[redacted]

NOT DETAINED

Attorney for Respondent

[redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of*:* [redacted] **Respondent** IN REMOVAL PROCEEDINGS	FILE NO. A[redacted]

Immigration Judge [redacted]

Individual Hearing: [redacted] 2011, [redacted].
Memo of Law Call up Date: [redacted] 2012

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CONTENTION THAT SHE IS NOT INADMISSIBLE UNDER INA § 212(A)(6)(C)(I)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
[redacted]	**A** [redacted]
(RESPONDENT)	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CONTENTION THAT SHE IS NOT INADMISSIBLE UNDER INA § 212(A)(6)(C)(I)

NOW COMES, [redacted] (hereinafter "[redacted]"), through undersigned counsel, [redacted], who respectfully urges the Court to find she is not inadmissible under Section §212(a)(6)(C)(i) of the Immigration and Naturalization Act.

I. STATEMENT OF FACTS[1]

[redacted] and her then six-year old daughter, [redacted], came to the United States from Chile on [redacted] 1999. A few years later, [redacted] met her U.S. citizen husband, [redacted], and together they built a new life. They had plans to marry after the birth of their son, [redacted], but some months after [redacted] was born on [redacted] they discovered he suffered from strep meningitis and anemia, requiring a red blood cell transfusion. [redacted]'s illness and overall health problems forced the couple to focus on [redacted] and to put aside their marriage plans.

[1] The information included in this section derives from the attached declarations of the Respondent and the Allstate Insurance Agent [redacted] who prepared the life insurance applications at issue in the allegations and charges promoted by the Government against the Respondent.

In late 2009, [redacted]'s health stabilized and the couple began planning for marriage. The couple married and once married they hired a private immigration attorney who filed an I-130 petition and I-485 application for both [redacted] and [redacted]. Prior to the filing of this application package, [redacted] consulted with an Allstate insurance agent, Mr. [redacted], about his car insurance policy and during that process [redacted] proposed life insurance to [redacted]. [redacted] went home and discussed this proposition with [redacted]. While battling with [redacted]'s illness, [redacted] and [redacted] had discussed getting life insurance policies to protect their family. Further, their immigration attorney at the time had mentioned that documentary proof of insurance policies including life insurance would further support the I-130 petition. This advice was yet another reason the couple was interested in taking out life insurance policies. They agreed they would apply once [redacted] obtained a social security number; [redacted] had learned that to get life insurance she needed to have a social security number and that immigration status was not relevant.

On the evening of [redacted] 2011, [redacted] and [redacted] met with [redacted] to complete life insurance policy applications. The couple arrived at the office at approximately 8:00 p.m. and finished the paperwork around approximately 10:30 p.m. The couple—one at a time—answered the questions [redacted] posed and [redacted] noted the responses on the electronic version of the applications over his computer. The meeting was conducted in English with [redacted] serving as the translator for [redacted]. [redacted] was extremely tired because he had worked twelve hour shifts over the past few days and had not had much rest. Later in the course of the meeting, [redacted] went to get [redacted] and [redacted] and the children joined them at the AllState office. [redacted] and [redacted] remained at the office while [redacted] stepped out. [redacted] started acting out and showing signs of

fatigue, and [redacted] noticed that [redacted] was distracted by him. [redacted] also thought to himself that it was important to get the couple and the children home because of the late hour and [redacted]'s behavior. When they finished the application process, [redacted] printed the applications and explained that they had "already gone over the information during the data entry process and the paper copy mirrored all the work [they] had done on the computer." While [redacted] does not remember whether the couple reviewed the paperwork before signing it, [redacted] and [redacted] confirm that they did not review the paperwork. [redacted] did not review the paperwork because she did not think it was necessary, having spent approximately the last two-and-a-half hours completing the applications, and she really wanted to get home. [redacted] remembers glancing at the paperwork and then signing. [redacted] states that he did not deem it necessary to review the paperwork at length since the policies were not finalized. The couple asked [redacted] for copies of the applications so that they could submit copies at the adjustment interview with the U.S. Citizenship and Immigration Service's office in Baltimore on [redacted] 2011.

