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U.S. Citizenship
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Services

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FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date: **SEP 15 2006**

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), nor is he inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). Thus, the relevant waiver application is moot.

The applicant is a native and citizen of Mexico who 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 attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant was also found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen, is the son of a naturalized U.S. citizen, and is the father of two U.S. citizen children. He now seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) and 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse, father, and two children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director, dated February 17, 2005.*

On appeal, the applicant contends that Citizenship and Immigration Services (the Service) erred as a matter of law in finding that the applicant failed to meet the burden of establishing extreme hardship to a qualifying relative necessary for a waiver under 212(i) and 212(h) of the Act. *Form I-290B, dated March 21, 2005.*

In support of these assertions, the applicant submits a letter from the applicant's spouse, dated July 5, 2003; a letter from the applicant's spouse, undated; a copy of the applicant's marriage certificate; copies of the applicant's daughters' U.S. birth certificates; a copy of the applicant's Mexican birth certificate; an employment letter for the applicant; tax statements for the applicant and his spouse; earnings statements for the applicant; court records, Superior Court of Los Angeles, North Judicial District, County of Los Angeles, State of California, dated January 31, 2003; FBI records, dated October 29, 2001 and July 9, 2004; a copy of the applicant's spouse's U.S. birth certificate; and the Form I-213, dated September 8, 1996. The entire record was reviewed and considered in rendering this decision.

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.
- (ii) Falsely claiming citizenship.—
 - (I) In general.—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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.

The AAO notes that the provisions of section 212(a)(6)(C)(ii) are not retroactive. *9 FAM 40.63 N12*. Section 212(a)(6)(C)(ii) applies only to aliens who have made a false representation on or after September 30, 1996. *Id.* An alien who has attempted or achieved entry to the United States before September 30, 1996 on a false claim of U.S. citizenship is not ineligible under the terms of section 212(a)(6)(C)(ii). *Id.* They are, however, ineligible under section 212(a)(6)(C)(i), provided, such claim was made before a U.S. Government official. *Id.* While aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver, provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 afford those aliens making false claims to U.S. citizenship prior to September 30, 1996, the eligibility to apply for a waiver. *Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.*

The record reflects that on January 1, 1983 the applicant entered the United States when he was six years old. *Form I-213, dated September 8, 1996*. The applicant stated that he crossed in a vehicle with his uncle, and his uncle told the inspecting officer at the Calexico, California Port of Entry that the applicant was a United States citizen. *Id.* The applicant was allowed to enter the United States. *Id.* On September 8, 1996 a border patrol agent encountered the applicant as a passenger in a car at or near Niland, California. *Id.* When encountered, the applicant claimed to be born in Brawley, California. *Id.* The applicant's girlfriend and infant child were following in another car. *Id.* When the border patrol agent looked at the birth certificate of the applicant's child to establish citizenship, he noticed that the applicant's place of birth on his child's birth certificate stated that he was born in Mexico. *Id.* The applicant admitted to being an undocumented alien shortly afterward. *Id.* The applicant was returned to Mexico upon his request to depart voluntarily. *Id.*; *Decision of the District Director, dated February 17, 2005*. According to the applicant's Form I-485, he entered the United States without inspection on September 8, 1996. *Form I-485*.

Prior to addressing whether the applicant qualifies for a waiver, the AAO finds it necessary to analyze the issues concerning inadmissibility. The AAO finds that the District Director erred in finding the applicant inadmissible under section 212(a)(6)(C) for misrepresentation or fraud. Regarding the 1983 incident, the applicant was six years old at the time, and his accompanying uncle made the false claim to citizenship on the applicant's behalf. *Form I-213, dated September 8, 1996*. The misrepresentation must be made by the applicant. *9 FAM 40.63 N2*. An oral misrepresentation made on behalf of an alien at the port of entry by an aider or abettor of the alien's illegal entry will not shield the alien in question from ineligibility under section 212(a)(6)(C)(i), irrespective of what penalties the aider or abettor might incur, if it can be established that the alien was aware at the time of the misrepresentation made on his or her behalf. *9 FAM 40.63 N4.5*. In the

present case, there is nothing in the record to demonstrate that the applicant was aware in 1983 of the misrepresentation being made by his uncle on his behalf. The applicant's admission of being aware of this 1983 misrepresentation occurred in 1996, when he was stopped by a border patrol agent. *Form I-213, dated September 8, 1996*. Additionally, the applicant was six years old at the time of the 1983 incident, and therefore lacked the mental capacity to be aware of the false claim on his behalf.

With respect to the 1996 incident, the District Director stated that a review of the record revealed that on September 8, 1996, at El Centro Port of Entry, the applicant attempted to enter the United States by making an oral false declaration to United States citizenship. *Decision of the District Director, dated February 17, 2005*. The District Director stated that the applicant failed to disclose his true identity, a material fact, to the Service upon his attempted entry into the United States. *Id.* The applicant was then sent back to Mexico upon his request to depart voluntarily. *Id.* The AAO finds that the District Director erred as a matter of fact and law in its analysis of inadmissibility. According to the Form I-213, the only document in the record that provides a detailed account of what occurred on September 8, 1996, the border patrol agent questioned the applicant at or near Nidal, California, a location that is different from El Centro, California and is not a port of entry. *Form I-213*. Nowhere on the Form I-213 does it state that the applicant was attempting to gain entry into the United States. *Id.* The Form I-213 simply states that the border patrol agent encountered the applicant as a passenger and that no smuggling was established. *Id.* While the AAO recognizes that the applicant made a material misrepresentation by falsely claiming to be born in the United States, the record does not demonstrate that the applicant failed to disclose his true identity as stated by the District Director. *Form I-213; Decision of the District Director, dated February 17, 2005*. Additionally, even if the applicant were considered to have violated the provisions of section 212(a)(6)(C), the applicant made the misrepresentation and then retracted it shortly after the border patrol agent reviewed his son's birth certificate. A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* The AAO finds that while the applicant made a material misrepresentation regarding his place of birth, the record fails to show that this material misrepresentation was made to procure a benefit under the Act as required by section 212(a)(6)(C)(i) of the Act. The AAO also finds that the applicant's retraction of this misrepresentation was timely, as it was made during his initial conversation with the border patrol agent and a short time after the misrepresentation occurred. The applicant is therefore not inadmissible under section 212(a)(6)(C) for misrepresentation.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(h) of the Act provides, in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
 - (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The record shows that on May 30, 2002 the applicant was convicted in Los Angeles, California under section 496(a) of the Penal Code for receiving/concealing stolen property. *Court records, Superior Court of Los Angeles, North Judicial District, County of Los Angeles, State of California, dated January 31, 2003.* The applicant was ordered to serve 90 days in the Los Angeles county jail, was placed on probation for three years, and had to pay fines. *Id.* The AAO finds that while the applicant had been convicted of a crime involving moral turpitude, the maximum sentence for a section 496(a) violation of the California Penal Code is imprisonment for not more than one year. The applicant's sentence was less than six months and this is his only conviction. The AAO finds that the applicant satisfies the petty offense exception, and is therefore not inadmissible under section 212(a)(2)(A).

Based on the record, the AAO finds that the applicant did not willfully misrepresent a material fact or commit fraud and he is not inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO also finds that the applicant is not inadmissible under section 212(a)(2)(A) of the Act due to the petty offense exception. The waiver filed pursuant to sections 212(i) and 212(h) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot.