



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF G-H-

DATE: SEPT. 11, 2015

APPEAL OF SAN JOSE FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(i), 8 U.S.C. § 1182(i), and section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii). The Field Office Director, San Jose, California, denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii)(I), for attempting to enter the country by falsely claiming to be a U.S. citizen. She also was found to be inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for reentering the United States without admission after being ordered removed.

The Director determined, in a decision dated December 21, 2012, that the Applicant was statutorily ineligible for relief, because the Act provides no waiver of inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act. Accordingly, the Director did not address the Applicant's inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, and he denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, the Applicant asserts that she retracted her U.S. citizenship claim in a timely manner and that she is therefore not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. The Applicant asserts that the Director erroneously applied an "immediate retraction" standard in her case. She asserts further that the Director erred in not considering her youth and history as a victim of domestic violence when he assessed her inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act. The Applicant also asserts that she was not afforded an opportunity to review records that were the basis of the Director's inadmissibility finding and that she therefore was denied due process. In addition, the Applicant asserts that the Director erred in not analyzing her request for a waiver under section 212(a)(9)(C)(iii) of the Act.

In support of her assertions, the Applicant submits a personal affidavit and a copy of an unpublished U.S. Ninth Circuit Court of Appeals decision. The record also includes, but is not limited to, affidavits that she had submitted in support of other immigration applications; police reports; marriage and birth certificates; financial evidence; and medical and educational evidence pertaining

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to the Applicant's children. The entire record was reviewed and considered in rendering a decision on the appeal.

With regard to the Applicant's claim that her due process rights were violated, we note that we lack jurisdiction to decide constitutional issues. Further, the Applicant has not sufficiently established that she was unaware of the derogatory information referred to in the Director's decision. The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides, in pertinent part:

If the decision will be adverse to the applicant . . . and is based on derogatory information considered by the Service and of which the applicant . . . is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant . . . shall be included in the record of proceeding.

Here, the Director stated in the Form I-601 denial decision that:

USCIS records show that on March 9, 2000, you attempted to enter the United States at the [REDACTED] Arizona port of entry. During your attempted entry, you declared to an immigration officer that you were a citizen of the United States by virtue of birth in [REDACTED] California. During subsequent secondary inspections, you admitted on a sworn statement that you were in fact a citizen of Mexico. On the same day, you were expeditiously removed from the United States

The derogatory information referred to in the Director's decision consists of statements that the Applicant made when she attempted to enter the United States on March 9, 2000. Although the Applicant disputes, on appeal, when and how she retracted her March 9, 2000, U.S. citizenship claim, she admits that she attempted to enter the United States illegally on March 9, 2000, and that she claimed to be a U.S. citizen at the U.S. port of entry. The Applicant also does not dispute that she was referred for secondary inspection on March 9, 2000, and that she was removed to Mexico. The Applicant therefore has not shown that she was unaware of the derogatory information referred to by the Director.

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

(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 . . . 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.

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Section 212(a)(9) of the Act provides, in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

....

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception. Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security (Secretary) has consented to the alien's reapplying for admission.

(iii) Waiver- The [Secretary] may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

Although a waiver is available for a ground of inadmissibility under section 212(a)(9)(C)(i) of the Act, as of September 30, 1996, the date of enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, individuals making false claims to U.S. citizenship are statutorily ineligible for a waiver of inadmissibility. *See* section 212(a)(6)(C)(ii) and (iii) of the Act. Therefore, if it is determined that the Applicant made a false claim to U.S. citizenship on or after September 30, 1996, she is subject to a permanent ground of inadmissibility.

The Applicant does not dispute that she is a native and citizen of Mexico, and that on March 9, 2000, she attempted to enter the United States at the [redacted] Arizona, port of entry by verbally stating that she was a U.S. citizen. Further, the record reflects that the Applicant was born in Mexico on [redacted] that she was over the age of 16 on March 9, 2000, and that her parents are both citizens of Mexico. The exception contained in section 212(a)(6)(C)(ii)(II) of the Act therefore does not apply to the Applicant.

The Applicant asserts, however, that she retracted her U.S. citizenship claim in a timely manner at the port of entry, that the Director erroneously applied an "immediate retraction" standard in her case, and that she is not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act.

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The U.S. Ninth Circuit Court of Appeals held in *Llanos-Senarillos v. United States*, 177 F.2d 164, 165 (9th Cir. 1949) that if an individual “withdraws the false testimony of his own volition without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn.” The BIA has also applied the doctrine of timely recantation when an alien “voluntarily and prior to any exposure of the attempted fraud corrected his testimony[.]” *Matter of M-*, 9 I&N Dec. 118, 119 (BIA 1960); *see also Matter of R-R-*, 3 I&N Dec. 823, 827 (BIA 1949). Moreover, “[r]ecantation must be voluntary and without delay. *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (recantation was neither voluntary nor timely if made a year later and only after it appeared that disclosure of the falsity of the statements was imminent).

