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

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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: FEB 16 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:



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 District Director, Mexico City, Mexico, 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 under 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 is the spouse of [REDACTED] a naturalized citizen of the United States. 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), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that her 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 March 23, 2007. The applicant filed a timely appeal.

On appeal, counsel makes the following statements. The applicant's husband and children have experienced extreme financial and emotional suffering since the denial of the waiver application. The applicant has two U.S. citizen children who have resided with the applicant since January 2006 as the applicant's husband cannot work and care for the children at the same time. The applicant's daughter, [REDACTED] was diagnosed with Torticollis and fourth cranial nerve palsy. The applicant's husband is having difficulty maintaining two households, and his hypertension has become worse since the applicant left the United States. The applicant's lawful permanent resident mother has high blood pressure, diabetes, and high cholesterol, and when the applicant was employed she helped her mother financially. The applicant's mother suffered substantial emotional stress as a result of separation from her daughter and grandchildren, and the death of her son. [REDACTED] has been out of her normal schooling regimen. The applicant is undergoing uterine analysis. The denial of the waiver was "devoid of analysis or any balancing of the equities."

The AAO will first address the finding of inadmissibility.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in 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.

...

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection on January 5, 1987. The applicant filed an asylum application on May 6, 1998, which application was referred to an immigration judge on February 4, 1999. On June 2, 1999, the immigration judge ordered that the applicant be removed from the United States *in absentia* for failure to appear at a removal hearing. On March 5, 2001, a Notice of Hearing in Removal Proceedings was issued by mail to the applicant for a master hearing on April 26, 2001. On December 3, 2001, the Notice of Hearing in Removal Proceedings was issued to the applicant for an individual hearing on October 29, 2003. On July 26, 2002, the applicant filed a motion to cancel the individual hearing. The immigration judge denied the applicant's motion on August 27, 2002. On October 29, 2003, the applicant failed to appear and immigration judge ordered her removal *in absentia* from the United States. On November 17, 2003, a warrant of removal was issued. On January 24, 2004, the applicant filed a Motion to Reopen and Rescind Removal Order Entered *In Absentia* and Request for Stay of Removal. On May 11, 2004, the immigration judge denied the motion to reopen and the motion to stay removal. On June 10, 2004, a warrant of removal was issued. The record is unclear as to when the applicant departed the United States; however, the applicant claims to have left in December 2005. On July 29, 2007, the applicant applied for admission into the United States at the Otay Mesa port of entry by presenting a visa laser (DSP-150) bearing the name [REDACTED] that she bought in Tijuana, Mexico for US\$1,000. She was summarily removed from the United States pursuant to section 235(b)(1) of the Act. On May 19, 2008 the applicant was apprehended in Fresno, California and removed from the United States.

The applicant began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until May 6, 1998 when she filed the asylum application, and from June 2, 1999, when she was ordered removed from the United States, to at least December 2005, when she left the country and triggered the ten-year bar, rendering her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The applicant is also inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation.

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.

The record shows that on July 29, 2007, the applicant applied for admission into the United States presenting another person's visa laser (DSP-150) that she bought in Tijuana, Mexico for US\$1,000.

She is therefore inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting the material fact of her true identity and eligibility for admission into the United States in an attempt to procure admission into the United States.

The applicant is also inadmissible under section 212(a)(9)(C) of the Act. That section states:

(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.

The applicant is inadmissible under section 212(a)(9)(C)(i)(I) and (II) of the Act. She sought to reenter the United States without admission or parole after a prior period of unlawful presence in this

country of more than 1 year, and is, consequently, inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act. *See In re Briones*, 24 I& N Dec. 355 (BIA 2007). An immigration judge ordered her removal from the United States in proceedings under section 240 of the Act, and the applicant attempted to reenter the United States without being admitted or paroled. She is therefore inadmissible under section 212(a)(9)(C)(i)(II) 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 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 applicant's last departure from the United States occurred in May 2008. She has remained outside the United States for one year. She 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 (9<sup>th</sup> 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*.

It is noted that the applicant filed a Form I-601 waiver application for inadmissibility under section 212(a)(9)(B)(v) of the Act. The director denied the applicant's waiver application. In that the applicant is inadmissible under section 212(a)(9)(C) of the Act, the AAO finds that there is no purpose in adjudicating the applicant's waiver application.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility 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.