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U.S. Citizenship  
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[REDACTED]

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FILE: [REDACTED] OFFICE: LOS ANGELES, CA DATE: **MAY 19 2006**

IN RE: APPLICANT: [REDACTED]

APPLICATION: Application to Register Permanent Resident or Adjust Status under Section 245 of the Immigration and Nationality Act; 8 U.S.C. §1255.

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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Los Angeles, California and the matter has been certified to the Administrative Appeals Office (AAO) for review. The district director's decision will be affirmed.

The record reflects that the applicant entered the United States without admission or parole in 1975, at the age of eleven. The applicant claims his father gave him a U.S. birth certificate at the time of his entry into the United States, and that his father told him he was a U.S. citizen. The applicant learned he was not a U.S. citizen after applying for, and being denied a U.S. passport in 1997. The applicant married a U.S. citizen on July 20, 1996. The applicant's spouse filed a Form I-130, Petition for Alien Relative (Form I-130) on the applicant's behalf on January 14, 1998. The I-130 was approved by the Immigration and Naturalization Service (Service, now, U.S. Citizenship and Immigration Services, CIS) on October 16, 2000. On August 15, 2001, the applicant's spouse filed a Form I-485, Application to Register Permanent Resident or Adjust Status (I-485 Application).

In a decision dated, August 3, 2002, the district director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(10)(D)(i) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1182(a)(10)(D)(i), because he had voted in the November 1996, General Election.

Counsel asserted in a Motion to Reconsider, that the applicant reasonably believed he was a U.S. citizen when he voted in the November 1996, General Election. Counsel asserted further that the applicant's father was married to a U.S. citizen at the time of the applicant's entry into the United States, and that the applicant's stepmother treated the applicant as her own child and qualifies as a parent for section 212(a)(10)(D)(ii) exception purposes. In a supplement brief to the AAO, counsel asserts that pursuant to the U.S. Ninth Circuit Court of Appeals decision, *McDonald v. Gonzales*, 400 F.3d 684 (9<sup>th</sup> Cir. 2005), criminal intent is necessary in order to be inadmissible under section 212(a)(10)(D) of the Act. Counsel asserts that the applicant did not have the requisite intent to violate the unlawful voter provisions contained in California State statutes, and he concludes that the applicant is therefore not inadmissible under section 212(a)(10)(D) of the Act. Counsel additionally asserts that criminal intent is necessary to violate section 212(a)(6)(C)(ii) of the Act; 8 U.S.C. § 1182(a)(6)(C)(ii), and that the applicant therefore also did not violate false claim to U.S. citizenship provisions contained in the Act.

On certification, the district director presents the following issues:

- 1) Whether voting in a General Election violated section 212(a)(10)(D) of the Act (pursuant to 18 U.S.C. §611) if, at the time of voting, the applicant believed in good faith that he was a U.S. citizen.
- 2) Whether the exception provisions contained in section 212(a)(10)(D)(ii) of the Act include an exception for stepchildren of U.S. citizens.
- 3) Whether registering to vote and applying for a U.S. passport make an alien inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), if the alien believes in good faith that he is a U.S. citizen.

The AAO notes that the district director's denial of the applicant's I-485 application was based on the applicant's inadmissibility under section 212(a)(10)(D) of the Act. The AAO will therefore limit its analysis

to section 212(a)(10)(D) of the Act related issues, and the AAO will not address whether the applicant is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, false claim to U.S. citizenship provisions.

Section 245 of the Act, 8 U.S.C. § 1255 states in pertinent part:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) may be adjusted by the Attorney General (now Secretary, Homeland Security, "Secretary"), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa **and is admissible to the United States for permanent residence**, and
- (3) an immigrant visa is immediately available to him at the time his application is filed. (Emphasis added).

Section 212(a)(10)(D) of the Act states, in pertinent part:

(D) Unlawful Voters.

(i) In General- Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception- In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

The section 212(a)(10)(D)(ii) of the Act exception provision clearly states that in order to qualify for the exception, *each* of the alien's *natural* or *adoptive* parents must be a U.S. citizen. In the present matter, the record contains no evidence to establish that that the applicant's natural father became a U.S. citizen at any time. In addition, the record contains no evidence to establish that the applicant's natural mother was a U.S. citizen. The record also contains no evidence to establish that the applicant's father married the applicant's stepmother, or to establish that the applicant was legally adopted by his stepmother. Accordingly, the AAO finds that the exception contained in section 212(a)(10)(D)(ii) of the Act is inapplicable to the applicant's case.