On appeal, the Applicant also refers to an unpublished Ninth Circuit Court of Appeals decision, *Olea-Reyes v. Gonzalez*); however, unpublished legal decisions are not legally binding on this office. Further, the *Olea-Reyes* decision does not differ from published decisions on the issue of timely retraction. In addition the Applicant refers to U.S. Department of State’s Foreign Affairs Manual (FAM) guidance at 9 FAM 40.63 N4.6, which states, in pertinent part, “[w]hether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. . . .” This guidance does not differ from published cases on the issue of timely retraction. Moreover, while it is useful as guidance, the FAM also is not binding on this office.

The Applicant indicates on appeal that when she attempted to enter on March 9, 2000, she told the first U.S. immigration officer she saw that she was an American citizen and that she was going to [REDACTED] California. She states further, that upon:

[S]eeing his reaction, I did admit that I was Mexican. Maybe he did not understand me when I said that I was in fact Mexican. I was then sent to a second officer with a paper given to me by the first officer. By the time I spoke to the second officer, I was crying. I admitted that I was Mexican. I never claimed that I was born in [REDACTED] I only stated that I planned to go to [REDACTED]

The record does not demonstrate that the Applicant timely retracted her U.S. citizenship claim. The evidence in the record does not corroborate the Applicant’s claim that she told a U.S. immigration officer that she was a Mexican citizen prior to being sent for secondary inspection.

A March 9, 2000, memorandum written by the U.S. customs officer who encountered the Applicant at the [REDACTED] Arizona, Port of Entry provides a detailed summary of her statements when she attempted to enter the United States:

On the above date . . . , a female subject attempted to enter the U.S. through the [REDACTED] AZ Port of Entry pedestrian lane manned by myself. The subject claimed she was a U.S. citizen. I asked the subject were [sic] she was going and she stated to [REDACTED] CA. I asked the subject where she had been born and she stated in [REDACTED] CA. All other questions rendered the same answer, even when asking the questions in Spanish (a language the subject understood). . . . I referred the subject to secondary INS inspection, at which time it was discovered she was a false claim to U.S. citizenship. The subject was identified as [REDACTED]

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The memorandum was written at the time of the Applicant's attempted entry into the country and reflects in detail the questions of the first immigration officer and the answers the Applicant provided. The memorandum does not demonstrate that the Applicant retracted her U.S. citizenship claim to the first immigration officer. Rather, the memorandum reflects that the Applicant maintained her claim of U.S. citizenship in response to all of the officer's questions, and only after she was referred for secondary inspection did she admit, under a false name, that she was not a U.S. citizen.

The record also contains a Record of Deportable/Inadmissible Alien (Form I-213) with Continuation Page (Form I-831), dated March 9, 2000. These documents also reflect that the Applicant attempted to enter the United States claiming to be a U.S. citizen under the name [REDACTED]. In particular the Form I-831 states:

On the 9th of March, 2000 the above named subject applied for admission to the United States at the [REDACTED] AZ Port of Entry. Subject applied for admission by verbally claiming to be a Citizen of the United States by birth in [REDACTED] CA USA [sic].

Subject was referred to INS secondary for further inspection.

.....

When questioned about her country of Citizenship, subject admitted to have been born in [REDACTED] Mexico and to actually being a Citizen of Mexico and of no other country.

The Forms I-213 and I-831 were written at the time of the Applicant's attempted entry and provide further evidence that the Applicant did not retract her citizenship claim until she was questioned during secondary inspection.

The documents in the record prepared when the Applicant attempted to enter the United States in 2000 reflect that the Applicant did not retract her claim to U.S. citizenship until she was questioned in secondary inspection. The Applicant's assertions on appeal, that perhaps the officer who first questioned her did not hear her retract her claim and that she did not tell him that she was born in [REDACTED] California, are insufficient to overcome the evidence in the record and to establish that she timely retracted her U.S. citizenship claim.

Although the record does not demonstrate that the Applicant retracted her U.S. citizenship claim in a timely manner, the record nevertheless reflects that the Applicant lacked the maturity and judgment to understand the nature and consequences of her false citizenship claim, such that she should be found to be inadmissible under section 212(a)(6)(C)(ii) of the Act.

The record reflects that the Applicant turned 17 years old on [REDACTED] one day before she tried to enter the United States. The Applicant was therefore a minor at the time of her false U.S. citizenship claim.

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The law recognizes that many children lack the judgment to appreciate the consequences of ill-advised choices. Whether the Applicant had the capacity to make a false citizenship claim, such that she should be found to be inadmissible under section 212(a)(6)(C)(ii) of the Act, depends on whether she had the maturity and judgment to understand the nature and consequences of her action. In the present matter, the cumulative evidence in the record reflects that the Applicant, given her particular circumstances, lacked the capacity to make a false citizenship claim under section 212(a)(6)(C)(ii) of the Act.

