U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 29 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Taiwan who is inadmissible to the United States pursuant to sections 212(a)(9)(B)(i)(II), 212(a)(6)(C)(i) and 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II), 1182(a)(6)(C)(i) and 1182(a)(6)(C)(ii), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States, attempting to procure admission to the United States by fraud or willful misrepresentation and falsely representing himself to be a citizen of the United States. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to reside in the United States with his spouse.

The acting director concluded that there is no waiver available under section 212(i) or any other section of the Act for those who have, at any time after September 30, 1996, falsely represented themselves to be citizens of the United States and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of Acting Director*, dated January 30, 2006.

The record shows that, on February 3, 2002, the applicant attempted to enter the United States at the Pacific Highway, Washington Port of Entry by verbally stating that he was born in Everett, Washington. The applicant was found to be inadmissible and was refused entry. On August 8, 2002, the applicant married his spouse, [redacted]. On October 7, 2002, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 10, 2004, the applicant was placed into proceedings. On September 7, 2004, the Form I-130 was approved. On September 16, 2004, the immigration judge granted the applicant voluntary departure until October 16, 2004. On September 20, 2004, the applicant appeared at the U.S. Consulate in Vancouver, Canada to verify his departure from the United States. The applicant has resided outside the United States since this date. On February 22, 2005, the applicant filed an Application for Immigrant Visa and Alien Registration (Form DS-230). On June 27, 2005, the applicant filed the Form I-601 with documentation supporting his claim that extreme hardship would be imposed on his spouse.

On appeal, counsel contends that the district director erred in finding that the applicant is inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(6)(C)(ii) of the Act. Counsel contends that the applicant's unintentional claim to U.S. citizenship was retracted when faced with further questioning. Counsel contends that the applicant's spouse would suffer extreme hardship if he were to be denied a waiver. *See Counsel's Brief,* dated March 29, 2006. The entire record was reviewed and considered in rendering a decision in this case.

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.
>
> (ii) Falsely claiming citizenship. –

a. 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 . . . is inadmissible.

b. Exception-

> In the case of an alien making a representation described in subclause (I), if each natural parents 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.

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

On appeal, counsel asserts that the applicant did not make a claim to U.S. citizenship because his first response to questioning by an immigration officer was a result of confusion as to whether he was being asked where he lived or where he was born. Counsel asserts that as soon as the applicant realized there was confusion over the answers he had provided he clarified his response and informed the immigration officer that he was born in Taiwan but resided in Everett, Washington. Counsel contends that the applicant's actions were unintentional and a result of confusion and fear when faced by an intimidating and shouting immigration officer. Counsel asserts that although the applicant signed something, he was never advised as to what it was, nor was he provided a copy.

In his affidavit, on appeal, the applicant states that he did not intentionally state that he was a U.S. citizen when attempting to enter the United States in 2002. The applicant states that, when the immigration officer asked him and the group of people with whom he was traveling where they were from, he replied that he was from Everett, Washington, believing that the immigration officer was not asking him where he was born, but rather, from where he came. He states that then the officer asked the group why they had been in Canada and where each of them had been born. He states that he replied he had been born in Everett. He states that he does not know why he said he was born in Everett, but that his mind was blank and he was scared and confused. He states that it was not intentional and he did not mean any harm. He states that, after he was taken to secondary inspection, he informed a different immigration officer that he had been born in Taiwan and that he did not have any documentation with him to prove his status in the United States. He states that after being questioned by the first immigration officer in a separate room, during which the immigration officer yelled at him and was aggressive, he just gave the immigration officer the answers that he wanted so that he would stop shouting. He states that he was nineteen and did not realize that seriousness of the situation, and the problem

with his status was not fully explained to him. He states that he never meant to convey any false impression or information about his immigration status and he was confused, scared and tired.

While the applicant claims that he did not intentionally make an affirmative claim to U.S. citizenship and that he informed the immigration officers of his misunderstanding of the questions upon referral to secondary inspection, the Record of Sworn Statement In Proceedings under Section 235(b)(1) of the Act (Form I-867A) does not support these assertions. The Form I-867A indicates that the applicant was asked if he was willing to answer the questions of the immigration officer and would swear or affirm that his responses would be truthful. The applicant responded affirmatively and when asked what he said to the immigration officer outside in response to the question of the place of his birth he responded Everett, Washington. When asked what he said to the immigration officer inside (secondary inspection) in response to the question of the place of his birth he responded Everett, Washington. Therefore, the record reflects that the applicant failed to provide correct information in regard to his immigration status until sometime after he was referred to secondary inspection. The Form I-867A also indicates that the applicant had discussed what to say to the immigration officers with the group with whom he was traveling and had followed their advice to respond that he had been born in Everett in order to make the entry into the United States easy. Accordingly, the AAO finds the record to establish that the applicant made an affirmative oral claim to U.S. citizenship in attempting to enter the United States in 2002. The AAO also finds that the applicant is ineligible for the exception to the inadmissibility grounds for falsely representing that he was a U.S. citizen.

On appeal, counsel asserts that in order to represent oneself as a U.S. citizen there must be some level of "intent" and that one must have an "intent to commit an act" in order to be held accountable for it. Counsel asserts that it is clear that the applicant was confused and there may have been a misunderstanding of what was being asked, but there was never an intentional act to misrepresent the applicant's status. As discussed above, the record does not support these assertions. Moreover, a finding of inadmissibility under section 212(a)(6)(C)(ii) of the Act does not require the alien to have made a *willful misrepresentation* or to have committed fraud, acts that require a *mens rea*. Such a finding requires only that an individual have made a false claim to U.S. citizenship.

On appeal, counsel also asserts that, if the applicant's acts are found to be misrepresentation, such misrepresentation is nullified by the applicant's timely retraction and explanation. The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. Stated in part; (1) a misrepresentation can be made orally or in writing, (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation, (3) the misrepresentation must have been practiced on an official of the U.S. government, generally a consular or immigration officer, (4) a timely retraction will avoid the penalty of the statute. Whether a retraction is timely depends on the circumstances of the particular case.

A timely retraction has been found in cases where applicants used fraudulent documents only *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel,* 18 I&N 33 (BIA 1984). In the instant case, the applicant retracted his claim to U.S. citizenship only after having unsuccessfully asserted to two different U.S. immigration officials that he had been born in the United States. Based on the record, the AAO finds that the applicant did not offer a timely retraction of his claim to U.S. citizenship.

The applicant is, therefore, inadmissible to the United States pursuant to section 212(a)(6)(C)(ii) of the Act and no waiver available to the applicant under this ground of inadmissibility. Accordingly, the appeal will be dismissed.

In proceedings for an application for waiver of grounds of inadmissibility, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.