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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JAN 3 1 2014 OFFICE: BALTIMORE, MD [redacted]

IN RE: [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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ellen C. Johnson

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and a subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO on a second motion. The motion will be granted, but the application remains denied.

The applicant is a native and citizen of Mexico who has resided in the United States since February 7, 1991, when he entered the United States without inspection. The applicant was found to have subsequently obtained an employment authorization document through fraud or willful misrepresentation. He was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured a benefit under the Act through fraud or misrepresentation. The applicant is the beneficiary of an approved I-140 Immigrant Petition for Alien Worker. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States.

The District Director concluded that the applicant did not have a qualifying relative through which he could obtain a waiver of inadmissibility and denied the application accordingly. *See I-601 decision of District Director* dated September 13, 2012. The applicant's I-485 application was denied based on his inadmissibility under section 212(a)(6)(C)(i) of the Act. *See I-485 decision of District Director* dated September 13, 2012.

The AAO rejected the applicant's subsequent appeal, finding the applicant failed to timely file the appeal, and that it did not have jurisdiction over an appeal of an I-485 application. *See AAO decision,* March 29, 2013. On motion, the AAO affirmed the Field Office Director's finding of inadmissibility, adding that the applicant obtained employment authorization by filing a fraudulent asylum application. *AAO decision on motion,* October 1, 2013.

On this second motion, counsel submits a brief in support. Therein, counsel asserts that the AAO erred by considering a new issue, namely, the asylum application, in the appellate process. Counsel additionally claims that the AAO cannot infer that the asylum application was fraudulent solely based on the fact that he did not appear for his asylum interview, and that in any event, the AAO does not have the jurisdiction to make the determination that the asylum application was fraudulent.

The record includes, but is not limited to, the documents listed above, additional briefs in support, statements from the applicant, letters from family and friends, other applications and petitions, evidence of birth, marriage, residence, and citizenship, and documentation of immigration proceedings. The entire record was reviewed and considered in rendering a decision on the motion.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (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:

(1) The [Secretary] may, in the discretion of the [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 [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.

In the present case, the record reflects that with his application for adjustment of status, the applicant submitted an I-601 stating that he was inadmissible under section 212(a)(6)(C)(i) of the Act. The District Director found that the applicant fraudulently obtained work authorization documents. In an affidavit, the applicant explains he entered the United States without inspection on February 7, 1991, and he subsequently contacted an organization named to obtain assistance with normalizing his immigration status and obtaining a work permit. The applicant states he was assisted by a Guatemalan couple who have since gone to jail for immigration fraud. He indicates that he paid the couple $500, and gave them his passport, his birth certificate, and two passport photos so he could obtain a work permit. The applicant adds that on January 14, 1992, took him to immigration offices in Arlington, Virginia and then in Baltimore, Maryland. He explains that in Baltimore the applicant was called by an immigration officer, his photo was taken, he was handed a work authorization card, and he was asked to sign a receipt.

Counsel claims on this second motion that the AAO did not make a finding on the applicant's assertion that he did not have any contact with U.S. government officials. The AAO's decision on motion states that the applicant submitted a Form I-589 Application for Asylum and a Form I-765 Application for Employment Authorization. *See AAO Decision on motion,* page 3. It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made to an authorized official of the United States Government in order for inadmissibility under section 212(a)(6)(C)(i) of the Act to be found. See *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of Shirdel*, 19 I & N Dec. 33 (BIA 1984); *Matter of L-L-*, 9 I & N Dec. 324 (BIA 1961). *Matter of Y-G-*, 20 I&N Dec. 794(BIA 1994) As the applicant submitted written applications for benefits under the Act which were to be reviewed by U.S. government officials, the applicant had sufficient contact with those officials for inadmissibility under section 212(a)(6)(C) of the Act to apply. The AAO therefore affirms its previous finding that the applicant had sufficient contact with a U.S. government official when he filed the I-589 and I-765 applications to be inadmissible under section 212(a)(6)(C) of the Act.

Counsel additionally contends that the AAO may not consider new issues, namely, the asylum application, for the first time on appeal. In support, counsel cites to *Matter of O-S-G,* 24 I&N Dec. 56, 60 (BIA 2006) and *Matter of Medrano,* 20 I&N Dec. 216, 219 (BIA 1990, 1991). These cases, however, pertain to procedures before the Board of Immigration Appeals (BIA), not the AAO. Furthermore, in those cases the Board did not indicate that it could not consider new issues on appeal, but rather, that motions which raise new legal arguments the movant could have raised earlier will not be considered. In *Matter of O-S-G,* the Board states,

> [a] motion to reconsider is not a mechanism by which a party may file a new brief before the Board raising additional legal arguments that are unrelated to those issues raised before the Immigration Judge on appeal. Rather, the 'additional legal arguments' that may be raised in a motion to reconsider should flow from new law or a de novo legal determination reached by the Board in its decision that may not have been addressed by the parties.

Matter of O-S-G at 58. In the decisions cited, the Board did not restrict its own powers of review. Similarly, in adjudicating an appeal or a motion, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Moreover, the applicant indicated on his I-765 application that he was eligible for employment authorization under 8 C.F.R. § 274a.12(c)(8) as an applicant for asylum. *See I-765 Application for Employment Authorization,* dated September 25, 1991. In order to evaluate the applicant's continued contention that he is not inadmissible under section 212(a)(6)(C) of the Act for filing a fraudulent I-765 application, the basis of that application must also be considered.

Counsel also asserts that the applicant never filed an asylum application. As noted on the first motion, the record contains the applicant's Form I-589 Request for Asylum in the United States, filed concurrently with his Form I-765, Application for Employment Authorization. The applicant not only filed these applications concurrently, he also used the same name, date of birth, birthplace, and citizenship on those applications as he continues to use on current immigration applications. The record therefore reflects that the applicant filed an asylum application, and obtained employment authorization through this asylum application.

Counsel further claims that even if the applicant filed an asylum application, his failure to appear for the asylum interview cannot support a finding that the asylum application was filed fraudulently. The applicant's failure to attend his asylum interview, however, is only one factor which indicates that the applicant attempted to obtain a benefit under the Act, namely, asylum status, through fraud or misrepresentation. It is the applicant's burden to establish that he filed a legitimate asylum application based on a well-founded fear of persecution. The applicant has provided no explanation as to why he didn't pursue this legal avenue to obtain work authorization. The applicant has had an opportunity to rebut the AAO's findings of fraud and misrepresentation, and to date, he has not provided assertions or documentation indicating that his I-589 application was not based on fraud or willful misrepresentation of a material fact.

Counsel lastly contends that the AAO does not have jurisdiction to make a determination on whether an asylum application is fraudulent. The AAO does not have jurisdiction to adjudicate asylum applications. However, the AAO has jurisdiction over the appeal of the waiver application and the authority to review the entire record for any issues of inadmissibility.[1] This would include any documents submitted in order to obtain a benefit under the Act. As the AAO's findings in this case pertain to inadmissibility under section 212(a)6)(C) of the Act, they are within the AAO's jurisdiction.

Given the present record, the AAO affirms its prior finding that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to obtain a benefit under the Act through fraud or misrepresentation.

As previously noted, the applicant has not shown that he has a qualifying relative required for a waiver. Without a qualifying relative, the AAO cannot find that the applicant has demonstrated the existence of extreme hardship to a qualifying relative as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether he merits a waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, although the motion is granted, the underlying application remains denied.

ORDER: The motion is granted, but the underlying application remains denied.

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[1] The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).