FRAUD OR WILLFUL MISREPRESENTATION

An alien is inadmissible if he or she commits willful misrepresentation or fraud in attempting to obtain, or in obtaining, a visa, other documentation, admission into the United States, or other benefit.¹ "Other documentation" refers to documents required at the time of the alien’s admission to the United States, such as re-entry permits, border crossing cards, U.S. Coast Guard identity cards, or U.S. passports. “Other benefit” is understood to include, among other things, adjustment of status applications, all visa petitions, requests for extension of stay, change of nonimmigrant classification, requests for employment authorization, and voluntary departure requests.² All such misrepresentations that are material create a permanent bar to admission. The BIA has held that “fraud” and “misrepresentation” are the same, except that in cases of “willful misrepresentation” it is unnecessary to prove that the “person to whom the misrepresentation was made was motivated to action because of the misrepresentation.”³

Under this ground, only misrepresentations to U.S. officials (generally a consular officer or a USCIS officer) are the basis of inadmissibility. Therefore, buying documents from a private individual does not make an alien inadmissible under the ground of procuring a document by fraud or misrepresentation, nor does using false documents to procure an entry into the United States make an alien inadmissible, unless they are presented to a U.S. official.⁴ However, aliens are inadmissible if they are subject to a final order under the civil document fraud provisions of INA §274C.⁵ Presenting false documents to an airline or transportation company constitutes a violation of §274C.⁶

The visa fraud inadmissibility ground does not apply if the statements made by the alien were not untrue at the time they were uttered. Thus, the alien’s activities after entering the United States do not necessarily indicate that the alien misrepresented his or her intentions at the time of applying for a visa or for admission. For example, if an alien applies for adjustment of status to permanent residence after entering the United States with a tourist visa, this does not mean necessarily that the alien misrepresented his or her intentions at the time he or she obtained the visa. A person may have valid reasons for changing his or her plans after admission.

When aliens actively seek unauthorized employment or otherwise violate the terms of a nonimmigrant visa within 30 days of the date their visa is issued or they are admitted to the United States, DOS places the burden on the alien to rebut a presumption that the initial admission was based on a misrepresentation. If the conduct occurred more than 30 but less than 60 days after the person’s admission to the United States, no presumption applies, but a consular officer still may conclude that the alien misrepresented his or her original intent.⁷ USCIS officers may look at the

¹ INA §212(a)(6)(C)(i).
² AFM § 40.6.2(c)(2)(A)(v)
⁵ INA §212(a)(6)(F)(i).
⁶ INA §274C(a)(6).
⁷ DOS Cable, 91 State 187392 (June 7, 1991), reprinted in 68 Interpreter Releases 1569 (Nov. 4, 1991); 9 FAM 40.63 N4.7.
30/60 day rule for guidance in determining whether or not an applicant obtained admission through misrepresentation. The 30/60 day rule is not conclusive as to misrepresentation, however.\footnote{AFM § 40.6.2(c)(1)(B)(viii).}

For the misrepresentation to be willful, intent to deceive is not necessary.\footnote{Matter of Kai Hing Hui, 15 I&N Dec. 288 (BIA 1975).} It is sufficient that the false statement be made in a deliberate and voluntary manner or that the applicant has knowledge of the falsity of the documentation he or she is employing.\footnote{Falaja v. Gonzales, 418 F.3d 889 (8th Cir. 2005).}

A timely retraction of a misrepresentation can prevent it from being considered a basis for inadmissibility.\footnote{Matter of M, 9 I&N Dec. 118 (BIA 1960).} In general, a retraction should be made at the first opportunity.\footnote{AFM § 40.6.2(c)(1)(B)(vii).}

Only misrepresentations of material facts may make a person inadmissible. In this context, a misrepresentation can be fairly characterized as material: (1) if the alien was inadmissible on the true facts, or (2) if the misrepresentation tended to shut off a line of inquiry that was relevant to the alien’s eligibility and that line of inquiry might have resulted in a proper determination that the alien not be admitted.\footnote{Kungys v. U.S., 485 U.S. 759 (1988).}

