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Memorandum For: Office of the Chief Counsel
U.S. Citizenship and Immigration Services

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

From: (b)(6),(b)(7)(C),(k)(2)
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Subject: False Citizenship Claims by Children: Knowledge and Legal Capacity Elements

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Immigration and Nationality Act (INA) § 212(a)(6)(C)(ii) provides that an individual who makes a false claim of U.S. citizenship is inadmissible. A question has been raised regarding the proper legal interpretation of this inadmissibility ground, and, in particular, its application to children. To resolve this legal question, and to ensure consistency in the application of this ground of inadmissibility across the Department of Homeland Security (DHS), this memorandum analyzes two separate but related issues: (1) whether an alien's mistaken belief that he or she is a U.S. citizen is a defense to inadmissibility under section 212(a)(6)(C)(ii); and (2) whether a child's lack of legal capacity is a defense to such inadmissibility. This memorandum also considers the burdens and standards of proof applicable to both issues.

The memorandum concludes that: (1) An individual is not inadmissible under INA § 212(a)(6)(C)(ii) if the individual mistakenly believed he or she was a U.S. citizen at the time of the representation. Because this provision is an inadmissibility ground, the alien has the burden of proving the mistaken belief "clearly and beyond a doubt." (2) An individual is not inadmissible under INA § 212(a)(6)(C)(ii) if, at the time of this misrepresentation, the individual was under 18 years of age and lacked the legal capacity to make a false claim of U.S. citizenship. This is an individualized inquiry, based on the nature and consequences of the false citizenship claim, and the individual has the burden of proving lack of legal capacity.

Background

Under section 212(a)(6)(C)(ii) of the INA, 8 U.S.C. § 1182(a)(6)(C), "[a]ny 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 chapter ... or any other Federal or State law is inadmissible." By including the phrase "or has falsely represented," the statute makes the inadmissibility

lifelong. There is only one narrow exception (discussed below) and no possibility of a discretionary waiver.

In *Sandoval v. Holder*, 641 F.3d 982 (8th Cir. 2011), a child had sought adjustment of status in removal proceedings. U.S. Immigration and Customs Enforcement (ICE) initially opposed adjustment, alleging that the child was inadmissible under INA § 212(a)(6)(C)(ii) for having falsely claimed to be a U.S. citizen. At the time of the alleged false claim, this child was 16. The immigration judge (IJ) granted her application for adjustment of status, ruling that minors categorically lacked the legal capacity to be charged with false citizenship claims, but the Board of Immigration Appeals (BIA) reversed. On remand, the IJ denied the child's application for adjustment of status and found her removable, but granted her request for voluntary departure. The BIA upheld the IJ's factual findings. The child petitioned for review, and the court remanded to the BIA for an explanation of its precise reason for denying adjustment. In particular, the court could not discern whether the BIA position was that all children possessed sufficient legal capacity to be inadmissible under section 212(a)(6)(C)(ii), or simply that this particular child had the requisite capacity. After the remand, ICE withdrew its opposition to adjustment and agreed that Sandoval was not inadmissible.

Discussion

It remains important for DHS to adopt a corporate position on the best legal interpretation of INA § 212(a)(6)(C)(ii) with respect to its application to children. This issue is likely to recur, and at present there is no binding BIA precedent addressing whether, and if so under what circumstances, a child can be inadmissible under INA § 212(a)(6)(C)(ii). Accordingly, this memorandum assesses that issue and a related issue, in turn.

A. Mistaken Belief of U.S. Citizenship

The statutory language does not expressly address whether an alien must know that the citizenship claim is incorrect in order to be inadmissible. The U.S. Citizenship and Immigration Services (USCIS) Adjudicators Field Manual 40.6.2(c)(2)(B)(i) interprets this provision as requiring knowledge that the representation was false. The Office of the General Counsel (OGC) adopts this interpretation as the best reading of the statute.

