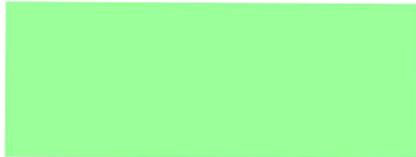




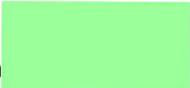
U.S. Citizenship
and Immigration
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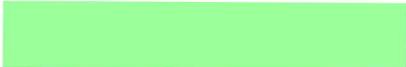
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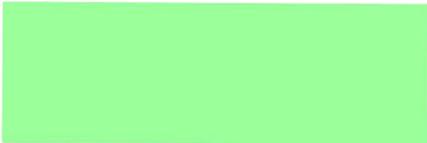
OFFICE: GUATEMALA CITY

FILE: 
(relates)

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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guatemala City, Guatemala. 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 underlying application remains denied.

The applicant, a native and citizen of Belize was found inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II) for possession of a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), based on extreme hardship to his U.S. citizen spouse.

On December 9, 2011, the Field Office Director concluded that the applicant did not establish extreme hardship to his U.S. citizen spouse. The applicant appealed that decision and after the submission of the applicant's appeal, he was found to be inadmissible to the United States under section 212(a)(6)(C)(ii) of the Act for having made a false claim of U.S. citizenship in order to gain entry into the United States. The AAO dismissed the appeal on August 14, 2012, finding that the applicant was inadmissible under section 212(a)(6)(C)(ii)(I) of the Act, a provision for which he is not eligible for a waiver. The applicant filed a motion to reopen and reconsider the AAO decision.

On motion, counsel for the applicant states that the applicant should not be inadmissible under section 212(a)(6)(C)(ii)(I) of the Act and asks the AAO to reopen and or reconsider the prior decision in the applicant's case.

In support of the application, the record includes, but is not limited to a brief from counsel, statements from the applicant, financial and medical documentation concerning the applicant's spouse, biographical information for the applicant and his spouse, photographs of the applicant and his spouse, and documentation relating to the applicant's immigration history.

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 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).

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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

(ii) 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 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.

The record makes clear that the applicant attempted to gain admission to the United States on August 2, 2012 at the San Ysidro Port of Entry in California by stating that he was a U.S. citizen, and upon further questioning also stated that he was born in New York. The applicant was sent to secondary inspection where he then stated under oath that he was not born in New York, was a native of Belize, and that he presented himself as a U.S. citizen in order to gain admission to the United States. He was found to be inadmissible under sections 212(a)(6)(C)(ii) and 212(a)(7)(A)(i)(I) of the Act and was ordered removed.¹ As a result, the AAO found that the applicant was inadmissible under section 212(a)(6)(C)(ii)(I) of the Act as an alien who has falsely represented himself to be a citizen of the United States to gain admission to the United States. As there is no waiver available for inadmissibility under 212(a)(6)(C)(ii)(I) of the Act and the record does not illustrate that the applicant is eligible for the exception at section 212(a)(6)(C)(ii)(II) of the Act, the AAO determined that the applicant was statutorily ineligible for relief and no purpose would be served in discussing whether he established eligibility for a waiver under section 212(h) of the Act or whether he would merit the waiver as a matter of discretion.

On motion, counsel for the applicant states that the applicant should not be inadmissible under section 212(a)(6)(C)(ii)(II) of the Act as he made a timely retraction and explained his false claim to U.S. citizenship. Counsel cited *Sandoval v. Holder*, 641 F.3d 982 (8th Cir. 2011), where the court reiterates that a “a timely retraction will serve to purge a misrepresentation and remove it from further consideration” as a ground of inadmissibility under section 212(a)(6)(C)(ii)(II). *Id.* at 989 (citing the U.S. Dep't of State Foreign Affairs Manual, Vol. 9, § 40.63, Note 4.6.). The court goes on to cite the Foreign Affairs Manual, which explains that “[w]hether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity.” *Id.* at 989. The AAO also notes that for the retraction to be effective, however, it must be done “voluntarily and without prior exposure of [the] false testimony.” *Matter of R-R*, 3

¹ As a result of the applicant's expedited removal order he is also now inadmissible under section 212(a)(9)(A)(i) of the Act.

I&N Dec. at 827; *see also* *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that recantation of false testimony one year after the event, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was not voluntary or timely); *see also* *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309-10 (9th Cir. 2010) (affirming that the doctrine of timely recantation is not available if a person recants only when confronted with evidence of his prevarication). A timely retraction has been found in cases where applicants used fraudulent documents *en route* to the United States 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). Or in the case cited by counsel, a timely retraction was argued in the case of an individual who made a false claim to citizenship as an unaccompanied minor. In that case, however, the court did not make a final decision in the matter, but rather remanded the case to the Board of Immigration Appeals. *Sandoval*, 641 F.3d at 989. In the applicant's case, the record indicates that he presented himself for admission to the United States as a U.S. citizen and only provided his true identity once he was placed in secondary inspection. This is not a timely retraction. A retraction after an immigration officer's discovery of the misrepresentation does not serve as a timely retraction.

Counsel also states that the applicant lacked the requisite intent to make a false claim to U.S. citizenship as "he did not wish to make any false statement in order to obtain immigration benefits or an entry because his documents were already in process and he was well aware of that." In a statement provided on motion, the applicant states that he when he was in line for entry at the border "he gave the officer my alien number and I told the officer that I came to the border to find out about my petition." The record does not support the applicant's claim. The record indicates that the applicant claimed to be a U.S. citizen to the immigration officer at the port-of-entry and only stated that he wished to check into the status of his case after being referred to secondary inspection. It is the applicant's burden of proof in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361. Additionally, the applicant must correct his testimony prior to being exposed by a government official. *See* Memo, from Lori Scialabba, Act. Assoc. Dir., Dom. Ops., Donald Neufeld, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators* 13 (March 3, 2009). Moreover, the AAO notes that the plain language of the Act, does not address intent, but rather states that the claim to U.S. citizenship must be false. USCIS has found that this language instructs that the applicant "knowingly misrepresents the fact that they individual is a citizen of the United States." *Id.* at 25. Or, more specifically, the applicant "must have known that he or she was not a U.S. citizen." *Id.* at 25. The exceptions under section 212(a)(6)(C)(ii) of the Act apply to individuals who reasonably believed themselves to be U.S. citizens as a result of their U.S. citizen parents. This exception has not been shown to apply to the applicant.

The AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(ii) of the Act. The applicant's inadmissibility under this section is a permanent grounds of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act,

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8 U.S.C. § 1361. After a careful review of the record, the AAO finds that in the present motion, the applicant has not met this burden. Accordingly, the motion is granted and the underlying appeal is dismissed.

ORDER: The motion is granted and the waiver application remains denied.