

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

#5

DATE: OCT 10 2012

OFFICE: SPOKANE, WA

FILE: [REDACTED]

IN RE: [REDACTED]

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

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Field Office Director, Spokane, Washington. 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. The underlying application remains denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible 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 seeking readmission within ten years of his departure, and 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 procure admission into the United States by falsely claiming to be a U.S. citizen. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. He seeks a waiver of his inadmissibilities 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), so that he may live in the United States with his spouse and child.

The applicant is also inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for entering the United States without admission after removal or a previous immigration violation. To qualify for an exception to his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, the applicant must obtain permission from U.S. Citizenship and Immigration Service (USCIS) to apply for admission into the United States. The record contains a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, filed by the applicant on April 24, 2008. It was denied on November 19, 2010, and the denial was not appealed.

Section 212(a)(6)(C)(ii) 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 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.

Aliens 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.

In a decision dated July 15, 2008, the director determined the applicant was statutorily ineligible for a waiver under section 212(a)(6)(C)(ii)(I) of the Act, because he attempted to procure admission into the United States in February 1999 by falsely claiming to be a U.S. citizen. The Form I-601 waiver was denied accordingly. In a decision dated October 29, 2010, the AAO agreed that the applicant was ineligible for a waiver due to his inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act. The appeal was dismissed.

Counsel asserts on motion to reopen and reconsider that the AAO failed to evaluate all the facts and circumstances surrounding the applicant's U.S. citizenship claim prior to determining the applicant's inadmissibility under section 212(a)(6)(C)(ii) of the Act; evidence establishes the applicant reasonably believed he was a "citizen of America" and recanted his claim to U.S. citizenship at the first reasonable opportunity to do so; and the AAO decision was contrary to agency policy directives on prosecutorial discretion and U.S. Department of State Foreign Affairs Manual (FAM) guidance on timely retractions. In support of her assertions, counsel submits declarations from a Seattle public-school administrator and herself, as well as copies of USCIS memoranda and FAM provisions, and evidence of a Freedom of Information Act request.

Counsel also requests that the AAO release all records to which it refers in its October 29, 2010 decision. It is noted that the Freedom of Information Act (FOIA) pertains to requests for access to Federal agency records. 5 U.S.C. § 552. USCIS record information requests must be made through proper submission of a Form G-639, Freedom of Information/Privacy Act Request.

The entire record was reviewed and considered in rendering a decision on the motion.

The regulations provide in pertinent part at 8 C.F.R. § 103.5(a):

(2) Requirements for motion to reopen. 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.

....

(3) Requirements for motion to reconsider. 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 Service 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. . . .

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

The AAO finds that counsel has met the requirements for a motion to reopen and reconsider. The motion is therefore granted.

Counsel indicates on motion that agency memoranda on prosecutorial discretion and FAM guidance at 9 FAM 40.63 demonstrate that the AAO must consider discretionary factors in determining whether the record supports finding the applicant made a false claim to U.S. citizenship. Counsel asserts that the record is unclear about events surrounding the applicant's false claim to U.S. citizenship, and she submits declarations written by herself and by a public-school administrator to support these assertions.

Counsel, in her declaration, states that the applicant's account of events is consistent with his Form I-213, Record of Deportable/Inadmissible Alien (Form I-213), as read to her by an immigration officer, reflecting the applicant showed his Washington State high school identification at the port of entry, stated he was born in Washington, and immediately admitted he was born in Mexico when the official explained the legal meaning of U.S. citizenship. Counsel states that in response to a FOIA request filed with U.S. Customs and Border Protection in 2008, she learned there was no record of this incident, and she has been unable to obtain additional evidence regarding the applicant's claim because a FOIA request filed with U.S. Immigration and Customs Enforcement is still pending.

A Washington State public-school administrator describes the citizenship curriculum in Washington State middle schools. She states the legal definition of U.S. citizenship is not examined in middle schools, and the applicant may or may not have been taught the legal requirements of U.S. citizenship in high school. She believes it is reasonable, based on his Washington State public-school education, that the applicant did not apply the definition of U.S. citizen to himself until he was reminded of the legal definition at the port of entry.