At the adjustment interview, the couple provided their attorney with copies of the life insurance policy applications. Neither [redacted] nor [redacted] saw their attorney closely review the applications before giving them to the interviewing CIS officer. The interview went well and weeks later both [redacted] and [redacted] received notice of the approval of their I-485 applications. Then, in [redacted] 2011, [redacted] and [redacted][2] received Notices to Appear at the Baltimore Immigration Court for removal proceedings. The family scheduled a meeting with their prior attorney and he explained the situation. He charged

[2] [redacted]'s proceedings have since been terminated following undersigned counsel informing Baltimore CIS that they had erroneously referred her case for removal proceedings because [redacted] was sixteen at the time [redacted] married [redacted] and therefore qualified for adjustment of status as a "child" and immediate relative of [redacted] [redacted], her stepfather.

them a new amount of over $7,000.00 to represent [redacted] and [redacted] in removal proceedings. [redacted], still confused about the situation because, to her knowledge, she had never described her immigration status anywhere, except in her application for adjustment of status, finally understood the matter when her daughter showed her that the question as to whether the primary insured and beneficiary were U.S. citizens should have been marked "no" for her but were instead marked as "yes." The couple went to see [redacted] about the error and [redacted] immediately corrected this response. The putative citizenship did not change the rates of the policies. Likewise, the corrections had no impact on the policies and did nor render [redacted] ineligible for the life insurance policy.

In his declaration, [redacted] notes that "[…] it is clear that there was a mistake concerning [redacted]'s citizenship and knowing what I know about [redacted], I do not believe she would have answered 'yes' to the question of 'are you a U.S. citizen?'"

II. LEGAL STANDARD

Section 212(a)(6)(C)(i) of the INA states that any person "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 U.S. or other benefit provided under the Act is inadmissible". Section 212(a)(6)(C)(i), in its plain language, covers only willful misrepresentations related to a material fact.

In *Kungys v. United States*, 485 U.S. 759 (1988) the Supreme Court listed four elements that together indicate a willful misrepresentation. Although these elements were developed in the context of denaturalization proceedings, they are widely applied to other fraud and/or misrepresentation cases. The elements are: 1) misrepresentation or concealment of some fact; 2) the misrepresentation was willful; 3) the fact was material;

and 4) the misrepresentation was made to seek or procure admission or another benefit under the INA. *Kungys v. United States*, 485 U.S. 759, 767 (1988).

The test for materiality is "whether the concealment of a material fact or the willful misrepresentation had a natural tendency to influence the decision of the [INS]." *Kungys v. United States*, 485 U.S. 759, 772 (1988). In a similar fashion the BIA held that the "materiality standard […] is satisfied if either (1) the alien is excludable on the true facts or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S-& B-C-*, 9 I&N Dec. 436, 448 (BIA 1960); *Matter of Ng*, 17 I & N Dec. 536 (BIA 1980); *Matter of Bosuego*, 17 I & N Dec. 125 (BIA 1980).

A misrepresentation must also be willful. This element is satisfied by a finding that the misrepresentation was "deliberate and voluntary". *Matter of S- and B- C-*, 9 I. & N. Dec. 436 (BIA 1960). Similarly, the Second Circuit held that "a misrepresentation is willful if the alien voluntarily spoke with the knowledge that the statement was false." *Cooper v. Gonzales*, 216 Fed. Appx. 294 (4th Cir. 2007) (citing *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995)). Thus, an alien's knowledge of the falsity is necessary. Furthermore, the Department of State's (DOS) Foreign Affairs Manual (FAM) also addresses willful misrepresentation, defining "willful" as: "knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise … it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement." 22 CFR §40.63 N5.1 Where a misrepresentation is unintentional, a claim of willful misrepresentation cannot be sustained. *Nowak v. United States*, 356 U.S. 660, 665,

2 L. Ed. 2d 1048, 78 S. Ct. 955 (1958).

II. ARGUMENT

The findings that led to charging [redacted] under Section 237(a)(1)(A) of the INA do not constitute fraud or willful misrepresentation in violation of Section 212(a)(6)(C)(i) of the Immigration and Naturalization Act.

