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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VIENNA Date: JAN 12 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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).

Cheryl Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native of Macedonia, entered the United States without inspection on June 6, 1985. On the same date the applicant was served an Order to Show Cause for a hearing before an Immigration Judge and on June 10, 1985, he was released on a $2,000 bond. On August 7, 1985, the applicant applied for asylum. An Immigration Judge denied his applications for asylum and withholding of deportation on May 13, 1988. The Immigration Judge granted the applicant voluntary departure until June 30, 1988. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on September 27, 1993. He was granted thirty days to depart the United States voluntarily. The applicant failed to depart the United States. The applicant's failure to depart on or prior to October 26, 1993 changed the voluntary departure order to an order of deportation. On October 27, 1993, a Warrant of Deportation (Form I-205) was issued. On June 21, 1994, the applicant filed a Motion to Reopen (MTR) his deportation proceedings, which was denied by the BIA on August 1, 1994. A second MTR was filed in August 1995 and the BIA denied it on February 2, 1996. A petition to review the BIA's decisions filed with the United States Court of Appeal for the Second Circuit was denied on October 30, 1996. An application for a stay of deportation filed by the applicant was granted on July 22, 1994. On December 12, 1996, the case was dismissed with prejudice and the stay of deportation was dissolved. The record of proceedings reveals that on December 20, 1996, the applicant departed the United States, executing the pending order of deportation. The record further reveals that a previously filed Application for Permission to Reapply for Admission after Deportation or Removal (Form I-212) was denied on February 18, 1988. The applicant reentered the United States in May 1998, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1326. On September 10, 2001, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act. On February 6, 2002, an Immigration Judge denied the applicant's requests for withholding of removal under section 241(b)(3) of the Act and under the Convention Against Torture. On March 10, 2002, the applicant was removed from the United States.

The officer in charge found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for more than one year. In addition, the officer in charge found that the applicant was inadmissible under section 212(a)(9)(C) of the Act, for entering the United States without being admitted after having been ordered removed. The officer in charge concluded that "because you [the applicant] are inadmissible under a provision of the law for which there is no waiver, we must deny your application. Additionally, your spouse....has not established that she would experience hardship that rises to the level of 'extreme' if she were to choose to remain in the U.S. without you or if she were to return to her native Macedonia and reunite with you...." *Decision of the Officer in Charge,* dated April 8, 2009.

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

. . . .

(B)(i)(II) 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…

. . . .

(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 officer in charge that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for 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, 8 U.S.C. §1182(a)(9)(C)(i)(II), for entering the United States without being admitted after having been ordered removed.[1]

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 record indicates that the applicant's last departure from the United States occurred in March 2002, less than ten years ago. 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(a)(9)(B)(v) 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 (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 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 he has established extreme hardship to his U.S. citizen spouse or whether he 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.

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[1] The AAO notes that the applicant may also be inadmissible to the United States under section 212(a)(2)(A)(i) of the Act, for having been convicted of crimes involving moral turpitude, including convictions for assault in 1994 and 1995. However, as the AAO concurs with the officer in charge that the applicant is inadmissible under sections 212(a)(9)(B)(i)(II) of the Act, for unlawful presence, and under 212(a)(9)(C)(i)(II), for entering the United States without being admitted after having been ordered removed, it is not necessary at this time for the AAO to analyze whether the applicant's convictions render him inadmissible under section 212(a)(2)(A)(i) of the Act.