c) Section 212(a)(6)(C) of the Act: Misrepresentation and False Claim to U.S. Citizenship.

Section 212(a)(6)(C) of the Act includes two (2) separate grounds of inadmissibility based on past misrepresentations. Section 212(a)(6)(C)(i) of the Act applies to fraud or misrepresentations in general. Section 212(a)(6)(C)(ii) of the Act applies to any alien who, on or after September 30, 1996, has made a false claim to be a U.S. citizen.

(1) Section 212(a)(6)(C)(i) of the Act: Fraud or Misrepresentation. Any alien who, by fraud or by 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.

The provision penalizes the following four (4) actions:

- the procurement or attempted procurement of a visa, by fraud or willfully misrepresenting a material fact;
- the procurement or attempted procurement of other documentation, by fraud or by willfully misrepresenting a material fact;
- the procurement or attempted procurement of admission into the United States, by fraud or misrepresenting a material fact;
- the procurement or attempted procurement of other benefits under the Act, by fraud or misrepresenting a material fact.

For an adjudicator to find fraud, he or she must determine that:

(1) the alien made a false representation of a material fact;
(2) the false representation was made with the alien's knowledge of its falsity;
(3) the false representation was made with the intent to deceive a government official authorized to act upon the request (generally the consular or immigration officer); and
(4) the government official believed and acted upon the false representation. See Matter of G-G-, 7 I&N Dec. 161 (BIA 1956).

For an adjudicator to find misrepresentation, he or she must determine that:

(1) the alien made a false representation of a material fact;
(2) the misrepresentation was willfully made; and
Prior to September 30, 1996, if an alien obtained a benefit under the Act by falsely claiming to be a U.S. citizen or a non-citizen U.S. national, the alien may be inadmissible under section 212(a)(6)(C)(i) of the Act. Section 212(a)(6)(C)(ii) of the Act applies to false claims to U.S. citizenship made on or after September 30, 1996. See section 40.6.2(c)(2) of this AFM chapter. A false claim, made on or after September 30, 1996, to be a non-citizen U.S. national may still make the alien inadmissible under section 212(a)(6)(C)(i) of the Act.

(A) Definitions.

(i) Fraud.

The Board of Immigration Appeals (BIA) has determined that a finding of “fraud” requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive a consular or immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. See Matter of G-G, 7 I&N Dec. 161 (BIA 1956).

(ii) Misrepresentation.

Misrepresentation is an assertion or manifestation that is not in accordance with the facts. A material misrepresentation includes a false misrepresentation concerning a fact that is relevant to the alien’s entitlement. It is not necessary that there was intent to deceive or that the officer believes and acts upon the false representation. See Matter of Kai Hing Hui, 15 I&N Dec. 288 (BIA 1975).

Misrepresentation can be made in oral interviews, written applications, or by submitting evidence containing false information. See General Counsel Opinion 91-39; see also 9 FAM 40.63 N4.

In practice, the distinction between “fraud” or “misrepresentation” is not greatly significant. If the evidence shows that the alien made the misrepresentation with an intent to deceive and that the officer believed and acted upon the misrepresentation, then, under Matter of G-G, the alien is inadmissible on the fraud theory.

But even assuming there was no intent to deceive, Matter of Kai Hing Hui makes clear that the alien is still inadmissible, if the misrepresentation was willful and was material. See Matter of Kai Hing Hui, 15 I&N Dec. 288, at 290 (“We interpret the Attorney General’s decision in Matter of S-and B-C as one which modified Matter of G-G so that the intent to deceive is no longer required before the willful misrepresentation charge comes into play.”).

(iii) Willfully.

The term “willfully” should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. See Matter of G-G, 7 I&N Dec. 161 (BIA 1956).

(iv) Definition and Test of Materiality.
The test of whether a misrepresentation is material was restated by the United States Supreme Court in the context of a proceeding to revoke naturalization. See Kungys v. U.S., 485 U.S. 759 (1988). The court held in Kungys that the false statements must be shown to have been predictably capable of affecting the decisions of the decision-making body for it to be material.

A misrepresentation made in connection with an application for a visa or other document, or in connection with an entry into the United States, has a natural tendency to influence the decision on the person’s case, if either:

- the alien is inadmissible/removable/ineligible on the true facts; or
- the misrepresentation tends to cut 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 or she is inadmissible. See Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1961).