A. RESPONDENT'S ALLEGED MISREPRESENTATIONS DO NOT RENDER HER INADMISSIBLE BECAUSE THEY: WERE NOT INTENTIONAL OR WILLFUL, WERE NOT MATERIAL, WERE NOT MADE TO A GOVERNMENT OFFICIAL, AND WERE NOT RELATED TO OBTAINING ANY "BENEFIT" UNDER THE INA.

The Government alleges that [redacted] is excludable due to two alleged misrepresentations concerning her immigration status. *Notice to Appear* at 3, ¶¶6-7. "The principal elements of the ground of excludability contained in Section 212(a)(6)(C)(i) of the Act pertinent to our determination are (1) fraud or (2) willfulness and (3) materiality." *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998) (Rosenberg, J., concurring and dissenting.) Neither of the alleged misrepresentations was an act of fraud, nor willful misrepresentation, nor was either of them material. Therefore, the alleged misrepresentations are not grounds of excludability under 212(a)(6(C)(i) of the INA.

The Government presents a two-step theory of misrepresentation. First, [redacted] allegedly "attempted to gain a benefit by fraud or by willfully representing yourself as a United States citizen on the form [redacted] submitted to Lincoln Benefit Life Company, and this form was submitted as evidence in support of [redacted]'s] application." *Notice to Appear* at 3, ¶6. Then, according to the Government, [redacted] lied about lying: [redacted] failed to admit in the course of her I-485 application that she had previously lied in order to obtain an insurance policy. *Id.* at ¶7. Therefore, whether [redacted]'s I-485 contained a

misrepresentation depends entirely on whether [redacted]'s application to the Lincoln Benefit Life Company contained an act of fraud or misrepresentation. On the Government's own theory, if the application to the Lincoln Benefit Life Company was not fraudulent, then the I-485 was not fraudulent. In fact, neither the life insurance application nor the I-485 form was fraudulent within the meaning of the statute.

1. **The alleged misrepresentation was not intentional or willful, and therefore is not a ground of inadmissibility.**

A "statement constituting a misrepresentation must be made with knowledge of its falsity to be considered 'willful.'" *Tijam* at 425, *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979). In order to determine whether [redacted] made the alleged misrepresentation with knowledge of its falsity, the BIA "requires a case-by-case assessment of the alien's intent." *Matter of Guadarrama*, 24 I&N Dec. 625, 628 n. 1 (2008) (interpreting a parallel provision of the Act, INA § 212(a)(6)(C)(ii)(I)), Here, [redacted] plainly did not intend to represent herself as a citizen. Her statement under oath that she "would never have intentionally said she was a U.S. citizen" and that she "had no reason to say that [she] was a U.S. citizen because she was not yet even a Legal Permanent Resident and was very aware and happy with the manner [her] immigration process was going" is buttressed by the testimony of her insurance agent that this "was an honest mistake. The misunderstanding concerning [redacted]'s stated resulted from a combination of factors, including the language barrier, the late hour, and the distraction of having a [redacted] child in the room for a two-and-a-half-hour session." *See* Exhs. A and B, Declarations from Respondent and [redacted], Allstate Insurance Agent. These sworn affidavits show that this is not a case of misrepresentation, but a simple accident. "An accidental statement or one that is the product of honest mistake is not

considered to be a willful representation." *Tijam* at 425, *see also Emokah v. Mukasey*, 523 F.3d 110, 117 (2d Cir. 2008) (holding that an innocent mistake, negligence or inadvertence cannot support a finding of willfulness). A case-by-case assessment of [redacted]'s intent shows plainly that she did not intend to represent herself as a U.S. citizen, but rather merely signed her name to a lengthy insurance policy application without reading it following a long evening meeting with the insurance agent during which her husband interpreted and her little boy became increasing inpatient. *Matter of Guadarrama*, *supra*.