The Applicant indicates, in an affidavit dated August 6, 2010, that she grew up in a household in which her mother was abused by her father, that she also, was subjected to violence and abuse by her mother, and that she married when she was 14 years old to “escape the violence” in her home. The Applicant recounts that her husband began to physically and emotionally abuse her soon after they married, and she “lived in fear” of him. Nevertheless, she stayed in the marriage because her parents told her that she belonged to her husband and they did not want to hear complaints about her marriage. The Applicant indicates that by the time she was 15 years old, she already had her first child. She states that they had nowhere to live in Mexico and that she had to beg for food, shelter, and clothing from friends and relatives. She states further that her husband lived in the United States at the time and decided that she and their son would join him. He “made all the arrangements” for their entry into the United States, including arranging for their son to be brought into the United States separately and for her to use a false name because he feared he would be found if she gave her real name. The Applicant asserts also that her husband told her she had to do as he said, and that she felt she “could not refuse what he had planned” because she was afraid of him.

The Applicant’s statements are detailed and corroborated by documentary evidence in the record. Evidence in the record corroborates claims that the Applicant was married in Mexico on [REDACTED], at the age of 14, and that she gave birth to her son on [REDACTED], at the age of 15. In addition, police reports reflect that the Applicant was subjected to ongoing domestic violence by her husband. The record also includes evidence that the Applicant is the beneficiary of an approved Form I-360 petition based on battery and extreme cruelty by her husband.

The evidence in the record demonstrates that, due to the Applicant’s unique personal circumstances, she was unable to develop the maturity and judgment to understand the nature and consequences of her false claim. Therefore, we find that she lacked capacity to make a false claim of U.S. citizenship pursuant to section 212(a)(6)(C)(ii) of the Act. Accordingly, we find that the Applicant is not inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act for attempting to enter the United States by making a false claim to U.S. citizenship.

The record reflects, however, that the Applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act for reentering the United States without being admitted, after having been ordered removed. On March 9, 2000, the Applicant was removed from the United States in an expedited-removal proceeding pursuant to section 235(b)(1) of the Act. The Applicant indicates, in her August 6, 2010 affidavit, that she reentered the United States about three days later without admission, and that she has resided in the United States since that time. Because she reentered without being admitted after she had been ordered removed, section 212(a)(9)(C)(i)(II) of the Act applies to the Applicant. She does not contest her inadmissibility under this section of the Act.

Section 212(a)(9)(C)(iii) of the Act provides for a waiver of inadmissibility under section 212(a)(9)(C)(i)(II) of the Act for Violence Against Women Act (VAWA) self-petitioners, where removal or departure from the United States, and reentry or attempted reentry into the United States was connected to the Applicant's subjection to battery or extreme cruelty. The Applicant has established that she meets the requirements contained in section 212(a)(9)(C)(iii) of the Act.

The record contains an approved Form I-360 VAWA petition for the Applicant, based on abuse by her former spouse. Further, the Applicant asserted credibly in an August 6, 2010, affidavit that she married at the age of 14; that her husband subjected her to physical and emotional abuse throughout her marriage and she "lived in fear" of her husband; and that she was afraid to disobey the plans her husband made for her to reenter the country illegally to join him in the United States, particularly because he had their son and she was worried about his safety. The record contains police report, restraining order, and criminal record evidence reflecting an ongoing pattern of violence by the Applicant's husband against the Applicant. The record also corroborates the Applicant's assertions that she had her first child at the age of 15 and that her husband arranged for their son to enter the United States separately. Further, the Applicant asserted that after she was removed to Mexico, her husband threatened to keep their son and raise him without her if she did not agree to reenter the United States illegally.

Upon review of the record, the Applicant has shown a connection between the battery and extreme cruelty she was subjected to by her husband, and her removal and reentry to the United States that gave rise to her inadmissibility under section 212(a)(9)(C)(i) of the Act. The Applicant therefore satisfies the requirements contained of section 212(a)(9)(C)(iii) of the Act. The circumstances of the Applicant's case also warrant a favorable exercise of discretion. In addition to establishing a connection between the battery and extreme cruelty she was subjected to, and her removal and reentry to the United States, the record reflects that the Applicant has resided in the United States for over 14 years, since she was 15 years old. She has a U.S. citizen child, and she has presented evidence of financial, medical and educational hardship to her family if she is returned to Mexico. The Applicant also has no criminal history, and the record contains no evidence of other immigration violations. The Applicant's inadmissibility under section 212(a)(9)(C)(i)(II) of the Act is therefore waived.

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 been met.¹

ORDER: The appeal is sustained.

Cite as *Matter of G-H-*, ID# 13595 (AAO Sept. 11, 2015)

¹ The Applicant remains inadmissible under section 212(a)(9)(A) of the Act, based on her expedited removal from the United States, and must request permission to reapply for admission by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.