The adjudicator should administer the test as follows:

(1) Consider whether the evidence in the record supports a finding that the alien was inadmissible on the true facts. If it does, the misrepresentation is material. If it does not, proceed to (2) below.

(2)(a) Consider whether the misrepresentation tended to shut off a line of inquiry, which was relevant to the alien’s eligibility. If it did, proceed to number 2(b).

(2)(b) If a relevant line of inquiry had been cut off, ask whether that inquiry might have resulted in a proper determination of inadmissibility. See Matter of S- and B-C-, 9 I&N Dec. 436, at 447-449.

(v) Other Documentation.

“Other documentation,” in the context of 212(a)(6)(C)(i) of the Act refers to visas and other documents that are required at the time of an alien’s application for admission to the United States. This includes documents such as reentry permits, border crossing cards, and U.S. passports.

Documents evidencing extensions of stay are not considered to be entry documents under section 212(a)(6)(C)(i) of the Act. Similarly, documents such as SEVIS Form I-20 petitions, and labor certification forms are documents that are presented in support of a visa application or applications for status changes. Therefore, they are not in themselves “other documentation” for purposes of section 212(a)(6)(C)(i) of the Act. See Matter of M-y R-, 6 I&N Dec. 315 (BIA 1954); and 9 FAM 40.63, N9.1.

(vi) Other Benefit.

Any immigration benefit or entitlement provided for by the Act including, but not limited to, requests for extension of nonimmigrant stay, change of nonimmigrant status, permission to reenter the United States, waiver of the section 212(e) requirement, employment authorization, parole, voluntary departure, adjustment of status, and requests for stay of deportation. See 9 FAM 40.63 N9.2.

(B) Applicability.
In order for this ground of inadmissibility to apply, there must be sufficient evidence to show that an alien used fraud or that he or she misrepresented material facts in an attempt to obtain a visa, other documentation, admission into the United States, or any other benefit provided for under the Act.

In addition, the alien must have made the misrepresentation (whether verbal or written, or through the presentation of evidence or documentation containing false information) before an authorized official of the United States government. See Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994); Matter of D-L- & A-M-, 20 I&N Dec. 409 (BIA 1991); Matter of L-L-, 9 I&N Dec. 324 (BIA 1961).

Inadmissibility based on fraud is usually difficult to establish because it requires proof of an alien’s “intent to deceive.” Misrepresentation, on the other hand, is established, if an applicant makes a false statement in a deliberate and voluntary manner, or if the applicant has knowledge of the falsity of the documentation that he or she is presenting. It is not necessary to prove an intent to deceive. See Matter of Kai Hing Hui, 15 I&N Dec. 288 (1975) and Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1961).

Therefore, the following paragraphs deal primarily with willful misrepresentations of material facts:

(i) The Burden and Standard of Proof.

The burden of proof during the immigration benefits seeking process is always on the alien to establish by a preponderance of the evidence that he or she is not inadmissible; this is also true in the case of possible inadmissibility under section 212(a)(6)(C)(i) of the Act. The burden never shifts to the government to prove inadmissibility during the adjudication of a benefit. See section 291 of the Act; see also Matter of Arthur, 16 I&N Dec. 558 (BIA 1978).

However, there must be some evidentiary basis for a USCIS conclusion that an alien is inadmissible under section 212(a)(6)(C)(i) of the Act. See INS v. Elias-Zacarias, 502 U.S. 478 (1992) (Agency factfinding must be accepted, if the evidence would permit a reasonable factfinder to make the findings ["preponderance of the evidence"- standard]).

- If there is no evidence at all that the applicant obtained or sought to obtain some benefit under the Act by fraud or willful misrepresentation, then USCIS should find that the applicant has met the burden of proving that he or she is not inadmissible under section 212(a)(6)(C)(i) of the Act. See Matter of D- L- and A- M-, 20 I&N Dec. 409 (BIA 1991).

- If, however, there is any evidence that would permit a reasonable person to conclude that the alien may be inadmissible under section 212(a)(6)(C)(i) of the Act, then the alien has the burden of establishing at least one (1) of the following facts that:

(1) there was no fraud or misrepresentation; or

(2) any fraud was not intentional or with the intent to deceive, or that the misrepresentation was not willful; or

(3) any fraud or any concealed or misrepresented fact was not material; or
(4) the fraud or misrepresentation or concealment was not made to procure a visa, admission, or some other benefit.