2. The alleged misrepresentation was not material, and therefore is not a ground of inadmissibility.

Even assuming *arguendo* that the alleged misrepresentation was a fraudulent or a willful representation, the alleged misrepresentation is still not a ground of excludability because the statement was not material. A statement is material if "the respondent is excludable on the true facts; and the misrepresentation tends to shut off a line of inquiry relevant to the visa, document, or other benefit procured or sought to be procured that might have resulted in the alien's exclusion." *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960, A.G. 1961). In *Matter of S- and B-C-*, the CIS district director denied a Yugoslav citizen's admission because he failed to disclose his involuntary membership in the Hungarian Communist Party. The Attorney General overturned the district director's decision because the misrepresentation was not material since the true facts—involuntary membership in the Communist Party—would not have resulted in the denial of admission as this was not a ground of inadmissibility. *Id*. at 440-441. Here, [redacted] is not excludable on the true facts that she was a visa overstay seeking admission. Had the life insurance policy applications not included the mistake of [redacted]'s legal status and correctly been

marked as "no", this would not have affected the "line of inquiry" and would have resulted in a proper determination that [redacted] be admitted as was the case prior to the revocation of [redacted]'s grant of conditional permanent residence. Nor did the alleged misrepresentation "shut off a line of inquiry"; indeed, the alleged misrepresentation, far from shutting off a relevant line of inquiry, is the alpha and omega of the Government's case. The "line of inquiry" here should have ended with [redacted]'s ready admission that she is not a citizen, which she made throughout the adjustment of status application process, and her correction of the insurance company's error. *See* Exhs. D and E, Letters from Lincoln Benefit Life to Respondent confirming correction of error on the life insurance applications.

Nor did the statement in question influence the Lincoln Benefit Life Company, which neither granted [redacted] a policy nor changed her rate according to her immigration status. To this end, the Insurance Agent [redacted] states the following:

> When the error [as to [redacted]'s citizenship status] was brought to [redacted] and [redacted]'s attention by the Department of Homeland Security, they came to my office. We contacted Allstate/Lincoln Benefit and requested this to be corrected […] Allstate/Lincoln Benefit has corrected this and also advised us that this had not had any impact on these policies. The mistake has neither lowered [redacted] and [redacted]'s insurance premiums nor increased the life insurance payments available to them. Even if we had correctly noted "No" as the answer to [the question of citizenship], this answer would not have made a difference with respect to her policy eligibility. [redacted] would still have been eligible for the policy and she still retains this life insurance policy today after correcting the answer to this question. *See* Exh. A, Respondent's Declaration.

Nor should the statement have influenced the Government. The case at bar may be usefully compared with *Hassan v. Holder*, a recent case decided by the Sixth Circuit. *Hassan v. Holder*, 604 F.3d 915 (6th Cir. 2010). In *Hassan*, the Sixth Circuit held that "the government had the burden to show not only that [the respondent] misrepresented

himself as a U.S. citizen, but also that he did so for any purpose or benefit under some law." *Hassan* at 928. Despite the fact that Hassan applied for and received a Small Business Administration (SBA) loan, and described himself as a United States Citizen on his SBA application, the Sixth Circuit held that Hassan's conduct was outside the bounds of the statute because "his immigration status would have no effect on the loan." *Id.* Here, just as in *Hassan*, [redacted]'s alleged representation that she was a United States citizen had no effect on her life insurance application. *See* Exh. B, Declaration from [redacted] Allstate Insurance Agent. In contrast, [redacted]'s harmless representation is utterly unlike the serious conduct which has been held to be within the limits of the statute. See, e.g. *Pichardo v. INS*, 216 F.3d 1198 (9th Cir. 2000) (drug trafficker admitted to using false birth certificate to cross the border), *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007) (alien stated that he was a USC on a job form in order to obtain employment which he could not otherwise obtain).

3. The alleged underlining misrepresentation was not a fraudulent or willful misrepresentation because it was not made to a government official.

The alleged misrepresentation to Lincoln Benefit Life Company was not fraud or a willful misrepresentation within the meaning of the INA, because the representation was not made to a government official. "It is well-established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made to an authorized official of the United States government in order for excludability under section 212(a)(6(C)(i) of the Act to be found." *Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994) (emphasis added). The Lincoln Benefit Life Company is a private insurance company within the Allstate network. *https://www.accessallstate.com/anon/companyinfolbl1.aspx* (Last accessed Aug.

