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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

**PUBLIC COPY**

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FILE:

Office: MEXICO CITY, MEXICO Date OCT 1 8 2010

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and (g) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and (g)

ON BEHALF OF APPLICANT:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 Acting District Director, Mexico City, Mexico and 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 was found to be inadmissible to the United States pursuant to section 212(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(a)(iii), for having a physical or mental disorder with associated harmful behavior and section 212(a)(9)(B)(i)(II) of 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 and seeking admission within ten years of his last departure from the United States. The applicant is the husband of a U.S. citizen and the son of lawful permanent residents. He seeks waivers of his inadmissibilities in order to reside in the United States with his family.

The Acting District Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Acting District Director*, dated August 19, 2008.

On appeal, the applicant contends that his spouse, children and parents will suffer extreme hardship if his waiver application is denied. He asserts that the Acting District Director failed to take into consideration his compliance with all of the requirements relating to his misdemeanor DUI offenses and that he has had no other encounters with the law. He states that he has stopped drinking and that his spouse will attest that his alcoholism is now cured. The applicant also states that his parents depend on him for financial and spiritual support. *Form I-290B, Notice of Appeal or Motion*, dated September 16, 2008.

The evidence of record includes, but is not limited to: statements from the applicant, his spouse, his mother, his mother-in-law and his children; medical documentation relating to the applicant's spouse and father; billing statements; and rent receipts. The entire record was reviewed and all relevant evidence considered in reaching this decision.

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

(a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.—

(A) In general.—Any alien-

....

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.

Section 212(g), 8 U.S.C. § 1182(g), reads, in pertinent part:

(g) The Attorney General may waive the application of—

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

The physician who conducted a psychological evaluation of the applicant prior to his October 16, 2006 immigrant visa interview diagnosed him as suffering from “alcohol abuse in partial remission.” Consultation with the Centers for Disease Control and Prevention, as required by statute, resulted in a determination that the applicant had a “Class A” medical condition and a finding of inadmissibility under section 212(a)(1)(A)(iii) of the Act.

Although not addressed in the Acting Director’s decision, the AAO finds the record to include documentation that indicates the applicant has complied with the waiver requirements of section 212(g) of the Act. Accordingly, the applicant’s section 212(a)(1)(iii) inadmissibility no longer appears to be a bar to his admission and will not be further addressed in this proceeding.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

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

....

(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.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that during his October 16, 2006 immigrant visa interview at the American consulate in Ciudad Juarez, the applicant testified that he had resided unlawfully in the United States from April 2001 until June 2004, when he temporarily departed. At this same interview, the applicant also stated that he had reentered the United States in June 2004 using a valid border crossing card, overstayed his period of admission and departed in October 2006 for his immigrant visa interview. As the applicant's accrued unlawful presence in excess of one year and is seeking admission to the United States within ten years of his 2006 departure, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

Beyond the Acting District Director's decision, the AAO finds that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act for having been unlawfully present in the United States for more than one year and subsequently reentering the United States without being admitted.<sup>1</sup>

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.

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<sup>1</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3<sup>d</sup> Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

- (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....

The record indicates that on February 26, 2009, an Immigration and Customs Enforcement agent interviewed the applicant in the El Paso County Detention Facility and that, during this interview, the applicant admitted to having entered the United States without inspection on January 6, 2009. As the applicant entered the United States without inspection after having been unlawfully present for more than one year, he is subject to section 212(a)(9)(C)(i)(I) of the Act.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must have remained outside the United States for at least ten years since his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).<sup>2</sup> The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. As no purpose would be served in considering the merits of his Form I-601 waiver application under section 212(a)(9)(B)(v) of the Act, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>2</sup>The AAO notes the preliminary injunction that was previously entered against the ability of the Department of Homeland Security 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 of Immigration Appeal’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*.