Under the Act, the "false representation" is purposive; it must be made "for any purpose or benefit" under the INA or other Federal or State law. This element supports the conclusion that Congress's aim was not to bar otherwise admissible individuals because of innocent mistakes, if for no other reason than someone unaware that he or she is a U.S. citizen cannot intend to falsely claim that citizenship for a stated end. Rather, Congress's aim was to bar those who deliberately fabricate claims of U.S. citizenship with the goal of gaining legal benefits to which they are not entitled. Although one could make a colorable argument that any incorrect claim of U.S. citizenship, however innocent, was meant to result in a lifetime, non-waivable exclusion, that extreme result seems unlikely without a clearly-expressed Congressional intention to make innocent representations a basis for exclusion. Moreover, if Congress had felt that even an innocent mistake was enough to trigger permanent inadmissibility, it most likely would not have required that it be made "for a purpose or benefit" under the law.

Congress did subsequently create one specific exception to inadmissibility under section 212(a)(6)(C)(ii). An alien is exempted from this bar if both parents are or were U.S. citizens, the alien permanently resided in the U.S. before age 16, and the alien reasonably believed that he or she was a citizen at the time of the claim. INA § 212(a)(6)(C)(ii)(II). Interpreting section 212(a)(6)(C)(ii) to require knowledge that the citizenship claim is false would not, however, render the section 212(a)(6)(C)(ii)(II) exception superfluous. First, this exception is not limited to waiving section 212(a)(6)(C)(ii). Rather, a false claim of citizenship would not give rise to inadmissibility under any provision of 212(a) if it is made under the circumstances described in section 212(a)(6)(C)(ii)(II). As an exception to *any* grounds of inadmissibility under subsection (a) based on a mistaken claim of citizenship, sub-clause (II) does not imply that a mistaken representation can support inadmissibility under sub-clause (I).

Second, there is no indication that Congress intended to make this exception the *only* limitation on section 212(a)(6)(C)(ii). The exception was enacted more than four years after the inadmissibility ground. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Division C, § 344, 110 Stat. 3009, 3009-546, 3009-637 (1996) (inadmissibility ground); Child Citizenship Act ("CCA"), Pub. L. 106-395, 114 Stat. 1631, 1634, 1635, §§ 201(b)(2), 201(d)(2) (2000) (the exception). When the 106th Congress passed the 212(a)(6)(C)(ii)(II) exception, it was addressing only the reality that many parents of adopted children mistakenly thought their children had become citizens because they had been admitted to the United States as the children of citizens. The CCA amended INA § 320 to naturalize the alien child of a citizen upon the child's residing in the United States with the parent after a Lawful Permanent Resident admission. Congress included the exception to ensure that children who immigrated before the law had changed would not be inadmissible under section 212(a) on the basis of any mistaken claim to citizenship. 146 Cong. Rec. H. 7774, H7776 (daily ed. Sept. 19, 2000). Congress clearly intended to provide a safe harbor for these specific individuals. Thus, there is no indication that Congress intended this generally applicable exception to imply anything about the proper construction of section 212(a)(6)(C)(ii)(I).

As to the burden and standard of proof, the critical point is that section 212(a)(6)(C)(ii) is a ground of inadmissibility. The statute makes clear that the alien must establish admissibility "clearly and beyond a doubt." INA §§ 235(b)(2), 240(c)(2)(A). The same is true for admissibility in the context of an application for adjustment of status. *See Kirong v. Mukasy*, 529 F.3d 800, 804 (8th Cir. 2008); *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). There must, of course, be at least some evidence in the record that would be enough for a reasonable fact finder to call the alien's admissibility into question. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992). But once DHS alleges inadmissibility under section 212(a)(6)(C)(ii), and offers evidence that the alien claimed to be a U.S. citizen but was not, the alien has the burden of proving "clearly and beyond a doubt" that he or she believed the claim to be true.

