

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[REDACTED]

H6

FILE: [REDACTED] Office: SPOKANE, WASHINGTON Date:

OCT 29 2010

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Spokane, Washington. The matter 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 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 10 years of his departure, and pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for attempting to procure admission by falsely claiming United States citizenship. The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility 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), in order to reside in the United States with his spouse.

In a decision dated July 15, 2008, the Field Office Director found that the applicant was ineligible for a waiver of inadmissibility under 212(a)(6)(C)(ii) of the Act for falsely representing himself as a United States citizen. The application was denied accordingly. *See Decision of Field Office Director* dated July 15, 2008.

On appeal, the applicant's attorney provided a brief in which she asserts that the applicant made an immediate retraction of his false claim to United States citizenship and that a legacy INS memo, dated May 7, 2002, provides for eligibility for a waiver through the use of prosecutorial discretion. In addition, the applicant's attorney asserts that the applicant's qualifying spouse would experience medical and educational hardships as a result of the applicant's inadmissibility.

The record contains Biographic Information (Form G-325A) regarding the applicant, an approved Petition for Alien Relative (Form I-130), an Application for Waiver of Grounds of Inadmissibility (Form I-601), a Notice of Appeal (Form I-290B), an application for Permission to Reapply for Admission into the United States (Form I-212), documentation regarding the applicant's 1999 removal, an appeal brief from the applicant's attorney, a letter from the applicant and the qualifying relative, the qualifying relative's naturalization certificate, a letter from the qualifying spouse's mother indicating that the qualifying spouse, the applicant and their son live with her, a birth certificate for the applicant's child and the adjustment application (Form I-485) with accompanying evidence.

USCIS records reflect that the applicant first entered the United States in 1989 as a minor. He left the United States in December 1998 to visit family in Mexico. On January 31, 1999, the applicant attempted to reenter the United States at San Ysidro, California, claiming to be a United States citizen. He was denied admission to the United States and processed for expedited removal. The applicant subsequently reentered the United States without inspection in February of 1999, despite being provided with notice (Form I-296) that his removal prohibited him from entering the United States for five years from his date of departure.

The applicant accrued unlawful presence from April 1, 1997,<sup>1</sup> the date of enactment of the unlawful presence provisions, until December 1998. As a result of his false claim to United States citizenship and unlawful presence, the applicant is inadmissible to the United States pursuant to sections 212(a)(6)(C)(ii) and 212(a)(9)(B)(i)(II) of the Act.

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

- (i) 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 plain language of the statute clearly reflects that there is no waiver available to an alien who falsely represents himself or herself to be a citizen of the United States. While USCIS officers may exercise prosecutorial discretion in certain circumstances, they cannot do so when it would be in violation of the law.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under statute or other applicable law that provides requirements for determining when the approval

---

<sup>1</sup> The applicant turned eighteen years old on [REDACTED]

should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

*Memorandum by Doris Meissner, Commissioner, Immigration and Naturalization Service, dated November 17, 2000 at 3. Admissibility is determined by statute. The applicant is applying for a benefit, adjustment of status, and must be admissible under the statute to receive this benefit. Therefore, counsel's assertions regarding prosecutorial discretion do not apply here.*

The record reflects that on February 1, 1999, the applicant applied for entry into the United States from Mexico at the San Ysidro Port of Entry in California by claiming to be a United States citizen and asserting that he was born in Washington State. *Form I-213*. When an immigration official suspected that the applicant was not a United States citizen and referred him to secondary inspection, the secondary inspection revealed that the applicant was not a United States citizen. The applicant admitted his true nationality. *Id.* The AAO acknowledges counsel's assertion that the applicant provided an immediate retraction of his false claim to United States citizenship, however, this assertion conflicts with the record. *Attorney's brief; Form I-213*.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. Counsel states that although the applicant misrepresented himself, he made a timely retraction and is thus not inadmissible. *Attorney's brief*. The AAO notes that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* The AAO finds that the applicant did not timely retract his misrepresentation, as his retraction occurred during the secondary interview and not during the initial questioning by the immigration officials. The AAO also finds that the applicant is not eligible for a waiver of this misrepresentation because he falsely claimed to be a U.S. citizen.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.