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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

[REDACTED]

H-3

FILE:

[REDACTED]

Office: PHOENIX, AZ

Date:

MAR 13 2009

RELATES)

IN RE:

[REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

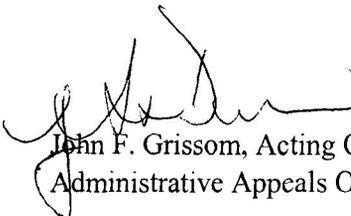
ON BEHALF OF APPLICANT:

[REDACTED]

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 Acting District Director, Phoenix, Arizona, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on March 17, 1997, married his then lawful permanent resident spouse, [REDACTED] in Yuma City, Arizona. On July 9, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on September 6, 1997. On March 1, 2002, [REDACTED] became a naturalized U.S. citizen. On March 12, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On April 27, 2004, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Phoenix, District Office. The applicant testified that he entered the United States in March 1997, without inspection and had remained in the United States until 1999. The applicant testified that he departed the United States in 1999 and reentered, on an unknown date in 1999, without inspection. The applicant testified that he had since traveled outside the United States utilizing advance parole (Form I-512). Records reflect that the applicant's last reentry into the United States occurred on April 23, 2002. On February 11, 2005, the Form I-485 was denied. On March 11, 2005, the applicant filed the Form I-212, indicating that he resided in the United States. The applicant is inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182(a)(9)(C). He seeks permission to reapply for admission into the United States under section 212(a)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his U.S. citizen spouse and U.S. citizen child.

The acting district director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for illegally reentering the United States after having accrued more than one year of unlawful presence. The acting district director determined that the applicant is not eligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. The acting district director denied the Form I-212 accordingly. *See Acting District Director's Decision*, dated December 7, 2005.

On appeal, counsel contends that the acting district director erred in finding the applicant inadmissible pursuant to section 212(a)(9)(C) of the Act and that the correct grounds of inadmissibility is section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for which the applicant may seek a waiver by filing an Application for Grounds of Inadmissibility (Form I-601). *See Counsel's Brief*, dated January 10, 2006. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the

date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

- (ii) Other aliens.-Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or
 - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

....

(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.* [Emphasis added]

(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.

While counsel contends and the applicant testified that, in 1999, the applicant departed the United States under a grant of voluntary departure, the record does not contain evidence to establish that the applicant was granted voluntary departure in 1999. The applicant, therefore, accrued more than one year of unlawful presence in the United States; from April 1, 1997, the date on which unlawful presence provisions were enacted under the Act, and the unknown date in 1999 on which he departed the United States. While counsel contends that the applicant is only inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, the AAO finds that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act.¹

The AAO notes that an exception to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained 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 since that departure, *and* that USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in April 2003, less than ten years ago, and he has not remained outside the United States since that departure. The applicant is currently statutorily ineligible to apply for permission to reapply for admission. Additionally, the AAO finds that, in light of the applicant's repeated violations of the immigration laws, he would not warrant a favorable exercise of discretion.

The AAO takes note of the preliminary injunction that had been entered against the ability of the Department of Homeland Security (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

¹ The AAO notes that the applicant may seek a waiver of his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act under section 212(a)(9)(B)(v) of the Act by filing an Application for Waiver of Grounds of Inadmissibility (Form I-601); however, the applicant must also seek a separate waiver under section 212(a)(9)(C)(ii) of the Act for his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

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*.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.