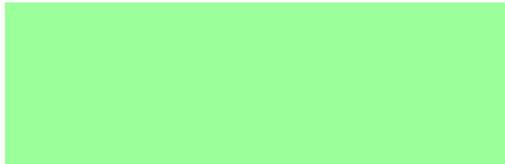




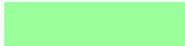
U.S. Citizenship
and Immigration
Services

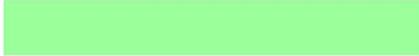
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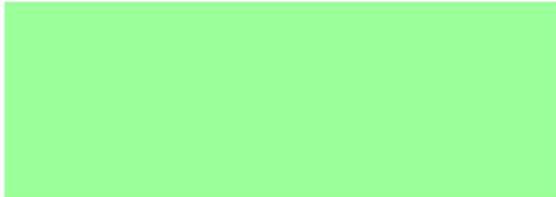
Office: LIMA, PERU

FILE: 

IN RE: 

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:



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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Lima, Peru. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision 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 also stated that an unfavorable factor in the applicant's case was his conviction for falsely claiming to be a U.S. citizen, which we noted was incorrect in our decision on appeal. The record indicated that although the applicant was charged with falsely claiming U.S. citizenship to gain an employment benefit, the charge was dismissed and the applicant was not convicted.

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 our decision, dated October 10, 2012, we found the applicant inadmissible under section 212(a)(6)(C)(ii)(I) of the Act and thus ineligible for waiver consideration. We found that the record indicated that on September 23, 2003, February 18, 2004, and June 22, 2004, the applicant claimed to be a U.S. citizen on a Form I-9, Employment Eligibility Verification, for the purposes of obtaining employment. We also found that the record indicated that on September 1, 2006, the applicant was ordered removed from the United States pursuant to section 237(a)(3)(D) of the Act, as an applicant who falsely represented himself to be a U.S. citizen for any purpose or benefit under the Act or a Federal or State law.

On motion, counsel asserts that the applicant was not removed pursuant to section 237(a)(3)(D) of the Act, as an applicant who falsely represented himself to be a U.S. citizen for any purpose or benefit under this Act or a Federal or State law; that the applicant denies having made a false claim to U.S. citizenship; that the record contains 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 to trigger the false claim to citizenship under precedent decisions from U.S. Courts of Appeal and the Board of Immigration Appeals (BIA). Counsel asserts 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 support of the motion, Counsel submits a brief; a letter from [REDACTED] a transcript of the oral decision of the immigration judge in the applicant's removal proceedings; an updated letter from the applicant's spouse; and six letters from mental health professionals in the United States regarding the applicant's spouse's diagnosis and treatment for obsessive-compulsive disorder, generalized anxiety disorder, and depression.

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.

Employment can be properly deemed a “purpose or benefit under the Act,” and when an applicant has made a false claim of U.S. citizenship for the purpose of obtaining employment with a private employer, he may properly be deemed inadmissible under section 212(a)(6)(C)(i) of the Act. See *Theodros v. Gonzales*, 490 F.3d 396, 402 (5th Cir. 2007); *Rodriguez v. Mukasey*, 519 F.3d 773, 776-77 (8th Cir. 2008); and *Ferrans v. Holder*, 612 F.3d 528, 532-33 (6th Cir. 2010). Moreover, many courts have found a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act appropriate in cases where the applicant checked the “citizenship or national” box on an I-9 Form for the purposes of obtaining employment. See *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007); *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008); and *Crocock v. Holder*, 670 F.3d 400, 403 (2nd Cir. 2012).

An alien seeking entry into the United States or an alien seeking to adjust his status bears the burden of establishing that he is clearly and beyond a doubt entitled to be admitted and is not inadmissible. See *Ferrans*, 612 F.3d at 531 (citing section § 245(a) of the Act, 8 U.S.C.A. § 1255(a)); 8 C.F.R. § 1240.8(b). Unlike a removal hearing in which the government bears the burden of establishing a respondent’s removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility “to the satisfaction of the Attorney General [Secretary of Homeland Security].” See Section 291 of the Act, 8 U.S.C. § 1361. We find that the applicant has failed to meet this burden of proof that he is not inadmissible under section 212(a)(6)(C)(i) of the Act.

