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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: [redacted] Office: LIMA, PERU FILE: [redacted]

IN RE: FEB 2 4 2014 [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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.

Thank you,

Michael Dunnway

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Lima, Peru. An appeal of the denial and a subsequent motion were dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a second motion to reconsider. The motion, to the extent it contains new evidence and may be considered a motion to reopen, will be granted, but the prior decision of the AAO will be affirmed.

The applicant is a native and citizen of Peru who was initially found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more, and under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In her decision, dated April 25, 2011, the field office director found that the applicant had failed to establish extreme hardship to his qualifying relative as a result of his inadmissibility. She also found that even if the applicant had established extreme hardship, his case did not warrant the favorable exercise of discretion because of his conviction for assaulting a federal officer. The field office director stated that another unfavorable factor in the applicant's case was his conviction for falsely claiming to be a U.S. citizen.

On appeal, counsel submitted additional evidence and asserted that the applicant's spouse was and would continue to experience extreme hardship as a result of the applicant's inadmissibility.

In a decision dated October 10, 2012, we noted that the field office director's reference to the applicant's conviction for falsely claiming U.S. citizenship was an incorrect statement of fact, as the applicant was charged but not convicted of that offense. However, we found that the applicant is inadmissible under section 212(a)(6)(C)(ii)(I) of the Act for having claimed to be a U.S. citizen on a Form I-9, Employment Eligibility Verification, for the purpose of obtaining employment. We found that as a result of this inadmissibility, the applicant is ineligible for waiver consideration.

In the first motion, counsel asserted that the record contained no clear, credible, or probative evidence that the applicant ever made a false claim to U.S. citizenship, and that even assuming the applicant had marked and signed the I-9 Forms in the record, these forms would not be sufficient evidence to support inadmissibility for a the false claim to U.S. citizenship under precedent decisions from U.S. Courts of Appeal and the Board of Immigration Appeals (BIA). Counsel asserted further that the applicant's U.S. citizen spouse is suffering extreme hardship as a result of his inadmissibility and that he warrants the favorable exercise of discretion.

In a decision dated August 1, 2013, we found that the applicant had failed to meet his burden of proof in showing that he is not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. We found that counsel's arguments, specifically the assertion that the record does not support a finding of inadmissibility under section 212(a)(6)(C)(ii)(I), failed to reflect a correct understanding of the applicable burden of proof, and was based primarily on an unwarranted reliance on the burden of proof applicable to establishing removability in removal proceedings, and on actions taken during the applicant's removal proceedings that are not dispositive in the current proceeding.. We found the record contained evidence that on its face supports a finding of inadmissibility under section 212(a)(6)(C)(ii) of the Act. We acknowledged that there was no additional evidence authenticating

or verifying the information found on the I-9 forms, but found that counsel did not provide legal support for the proposition that the applicant had met his burden of proof by demonstrating the lack of such evidence. We found that the applicant has the burden to refute the evidence reflecting a false claim to U.S. citizenship.

We also indicated that although the immigration judge found that the government had not met its burden of proving removability under section 237(a)(3)(D) of the Act, the record did not show that the immigration judge ruled that the applicant did not in fact made false claims to U.S. citizenship on the I-9 forms for purposes of inadmissibility. We also found that the court records did not show that DHS withdrew the allegations because it determined that the applicant, who was removable on other grounds, did not make false claims to U.S. citizenship on the I-9 forms. We found that in his motion, counsel failed to provide any legal support that the evidentiary requirements imposed on DHS in the immigration court proceedings, as pertaining to the government's burden of proving that the applicant was removable under section 237(a)(3)(D), are applicable in the present proceedings, in which the burden of proof is on the applicant. Therefore, we found unpersuasive counsel's arguments concerning the lack of an evidentiary basis for inadmissibility.

We found further that although the applicant denied making a false claim to U.S. citizenship, he had not demonstrated that he did not mark the box for U.S. citizen or that he intended to check the box as a national of the United States. We affirmed the finding of inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act. Finally, we affirmed that because the applicant's inadmissibility under section 212(a)(6)(C)(ii)(I) statutorily bars his admission to the United States, no purpose would be served in considering whether he would be able to establish eligibility for a waiver of his inadmissibility under sections 212(a)(9)(B)(i)(II) or 212(a)(2)(A)(i)(I) of the Act.

