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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 0 6 2015

FILE #:
APPLICATION RECEIPT #:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. 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 more than one year and seeking admission within ten years from his last departure from the United States. He also was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States through fraud or misrepresentation; 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 U.S. citizenship. The applicant's spouse is a U.S. citizen, and he has two U.S. citizen children. The applicant seeks a waiver of inadmissibility to reside in the United States with his wife and children.

The 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 U.S. citizen, because no waiver of that inadmissibility is available. The Director denied the application accordingly. *See Decision of the Director,* dated July 3, 2014.

On appeal, the applicant, through counsel, asserts that he lacked the capacity to understand and appreciate the nature and consequences of his false claim to U.S. citizenship, as he was a minor at the time. The applicant supports these assertions by citing an exception for minors who make false claims to U.S. citizenship from the U.S. Department of State's Foreign Affairs Manual (FAM). *See brief submitted in support of Form I-290B, Notice of Appeal or Motion*, filed July 17, 2014.

The record includes, but is not limited to, briefs;; letters from the qualifying spouse, her doctor, her mother, her father and the applicant; photographs;; financial documentation; a newspaper article regarding the applicant's immigration issues; and identification documents. 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, 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.

(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.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (I).

The record reflects that in November 1997, when he was [redacted] years old, the applicant unsuccessfully attempted to enter the United States. In his statement the applicant explains that his mother and aunt devised a plan for him to enter the United States using his cousin's U.S. birth certificate rather than his own passport and visa; that he believed this was a "stupid idea," because his cousin had a criminal record in the United States; and that he did not want to use his cousin's document. Evidence in the record establishes that U.S. border officials discovered the U.S. birth certificate in the applicant's luggage, and after seeing that it did not belong to the applicant, granted him voluntary return to Mexico. In December 1997 the applicant was admitted into the United States using his brother's non-immigrant visa, and he remained in the United States until 2007.

Aliens making false claims to U.S. citizenship on or after September 30, 1996, are ineligible to apply for a waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. As the applicant's false claim to U.S. citizenship occurred after September 30, 1996, the Director found that the applicant was not eligible for a waiver under section 212(a)(6)(C)(iii), based on the determination of the applicant's inadmissibility by the Department of State during his consular interview on November 29, 2012.

On appeal, the applicant, through counsel, asserts that he lacked the capacity to understand and appreciate the nature and consequences of a false claim to U.S. citizenship, as he was a minor at the time. To support his assertion, the applicant cites 9 FAM 40.63, N.11, which refers to a Department of Homeland Security (DHS) Office of General Counsel opinion and states, in pertinent part:

> A separate affirmative defense is that the individual was (a) under the age of 18 at the time of the false citizenship claim; and (b) at that time lacked the capacity (i.e., the maturity and the judgment) to understand and appreciate the nature and consequences of a false claim to citizenship. The individual must establish this claim by the appropriate standard of proof (for applicants for admission or adjustment, "clearly and beyond doubt").

9 FAM 40.63 N.11.

It must be noted that the FAM is not binding upon DHS or U.S. Citizenship and Immigration Services employees. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad.

In considering whether a claim to U.S. citizenship made on behalf of the applicant bars the applicant from admission to the United States under section 212(a)(6)(C) of the Act, we have sought guidance in precedent decisions that have addressed the inadmissibility of minors whose parents have fraudulently claimed immigration benefits. While we are aware of no decisions published by the Board of Immigration Appeals (BIA) that have relied on age as a dispositive factor in determining a child's culpability in instances of parental fraud or misrepresentation under section 212(a)(6)(C) of the Act, we find that several circuit courts have considered the issue in dealing with cases involving immigration fraud.

In *Singh v. Gonzales*, the Sixth Circuit Court of Appeals found that the immigration fraud committed by the parents of a five-year-old child could not be imputed to her as fraudulent conduct "necessarily includes both knowledge of falsity and an intent to deceive" and requires proof of such. 451 F.3d 400, 407 (6th Cir. 2006). The Sixth Circuit found that imputing fraud to a five-year-old child was "even further beyond the pale," than imputing a parent's negligence to that child. *Id.*, at 407. However, in *Malik v. Mukasey,* the Seventh Circuit Court of Appeals found that two 17-year-old brothers whose father had misrepresented their identities, nationality, and religious affiliation when he listed them as derivatives on his asylum application, could be held accountable for that fraud. While the brothers contended that the immigration judge had erred by imputing their father's fraud to them, the court concluded that the brothers "given their ages at the time" were accountable for the misrepresentations. The court also indicated in its opinion that the BIA had previously acknowledged that while the brothers were young at the time their father filed for asylum, "they were old enough to know better and to be held accountable for their actions." 546 F.3d 890, 892-893 (7th Cir. 2008). In deciding the case, the Seventh Circuit specifically noted that young was a "relative term and that "[b]eing over 16 - and eligible for a driver's license – is quite different than being 10." *Id.*, at 892.

The applicant in the present case was [redacted] years old at the time he represented himself to be a U.S. citizen. The record reflects that the applicant was aware that he was not a U.S. citizen and that he believed using his cousin's birth certificate was not a good idea, demonstrating a knowledge of falsity. Moreover, taking into account his awareness and initial resistance to the plan proposed by his family members he was old enough at the time of the misrepresentation to be held accountable for his actions.

The applicant does not provide sufficient evidence to support his assertion that he lacked the capacity to understand and appreciate the nature and consequences of his false claim to U.S. citizenship, relying in large part on his age at the time of the misrepresentation. Moreover, an exception to this rule was contemplated with the enactment of the Child Citizenship Act of 2000, and written into law under Section 212(a)(6)(C)(ii)(II) of the Act. However, the applicant does not meet

any of the exceptions under 212(a)(6)(C)(ii)(II), as the record reflects that the applicant did not permanently reside in the United States prior to attaining the age of and that the applicant knew he was a citizen of Mexico when he claimed to be a U.S. citizen. As such, the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(ii) of the Act.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his qualifying relative or whether he merits the waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.