

PRACTICE ADVISORY¹
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INSPECTION, ENTRY AND ADMISSION?²

The concept of an admission to the United States is critical to U.S. immigration law. Whether a noncitizen has been admitted can determine eligibility for immigration relief, such as adjustment of status or a waiver, the procedural rules that may apply in removal proceedings, and even the grounds of removal to which a person may be subject. In fact, the concept is so important that the term “admission”—or a variation of it—appears hundreds of times throughout the Immigration and Nationality Act (INA) and the regulations. Despite a statutory definition of admission,³ the term does not carry the same meaning in all contexts and there has been litigation over its meaning when used in different contexts.

This article focuses on the meaning of “admission” in four very specific, but frequently encountered situations:

- 1) When a noncitizen is “waved through” a port of entry by an immigration inspector who asks the noncitizen no questions;

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² Special thanks go to Isabel Guzman, Ramon E. Curiel, and Alexis S. Axelrad for their assistance with updates to this practice advisory.

³ The INA, as amended by the Illegal Immigration and Immigrant Reform Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), defines the terms “admission” and “admitted,” with respect to a noncitizen, as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A). Additionally, the definition makes clear that a person who is paroled under INA § 212(d)(5) or permitted to land temporarily as a noncitizen crew member is not considered to have been admitted, and a returning lawful permanent resident will not be regarded as seeking admission unless one of six enumerated circumstances exist. INA §§ 101(a)(13)(B) and (C); *see also Matter of Pena*, 26 I&N Dec. 613 (BIA 2015) (holding that a returning lawful permanent resident cannot be regarded as “seeking admission” unless he or she falls within one of the exceptions in INA § 101(a)(13)(C)).

- 2) When a noncitizen gains entry into the United States at a port of entry by misrepresenting his or her legal status or using false documents, other than a false claim to U.S. citizenship;
- 3) When a noncitizen gains entry into the United States at a port of entry by making a false claim to U.S. citizenship, either verbally or with false documents; and
- 4) Whether a noncitizen who entered without inspection and subsequently was granted Temporary Protected Status (TPS) is considered admitted for purposes of adjustment of status.

With respect to each situation, the advisory will address whether an admission has occurred; what the noncitizen's status is upon entry; and what possible immigration consequences there are to such an entry. The article also discusses the first three issues relative to DACA applications.

I. ENTRY AFTER BEING “WAVED THROUGH” BY AN INSPECTOR

Has a noncitizen been admitted if he or she is “waved” through at a port of entry without being asked any questions?

Yes. A noncitizen who physically presents him or herself for inspection, makes no false claim to U.S. citizenship, and is permitted to enter the United States, has been inspected and admitted, even if the inspecting officer asks no questions. Such an individual has *not* made an entry without inspection (EWI). *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980).

It is not uncommon for an individual to be “waved” through inspection at a port of entry; that is, to be allowed to enter without being asked any questions by the inspecting officer.⁴ For example, in *Matter of Areguillin*, the noncitizen testified that she was a passenger in a car. Ms. Areguillin, who had no entry documents on her, was not questioned and volunteered no information. After questioning only the driver, the inspecting agent allowed the car to enter.

Ms. Areguillin later married a U.S. citizen. The issue in her subsequent deportation proceeding was whether her entry was an “admission” for purposes of adjustment of status pursuant to INA § 245(a).⁵ The Board of Immigration Appeals (Board or BIA) held that a noncitizen is:

- “Inspected” when she physically presents herself for questioning and makes no false claim to U.S. citizenship,⁶ even if she volunteers no information and is asked no questions; and

⁴ That “wave throughs” occur with some frequency is supported by the testimony of Richard M. Stana of the Government Accountability Office to the House of Representative’s Committee on Homeland Security, entitled “Border Security: Despite Progress, Weakness in Traveler Inspections Exist at Our Nation’s Ports of Entry,” January 3, 2008 (<http://www.gao.gov/assets/120/118716.pdf>). This report can be used to support a claim that an individual was waved through when the client’s testimony is the only evidence of the entry.

⁵ To be eligible for adjustment of status under INA § 245(a), an applicant must have been “inspected and admitted or paroled” into the United States.

⁶ See section 3 below for a discussion of the consequences of a false claim to U.S. citizenship.

- “Admitted” when the officer communicates to the applicant that she is not inadmissible; this communication—whether verbal or by physical gestures—has occurred if the officer permits the applicant to enter the United States.

