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

U.S. Citizenship and Immigration Services

H4

[redacted]

DATE: DEC 21 2012 Office: SAN ANTONIO, TX FILE: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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 in accordance with the instructions on 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, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to Immigration and Nationality Act (the Act) § 212(a)(9)(C)(i), 8 U.S.C. § 1182(a)(9)(C)(i), for entering the United States without being admitted after voluntarily departing. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for having attempted to procure admission by falsely claiming U.S. citizenship. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and lawful permanent resident parents.

In his decision of June 27, 2009, the field office director determined that as the applicant was statutorily inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, no purpose would be served by considering the applicant's Form I-601, Application for Waiver of Ground of inadmissibility. Accordingly, the director denied the Form I-601.

On appeal, counsel asserts that because the applicant timely retracted his claim of citizenship, he is not inadmissible under section 212(a)(6)(C) of the Act. Counsel also contends that the applicant's prior unlawful presence had been waived and therefore should not be used against him in calculating unlawful presence under section 212(a)(9)(C)(i)(I) of the Act.

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

....

(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 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.

The record reflects that on October 1, 2001, the applicant made an oral false claim to U.S. citizenship at the border.

Counsel does not contest that the applicant made a false claim to U.S. citizenship in attempting to enter the United States on October1, 2001. Instead, she asserts that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(ii)(I) of the Act because he freely and voluntarily retracted his claim to U.S. citizenship during the same proceeding. In support of her claim, counsel cites to *Matter of M,* 9 I&N Dec. 118 (BIA 1960), a case in which the Board of Immigration Appeals (BIA) held that a respondent who had asserted and then voluntarily retracted his claim to being a lawful permanent resident during the same interview could establish the good moral character necessary for a grant of voluntary departure.

The AAO acknowledges the reasoning in *Matter of M* regarding the timely retraction of a misrepresentation and notes that the Department of State follows similar reasoning in determining whether a misrepresentation on the part of an overseas visa applicant bars his or her admission to the United States under section 212(a)(6)(C)(i) of the Act:

> A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for INA 212(a)(6)(C)(i) inadmissibility. Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview.

Foreign Affairs Manual (FAM), Title 9, Section 40.63, Note 4.6.

It is not clear, however, that the reasoning in *Matter of M* or that set forth in the FAM may be extended to false claims to U.S. citizenship. The misrepresentation in *Matter of M* involved a false claim to lawful permanent resident status, a violation of section 212(a)(6)(C)(i) of the Act. The FAM guidance noted above is also limited to misrepresentation under section 212(a)(6)(C)(i) of the Act. The AAO notes that FAM instructions relating to a false claim to citizenship (*See* 9 FAM 40.63 N11-N15) do not indicate that such a claim may be eliminated as a bar to admission by a timely retraction. While the AAO is not bound by the FAM, it finds the fact that it discusses timely retractions only in relation to section 212(a)(6)(C)(i) inadmissibilities to be persuasive. Accordingly, the AAO does not find that the applicant's false claim to U.S. citizenship may be corrected by a timely retraction.

However, even if the AAO were to accept this reasoning, it would not remove the applicant's inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act. The BIA has found respondents to have timely retracted misrepresentations in cases where they used fraudulent documents only *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 Dec. 33 (BIA 1984). In *Matter of M*, the respondent immediately retracted his claim to lawful permanent residency, voluntarily admitting that he had entered the United States unlawfully before completing his statement. The Foreign Affairs Manual also requires the retraction of a misrepresentation to be made without delay, at the first opportunity.

Although counsel asserts that the applicant's claim to U.S. citizenship was timely retracted, she also indicates that the retraction was made in response to questioning by an immigration inspector stating:

> When questioned further, [the applicant] freely and voluntarily admitted to the officer that he was not in fact a US citizen.

Based on the above statement, the AAO does not find the retraction of the applicant's claim to U.S. citizenship to have been timely as it occurred only in response to "further questioning" by an immigration inspector. Therefore, even if, as counsel asserts, the retraction was made during the course of the applicant's interview with the officer, it cannot be viewed as having been made at the first opportunity. Accordingly, the applicant is found to be inadmissible pursuant to section 212(a)(6)(C)(ii) (I) of the Act for having made a false claim to U.S. citizenship.

The applicant is inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. 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) of the Act statutorily bars him admission to the United States, the AAO will not address counsel's assertions regarding the director's inadmissibility finding under section 212(a)(9)(C)(i) of the Act.[1]

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[1] The AAO does note, however, that the applicant's departure from the United States on February 1, 1996 was under a grant of voluntary departure, not an order of removal. Accordingly, his 2000 entry without inspection does not make him inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Instead, the applicant appears inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act for having entered without admission after accruing more than one year of unlawful presence in the United States.