16, 2011). The notion that employees of Lincoln Benefit Life Company are authorized officials of the United States government is risible. Therefore, as a matter of law, [redacted] cannot have committed fraud or willful misrepresentation, within the meaning of the statute, by intentionally or unintentionally, as is the case here, representing herself as a United States citizen to the Lincoln Benefit Life Company.

4. The alleged misrepresentation was not made in support of a request for a "benefit" under the INA.

The Government also contends that [redacted] committed fraud or willful misrepresentation by submitting the life insurance application form as "evidence in support of [her I-485] application." *Notice to Appear* at ¶7. That theory is utterly irrational at first glance. On the Government's view, [redacted] submitted a false attestation of her citizenship as evidence that she should be granted the status of a permanent resident. This simply cannot be construed as a "benefit" within the meaning of the INA; downgrading one's status from that of a supposed U.S. citizen, as the Government alleges [redacted] represented, to a legal permanent resident cannot in good faith be seen as a "benefit." Losing one's citizenship is not a benefit, but rather a severe punishment which is only possible in rare cases. *See Kungys v. United States*, 485 U.S. 759 (1988). Certainly, Legal Permanent Residency can be a "benefit" under the INA. Still, even assuming *arguendo* that the Government's allegations are true and the [redacted] did intend to misrepresent herself as a U.S. citizen, it cannot logically follow that [redacted] submitting an I-485 application would be a request for a "benefit" as it would have been a demotion of immigration status.

Unless the Government regards denaturalization and demotion to LPR status as a benefit, the Government's allegation of fraud or misrepresentation cannot stand. Indeed,

the Government's theory of fraud or misrepresentation is incompatible with statutory language requiring the fraud or misrepresentation to be in support of a benefit under the INA. Therefore, [redacted]'s alleged misrepresentation was not in support of a request for a benefit under the INA.

IV. CONCLUSION

For all of the reasons stated above, the Respondent, [redacted], urges the court to find that at the time of her adjustment of status she was admissible and that the Government's charge pursuant to INA § 237 92)(1)(A) is inapplicable to her. Respondent proves that no element of Section 212(a)(6)(C)(i) of the INA or of the standard set forth in *Kungys v. United States*, 485 U.S. 759 (1988) apply to her case or the situation the Government purports amounts to a willful misrepresentation. As such, Respondent respectfully requests that this court grant her I-485 application for permanent residence on April 12, 2012 during her individual hearing so that her family, comprised of her U.S. citizen husband, U.S. citizen son, and soon to be Legal Permanent Resident daughter, remains intact.

Should the Government concur with Respondent, Respondent welcomes the Government's withdrawal of the Notice to Appear or amendment of the Notice to Appear; whatever procedure will most easily cure Respondent's status to Legal Permanent Resident.

Respectfully submitted,

_____

[redacted]
Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
[redacted]	**A** [redacted]
(RESPONDENT)	

EXHIBIT LIST FOR MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CONTENTION THAT SHE IS NOT INADMISSIBLE UNDER INA §212(A)(6)(C)(I)

EX.	NAME	PAGE
A.	Respondent [redacted] Declaration	**14-19**
B.	Declaration of [redacted] Allstate Agent Insurance Agent	**20-23**
C.	Letter from Lincoln Benefit Life to Respondent [redacted] confirming correction of error on her life insurance application of her immigration status as a non-citizen	**24**
D.	Letter from Lincoln Benefit Life to Respondent's U.S. citizen [redacted] confirming correction of error on his life insurance application regarding the beneficiary's (Respondent) immigration status as a non-citizen	**25**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of: [redacted] **Respondent** IN REMOVAL PROCEEDINGS	FILE NO. A[redacted]

PROOF OF SERVICE

On the _____ day of [redacted] 2011, I, [redacted], served a copy of the Respondent's Memorandum of Law in Support of Respondent's Contention that she is Not Inadmissible Under INA § 212(a)(6)(C)(i) and attached exhibits A through D on the Office of Chief Counsel, [redacted], by first-class mail.

_____ _____
Date

[redacted]