The Board found that the facts alleged by the respondent indicated that she had been inspected and admitted for purposes of adjustment of status.

The Board subsequently reaffirmed *Matter of Areguillin* in *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). There, the Board considered whether the definition of the terms “admitted” and “admission”—which Congress adopted years after the Board’s decision in *Matter of Areguillin*—conflicted with the Board’s earlier holding. See footnote 3, *supra*. The Board found that the statutory requirement of a “lawful entry” requires only an entry that is procedurally regular rather than a substantively lawful entry. Consequently, the Board in *Matter of Quilantan* concluded that the admission recognized in *Matter of Areguillin*—which was procedurally regular—was consistent with the statutory definition of the term “admission.”

Thus, under *Matter of Areguillin* and *Matter of Quilantan*, noncitizens who present themselves for inspection at the border, who do not make a false claim to U.S. citizenship, and who are allowed to enter the United States—even if not questioned by an immigration officer and even if they do not have valid entry documents—have been “admitted.” These individuals have not “entered without inspection.”

Several courts of appeals agree with the Board that the terms “admitted” and “admission” require only procedural—not substantive—compliance. See *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Martinez v. Attorney General*, 693 F.3d 408, 409, 415 (3d Cir. 2012); *Borrego v. Mukasey*, 539 F.3d 689, 693 (7th Cir. 2008) (holding that a respondent who was allowed to enter based on misrepresentations and was inadmissible at entry had nonetheless been “admitted”); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097-99 (9th Cir. 2010); but see *Ramsey v. U.S. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994) (distinguishing *Matter of Areguillin* where the facts involved an intentional misrepresentation).⁷

Does a noncitizen without entry documents who is “waved through” inspection and allowed to enter the United States gain lawful status upon admission? If not, is there a benefit to having been admitted?

⁷ Note, however, that in the reinstatement context, three courts have rejected the argument that a procedurally regular entry is a legal entry. *Cordova-Soto v. Holder*, 659 F.3d 1029, 1033-34 (10th Cir. 2011) (finding that *Matter of Quilantan* did not apply to a procedurally regular—but substantively unlawful—reentry for purposes of the reinstatement of removal provision); *Tamayo-Tamayo v. Holder*, 709 F.3d 795 (9th Cir. 2013) (Stating that “nothing suggests that Congress intended the procedural definition to apply to the phrase ‘reentered the United States illegally’” in the reinstatement provision.); *Beekhan v. Holder*, 634 F.3d 723 (2d Cir. 2011) (finding that the knowing use of another’s passport to reenter was an illegal reentry under the reinstatement provision, without discussing the definition of “admission”). For more on this topic, see the LAC’s advisory “Reinstatement of Removal,” <http://www.legalactioncenter.org/practice-advisor/reinstatement-removal>.

Although a noncitizen without valid entry documents has been admitted to the United States if “waved through” by an immigration inspector, he or she does not gain lawful immigrant or nonimmigrant status following this admission. Thus, upon admission, the individual is present in the United States without lawful status and subject to removal under the deportability charge INA § 237(a)(1)(A) (inadmissible at the time of entry).

Nonetheless, because such a person was admitted, he or she may be eligible for immigration benefits in the future. For example, if such a noncitizen subsequently marries a U.S. citizen or has a U.S. citizen child who is over 21, he or she would satisfy the “inspected and admitted” requirement for adjustment of status under INA § 245(a). Because an undocumented noncitizen who entered without inspection cannot satisfy this requirement, he or she can adjust status—even if married to a U.S. citizen or the parent of an adult U.S. citizen—only by meeting the more restrictive requirements of INA § 245(i).⁸

Additionally, should a person who is waved through later be placed in removal proceedings, he or she must be charged with a deportation ground under INA § 237—which applies to noncitizens who are “in and admitted to the United States”—rather than an inadmissibility ground under INA § 212.⁹ Noncitizens who have been admitted and are charged under the deportation grounds have somewhat greater procedural rights in removal proceedings than those who have not been admitted and are charged under INA § 212. *See* INA § 240(c)(3) (placing the burden of proof of deportability on the government).