If the preponderance of the evidence shows the existence of at least one (1) of these four (4) facts, the USCIS adjudicator should find that the applicant has met his or her burden of proving that he or she is not inadmissible under section 212(a)(6)(C)(i) of the Act.

If, however, the USCIS adjudicator determines that the evidence for and against finding the alien to be inadmissible under section 212(a)(6)(C)(i) of the Act is of equal probative weight, the adjudicator should find that the applicant is inadmissible because the alien has not satisfied the burden of proof. See Matter of Rivero-Diaz, 12 I&N Dec. 475 (BIA 1967); Matter of M-, 3 I&N Dec. 777 (BIA 1949).

Note and Compare

The burden and standard of proof is different in removal proceedings: If DHS seeks an alien’s removal as a deportable alien, section 240(c)(3) of the Act provides that DHS must establish the facts supporting the removal charge by clear and convincing evidence. Thus, if DHS seeks an alien’s removal under section 237(a)(1)(A) (Inadmissible aliens) of the Act on the claim that the alien was inadmissible under section 212(a)(6)(C)(i) of the Act at the time of admission, DHS must prove the claimed fraud or misrepresentation by clear and convincing evidence. See Matter of Bosuego, 17 I&N Dec. 125 (BIA 1980).

As mentioned above, however, this burden of proof and this standard of proof do not apply when USCIS is adjudicating an alien’s application for a benefit under the Act. Under section 291 of the Act, an alien seeking admission has the burden of proof to establish that he or she is not inadmissible. The burden of proving admissibility always rests with the applicant, and b shifts so as to require DHS to prove inadmissibility. See Matter of Arthur, 16 I&N Dec. 558 (BIA 1978); Matter of Rivero-Diaz, 12 I&N Dec. 475 (BIA 1967).

(ii) Silence or Failure to Volunteer Information.

An alien’s silence or failure to volunteer information does not, in and of itself, constitute material misrepresentation for purposes of determining inadmissibility under section 212(a)(6)(C)(i) of the Act because silence in itself “does not establish a conscious concealment or fraud and misrepresentation.” See Matter of G-, 6 I&N Dec. 9 (BIA 1953) superseded on other issues by Matter of F-M-, 7 I&N Dec. 420 (BIA 1957); see 9 Foreign Affairs Manual (FAM) 40.63 N.4.2.

(iii) Misrepresentations That Are “Harmless.”

A misrepresentation that does not affect admissibility is not material. See Matter of Martinez-Lopez, 10 I&N Dec. 409 (BIA 1964) (Submission of a forged job offer in the United States was not material when the alien was not otherwise inadmissible as an alien likely to become a public charge); Matter of Mazar, 10 I&N Dec. 79 (BIA 1962) (No materiality in the non-disclosure of membership in Communist Party since the membership was involuntary and would not have resulted in a determination of inadmissibility).

If an adjudicator is unsure whether a misrepresentation made by the applicant would affect the admissibility of the applicant, the adjudicator should seek guidance from his or her supervisor or local counsel.
(iv) Misrepresentation Must Be Made before a U.S. Official.


(v) False Representations Made on Behalf of Others.

False representations made in connection with another alien’s application for benefits under the Act would not make the alien who misrepresented a material fact inadmissible under section 212(a)(6)(C)(i) of the Act. See Matter of M-R-, 6 I&N Dec. 259 (BIA 1954)(The procurement of documentation for the alien’s two children to facilitate their entry into the United States, did not render the alien himself inadmissible under former section 212(a)(19) of the Act.)

However, such false representations may make the alien inadmissible under section 212(a)(6)(E) of the Act, if the representations were made in an attempt to assist, aid, or abet another alien to enter the United States in violation of law.

(vi) Agent’s Misrepresentation.

If the misrepresentation is made by the applicant’s attorney or agent, the applicant will be responsible for this misrepresentation, if it is established that the alien was aware of the action taken by the representative in furtherance of the alien’s application. This includes oral misrepresentations made at the border upon entry by an aider of the alien’s illegal entry.

Also, an alien cannot disavow responsibility for any misrepresentation made on the advice of another unless the alien is lacking the capacity to exercise judgment. See also 9 FAM 40.63, Note 5.2.

(vii) Timely Retraction.