In the current motion, dated August 30, 2013, counsel argues that a preponderance of the evidence indicates that the applicant's false claims to U.S. citizenship were not knowing or intentional and, therefore, the applicant is not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. In support of this argument, counsel submits new evidence, which includes a statement from the applicant and a forensic evaluation of Section I of the I-9 Form completed for employment at the . The evaluation claims that there is a high probability that the manager of the filled out Section I of the I-9 Form on behalf of the applicant, checking the box for "citizen or national of the United States" on the form. The applicant indicates that he cannot remember if he filled out Section I of his I-9 Form for SOS Staffing, but if he did, then he would have done so following the example of the information included on his I-9 Form for the . Counsel also states that the chain of custody for both I-9 Forms has never been established. He states that this documentation supports a finding, by the preponderance of the evidence, that the applicant is not inadmissible under 212(a)(6)(C)(ii)(I) of the Act. To support this assertion counsel cites to *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Counsel states further that, unlike the applicant's case, in all other cases involving a false claim to U.S. citizenship on an I-9 Form, the applicant admitted to making the false claim. *See Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Theodros v. Gonzales,* 490 F.3d 396 (5th Cir. 2007); *Ferrans v. Holder,* 612 F.3d 528 (6th Cir. 2010); and *Crocock v. Holder,* 670 F.3d 400 (2nd Cir. 2012). Counsel again asserts that because four other agencies of the U.S. Government did not rely on the documents in the record to establish criminal liability or removability for falsely claiming U.S. citizenship to gain employment, the AAO

should also decline to find inadmissibility. Counsel pleads for compassion and discretion given the circumstances of the applicant's case and the evidence presented in regards to the applicant's moral character. Counsel also indicates that in our previous decision, the AAO erroneously referenced the applicant's inadmissibility as being under 212(a)(6)(C)(i) of the Act.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Upon review of the present motion, the AAO's finds that the applicant has submitted new evidence, which we have considered. However, the AAO also finds that the applicant's motion does not establish that our prior decision was incorrect, either on the basis of the evidence of record at the time of that decision, or on the basis of the new evidence submitted on motion. An application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

We note first that the reference to section 212(a)(6)(C)(i) of the Act in our previous decision was in error. The correct statutory provisions for inadmissibility for a false claim to U.S. citizenship is section 212(a)(6)(C)(ii). Notwithstanding the inclusion of the wrong section of law, our prior decision was clear that the applicant is inadmissible for a false claim to U.S. citizenship.

We find incorrect counsel's assertion that the applicant must establish his admissibility only by a *preponderance of the evidence* in accordance with *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). While we do not believe that the applicant has demonstrated that he is admissible by a preponderance of the evidence, we note that the *preponderance of the evidence* standard applies to waiver eligibility generally, but is not the appropriate standard for inadmissibility determinations. The applicant has the burden to establish that he is *clearly and beyond a doubt* entitled to be admitted and is not inadmissible. Section 235(b)(2)(A) of the Act; *see also Kechkar*, *supra*, at 1085; *Rodriguez*, *supra*, at 778; *Ferrans, supra,* at 531; 8 C.F.R. § 1240.8(b).

Taking into account the evidence submitted on motion, we affirm that the applicant has not met his burden to establish that he did not claim to be a U.S. citizen to obtain employment in the United States. The documentation in the record indicates the following: the applicant completed and/or signed the [redacted] (September 23, 2003) and the [redacted] (February 18, 2004) I-9 Forms, attesting to the truthfulness of the facts contained therein, and these forms were submitted to and later obtained from the records of these employers; the applicant applied for employment and was hired both at [redacted] and SOS Staffing; the applicant was aware that he entered the United States as a visitor for pleasure, with no legal authorization to work; the applicant indicated in the application for employment with [redacted] that he was legally eligible for work in the United States; and the applicant presented a social security card and driver's license as proof of employment eligibility with his applications for employment.