Moreover, at least one court has held that a “wave-through” entry constitutes an “admission in any status” for purposes of cancellation of removal, which requires that the applicant have resided in the U.S. for 7 years after an “admission in any status” (INA § 240A(a)(2)). *Rubio v. Lynch*, 787 F.3d 288, 291-92 (5th Cir. 2015). The court first determined that, under *Areguillan* and *Quilantan*, the entry was an “admission.” *Id.* Thereafter, the court held that, because the term “any status” was not limited to any “legal” status, it included an undocumented status. *Id.*

II. ENTRY GAINED UPON FRAUD OR MISREPRESENTATION (OTHER THAN FALSE CLAIM TO CITIZENSHIP)

Has a noncitizen been admitted if he or she gains entry by fraud or misrepresentation (other than a false claim to U.S. citizenship)?

The majority of circuit courts and the Board treat a noncitizen who has been inspected and allowed to enter as someone who has been admitted even if the admission was gained through fraud, misrepresentation or the use of false documents. Several courts have dealt with the issue explicitly. For example, in *Emokah*, 523 F.3d at 118, the Second Circuit considered whether the petitioner was “present in the United States without being admitted” in violation of INA § 212(a)(6)(C)(i), because she had entered the United States on a visa obtained through fraud or misrepresentation. Relying on INA § 101(a)(13)(A), the court concluded that the petitioner had in fact been “admitted” when she entered on a fraudulent visa because she had entered after

⁸ Among other requirements for § 245(i) eligibility, the underlying visa petition or labor certification must have been filed prior to May 1, 2001.

⁹ *See, e.g., Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) and *Matter of Guang Li Fu*, 23 I&N Dec. 985 (BIA 2006) are both examples of this.

inspection and authorization. The court reasoned “[t]he manner in which she procured her admission rendered her inadmissible at the time of entry . . . but does not change the fact that she was, indeed, *admitted*.” *Id.* (emphasis added).¹⁰

This result is consistent with the statutory structure. The grounds of deportation apply only to noncitizens who are “in and admitted to the United States.” INA § 237(a).¹¹ As *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), *rev’d on other grounds, Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010), and *Matter of Guang Li Fu*, 23 I&N Dec. 985 (BIA 2006) reflect, one ground of deportation—INA § 237(a)(1)(A)—specifically contemplates the admission of noncitizens who are inadmissible at the time of entry. Additionally, INA § 237(a)(1)(H) provides a waiver of deportation for someone found deportable for being inadmissible at the time of admission. Neither of these two provisions would exist if a noncitizen who gained entry at inspection through misrepresentation was not, as a matter of law, considered to have been admitted. *Accord Matter of Quilantan*, 25 I&N Dec. at 292 (noting that an interpretation of “admitted” as requiring substantive compliance would “effectively render null section 237(a)(1)(H)”).

As a result, there are numerous cases involving a claim of misrepresentation in which the government charged the noncitizen under INA § 237(a)(1)(A), the *deportation* ground for being inadmissible at the time of entry. *See, e.g., Hoxha v. Gonzales*, 446 F.3d 210, 211, 214 (1st Cir. 2006) (false passports); *Shtaro v. Gonzales*, 435 F.3d 711, 713 (7th Cir. 2006) (fraudulent document); *Aden v. Ashcroft*, 396 F.3d 966, 967 (8th Cir. 2005) (fraudulent documents); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005) (misrepresentation of marital status); *Alim v. Gonzales*, 446 F.3d 1239, 1242-43 (11th Cir. 2006) (use of another person’s passport and visa); *see also Matter of Federiso*, 24 I&N Dec. at 661-62 (misrepresentation of marital status) and *Guang Li Fu, supra* (failure to reveal the death of petitioning relative).

What are the consequences of an entry that is based upon fraud or misrepresentation?

¹⁰ Other cases reaching this same result include: *Martinez*, 693 F.3d at 409 (“‘admission’ as a lawful permanent resident [] in Section 212(h) refers to a procedurally regular entry, not a substantively compliant one”); *Borrego*, 539 F.3d at 692-93 (admission obtained through misrepresentation still constitutes an “admission”); *Yin Hing Sum*, 602 F.3d at 1097 (finding it “clear that Congress intended to define admission in procedural, rather than substantive, terms”); *but see Ramsey*, 14 F.3d at 211 n.6 (distinguishing *Matter of Areguillin* where the noncitizen made statements intended to mislead the immigration inspector).

