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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: PHOENIX, ARIZONA

Date:

JUL 23 2009

IN RE: Applicant:

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:

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 22, 2005. The applicant submitted a timely appeal.

On appeal, counsel states that [REDACTED] has three children and they are members of a church in Phoenix. She states that [REDACTED] and her husband, [REDACTED] own two houses and that [REDACTED] is employed full-time making golf clubs and his employment provides the family's health benefits. Counsel states that the family's combined income is \$31,997. According to counsel, [REDACTED] is depressed and worried about what will happen if his wife's waiver is denied and counsel points to the psychological evaluation in the record to demonstrate his condition. Counsel contends that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and that there is no precedent discussing inadmissibility under that section, and no guidance as to its application. Counsel claims that U.S. Citizenship and Immigration Services (USCIS) relies upon a heightened standard of "extreme hardship" and should have applied the hardship factors set forth in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), instead of relying on those in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). Counsel states that [REDACTED] would not find employment in Mexico because she does not have any useful skill and is considered an aging employee. Family separation, including the impact on children, counsel asserts, must be considered in analyzing hardship. Counsel states that extreme hardship in the context of suspension of deportation cases differs from extreme hardship in waiver of inadmissibility cases. Lastly, counsel asserts that [REDACTED] has fundamental substantive and procedural due process rights concerning his family.

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. Dept. 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 v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The AAO will first consider the finding of inadmissibility for unlawful presence in the United States.

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

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

(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.

USCIS records reflect that the applicant entered the United States without inspection in 1988. The applicant had filed an Application for Temporary Resident Status as a Special Agricultural Worker on October 31, 1988, which was denied on May 8, 1991, and its appeal was dismissed on May 22, 1995. The applicant stated under oath that she remained unlawfully in the country until February 2001, at which time she left to Mexico. The applicant stated that she returned to the United States a few days later, and she claimed to have been waived through by an inspecting officer. Section 101(a)(13) of the Act states that the terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." The applicant has provided no proof that she had been lawfully admitted or had gained lawful admission into the United States. The AAO notes that counsel on appeal states that the applicant entered the United States without inspection. On December 11, 2001, the applicant filed an adjustment of status application.

The record demonstrates that [REDACTED] had accrued three years of unlawful presence from April 1, 1997 until February 2001 before she departed from the United States. When [REDACTED] left from the United States she triggered the ten-year-bar of section 212(a)(9)(B)(i)(II) of the Act. Furthermore, when [REDACTED] returned to the United States without being admitted, she rendered herself inadmissible under section 212(a)(9)(C) of the Act. An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless more than 10 years have elapsed 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 *and* that CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on February 2001, less than ten years ago. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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*.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

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