Under the doctrine of timely retraction or recantation, an applicant can use as a defense to section 212(a)(6)(C)(i) of the Act that he or she timely retracted (recanted) the statement. The effect of a timely retraction is that the misrepresentation is eliminated. See Matter of R-R-, 3 I&N Dec. 823 (BIA 1949); Matter of M-, 9 I&N Dec. 118 (BIA 1960) (also cited by Matter of R-S-J-, 22 I&N Dec. 863 (BIA 1999)).

For the retraction to be effective, it has to be voluntary and without delay (timely). See Matter of R-R-, 3 I&N Dec. 823 (BIA 1949); see Matter of Namio, 14 I&N Dec. 412 (BIA 1973); referring to Matter of M-, 9 I&N Dec. 118 (BIA 1960) and Llanos-Senarrilos v. United States, 177 F.2d 164 (9th Cir. 1949) (If the witness withdraws the false testimony of his own volition and without delay, and during the same hearing or examination under oath, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn).

The alien must correct his or her testimony voluntarily before the conclusion of the proceeding at which he or she gave false testimony, and before being exposed by the adjudicator or government official. See id.

Admitting to the false claim of U.S. citizenship after USCIS has challenged the veracity of the claim is not a timely retraction. The BIA also held that an alien’s recantation of the false
testimony about one (1) year later, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was neither voluntary nor timely. See Matter of Namio, 14 I&N Dec. 412 (BIA 1973). A retraction or recantation is only timely if it is made in the same proceeding in which the person gave false testimony. Llanos-Senanillos, 177 F2d at 165.

(viii) **30/60-Day Rule of the U.S. Department of State**.

The U.S. Department of State (DOS) has developed the 30/60-day rule that assists consular officers in evaluating misrepresentations in cases involving aliens who were in the United States, and whose conduct is or was inconsistent with representations made to the consular officer concerning their intentions at the time of the visa application.

Such cases occur most frequently with respect to aliens who, after having obtained a non-immigrant visa, either apply for adjustment of status or who fail to maintain their nonimmigrant status. The State Department’s 30/60-day rule may assist USCIS adjudicators in evaluating the merits of such a case before USCIS.

The 30/60-day rule creates the following presumptions:

- Inconsistent conduct within the first 30-days of admission in the particular category creates a presumption that the alien misrepresented his or her intentions; the alien has to provide evidence contrary to the presumption and that he or she had the intention to comply with the status in which the alien entered.

- Inconsistent conduct between the 30th and the 60th day after admission in a particular category does not create a presumption of misrepresentation; the consular officer has to present reasons why the alien’s conduct may support a conclusion that the alien entered by misrepresentation. The alien must still establish that he or she did not enter by misrepresentation, but the adjudicator could find in the alien’s favor based on evidence that is less persuasive than might be required, if the alien had engaged in the inconsistent conduct within 30 days of admission.

- Inconsistent behavior that occurs more than 60 days after admission in a particular category: DOS doesn’t consider such conduct to constitute a basis for ineligibility under section 212(a)(6)(C)(i) of the Act.

The 30/60-day rule is used for guidance ONLY and is not governed by the statutes or the regulations. The text provided above must not be used in a denial. It is information for the USCIS field offices only.

The 30/60-day rule is not a conclusive tool to ascertain misrepresentation. The officer may still find the alien obtained admission by misrepresentation, if, on the basis of all the facts and evidence in the record, a reasonable person could reasonably find that the alien had done so.

A more detailed description of the 30/60-day rule can be found at 9 Foreign Affairs Manual (FAM) 40.63, Note 4.7.

(C) **Exemptions and Waivers**.

(i) **Exemptions**.
In addition to the general exceptions and waivers noted in section 40.6.1(b) or (c) of this AFM chapter, aliens

- who are mentally incompetent and small children judged to be incapable of independently forming an intent to defraud should not be deemed inadmissible under section 212(a)(6)(C)(i) of the Act, if applications submitted on their behalf contain false representations;

- who seek adjustment of status under section 245(h) of the Act are exempt from inadmissibility under section 212(a)(6)(C)(i) of the Act.

(ii) Available Waivers.

In addition to the general exemptions and waivers described in section 40.6.1(b) or (c) of this AFM chapter, section 212(i) of the Act provides for a waiver of inadmissibility in the case of an immigrant who is the spouse, son, or daughter of a U.S. citizen or of an alien lawfully admitted for permanent residence, or the fiancé(e) of a U.S. citizen, if it is established that refusal of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse, or parent, or the U.S. citizen K-visa petitioner.