The AAO finds that the declarations by counsel and the public-school administrator lack probative value in the present matter. Neither individual has first-hand knowledge of the events or statements that occurred when the applicant was found inadmissible; no documentary evidence corroborates their claims. Furthermore, counsel made similar assertions on appeal, and as discussed in the previous AAO decision, the evidence in the record conflicts with assertions that the applicant did not understand he was making a false U.S. citizenship claim and immediately retracted the statement once he became aware of its meaning.

As stated in the October 29, 2010 AAO decision, the record contains a Form I-213, dated February 1, 1999, reflecting that the applicant falsely claimed to be a U.S. citizen in order to enter the United States. Specifically, the Form I-213 indicates the applicant was apprehended on January 31, 1999. According to the narrative:

On this date, SUBJECT applied for admission into the United States from Mexico through the pedestrian primary inspections turnstile area at the San Ysidro Port of Entry by verbally stating that I [*sic*] was born in Washington State. The primary inspector suspected SUBJECT was not a Citizen of the United States and referred SUBJECT to the secondary office for further investigation. A secondary inspection revealed SUBJECT was not in fact a Citizen of the United States. SUBJECT freely and voluntarily admitted true nationality, and was then turned over to the San Ysidro Port Enforcement Team for further disposition.

A February 1, 1999, sworn statement from the applicant, taken during his secondary inspection, corroborates the events described above. The record also contains copies of a Washington State high school identification card and a Washington State driver's license submitted by the applicant to U.S. border officials.

Counsel asserts that according to *United States v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004), a claim of U.S. citizenship must be direct, and that, for example, a claim that "I was born in Chicago" is not a claim to U.S. citizenship. The AAO notes, however, that the issue in *United States v. Karaouni* was whether an alien's "yes" answer to a question asking if he was a U.S. citizen or a national of the United States constituted a false claim to U.S. citizenship for immigration purposes. Because it was unclear from the alien's answer whether he was claiming to be a citizen or a national of the United States, the alien in that case was not found to be removable for falsely claiming U.S. citizenship. The Ninth Circuit's holding does not apply to the applicant's case, as the record clearly establishes the applicant claimed to be a U.S. citizen, not a national, when he attempted to enter the United States.

Counsel also asserts that the applicant timely retracted his U.S. citizenship claim in accordance with FAM guidance, which establishes a timely retraction of a material misrepresentation occurs if the retraction is made during the same proceeding or interview in which the misrepresentation was made. The AAO notes that it addressed the same FAM provisions for timely retraction in its October 29, 2010 decision and found that because the retraction occurred at the applicant's secondary-inspection interview, it was not timely. Counsel presents no new case law or Service policy on motion to demonstrate that the previous AAO decision was incorrect.

The evidence in the record establishes the applicant falsely represented to immigration officials that he was a U.S. citizen in order to procure admission into the United States. It was only after he was sent to secondary inspection for further questioning that he admitted his true citizenship and place of birth.

Counsel also states on motion that agency memoranda on the exercise of prosecutorial discretion establish that the totality of facts must be considered in determining whether the applicant's U.S. citizenship claim constituted a false claim to U.S. citizenship. It is noted that the AAO addressed the agency memoranda referred to by counsel in its previous decision and determined the record established the applicant falsely claimed to be a U.S. citizen in order to procure admission into the United States. Prosecutorial discretion therefore does not apply in the applicant's case. Counsel presents no new case law or Service policy to demonstrate that the previous AAO decision was based on an incorrect application of law or policy.

Upon review, the AAO finds, based on the analysis above, that counsel failed to establish that the October 29, 2010 AAO decision was incorrect based on new evidence, or based on an incorrect application of law or Service policy.

There is no statutory waiver available for a ground of inadmissibility arising under section 212(a)(6)(C)(ii)(I) of the Act, and the record fails to demonstrate that the applicant qualifies for an exception under section 212(a)(6)(C)(ii)(II) of the Act. The underlying Form I-601 application therefore remains denied.

ORDER: *The motion is granted. The underlying application remains denied.*