¹¹ In contrast, inadmissibility grounds are charged against those who are “ineligible to receive visas and ineligible to be admitted to the United States.” INA § 212(a). As the Second Circuit has explained:

An alien’s prior “admission” *vel non* is also dispositive in determining which particular “charge” of removability is appropriate to his removal proceedings. An alien who is “in and admitted to the United States,” is considered potentially *deportable* and is therefore subject to a charge of deportability. 8 U.S.C. § 1227(a); *id.* § 1229a(a). By contrast, an alien who is not in the United States pursuant to a prior admission is considered potentially *inadmissible* and is therefore subject to a charge of “inadmissibility[.]” *Ibragimov v. Gonzales*, 476 F.3d 125, 131 (2d Cir. 2007).

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks, has sought, or has procured any benefit under the INA, is inadmissible. INA § 212(a)(6)(C)(i). Thus a noncitizen who was admitted based upon a misrepresentation could be charged in removal proceedings as deportable under INA § 237(a)(1)(A) for being inadmissible at the time of entry. A defense to this ground of inadmissibility—and thus to the deportation ground for being inadmissible at entry on this basis—is that the statement was not a knowing and deliberate misrepresentation. *See, e.g., Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979) (recognizing that a noncitizen must know that the statement is false); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (requiring that the statement must be made with knowledge of its falsity). Intent to deceive is not necessary so long as the individual knew that the information was false. *See, e.g., Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (finding inadmissibility ground met by fraud or willful misrepresentation; the latter is satisfied by a finding that the misrepresentation was deliberate and voluntary).

A “fraud waiver” under INA § 212(i) may cure some entries based on fraud or misrepresentation. The waiver is available to a noncitizen who: 1) is the spouse or son or daughter of a U.S. citizen or an LPR; and 2) can demonstrate that the denial of admission would result in extreme hardship to this relative. In VAWA self-petitioner cases, the self-petitioner, a United States citizen, LPR or qualified relative may demonstrate the necessary extreme hardship.

Case law almost conclusively establishes that an admission through fraud or misrepresentation constitutes an “admission” for adjustment purposes. The challenge for the practitioner is to document and detail the circumstances surrounding the admission, as well as to prepare for the consequences of any removal charge that the government may impose on the client upon full disclosure of the relevant facts. A practitioner should also consider whether the fraud or misrepresentation has to do with the person’s identity (i.e. using someone else’s lawfully issued documents), the person’s eligibility (i.e. the applicant was issued a visa that should not have been issued to him or her), or the person’s concealment of a material fact (i.e. using fraudulent documents to obtain a visa or entry). Different relief may be available to a client depending on the circumstances. Also, establishing the credibility of a client who has been found to have been admitted through fraud or misrepresentation may not be an easy task for a practitioner. Consequently, preparation and attention to detail are necessary to successfully represent a client under these circumstances.

III. ENTRY GAINED UPON A FALSE CLAIM TO U.S. CITIZENSHIP

Has a noncitizen been admitted if he or she gains entry by making a false claim to U.S. citizenship?

No. Unlike other fraud and misrepresentations, a noncitizen who gains entry by making a false claim to U.S. citizenship is treated as if he or she was not inspected at all; that is, his or her entry is treated as if it is an “entry without inspection.”

In *Reid v. INS*, 95 S. Ct. 1164, 1168 (1975), the Supreme Court held that a noncitizen who enters the U.S. by falsely claiming to be a U.S. citizen has so “significantly frustrated” the process for inspecting incoming noncitizens that he is deportable as having entered without inspection. The Court reasoned that the process for inspecting citizens is more perfunctory than that for inspecting noncitizens and that there are mechanisms in place for immigration authorities to track immigrants—but not U.S. citizens—who enter the United States. The Court concluded that

a noncitizen “who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted [noncitizens], one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected.” *Id.* (internal citation omitted); *see also Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013). As a consequence, an entry based upon a knowing false claim to U.S. citizenship is treated as an entry without inspection.

What are the immigration consequences of a false claim to U.S. citizenship made while seeking entry?

A noncitizen who is found to have made a false claim to U.S. citizenship for any purpose or benefit under the INA or any other federal or state law is permanently inadmissible to the United States. INA § 212(a)(6)(C)(ii)(I).¹² For this reason, “it has been characterized as the ‘immigrant version of the death sentence.’” *Munoz-Avila v. Holder*, 716 F.3d 976, 978 (7th Cir. 2013) (internal citations omitted).