As noted below, the grant of a waiver to the fiancé(e) is conditioned on the fiancé(e)’s actually marrying the K-1 petitioner within three (3) months of admission. The standard for extreme hardship is the same as the one that was applied under the old suspension of deportation of section 244 of the Act. See Matter of Kao & Lin, 23 I&N Dec. 45 (BIA 2001).

The effect of an approved waiver under section 212(i) of the Act is that any incidental inadmissibility that resulted from the misrepresentation is eliminated.

Example:

During his or her adjustment interview, the alien applies for a waiver of inadmissibility under section 212(i) of the Act, for having misrepresented a material fact during the nonimmigrant visa application at the U.S. consulate. USCIS approves the waiver.

Technically, the individual was inadmissible under two grounds of section 212(a) of the Act: (1) under section 212(a)(6)(C)(i) of the Act (misrepresentation) and (2) under section 212(a)(7)(B)(i) of the Act (not in possession of a valid nonimmigrant visa). By granting the waiver under section 212(i) of the Act, USCIS also implicitly waives the inadmissibility for failure to meet the documentary requirements under section 212(a)(7) of Act.

Note:

Section 212(i) of the Act was amended by section 349 of IIRIRA, and changed inasmuch as that the waiver is no longer available to the parents of U.S. citizens or legal permanent residents.

Also, section 212(i) of the Act as in effect prior to 1996 allowed an alien to apply for a waiver, if more than ten (10) years had passed since the date the fraud or material misrepresentation occurred. Section 349 of IIRIRA eliminated this provision, so that extreme hardship to the qualifying relative is now the only basis for the waiver.
The applicable law for the adjudication of the section 212(i) waiver is the law in effect on the date of the decision on the waiver application, that is, post-1996 law. See Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999).

**Note:**

Pursuant to 8 CFR 212.7(a), a K-1 or K-2 visa applicant is directed to file Form I-601 in order to overcome the inadmissibility prior to obtaining the visa. Because K-1s and K-2s do not yet have the requisite relationship to a U.S. citizen spouse or parent required under section 212(i) of the Act, USCIS will grant, if eligible, Form I-601 conditionally.

The condition imposed on the approval of Form I-601 is that the K-1 nonimmigrant and the K-1 visa petitioner must celebrate a bona fide marriage within the statutory time frame of three (3) months from the day of the K-1 nonimmigrant’s entry into the United States.

(D) **Case Law and Other Materials.**

- **Matter of Tijam,** 22 I&N Dec. 408 (BIA 1998) - The non-disclosure in the initial visa application that the applicant had two (2) children, was considered material because the alien had entered as the “unmarried” daughter of a citizen, and the children’s birth certificates showed that their mother was married when they were born.


- **Matter of Healy and Goodchild**, 17 I&N Dec. 22 (BIA 1979) - Knowledge of the falsity of a representation satisfies the fraud and willfulness requirements.

- **Matter of L-L-** 9 I&N Dec. 324 (BIA 1961) - A fraud charge can only be sustained, if the fraud was practiced upon an authorized U.S. Government official by inducing him to issue a document or grant some other benefit through fraud or material representation made by the alien involved.

- **Matter of Bosuego**, 17 I&N Dec. 125 (BIA 1980) - Where the true facts concealed by the respondent, i.e. that she was a college graduate with a sister residing in the United States, would not in and of themselves have barred her admission as a nonimmigrant, and where the record contains no additional facts, which would have influenced the consul one way or another in determining whether she was admissible as a mala fide nonimmigrant, the Service failed to establish a factual foundation for a finding that any further inquiry might well have resulted in a proper determination of inadmissibility.


- April 6, 1998 - Office of Programs memorandum – Section 212(a)(6)(C)(i) Relating to False Claims to U.S. Citizenship

- April 30, 1991, General Counsel Opinion 91-39, Penalties for misrepresentations by an unauthorized alien on an Employment Eligibility Verification Form (Form I-9)
State Department’s 9 Foreign Affairs Manual (FAM) 40.63 Misrepresentation; Falsely Claiming Citizenship, and 40.63 Notes


As mentioned in 40.6.2(c) of this AFM chapter discussing “Fraud and Misrepresentation,” section 212(a)(6)(C) of the Act includes two (2) separate grounds of inadmissibility that are based on past misrepresentations. Section 212(a)(6)(C)(i) of the Act applies to fraud or misrepresentations in general. Section 212(a)(6)(C)(ii) of the Act applies to any alien who, on or after September 30, 1996, makes a false claim to be a U.S. citizen. See section 344(c) of IIRIRA. This paragraph discusses inadmissibility that is based on a false claim to U.S. citizenship.