Counsel’s arguments that the record does not support a finding of inadmissibility under section 212(a)(6)(C)(i) do not reflect a correct understanding of the applicable burden of proof, and are based primarily on an unwarranted reliance on actions taken in immigration court proceedings that are not dispositive in the current proceeding. Counsel asserts that in immigration court, the applicant denied the allegations of a false claim to U.S. citizenship; the immigration judge did not consider the I-9 forms, and there is no evidence that they came from the respective employers or that the applicant marked or signed them; DHS did not further pursue the allegations; and the immigration judge did not find the allegations to be true and did not sustain the 237(a)(3)(D) charge. Counsel asserts further that even assuming that the applicant did mark and sign the I-9 forms, there is no

evidence of the applicant's intent or understanding to demonstrate that he claimed to be a U.S. citizen rather than a U.S. national.

The record contains two I-9 Forms dated September 23, 2003 and February 18, 2004, with the applicant's signature, a driver's license number, and a social security number. These contain stamps and signatures to indicate that they were submitted, respectively, as proof of employment eligibility to an [REDACTED], in West Bountiful, Utah, and to [REDACTED] in Salt Lake City, Utah.¹ There is a mark in the box for U.S. citizen or national on each form. The September 2003 I-9 Form, relating to [REDACTED] is signed and dated by the "store manager." The February 2004 I-9 Form, relating to [REDACTED] is signed and dated by the [REDACTED]. Thus, the record contains evidence that on its face supports a finding of inadmissibility under section 212(a)(6)(C)(ii) of the Act. We acknowledge that there is no additional evidence to authenticate or verify the information found on the I-9 forms, but counsel has not provided any legal support for the proposition that the lack of such further evidence is sufficient to meet the applicant's burden of proof. It is the applicant who must submit evidence to show that he did not mark, sign and submit the I-9 forms to the respective employers, as they appear to have been, or to otherwise refute the information contained therein.

We acknowledge, contrary to the finding in our prior decision, that the applicant was not removed under section 237(a)(3)(D) of the Act for falsely claiming to be a U.S. citizen. However, the record before us shows only that the immigration judge found that the government had not met its burden of proving removability under section 237(a)(3)(D) of the Act. It does not show that the immigration judge ruled that the applicant had not in fact made false claims to U.S. citizenship on the I-9 forms. It also does 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. Counsel has not provided 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 current proceeding, in which the burden of proof is on the applicant. Therefore, we find unpersuasive counsel's arguments concerning the lack of an evidentiary basis for inadmissibility.

As to counsel's contention that, assuming the applicant did mark the I-9 forms, there is no evidence showing that the applicant intended to claim that he was a U.S. citizen rather than a U.S. national, it is the applicant's burden to show that he intended to claim status as a national when he checked the box on the I-9 form. See *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); and *Crocock v. Holder*, 670 F.3d 400 (2nd Cir. 2012). In the applicant's case, though he denies making a false claim to U.S. citizenship, he has 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. See *Kechkar*, 500 F.3d at 1084-85 (Finding that the petitioner's testimony was insufficient to meet his burden of showing "clearly and beyond doubt" that he did not mark the I-9 form, or, if he did, that he marked the I-9 with intent to indicate nationality rather than citizenship).

¹ We will not consider, for purposes of the current proceedings, the I-9 Form signed by the applicant and dated June 22, 2004, as evidence of an additional false claim to U.S. citizenship for a purpose or benefit under the Act or other Federal or State law because it does not include employer information or an employer signature, and the record does not presently contain sufficient other evidence to show that it was submitted to an employer for the purpose of obtaining employment.

Counsel cites three court decisions, two of which are unpublished, as support for the proposition that a finding of false claim of U.S. citizenship for any purpose or benefit under the Act or any other Federal or State law must be based on something more than just marking the “citizen or national” box on the I-9 Form. *United States v. Karaouni*, 349 F.3d 1139 (9th Cir. 2004); *Mwagile v. Holder*, 374 Fed. Appx. 809, 2010 WL 1220731 (10th Cir. March 30, 2010); and *Victor Hugo Sanchez-Garcia*, 2007 WL 2588608 (BIA, Salt Lake City, August 14, 2007). We note that *Karaouni* involved criminal proceedings related to a conviction under 18 U.S.C. § 911, and is not of significant relevance to the issue of inadmissibility addressed in this case. Both *Mwagile* and *Sanchez-Garcia* involved removal proceedings where the burden of establishing removability was on the government. The cases cited above, particularly *Kechkar*, are on point and support our findings in this case. The applicant has not stated with any specificity, or otherwise provided sufficient evidence to prove, that he claimed to be a U.S. national by checking the “citizen or national” box on the I-9 Forms.

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 motion is granted, but the prior AAO decision is affirmed.

ORDER: The prior AAO decision is affirmed.