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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



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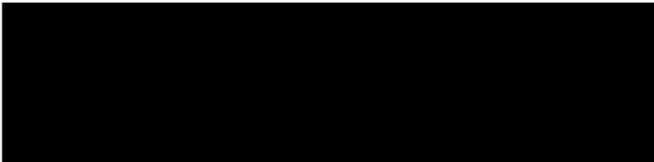
FILE: [REDACTED] Office: SACRAMENTO, CA

Date: OCT 29 2009

IN RE: [REDACTED]

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

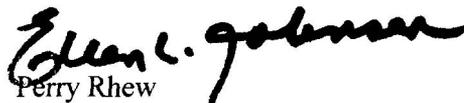
ON BEHALF OF APPLICANT:



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 Acting Field Office Director, Sacramento, California. 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. The record shows that in June 1998, the applicant attempted to enter the United States by using a photo-altered document. Although counsel contends that “the applicant purchased a passport to look for a job in the United States[, but] never made a willful misrepresentation to a United States Government Official,” *Notice of Appeal or Motion (Form I-290B)*, the record shows that the applicant presented the passport to a U.S. government official when he attempted to enter the United States. *Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act*, dated June 3, 1998 (“Q. How did you attempt to enter the United States?” A. With a passport that I bought.”). The applicant was, therefore, properly found inadmissible under section 212(a)(6)(C) of the Act for attempting to enter the United States through fraud. The record further shows that the applicant was served with a Notice and Order of Expedited Removal, and summarily removed. On November 29, 1999, the applicant unlawfully reentered the United States, was apprehended, and was removed again. Two days later, on or about December 1, 1999, the applicant unlawfully reentered the United States. The applicant now seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with his U.S. citizen wife and children in the United States.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen wife and denied the application accordingly. *Decision of the Acting Field Office Director*, dated May 25, 2007.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also Janka v. U.S. Dep’t of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *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 Dor*, 891 F.2d at 1002 n.9 (noting that the AAO reviews appeals on a de novo basis).

In addition to his inadmissibility under section 212(a)(6)(C) of the Act, the AAO also finds the applicant inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

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 CIS has consented to the applicant's reapplying for admission.

In the present matter, the applicant reentered the United States without being admitted after having been ordered removed on two separate occasions. Therefore, the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The applicant's last departure from the United States occurred on November 29, 1999. The applicant reentered the United States two days later and is currently residing in the United States. Therefore, he has not remained outside the United States for ten years since his last departure. Accordingly, he 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, 8 U.S.C. § 1182(i).

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.¹

ORDER: The appeal is dismissed.

¹ The AAO notes that in addition to appealing the denial of the waiver, counsel also submitted a separate Form I-290B Notice of Appeal related to the denial of the applicant's Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). However, there is no indication a separate fee was paid for that appeal and, therefore, no separate decision will be rendered. In any event, even if a separate fee had been paid, the Form I-212 would have been denied for the same reasons set forth in this decision.