The Form I-9 includes three choices as to which status one could claim: U.S. citizen or national, lawful permanent resident, or alien authorized to work. On each of the I-9 Forms at issue in this case, the "citizen or national" box is marked. In the submitted forensic evaluation, the evaluator, Ms. asserts that it is highly improbable that the applicant filled out the I-9 Form because the applicant, as opposed to the individual who completed the form, generally uses more upper case letters, structures his "m's" and numbers differently, and habitually makes an "X" in boxes, rather than a check mark as found on that I-9 Form. The applicant provided no such evaluation addressing the I-9 Form, which in Section 1 exhibits the very characteristics Ms. finds typical of the applicant's handwriting, including the use of an "X" in the U.S. "citizen or national" box. It is noted that one of the documents that Ms. reports as known to contain the applicant's handwriting is the applicant's application for employment with In his statement, the applicant asserts that the store manager at Mr. filled out the I-9 Form quickly without asking him questions about his status and then "presented it to [the applicant] for signature." As to the I-9 Form, however, the applicant states that "[b]ecause certain parts of the form look like my handwriting while other parts do not, I cannot say with 100% certainty what spaces of the form I did or did not fill out." The applicant continues that "even if I did fill out the entire section myself, which I doubt I did, I am quite certain that I would have referred back to my experience watching Mr. fill out the I-9 form . . . and would have filled out the I-9 form at in a similar manner."

The applicant has not disputed that he was employed by or that I-9 Forms were completed for this employment. We find that the applicant has not provided sufficient credible evidence to refute the information found in the Immigration and Custom Enforcement (ICE) investigation reports, or to challenge the authenticity of the particular I-9 Forms and other evidence in the record obtained from the applicant's former employers as part of that investigation. We find that the applicant has not demonstrated, with regards particularly to the I-9 Form, that he did not, in fact, fill out Section 1 and personally check the box for "citizen or national of the United States." Unlike the I-9 Form, the "preparer" section of the I-9 Form is blank, and the forensic evaluation of the I-9 Form supports the finding that the handwriting on the I-9 Form is the applicant's handwriting. Regardless, the applicant, through his signature, attested to the veracity of the information on each form, whether he personally checked the box or not. The applicant is not asserting, nor has he presented evidence to show, that he intended to claim he was a national. To the contrary, in his motion, counsel asserts that when the applicant signed the I-9 Forms, he did not specifically intend to claim to be a national. Given that the burden is on the applicant, the applicant would have to prove that the checked box reflected his claim to be a national, not a citizen. *See Kechkar*, *supra*, at 1085 (the court rejected petitioner's argument that he had not made a false claim to U.S. citizenship because "there was no evidence indicating that he 'meant to claim citizenship rather than nationality' if he did check the 'citizen or national' box" because it was his burden "to show that he intended to claim status as a national."); *see also Crocock*, *supra*, at 404 ("Because the I-9 shows that Crocock claimed to be a citizen or national, he had the burden of showing that he claimed to be a national, not a citizen. Crocock points to no evidence beyond his testimony to demonstrate that he thought he was a national when completing the I-9").

What the applicant is claiming is that he was completely unaware of any claim to U.S. citizenship, and that any such claim "would have been made inadvertently, unknowingly, or though some

misunderstanding, lack of knowledge of the English language, or miscommunication on my part." We note that the applicant states for the first time on the present motion that he spoke very poor English at the time of his employment and that he did not understand the I-9 Form. This is inconsistent with the ICE investigation conducted in 2005, during which Mr. reported that the applicant's hiring interview was completed in English because the applicant appeared to have no problem speaking, writing, or understanding English. And it does not explain the applicant's application for employment with in which he asserted legal eligibility to work. It does not account for the applicant's obtaining of a social security card and presenting it as proof of eligibility for employment. Nor can it fully account for the information provided – including the checked box – on the I-9 Form, which appears to be in the applicant's handwriting and which the applicant concedes he may have filled out himself.