It is well settled that obtaining entry into the United States at a port of entry by means of a false claim to U.S. citizenship is a “benefit” under the Act. *See Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) (citing *Reid v. INS*, 420 U.S. at 624-25 and *Kalejs v. INS*, 10 F.3d 441, 446 (7th Cir. 1993)); *Dugboe v. Holder*, 644 F.3d 462, 470 (6th Cir. 2011); *see also Rodriguez v. Gonzalez*, 451 F.3d 60, 65 (2d Cir. 2006) (misrepresenting oneself on an application for U.S. passport is considered a “benefit”). Once it is established that the noncitizen committed an act under the false claim bar, he or she is inadmissible under INA § 212(a)(6)(C)(ii)(I) unless a defense to the inadmissibility exists (see discussion of defenses below). There is no waiver for this ground of inadmissibility.¹³

While making oral misrepresentations to a border official in order to enter the United States clearly implicates INA § 212(a)(6)(C)(ii)(I), a court has limited the applicability of the provision where, at most, the claim to U.S. citizenship was only implicit. *Munoz-Avila*, 716 F.3d at 981 (holding that presentation of a another’s birth certificate showing the city of birth and nothing more did not constitute a false claim to U.S. citizenship). In other contexts, courts have strictly construed the requirement that the false claims of citizenship have been made for a “purpose or benefit” under the INA or other federal or state law. *Hassan v. Holder*, 604 F.3d 915, 928-29 (6th Cir. 2010) (false claim on a small business loan application did not implicate 212(a)(6)(C)(ii)(I), as immigration status had no bearing on whether he obtained the loan); *see also Castro v. Attorney Gen.*, 671 F.3d 356, 370 (3d Cir. 2012) (false claim upon arrest for purpose of minimizing risk that police would report to DHS does not fall under false claim bar); *but see Dakura v. Holder*, 772 F.3d 994, 999 (4th Cir. 2014) (citing cases and holding that a false

¹² Note that there is a parallel ground of deportation found at INA § 237(a)(3)(D)(i), which applies to false claims to U.S. citizenship made by noncitizens who are “in and admitted to the United States.”

¹³ There is one limited exception to this inadmissibility ground: a noncitizen who makes a false claim to U.S. citizenship will not be found to be inadmissible if his or her natural or adoptive parents are or were U.S. citizens, the noncitizen permanently resided in the U.S. prior to age 16, and the noncitizen reasonably believed at the time of making the false claim that he or she was a U.S. citizen. INA § 212(a)(6)(C)(ii)(II). A parallel exception exists for the deportation ground. *See* INA § 237(a)(3)(D)(ii).

claim to U.S. citizenship on an I-9 employment form is made for a “purpose or benefit” under the INA).

This ground of inadmissibility applies to false claims to U.S. citizenship made on or after September 30, 1996, the enactment date of IIRIRA in which § 212(a)(6)(C)(ii)(I) was included as a separate ground of inadmissibility. See Appendix 74.8, USCIS Adjudicator’s Field Manual (<http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>). Prior to this, false claims of U.S. citizenship were covered under the general inadmissibility ground for misrepresentation, for which a waiver is available under INA § 212(i) (see section II, above). For false claims that were made before September 30, 1996, and that are not considered to be continuing, a § 212(i) waiver is available for those eligible. (See section II, above).

What defenses may be available to counter a charge of inadmissibility for a false claim to citizenship?¹⁴

- **The individual was a child when he or she made a false claim to U.S. citizenship.**

The age of a child is a relevant factor to consider with respect to the defense of a false claim to U.S. citizenship. To date, neither the Board nor a federal court has issued a precedent decision on whether a minor has the legal capacity or state of mind to make a false claim to U.S. citizenship. In a case involving an unaccompanied fifteen year old, the Eighth Circuit chastised the Board for not resolving this issue and remanded the case with instructions that the Board clarify the standard it was using. *Sandoval v. Holder*, 641 F.3d 982, 983 (8th Cir. 2011). The court noted that, should the Board ultimately apply a blanket rule finding all children subject to § 212(a)(6)(C)(ii) regardless of age and circumstances, on further appeal the court would have to “wrestle with the implications of applying the ‘drastic measure’ of a permanent admissibility bar to each child regardless of her capacity to comprehend the wrongfulness of her action.” *Id.* at 987 (citation omitted).

