,

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<sup>1</sup> Counsel contends that the applicant has never been removed. Section 212(a)(9)(C)(i)(II) of the Act applies to aliens who have been ordered removed under any provision of the law, including, as is the case here, removal under section 235(b)(1) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. The record clearly establishes the applicant's removal in December 2001, as noted above.

[The applicant] first entered the United States at some point in 1996. She entered illegally to be with her husband.... Therefore, [redacted] [the applicant] remained unlawfully in the United States, until November 2001, when she voluntarily returned to Mexico for a short visit. She re-entered the United States [without being admitted] on or about the 30<sup>th</sup> of December 2001, at Nogales, Arizona.

*See Brief in Support of Appeal*, dated July 27, 2006. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until her departure in November 2001, and she then entered the United States without being admitted in December 2001.

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, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(i) of the Act.

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 (9<sup>th</sup> 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 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*.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to her lawful permanent resident spouse or whether she merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The waiver application is denied.