(A) General.

Any alien, who, on or after September 30, 1996, falsely represents, or who has falsely represented, him or herself to be a citizen of the United States for any purpose or benefit under the Act, or any other federal or state law, is inadmissible.

Note
Section 212(a)(6)(C)(ii)(I) of the Act makes an alien subject to removal as an inadmissible alien. Section 237(a)(3)(D)(i) of the Act is the identical provision, which applies to an alien who has been admitted, and makes the alien subject to removal as a deportable alien. Also, a related ground of inadmissibility is section 212(a)(10)(D) of the Act, which declares any alien inadmissible who votes in violation of any federal, state, or local law.

(B) Definitions.

(i) Falsely.

For Section 212(a)(6)(C)(ii)(I) of the Act to apply, the claim to U.S. citizenship must be “falsely” made in that the alien knowingly misrepresents the fact that the individual is a citizen of the United States. Thus, the alien must have known that he or she was not a U.S. citizen. See 40.6.2(c)(2)(D) of this AFM chapter for further information about what facts an alien must prove to support a claim and defense that he or she reasonably believed him or herself to be a U.S. citizen.

(ii) Representation.

A representation can be made orally, or in writing, under oath or not under oath.

(iii) For Any Purpose or Benefit Under the Act or Any Federal or State Law.

An alien is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, if he or she falsely claims U.S. citizenship in connection with obtaining any benefit under any federal or state law. Such a benefit includes, but is not limited to, entry into the United States, naturalization, adjustment of status, voting, or a misrepresentation on a Form I-9, Employment Eligibility Verification.

(iv) U.S. Citizenship.
U.S. citizenship is related to, but is not the same as U.S. nationality. Certain persons born in “an outlying possession” of the United States are U.S. nationals, who owe permanent allegiance to the United States, are entitled to live in the United States but are not “citizens.” Any citizen of the United States is, necessarily, a U.S. national, but not all U.S. nationals are citizens. Section 101(a)(22) of the Act governs the determination of who is a national of the United States.

Note:
As of 2008, American Samoa (including Swains Island) is the only “outlying possession” of the United States.

Note:
An alien who falsely claims to be a U.S. national, but not a U.S. citizen, is not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. The alien may, however, be inadmissible under section 212(a)(6)(C)(i) of the Act.

(C) Applicability.

(i) Applicable Only to False Claims Made on or after September 30, 1996.

The provision was implemented by section 344(a) of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), and became effective on September 30, 1996. See section 344(c) of IIRIRA. Therefore, section 212(a)(6)(C)(ii) of the Act only applies to claims made on or after the effective date.

If an alien made a false claim to U.S. citizenship before September 30, 1996, that false claim may make the alien inadmissible under section 212(a)(6)(C)(i) of the Act rather than under section 212(a)(6)(C)(ii) of the Act. See section 40.6.2(c)(1) of this AFM chapter for discussion of the elements needed to establish an alien’s inadmissibility under section 212(a)(6)(C)(i) of the Act.

This distinction is critically important because individuals who made a false claim to U.S. citizenship before September 30, 1996 may have the possibility to apply for a waiver of the ground of inadmissibility under section 212(a)(6)(C)(i) of the Act. Individuals who made false claims to U.S. citizenship on or after September 30, 1996 have no waiver available.

(ii) The Representation or False Claim Does Not Have to Be Made Before a U.S. Government Official.

Unlike under section 212(a)(6)(C)(i) of the Act, it is not necessary that the false claim is or was made to a U.S. government official; it can be made to a private individual such as an employer (for employment verification under section 274A of the Act) or other individuals.

(iii) Claiming to Be A National of the United States Does Not Subject An Individual to Section 212(a)(6)(C)(ii)(I) of the Act.

