

(b)(6)



U.S. Citizenship  
and Immigration  
Services

Date: **OCT 17 2014** Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who was 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 made a false claim to U. S. citizenship, and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II) for accruing more than a year of unlawful presence. He is the fiancé of a U.S. citizen and has three U.S. citizen children. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his spouse and children.

The Director concluded that the applicant was inadmissible under section 212(a)(6)(C)(ii), for which there is no waiver available and denied the waiver as a matter of discretion on February 14, 2014.

On appeal, counsel for the applicant asserts that the Director's decision was in error, that the applicant is not inadmissible for a false claim to citizenship under section 212(a)(6)(C)(ii) and that a waiver is available to him as a non-immigrant under section 212(d)(3) of the Act.

Counsel cites to section 212(d)(3) of the Act and *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978) as the basis for using the section 212(d)(3) standard for the applicant's waiver application.

Section 212(d)(3) of the Act, which relates to waivers of inadmissibility for non-immigrant visa holders, provides in pertinent part:

- (A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary]

....

The Board of Immigration (BIA) and various regulations have determined that the beneficiary of a non-immigrant K visa, the purpose of which is to enter the United States to adjust status as the spouse of a U.S. citizen, is to be treated as an immigrant.

In *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011), The BIA stated:

Since the creation of the K-1 visa, a fiancé(e) who entered the United States and married the United States citizen "would be classifiable as an 'immediate relative,'" because the fiancé(e) adjusts status as the spouse of a United States citizen. See H.R. Rep. No. 91-851, at 8, 1970 U.S.C.C.A.N. at 2758, 1970 WL 5815 at \*\*8; see also *Matter of Dixon*, 16 I&N Dec. at 357 n.2 (noting that lawful permanent residence is

accorded to a section 214(d) applicant as an immediate relative). Consistent with this analogy to immediate relatives, consular officers are instructed to evaluate an alien's eligibility for a K-1 visa as if it were an immigrant visa. Similarly, consular officers are to determine a fiancé(e)'s eligibility for a waiver of inadmissibility as if the alien was the immigrant spouse of a United States citizen. *See* Vol. 9, Foreign Affairs Manual § 41.81 note 9.1 (CT: VISA-756; 7-27-2005).

8 C.F.R. § 212.7(a), which governs applications for waivers of inadmissibility provides, in pertinent part:

(1) *Application.* Except as provided by 8 CFR 212.7(e), an applicant for an immigrant visa, adjustment of status, or a K or V nonimmigrant visa who is inadmissible under any provision of section 212(a) of the Act for which a waiver is available under section 212 of the Act may apply for the related waiver by filing the form designated by USCIS, with the fee prescribed in 8 CFR 103.7(b)(1), and in accordance with the form instructions. Certain immigrants may apply for a provisional unlawful presence waiver of inadmissibility as specified in 8 CFR 212.7(e).

Further, 22 C.F.R. § 41.81 provides:

Fiancé(e) or spouse of a U.S. citizen and derivative children.

(a) *Fiance (e).* An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) when all of the following requirements are met:

...

(3) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, including the requirements of paragraph (d) of this section.

...

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section as if the alien were an applicant for an immigrant visa, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

Supplemental information published in the Federal Register in 2001, when 8 C.F.R. § 212.7(a)(1) was amended, also informs our decision:

Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001).

8 C.F.R. § 212.7(a)(1), by requiring the K non-immigrant to seek a waiver on the same terms as an immigrant visa applicant, precludes the applicant's waiver application from being adjudicated under § 212(d)(3) of the Act. The supplemental information cited above at 66 Fed. Reg. 42587 clearly supports this conclusion. As such, the applicant must seek entry as a K-3 non-immigrant by applying for a waiver under § 212(i), § 212(h) or § 212(a)(9)(B)(v) of the Act. 8 C.F.R. § 212.7(a).

Counsel asserts on appeal that the applicant denies he is inadmissible due to a false claim to citizenship and that it must be proven that any such representation was intentional or willful. Counsel states that the applicant never intentionally made a false claim to citizenship.

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

(i) In General –

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(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.

....

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [*Secretary*], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [*Secretary*] that the refusal of admission to the United States

of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record contains a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, dated January 15, 2006, in which the applicant stated that he entered the United States using the birth certificate of a U.S. citizen. The transcript of his statement indicates that he claimed to be that person upon applying for admission, and that he knew it was wrong to use a document that was not his to enter the United States. Counsel for the applicant, has not presented any evidence in support of the applicant's assertion denying he entered the United States by wilfully claiming to be a United States Citizen. As such, the record establishes that the applicant is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act. There is no waiver for this basis of inadmissibility.

It is the applicant's burden to establish admissibility. The Immigration and Nationality Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." See section 235(b)(2)(A) of the Act. See also 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008). See *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008). See *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008).

The record further establishes that the applicant was removed from the United States on January 15, 2006 and then attempted to enter the United States without inspection twice, on January 25, 2010, and January 26<sup>th</sup>, 2010, without success. The applicant entered the United States without inspection sometime thereafter in January 2010. He remained in the United States until August 2011. The applicant is therefore, inadmissible under section 212(a)(9)(C)(i)(II) of the Act for having reentered the United States without admission after having been removed, and section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence. However, as the applicant is inadmissible under section 212(a)(6)(C)(ii) of the Act, which is a permanent bar for which there is no waiver, the appeal of those grounds of inadmissibility is dismissed as a matter of discretion as granting a waiver would not result in the applicant's admissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.