

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



**U.S. Citizenship
and Immigration
Services**



H 6

FILE: [REDACTED] Office: SACRAMENTO

Date: **APR 16 2010**

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility

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 Field Office Director, Sacramento, California. The matter 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. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for reentering the United States without admission after having been in the U.S. unlawfully for an aggregate period of more than one year. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and children.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) and an Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 4, 2007.

In denying the application, the director noted that there are no waivers available for inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. The director notified the applicant that he must obtain consent to reapply for admission to the United States. *See Director's Decision*, dated July 31, 2009.

On appeal, the applicant asserts that "INA § 212(a)(9)(c) should not be interpreted to prevent an alien from applying for permission to reapply for entry after deportation or removal within the statutory period or when reentry has occurred as [the immigration] regulations . . . clearly allow applicants to file Form I-212 within the United States." The applicant states that "8 C.F.R. § 212.2 specifically clearly mandates that five years is the period of inadmissibility refer to by §§ 212(a)(6) and 212(a)(9)(C) of the INA." The applicant states that "INA § 245(i) should control over both INA § 212(a)(9)(C)(i) and 8 C.F.R. § 212.1 because it was the last regulation in time . . . and [he] should be allowed to adjust in the United States despite his unlawful presence." The applicant states that he is a "class member of *Duran Gonzales*" and "relied upon *Perez-Gonzales* in submitting his I-601." The applicant states that "If the application is not allowed to remain open" or he "is not allowed to remain in this country while the *Duran Gonzales* appeal is pending before the Ninth Circuit" he will be "irreparabl[y] damaged." *See Brief in Support of Appeal*, dated August 13, 2009.

Section 212(a)(9)(C)(i)(I) of the Act provides in pertinent part:

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. . . . 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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver -- The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between --

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

A violation under section 212(a)(9)(C)(i)(I) of the Act constitutes a permanent bar to admission to the United States. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must have entered or attempted to enter the United States without being admitted. In the present matter, the evidence reflects that the applicant was unlawfully present in the United States for an aggregate period of more than one year between May 1998 and July 2000. The applicant departed the United States in July 2000, and he reentered the United States unlawfully in August 2000. The applicant is therefore inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

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's last departure from the United States occurred in July 2000. The applicant is currently residing in the United States after his illegal reentry in August 2000 and therefore, has not remained outside the United States for 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission.

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 conclusion, the instant appeal relates to a Form I-601 application for a waiver of the grounds inadmissibility arising under sections 212(g), (h), (i) and (a)(9)(B)(v) of the Act. Here, the applicant is inadmissible under section 212(a)(9)(C), which is not the subject of the Form I-601 and therefore is not within the subject matter jurisdiction of the AAO to adjudicate with this appeal. An alien who is inadmissible under section 212(a)(9)(C) of the Act must file an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) once 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). Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.