Form I-9, Employment Eligibility Verification, used prior to April 3, 2009, asked the individual whether he or she is a “citizen or national” of the United States and required the individual to check the corresponding box. The fact that an alien marked this box does not necessarily subject the individual to section 212(a)(6)(C)(ii)(I) of the Act because the alien may have
claimed to be a “national” or a “citizen.” Claiming to be a national of the United States does not subject an individual to section 212(a)(6)(C)(ii)(I) of the Act.

In *Ateka v. Ashcroft*, 384 F.3d 954 (8th Cir. 2004), and in *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008), the individuals specifically testified that they claimed to be “citizens” when checking the particular box on Form I-9. Based on this testimony, the court determined that the aliens were subject to section 212(a)(6)(C)(ii) of the Act. Board of Immigration Appeals (BIA) non-precedent decisions seem to draw on this distinction. *See, for example*, *Matter of Oduor*, 2005 WL 1104203 (BIA, March 15, 2005) and *Matter of Soriano-Salas*, 2007 WL 2074526 (BIA, June 5, 2007).

Therefore, because there is a distinction between a national and a citizen, the adjudicator should clearly establish during the interview, or otherwise, what the individual meant by checking the box of “citizen or national” on Form I-9 as used prior to April 3, 2009. In *Ateka*, *Oduor*, and *Soriano-Salas*, for example, the evidence showed that the alien had no idea what it meant to be a non-citizen national and that the alien intended to claim that he or she was a citizen.

*United States v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004) supports this approach as well: *Karaouni* actually involved a criminal charge based on an allegedly false claim of citizenship, rather than an inadmissibility charge under section 212(a)(6)(C)(ii) of the Act. The standard of proof in a criminal case is higher than in an administrative proceeding before USCIS.

Nevertheless, *Karaouni* is instructive in showing that checking the “citizen or national” box on the Form I-9 is not enough to prove inadmissibility under section 212(a)(6)(C)(ii) of the Act, without some evidence that, by doing so, the person intended to claim that he or she was a citizen.

As of April 3, 2009, a new Form I-9 version is in use. This version has separate boxes that clearly differentiate between “Citizen of the United States” and “Non-citizen National of the United States.”

(iv) **No Civil Penalty or Conviction Required for Purposes of Section 212(a)(6)(C)(ii) of the Act**.

Falsely claiming to be a citizen could result in a civil penalty under section 274C of the Act or in a criminal conviction for having violated 18 U.S.C. 911 (Falsely and willfully representing to be a U.S. citizen).

The ground of inadmissibility can be sustained simply by proving that the alien knowingly made the false claim in order to obtain the benefit or for the purpose of the benefit.

It is not necessary to establish that the alien is the subject of a civil penalty under section 274C of the Act, nor that the alien was convicted of a violation of 18 U.S.C. 911.

The exact language of 8 U.S.C. 911, Citizen of the United States, states, “Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.”

(v) **Civil Penalty or Conviction Sufficient to Establish Inadmissibility under Section 212(a)(6)(C)(ii) of the Act**.
If the alien has been convicted of violating 18 U.S.C. 911 or has been found liable to a civil penalty under section 274C of the Act for having falsely claimed to be a U.S. citizen, the conviction record or the section 274C order is sufficient to establish that the alien is inadmissible under section 212(a)(6)(C)(ii) of the Act.

Note that a civil penalty under section 274C of the Act may be based on fraudulent conduct other than a false claim to U.S. citizenship.

If the alien has been found liable to a civil penalty under section 274C of the Act for document fraud that does not relate to a false claim of U.S. citizenship – for example, on the basis of the use of a fraudulent visa -- the 274C order is not indicative of inadmissibility under section 212(a)(6)(C)(ii) of the Act.

In order to establish inadmissibility under section 212(a)(6)(C)(ii) of the Act, the penalty under section 274C of the Act must specifically relate to a false claim of U.S. citizenship.

(vi) False Claim to Citizenship prior to September 30, 1996.

A false claim to citizenship before September 30, 1996, could make the alien inadmissible under section 212(a)(6)(C)(i) of the Act relating to fraud or willful misrepresentation of a material fact in certain cases. These individuals may have the possibility of a waiver under section 212(i) of the Act.

(vii) Considerations When Determining False Claim to Citizenship on or after September 30, 1996.

In considering a case involving a false claim to U.S. citizenship, the adjudicator should determine: Whether the false claim to U.S. citizenship was made on or after September 30, 1996.