Notably, in *Sandoval*, the government attorney conceded at oral argument that § 212(a)(6)(C)(ii) “would not apply to an eight-year-old child whose parents armed her with a fraudulent birth certificate and instructed her to say she was a United States citizen if asked by the officer.” *Id.* This concession is consistent with reports that we have heard of young children—generally under 10—not being found inadmissible for false claims to U.S. citizenship. The more difficult cases involve pre-teen and teenage children, although arguments still exist that they do not have the legal or mental capacity to make a false claim to U.S. citizenship.

Following the *Sandoval* decision, in 2013, the Foreign Affairs Manual (“FAM”) was amended to provide for an affirmative defense for children under the age of 18 who “lacked the capacity (i.e., the maturity and the judgment) to understand and appreciate the nature and consequences of a false claim to citizenship.” FAM 40.63 N11(b)(2). USCIS has provided its field attorneys with similar guidance. Letter from Brian de Vallance, Acting Assistant Secretary for Legislative

¹⁴ Note that these defenses are to the charge that the person is inadmissible based upon having made a false claim to citizenship. They do not change the fact that the noncitizen has not been admitted to the U.S. due to the false claim and is thus considered to have entered without inspection.

Affairs, Department of Homeland Security, to Harry Reid, United States Senator (Sept. 12, 2013) (on file with the American Immigration Council), *available at* <http://www.aila.org/infonet/dhs-dos-new-policy-false-claims-citizenship>, AILA.org Doc. No. 13092060. (Posted 9/20/13).

- **The noncitizen honestly believed he or she was a U.S. citizen.**

Pre-1996 false claims: Prior to IIRIRA, only false claims to citizenship that were made willingly and knowingly rendered a noncitizen inadmissible. *Matter of Wang*, 11 I&N Dec. 712 (BIA 1966). The Board had held that a noncitizen who honestly believed he was a citizen at the time of entry would not be deportable for a knowing false claim to citizenship; moreover, unlike a noncitizen who has made a knowing false claim, one who was admitted upon the honest but mistaken belief that he was a U.S. citizen would be found to have been “inspected” within the meaning of the immigration laws. *Matter of Wang*, 11 I&N Dec. 712 (BIA 1966).

Post-1996 false claims: Unlike pre-1996 false claims, for which the inadmissibility ground is INA § 212(a)(6)(C)(i), the statutory language in INA § 212(a)(6)(C)(ii)(I) does not contain an element of willfulness. Thus, the statute is written in terms of strict liability.

However, in practice, there is a defense if the noncitizen honestly believes he or she is a U.S. citizen. USCIS instructs its adjudicators that for a claim to be “falsely” made, a noncitizen must “knowingly” misrepresent the fact that he or she was not a citizen of the U.S. *See* USCIS Adjudicator’s Field Manual, AFM § 40.6(c)(2)(B)(i). The AFM further states that such belief must be “reasonable.” AFM § Ch. 40.6(c)(2)(B) When seeking admission or adjustment of status, the individual has the burden of proving clearly and without doubt that at the time of making the false claim, the individual thought he or she was a U.S. citizen. FAM § 40.63 N11(b)(1) and AFM § 40.6(c)(2)(B).

There are no precedent BIA decisions addressing whether INA § 212(a)(6)(C)(ii)(I) should be read to include an element of intent. In at least one unpublished decision, however, the BIA reversed an immigration judge who ordered the noncitizen removed for a false claim to U.S. citizenship, noting that “[i]t has long been settled that a false claim of United States citizenship must be knowing and willful for immigration purposes and that an alien who honestly believed he/she was a United States citizen at the time of entry has not made a false claim to United States citizenship.” *In Re: Alma Delia Contreras*, 2005 WL 952460 (BIA April 14, 2005). Because both the noncitizen and the government stipulated that she honestly believed that she was a U.S. citizen at the time her claim was made, the BIA found that she was not inadmissible under INA § 212(a)(6)(C)(ii)(I). *Id.*; *but see In Re: Ahed Salah Shibli*, 2008 WL 5025279 (BIA Oct. 29, 2008) (“intent is not relevant in determining inadmissibility for having made a false claim of United States citizenship”).