California Elections Code, section 18560 provides in pertinent part that:

Every person is guilty of a crime punishable by imprisonment in the state prison for 16 months or two or three years, or in county jail not exceeding one year, who:

- a) Not being entitled to vote at an election, fraudulently votes or fraudulently attempts to vote at that election.

California Elections Code, section 18100 states in pertinent part that:

- a) Every person who willfully causes, procures, or allows himself or herself or any other person to be registered as a voter, knowing that he or she or that other person is not entitled to registration, is punishable by imprisonment in the state prison for 16 months or two or three years, or in a county jail for not more than one year.

In *McDonald v. Gonzales, supra*, the U.S. Ninth Circuit Court of Appeals found that an alien who had voted in primary and general elections in violation of a Hawaiian voter fraud statute was not removable under section 237(a)(6)(A) of the Act, 8 U.S.C. § 1227(a)(6)(A), because she did not knowingly violate Hawaiian State statute, H.R.S. § 19-2.5(2), which states that “[a]ny person who knowingly votes when the person is not entitled to vote” is guilty of a felony.”<sup>1</sup>

In the present matter, the record reflects that the applicant believed he was a U.S. citizen when he voted in the November 1996, General Election. The applicant therefore did not fraudulently or willfully vote in violation of California Election Codes. Based on the principals set forth in *McDonald v. Gonzales*, the applicant is thus not inadmissible pursuant to section 212(a)(10)(D)(i) of the Act, for voting in violation of State statute provisions. Nevertheless, the AAO notes that the U.S. Ninth Circuit Court of Appeals limits its discussion in *McDonald v. Gonzales*, to Hawaiian state law, and the requirement that a violation under the Hawaiian voter law must be willful and knowing. The *McDonald v. Gonzales* decision does not pertain to requirements for a violation under federal voting laws, and the decision does not discuss the alien’s inadmissibility pursuant to federal voting law violations.

Title 18 of the United States Code (18 U.S.C.) section 611 states in pertinent part that:

- a) It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless—
  - 1) The election is held partly for some other purpose;
  - 2) Aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and
  - 3) Voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

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<sup>1</sup> Section 237(a)(6)(A) of the Act provides that, “[a]ny alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.”

- b) Any person who violates this section shall be fined under this title, imprisoned not more than one year, or both.
- c) Subsection (a) does not apply to an alien if—
  - 1) Each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization);
  - 2) The alien permanently resided in the United States prior to attaining the age of 16; and
  - 3) The alien reasonably believed at the time of voting in violation of such subsection that he or she was a citizen of the United States.

In the present matter, the record reflects that the applicant voted in a federal General Election and that he was not a U.S. citizen when he voted. The record contains no evidence to indicate that the election exceptions contained in 18 U.S.C. § 611(a) apply to the applicant's case, and as discussed previously, the record contains no evidence to establish that the applicant's natural parents were U.S. citizens.

The plain language of 18 U.S.C. § 611 does not contain a requirement that an alien must be aware that he or she is not a U.S. citizen in order for a violation of the statute to occur. The AAO additionally notes that the language of section 212(a)(10)(D) of the Act does not require an element of knowledge or intent. Rather, both provisions provide that a violation is committed once the act of voting has occurred.

A May 7, 2002, Memorandum from William R. Yates, Deputy Executive Associate Commissioner, Office of Field Operations, Immigration Services Division, entitled, "Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote" (Memorandum) clarifies on page 4 that, "[w]hether the alien actually violated federal, state or local law depends upon whether he or she: (1) actually voted and (2) the act of voting violated a specific election law provision." Page 5 of the Memorandum distinguishes election laws that penalize the act of voting only upon an additional finding that the individual acted willfully or with knowledge that the individual was not a citizen, and the Memorandum states that if, on the other hand, "[t]he election law penalizes the actual act of voting, the fact that an applicant has actually voted is sufficient to establish that he or she has voted unlawfully." Voting in a federal General Election is clearly covered by the definition contained in 18 U.S.C. § 611(a). Moreover, page 5 of the Memorandum clarifies that, "[f]ederal election laws provide that only U.S. citizens can vote."

The AAO finds that 18 U.S.C. § 611 does not contain an element of intent or knowledge in its definition. It is thus not necessary for an alien to vote with the knowledge that he is not a U.S. citizen, in order for a violation of 18 U.S.C. § 611 to occur. Because the applicant voted in violation of a Federal statute, he is inadmissible pursuant to section 212(a)(10)(D)(i) of the Act. The applicant has therefore failed to establish eligibility for adjustment of status under section 245(a) the Act, and the district director's decision will be affirmed.

**ORDER:** The District Director's decision is affirmed.