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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

#5

[redacted]

DATE: OCT 0 4 2011 Office: FRESNO, CA FILE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, Fresno, California, and 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 who was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act) for having been ordered removed under section 235(b)(1) of the Act and reentering the United States without being admitted. The applicant's spouse and three children are U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her family.

The field office director found that the applicant was inadmissible under section 212(a)(9)(C) of the Act, less than 10 years had elapsed since she last left the United States, and approving the Form I-601 would not make her admissible. *Decision of the Field Office Director*, at 5, dated July 30, 2009. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Id.*

On appeal, counsel asserts that the application should be granted as ten years have passed since the applicant's removal and subsequent reentry to the United States, and the denial was legally erroneous as there is pending class action litigation related to her inadmissibility. *Counsel's Appeal Brief*, dated July 21, 2009.

The record includes, but is not limited to, counsel's brief. The entire record was reviewed and considered in arriving at a decision on the appeal.

The AAO notes that the applicant filed her Form I-601 in regard to a misrepresentation, although the field office director did not address her misrepresentation in the decision. The record reflects that the applicant presented another individual's Form I-551 when seeking to procure admission to the United States at the San Ysidro port of entry on January 24, 1998. Based on this misrepresentation, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and she would require a Form I-601 under section 212(i) of the Act. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 212(a)(6)(C) of the Act 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 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 alien 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.

On January 26, 1998, the applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act. The applicant subsequently entered the United States without inspection on January 29, 1998. As such, the AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed under section 235(b)(1) of the Act and reentering the United States without being admitted.

Section 212(a)(9)(C)(i) 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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, an applicant must file for permission to reapply for admission (Form I-212). However, consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted to one who has left the United States, is currently abroad and is seeking admission to the United States at least ten years after the date of his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).[1] The

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[1] The AAO takes note of the preliminary injunction that was previously 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 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 decision by the Board of

record does not reflect that the applicant in the present matter has met these requirements. Accordingly, the applicant is statutorily ineligible to seek an exception from her inadmissibility under section 212(a)(9)(C)(i)(II) of the Act and the AAO therefore finds no purpose would be served in considering the merits of her Form I-601 waiver application under section 212(i) of the Act. The appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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Immigration Appeals (BIA) 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, finding that the plaintiffs were unlikely to be successful on appeal. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt ), *Gonzales v. DHS,* No. C06-1411-MJP (W.D. Wash. Filed February 6, 2006). The AAO notes counsel's claim regarding a pending appeal of this case in the Ninth Circuit (Docket number . However, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO from applying the rule laid down in *Matter of Torres-Garcia.*