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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PHOENIX, AZ Date: APR 22 2004

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, on August 9, 2000. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on October 16, 2002. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous October 16, 2002, AAO Order dismissing the applicant's appeal will be withdrawn. The application is determined to be moot, as it has not been established that the applicant is inadmissible.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States (U.S.) pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) for obtaining and using a fraudulent Employment Authorization Document (EAD) to gain employment in the United States. The applicant is married to a United States citizen and he is the beneficiary of an approved petition for alien relative. He seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and child.

The district director determined that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly.

On appeal, counsel asserted that the applicant was deprived of his procedural due process rights and that the denial of the applicant's waiver was factually and legally flawed and an abuse of discretion. Counsel stated that the applicant's wife's (Mrs. [redacted] has significant ties in the United States, and that her son is a U.S. citizen and her parents are lawful permanent residents. Counsel stated further that Mrs. [redacted] and the applicant share all of their financial expenses and that they own a house and two vehicles together. Counsel additionally asserted that Mrs. [redacted] ould have difficulty finding work if she moved to Mexico, and that she would suffer emotional hardship if she remained in the U.S. and her husband moved to Mexico alone.

In a decision dated October 16, 2002, the AAO determined that the totality of the evidence submitted on appeal failed to establish that Mrs. [redacted] would suffer hardship above and beyond that normally experienced by family members of aliens who are removed from the United States.

In the present motion to reconsider, counsel asserts that the AAO failed to give appropriate weight to the financial and emotional hardship factors in the applicant's case. Counsel additionally asserts that the AAO's finding that the applicant was statutorily ineligible for a waiver of inadmissibility was erroneous as a matter of law and fact.

8 C.F.R. § 103.5(a) states in pertinent part:

> (a) Motions to reopen or reconsider
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> . . . .
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> (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed

The AAO finds counsel's assertion that it erred in finding the applicant to be statutorily ineligible for relief to be unconvincing. The AAO notes that its October 16, 2002, decision addressed and analyzed the extreme hardship evidence presented by the applicant, pursuant to the waiver of inadmissibility provisions set forth in section 212(i) of the Act, 8 U.S.C. § 1182(i). The October 16, 2002, AAO decision did not treat the applicant's appeal as one in which the applicant was statutorily ineligible to apply for a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i). Rather, the AAO finding related to its determination that the applicant had failed to meet the statutory requirements for relief as set forth in section 212(i) of the Act. On that basis, the AAO found the applicant to be statutorily ineligible for section 212(i) relief and the AAO determined accordingly that the discretionary elements of section 212(i) need not be addressed.

The AAO additionally finds that counsel failed to provide new evidence or legal precedent information to substantiate the assertion that the AAO abused its discretion or accorded inappropriate weight to the hardship factors of the applicant's case. The AAO therefore finds these assertions to be unconvincing.

Upon thorough review of the present matter, however, the AAO nevertheless finds that its previous October 16, 2002, decision was based on an erroneous application of the law, and that pursuant to legal precedent decisions, the applicant was erroneously found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C)(i) of the Act states:

> (6) Illegal entrants and immigration violators.-
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> . . . .
>
> (C) Misrepresentation.-
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> (i) In general.-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.

In a concurring opinion written by the Board Of Immigration Appeals (Board) Chairman, Paul W. Schmidt and Board Member, Gustavo D. Villageliu, in *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999), the Board made clear its position on the ancillary issue of whether gaining employment in the U.S. was considered to be a benefit provided under the Act, by stating that:

> [T]he majority's opinion correctly notes that in purchasing the fraudulent birth certificate, using it to procure a fraudulent social security card, and subsequently using these documents to seek to procure a United States passport in order to travel into and out of the United States and seek employment, the respondent sought to procure both "documentation" and "other

> benefits" under the Act . . . . However, a small clarification is needed. The other benefits under the Act the respondent sought to procure are the right to travel with a United States passport pursuant to section 215(b) of the Act, 8 U.S.C. § 1185(b) (1994). The majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act.
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> . . . .
>
> Although the use or possession of such document is punishable under section 274C of the Act . . . working in the United States is not "a benefit provided under this Act," and we have specifically held that a violation of section 274C and fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act are not equivalent.

Both the August 9, 2000, district director decision and the October 16, 2002, AAO decision found that the applicant is inadmissible because he obtained and used a fraudulent EAD card to gain employment in the United States. The AAO finds that the above-stated ground of inadmissibility was legally erroneous. The appeal is therefore determined to be moot because the applicant has not been determined to be inadmissible, and the October 16, 2002, AAO decision will be withdrawn.

ORDER: The motion is granted. The previous orders denying the application will be withdrawn and the application is determined to be moot.