- **The noncitizen retracted the claim in a timely manner.**

In pre-1996 cases, the BIA had long recognized that a timely retraction of a false or fraudulent claim—including a false claim of U.S. citizenship—has the effect of withdrawing the claim. *See, e.g., Matter of R – R –*, 3 I&N Dec. 823 (BIA 1949) (holding that the respondent was not inadmissible for perjury when he timely retracted his false claim of citizenship); *Matter of M –*, 9 I&N Dec. 118 (BIA 1960) (involving timely retraction of a false claim of lawful residence). For

a retraction to be “timely,” it must be “voluntary and without delay.” *Matter of Namio*, 14 I. & N. Dec. 412, 414 (BIA 1973). A retraction will not satisfy this standard if it is “not made until it appeared that the disclosure of the falsity of the statements was imminent.” *Id.*

USCIS explicitly recognizes a timely retraction as a defense to a charge of inadmissibility under INA § 212(a)(6)(C)(ii)(I). See USCIS Adjudicator’s Field Manual, § 40.6.2(c)(2)(C)(viii). While there are no precedent Board decisions on whether this defense applies to the post-IIRIRA false claim provisions, at least two unreported decisions recognize the defense. See *In re Marrakchi*, 2003 WL 23216757 (BIA September 29, 2003) (relying on *Matter of R – R –* and finding the noncitizen *not* inadmissible under INA § 212(a)(6)(C)(ii) due to timely retraction of his false claim to citizenship); *In re Valadez-Munoz*, 2006 WL 1558823 (BIA April 12, 2006) (rejecting an immigration judge’s characterization of the timely retraction doctrine as “antiquated” but finding that respondent had not timely retracted his false claim to citizenship), *aff’d Valadez-Munoz v. Holder*, 623 F.3d 1304 (9th Cir. 2010); *but see In re Cerda Duarte*, 2007 WL 416832 (BIA Jan. 24, 2007) (finding that, even if the timely retraction doctrine applies to INA § 212(a)(C)(ii), it should not be allowed in a border case in which an unquestioned false claim to citizenship could lead to the noncitizen being “waved through” and admitted).

IV. IMPACT OF THESE THREE TYPES OF ENTRY ON A DACA APPLICATION

Each of the three entry situations discussed above involves an issue of inadmissibility. Although inadmissibility may result in adverse immigration consequences, inadmissibility by itself does not bar eligibility for Deferred Action for Childhood Arrivals (DACA).

Additionally, as discussed, the immigration consequences of a false claim to U.S. citizenship made after September 30, 1996 are extremely serious. There is no waiver available and, absent a defense, a noncitizen who is found to have made such a claim will be permanently inadmissible. Consequently, it is critical that a DACA applicant who has made such a claim understand the potential immigration consequences, the risks involved in applying for DACA, and if a decision is made to go forward with a DACA application, how to present information on the application.

When applying for DACA and the related employment authorization document (EAD), noncitizens must answer questions about the manner of their initial entry into the United States, their immigration status at the time of their entry, and their immigration status at the time of their application. Thus, individuals who initially entered in any of the three ways discussed above will have to report information related to this entry. As a result, applicants must remain aware of future immigration benefits for which they might become eligible or future adverse immigration consequences that they might face. Regardless, applicants may conclude that the adverse facts will not be cured by not applying and that the benefits of deferred action may outweigh the risks.

Noncitizens who are “admitted” to the United States have more options with respect to possible future immigration benefits than individuals who entered without inspection. Thus, it is important not to misclassify an entry as being an “entry without inspection” if it was actually—or even possibly—an admission. Additionally, because the entry may have been years ago and/or may have been when the DACA applicant was very young, his or her memory of what took place may be incomplete. In order to preserve the ability to bring future claims to which the applicant might be entitled, and to minimize any conflict with future statements, one answer to

question 15 (“Status at Entry”) on the DACA application that would be accurate for all three situations is the drop-down selection “no lawful status.”

With respect to questions 14 (“Manner of Last Entry”)¹⁵ and 15 (“Current Immigration Status”) on the EAD application, an applicant could accurately answer “no lawful status” with respect to all three situations.

V. ENTRY WITHOUT INSPECTION AND SUBSEQUANT GRANT OF TPS: DOES THIS QUALIFY AS AN ADMISSION FOR PURPOSES OF ADJUSTMENT OF STATUS?