B. The Legal Capacity of Children

In the same way that INA § 212(a)(6)(C)(ii)(I) does not extend to mistaken claims of citizenship, it similarly does not extend to claims made by those who, because of age or cognitive

impairment, lack the legal capacity to appreciate the nature and consequences of a false claim of citizenship. Sub-clause (I) refers to "any alien" who has made a false representation of U.S. citizenship. An expansive reading of this sub-clause would encompass an alien of any age, regardless of his or her ability to comprehend the concept of "citizenship." An alien child of any age would be barred for life from entering the United States if he or she has ever claimed to be a U.S. citizen. Under that interpretation, if a five-year-old child responds affirmatively to a question about her U.S. citizenship with some awareness (however vague) that she is not a citizen, she would be excluded from the United States forever, with no possibility of discretionary relief. This would be the case regardless of whether she had no understanding of citizenship – for instance, she believed citizenship was like being a member of a voluntary association – or had said yes only because her parents had coached her that she must answer yes in order to enter the United States.

At the other extreme would be an interpretation that insulates all children from inadmissibility based on false claims of citizenship. Some support for that position could be derived from the common law rule that minors lack the legal capacity to enter into contracts and therefore are generally not bound by any contracts they purport to enter into. As the Nebraska Supreme Court observed, "[t]he right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others." *Webster Street Partnership, Ltd., v. Sheridan*, 220 Neb. 9, 12, 368 N.W.2d 439, 442 (Neb. 1985); *see also* Holly Brewer, By Birth of Consent: Children, Law & the Anglo-American Revolution in Authority 230-287 (Chapel Hill 2005) (describing the development at common law of the proposition that minors lack the legal capacity to contract).

Both extremes, however, seem at odds with any realistic Congressional purpose. On the one hand, it is clear that Congress wanted to deter fraudulent claims to U.S. citizenship and that some children possess the requisite culpability for an understanding of their actions. There is also no indication that Congress intended a blanket exemption of all individuals under a specified age. On the other hand, applying the bar – which is lifelong and non-waivable – to a young child who has little comprehension of the meaning and consequences of his or her action does little to serve Congressional intent.

The more realistic interpretation is a middle ground that recognizes that some children possess, and other children lack, the maturity and the judgment to understand the legal significance and consequences of a false claim of U.S. citizenship. As the Supreme Court recently noted in *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394 (2011) (involving whether minors should be found to be in "custody" for purposes of *Miranda* warnings), the case law in numerous contexts recognizes that "age is far 'more than a chronological fact.'" 564 U.S. at ___, 131 S. Ct. at 2403 (citing *Eddings v. Oklahomo*, 455 U.S. 104, 115 (1982)). Rather, the law recognizes that many children simply lack the judgment to appreciate the consequences of ill-advised choices. *Id.* (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)).

INA § 212(a)(6)(C)(ii) should be interpreted consistently with these long-settled judicial understandings. Under this interpretation, which OGC believes is the one most realistically attributable to Congress, a child under the age of 18 would not fall within section 212(a)(6)(C)(ii) if he or she is found to lack the requisite legal capacity. Whether a given child

possesses the requisite legal capacity is a question of fact, to be based on the evidence in the individual case. In each case, the question is whether the particular child had the maturity and the judgment to understand and appreciate the nature and consequences of his or her actions – here, the nature and consequences of falsely representing oneself to be a U.S. citizen. Because INA § 212(a)(6)(C)(ii) is an inadmissibility ground, the alien child has the burden of proving lack of legal capacity.

Conclusion

For the reasons set forth above, OGC determines that, when DHS is applying INA § 212(a)(6)(C)(ii):

1. An alien is not inadmissible under INA § 212(a)(6)(C)(ii) if the alien mistakenly believed he or she was a U.S. citizen at the time of the representation. Because this provision is an inadmissibility ground, the alien has the burden of proving the mistaken belief "clearly and beyond a doubt."

2. A child under the age of 18 is not inadmissible under INA § 212(a)(6)(C)(ii) if the child lacked the legal capacity to make a false representation of U.S. citizenship. The test is whether the child had the maturity and the judgment to understand the nature and consequences of his or her actions – in the present context, the nature and consequences of a false citizenship claim. This is an individualized inquiry. The alien has the burden of proving lack of legal capacity.