When the true facts would not have made the alien inadmissible, but it has been established that the misrepresentation tended to cut off a relevant line of inquiry, the alien has the burden of persuasion and production to show that the inquiry would not have resulted in a proper determination that he or she was inadmissible.\footnote{Matter of S & B C, 9 I&N Dec. 436 (BIA 1961).} This burden is higher than just showing that the alien is eligible for a visa, because passage of time may have deprived the government of the possibility of making an adequate investigation. Consequently, when available facts indicate the existence of a substantial question as to the alien’s eligibility for admission to the United States, a holding that the alien’s misrepresentation was material may be warranted. On the contrary, if the record does not contain indications of inadmissibility, the misrepresentation will not be considered material. This holds even when applicants misrepresented their identity, if nothing in the record suggests that by disclosing their true name and identity they would have revealed an inadmissibility ground.

Misrepresentations on behalf of others do not make an applicant inadmissible under this section. They may, however, lead to inadmissibility due to alien smuggling under INA § 212(a)(6)(E).\footnote{AFM § 40.6.2(c)(1)(B)(v).}

Fraud or willful misrepresentation in securing entry into the United States may defeat the ability to adjust status under INA §245(a).

**False Claim of U.S. Citizenship**

Any alien who, on or after September 30, 1996, falsely represents himself or herself to be a citizen of the United States for any purpose or benefit under the INA or any other federal or state law is inadmissible.\footnote{INA §212(a)(6)(C)(ii).} This could include false claims of citizenship to a USCIS agent for
purposes of gaining admission to the United States, as well as false claims of citizenship to a state employee for purposes of obtaining a driver’s license or public benefit, or voting.

An exception for certain persons was included in section 201(b)(2) of the Child Citizenship Act of 2000.\(^\text{17}\) Under that exception, the inadmissibility ground does not apply if each natural or adoptive parent of the alien is or was a U.S. citizen, by birth or naturalization, the alien permanently resided in the United States prior to reaching age 16, and the alien reasonably believed at the time of making the representation that he or she was a citizen.\(^\text{18}\) The exception applies to representations made on or after September 30, 1996.\(^\text{19}\)

Two circuit courts of appeal have determined that an individual who marks the box “citizen or national of the United States” on a Form I-9 for the purpose of obtaining employment as a U.S. citizen is inadmissible for having made a false claim to U.S. citizenship.\(^\text{20}\) Timely retraction of a false claim to U.S. citizenship may be used as a defense to this section. As with timely retractions of general fraud and misrepresentation, the retraction must be both voluntary and without delay in order to be effective.\(^\text{21}\)

**Miscellaneous Grounds**

The “miscellaneous” inadmissibility grounds concern “unlawful voters,” practicing polygamists, guardians required to accompany an inadmissible person, former citizens who renounced their citizenship in order to avoid taxation, and international child abductors.\(^\text{22}\) Unlawful voters are individuals who voted in a U.S. election in violation of federal, state, or local law.\(^\text{23}\) However, such individuals will not be considered inadmissible if their natural parents are or were citizens of the United States.\(^\text{24}\)

\(^{18}\) INA §212(a)(6)(C)(ii)(II).
\(^{20}\) Rodriguez v. Mukasey, 519 F.3d 773 (8th Cir. 2008); Kechkar v. Gonzales, 500 F.3d 1080 (10th Cir. 2007). See also Theodros v. Gonzales, 490 F.3d 396 (5th Cir. 2007) (false claim to U.S. citizenship in order to gain private sector employment).
\(^{21}\) AFM § 40.6.2(c)(2)(C)(viii).
\(^{22}\) INA §212(a)(10).
\(^{23}\) INA §212(a)(10)(D).
\(^{24}\) 22 CFR §40.104.