If it was made before, the alien is not inadmissible under section 212(a)(6)(C)(ii) of the Act but may be inadmissible under section 212(a)(6)(C)(i) of the Act. In this case, the applicant may also possibly be eligible for a waiver.

If the claim was made on or after September 30, 1996, the adjudicator should determine:

Whether the false claim was made to procure any immigration benefit under the Act or any other type of benefit under federal or state law. If this is the case, the alien should be found inadmissible under section 212(a)(6)(C)(ii) of the Act. There is no waiver available, except for the exceptions or waivers referred to in section 40.6.1(b) or 40.6.1(c) of this AFM chapter.

(viii) Timely Retraction.

Under the doctrine of timely retraction or recantation, an applicant can use as a defense to section 212(a)(6)(C)(ii) of the Act that he or she timely retracted (recanted) the statement. The effect of a timely retraction is that the misrepresentation is eliminated. See Matter of R-R , 3 I&N Dec. 823 (BIA 1949); Matter of M , 9 I&N Dec. 118 (BIA 1960) ( also cited by Matter of R-S-J , 22 I&N Dec. 863 (BIA 1999)).

For the retraction to be effective, it has to be voluntary and without delay (timely). See Matter of R-R , 3 I&N Dec. 823 (BIA 1949); see Matter of Namio , 14 I&N Dec. 412 (BIA 1973); referring
to Matter of M-, 9 I&N Dec. 118 (BIA 1960) and Llanos-Senarillos v. United States, 177 F.2d 164 (9th Cir. 1949) (If the witness withdraws the false testimony of his own volition and without delay, and during the same hearing or examination under oath, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn).

The alien must correct his or her testimony voluntarily prior to being exposed by the adjudicator or government official. See id. Admitting to the false claim of U.S. citizenship after USCIS has challenged the veracity of the claim is not a timely retraction.

The BIA also held that an alien’s recantation of the false testimony about one (1) year later, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was neither voluntary nor timely. See Matter of Namio, 14 I&N Dec. 412 (BIA 1973).

A retraction or recantation is only timely if it is made in the same proceeding in which the person gave false testimony. Llanos-Senarillos, 177 F2d at 165.

(D) Exceptions and Waivers.

(i) Exceptions.

(A) Applicants who reasonably believed themselves to be U.S. citizens because of their US citizen parents.

With the passage of section 201(b) of the Child Citizenship Act of 2000, PL 106-395 (Oct. 30, 2000) (CCA), Congress provided a statutory exception in section 212(a)(6)(C)(ii)(II) of the Act for an individual who satisfies the following requirements:

- Each parent of the alien (or each adoptive parent in case of an adopted alien) is or was a U.S. citizen, whether by birth or naturalization; and

- The alien permanently resided in the United States prior to attaining the age of sixteen (16); and

- The alien reasonably believed at the time of the representation that he or she was a U.S. citizen.

Note: The CCA provision applies retroactively, as if it had been included in the original IIRIRA version of section 212(a)(6)(C)(ii) of the Act, that is, September 30, 1996.

Note: As a matter of policy, USCIS has determined that the applicant’s parent had to be a U.S. citizen at the time of the illegal voting or false claim to U.S. citizenship in order to meet the first requirement of this exception.

(B) Application for Adjustment of Status by Special Immigrant under Section 245(h) of the Act.

Section 212(a)(6)(C)(ii) of the Act does not apply to special immigrants described in section 101(a)(27)(J) of the Act seeking adjustment of status under section 245(h) of the Act.
(ii) No Waivers Available for Immigrants. There is no waiver available for immigrants under section 212(a)(6)(C)(ii) of the Act, other than the ones described in section 40.6.1(b) or 40.6.1(c) of this AFM chapter. In particular, a waiver under section 212(i) of the Act is not available because section 212(i) of the Act, by its express words, waives only inadmissibility under section 212(a)(6)(C)(i) of the Act, and not inadmissibility under section 212(a)(6)(C)(ii) of the Act.

(iii) Waivers for Nonimmigrants. Nonimmigrants may seek advance permission to enter the United States despite inadmissibility pursuant to section 212(d)(3)(A) of the Act, as applicable.

(E) Memoranda and Other Pertinent Materials.


- May 7, 2002, Field Operations memorandum - Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering To Vote.

- Department of State’s 9 Foreign Affairs Manual (FAM) 40.63 Misrepresentation; Falsely Claiming Citizenship, and 40.63 Notes.