In light of the forensic evaluation and documentation not previously reviewed by the AAO, we have also reconsidered our prior determination concerning the additional I-9 Form (June 22, 2004) in the record. We indicated in our August 1, 2013 decision that we would not consider it as evidence of an additional false claim to U.S. citizenship because it did not include employer information or an employer signature, and the record did not contain sufficient other evidence to show it has been submitted to an employer for the purpose of obtaining employment. However, the AAO conducts appellate review on a *de novo* basis, *see Soltane, supra*, and the AAO has now reviewed the ICE investigation report for this I-9 Form, which indicates that it was obtained from A representative from reported to the ICE investigator that the applicant worked there from June 2004 to January 2005, and provided the I-9 Form relating to that employment along with copies of other documents submitted by the applicant to establish work eligibility – the applicant's social security card and driver's license. Based on the ICE investigation report and the forensic evaluation, we find that section 1 of the I-9 Form contains handwriting that appears to be the applicant's handwriting, including the "X" mark on the "citizen or national" box. We find that considered cumulatively, the evidence reflects that the applicant made a false claim to U.S. citizenship in obtaining employment at As with applicant's employment at and the applicant has not presented evidence that shows that he is not inadmissible for a false claim to U.S. citizenship in relationship to the I-9 Form.

We do not find the applicant's current testimony and other evidence sufficient to show that he was, as claimed, completely unaware of the representation of U.S. citizenship apparent in his seeking and obtaining employment in the United States. Thus, we affirm the finding of inadmissibility for false claim to U.S. citizenship. We acknowledge the forensic evaluation and applicant's testimony submitted on motion, but we are no persuaded that this evidence shows that the applicant is not inadmissible.

Moreover, we find that the cases cited by counsel do not support a different outcome. While it is true that in some of these cases – *Rodriguez*, *supra,* at 775-76; *Theodros, supra,* at 400-401; *Ferrans, supra*, at 531; and *Crocock, supra,* at 402 – the courts found the aliens inadmissible under section 212(a)(6)(C)(ii) of the Act on the basis of the I-9 Form and an admission of a false claim, the courts do not indicate that such an admission is required for a finding of inadmissibility under section 212(a)(6)(C)(ii). As in the present case, the petitioner in *Rodriquez* claimed that he did not understand what it meant when he marked the "citizen or national" box, and that his admission to making a false claim to an adjudications officer was the result of him not understanding the "questions or the resulting sworn statement because he did not have a translator or counsel at the

interview." *Rodriguez*, *supra,* at 777. The court noted, however, that the petitioner had not asked for a translator, and the adjudications officer testified that the petitioner "understood the questions and did not have difficulty answer the questions in English." *Id.* After reviewing all the "circumstances surrounding his submission of the Form I-9," the court found substantial evidence a false claim to U.S. citizenship, and that the petitioner had not proven "clearly and beyond doubt" that he was admissible. *Id.* at 778. In *Kechkar*, *supra*, at 1082, the petitioner did not admit to a false claim of U.S. citizenship, testifying before the immigration judge that he did not check the "citizen or national" box. However, his testimony was contradicted by the testimony of his former employer, as well as other evidence. *Id.* at 1082-83. Notwithstanding the petitioner's testimony, the court found that there was "nothing in the record indicating that Kechkar showed 'clearly and beyond doubt' that he did not check the box." *Id.* at 1085. We find that the I-9 Forms and the circumstances surrounding their submission, as reflected in other evidence in the record, support a finding of inadmissibility, and the applicant has not met his burden of proving that he is not inadmissible. Therefore, we find that the current motion fails to establish that the AAO's prior decision was incorrect.

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

> (i) 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
> >
> > (II) Exception—In the case of an alien making a representation described in subclause (I), 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 making such representation 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 representation.

Applicants making false claims to U.S. citizenship on or after September 30, 1996, the date of enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, are inadmissible under section 212(a)(6)(C)(ii)(I) of the Act and are ineligible for waiver consideration. No waiver is available for a violation of section 212(a)(6)(C)(ii)(I) and the record fails to demonstrate that the applicant qualifies for the exception described in section 212(a)(6)(C)(ii)(II). As the applicant's inadmissibility under section 212(a)(6)(C)(ii)(I) statutorily bars his admission to the United States, the AAO finds that no purpose would be served in considering whether he would be able to establish eligibility for a waiver of his inadmissibility under sections 212(a)(9)(B)(i)(II) or 212(a)(2)(A)(i)(I) of the Act.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Here, the applicant has not met that burden. Accordingly, the prior decision of the AAO is affirmed.

ORDER: The prior decision of the AAO is affirmed.