To adjust status under INA § 245(a), an applicant must have been “inspected and admitted or paroled” into the United States. Consequently, someone who entered without inspection is ineligible for § 245(a) adjustment. Entering without inspection is not a bar to a grant of Temporary Protected Status (TPS), however, and there are many TPS recipients who initially entered without inspection. A strong argument exists that an individual who entered without inspection, subsequently was granted TPS, and is an immediate relative,¹⁶ is eligible to adjust status under § 245(a) notwithstanding his or her entry without inspection. The basis for the argument is that the grant of TPS benefits constitutes an inspection and admission for purposes of adjustment of status. To date, the Sixth Circuit Court of Appeals and two district courts have adopted this argument.¹⁷ However, the Eleventh Circuit has rejected it.¹⁸

The relevant provision in the TPS statute, INA § 244(f)(4), reads:

Benefits and Status During Period of Temporary Protected Status.—
During a period in which an alien is granted temporary protected status
under this section—

¹⁵ Question 14 on the EAD application refers to the most recent entry that the applicant has made, whereas question 15 on the DACA application refers to the initial entry. Therefore, the answer to question 14 on the EAD application may be different from that on the DACA application if the noncitizen made a trip abroad following his or her initial entry.

¹⁶ Section 245(a) also requires that a visa be immediately available to the applicant at the time of application. Because there are no numerical limitations on the number of visas awarded to immediate relatives, visas are always immediately available to these adjustment applicants. Moreover, adjustment applicants who are immediate relatives are not subject to a bar on adjustment for any periods of unlawful status or for unauthorized employment. See INA § 245(c). For these reasons, this is the population that will most often benefit from this interpretation. In some employment-based cases, where a visa is immediately available, the individual might also benefit from this interpretation. See INA § 245(k) (permitting adjustment for certain employment-based applicants where other criteria are satisfied, notwithstanding certain prior periods of unlawful status or employment).

¹⁷ *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Medina v. Beers*, No. 14-1010, ___ F.Supp.3d ___, 2014 U.S. Dist. LEXIS 156526 (E.D. Penn. Nov. 5, 2014); *Ramirez v. Dougherty*, 23 F. Supp. 3d 1322 (W.D. Wash. 2014).

¹⁸ *Serrano v. U.S. Attorney General*, 655 F.3d 1260 (11th Cir. 2011).

(4) For purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered in, and maintaining, lawful status as a nonimmigrant.

In brief, the argument is that the phrase “shall be considered in, and maintaining, lawful status as a nonimmigrant” is plain and unambiguous; it must be interpreted as satisfying the admission requirement for purposes of adjustment of status.¹⁹ The most critical points supporting this argument are:

- First, USCIS’s review and approval of a TPS application constitutes an “inspection.” A TPS applicant must register by submitting a complete application and extensive evidence; must be fingerprinted; must demonstrate that he or she is not inadmissible under a number of inadmissibility grounds; and may be required to attend an interview.²⁰
- Second, upon being granted TPS, the statute mandates—through the use of the word “shall”—that the individual be treated as if he or she is “in, and maintaining lawful status as a nonimmigrant.” A noncitizen can only be in nonimmigrant status if he or she was admitted to the United States in that status.²¹ Thus, by “considering” the TPS recipient as being in nonimmigrant status, the statute necessarily “considers” the individual to have been admitted to the United States.
- By its clear terms, § 244(f)(4) applies to § 245(a) in its entirety, and not simply § 245(c)(2) as the government has argued in its briefing in the federal court cases.
- Additionally, § 244(f)(4) applies to all TPS recipients and not merely a subclass of these recipients as the government has argued.
- The government’s own regulations are in accord with this plain reading of the TPS statute. In the regulations pertaining to adjustment of status, the phrase “lawful immigration status” is defined to mean a person “*admitted* to the United States in nonimmigrant status.” 8 C.F.R. § 245.1(d)(1)(ii) (emphasis added).

In short, § 244(f)(4) creates a legal fiction that the TPS recipient is in lawful nonimmigrant status, regardless of whether he or she satisfies the definition of a nonimmigrant. *See* INA § 101(a)(15) (defining numerous categories of nonimmigrants). Because an admission is a prerequisite to a person “being in” nonimmigrant status, the TPS recipient necessarily must also be considered to be admitted, regardless of whether he or she satisfies the definition of admitted.

¹⁹ Because the provision states that the TPS applicant is considered in status as a nonimmigrant “for purposes of adjustment of status under section 245,” the same argument could not be made that a grant of TPS benefits constitutes an “admission” for purposes other than adjustment.

²⁰ *See* 8 C.F.R. §§ 244.3-244.9.

²¹ *See* 8 U.S.C. § 1184(a)(1) (“The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may be regulations prescribe.”). Note that a nonimmigrant admitted in one classification may be able to change to another nonimmigrant classification after entry. However, that change can only occur with respect to noncitizens who were previously admitted as nonimmigrants.