



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: publicengagementfeedback@uscis.dhs.gov

**Re: USCIS Policy Manual, Volume 8: Admissibility, Part K
False Claim to U.S. Citizenship**

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the new guidance on false claims to U.S. citizenship found in Volume 8 of the USCIS Policy Manual.

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Policy Manual and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

General Comments

AILA thanks USCIS for issuing guidance on analyzing potential false claims to U.S. citizenship. INA §212(a)(6)(C)(ii) “does not render inadmissible every alien who makes a false claim to United States citizenship,”¹ and it is vital for adjudicators and stakeholders to have clarity on the way in which DHS interprets these issues. However, we are concerned that the guidance fails to account for some of the legal subtleties that are involved in evaluating false claims to citizenship and which are critical given the drastic consequences of a §212(a)(6)(C)(ii) finding. As written, the Policy Manual leaves room for situations where individual circumstances may not be properly evaluated within the context of settled law and opens the door for officers to require the applicant to present evidence to rebut a false claim finding, when there was no objective evidence to satisfy the statutory requirements to begin with. With this in mind, we offer the

¹ *Castro v. Holder*, 671 F.3d 356 (3d Cir. 2012).

following suggestions to help ensure that USCIS does not unintentionally undermine efforts by DOS and DHS to bring clarity to this area of law.²

Burden of Proof

Though the applicant has the ultimate burden of proving that he or she is admissible, the Policy Manual must contain stronger language to make it clear that a mere allegation by USCIS is not enough to shift the burden to the applicant. The Policy Manual recognizes that if there is no suggestion of a false claim, the applicant does not have to come forward with proof of admissibility,³ and that there must be sufficient evidence that would lead a reasonable person to find that the foreign national falsely represented him or herself to be a U.S. citizen.⁴ However, it also contains language that may lead officers to incorrectly believe that they do not have to establish each element of the false claim.⁵ For example, the guidance says that the “burden never shifts to the government at any time during the adjudication process”⁶ and that “[a]s long as there is some evidence in the record that reasonably calls the foreign national’s admissibility into question, the foreign national has the burden to prove the foreign national is not inadmissible.”⁷ This confusing language could result in officers loosely accusing applicants of making a false claim to U.S. citizenship, even when they do not have evidence that establishes the legal elements of such a claim.

False Claims by Minors

The Policy Manual acknowledges that an officer cannot make a finding of inadmissibility for a false claim to U.S. citizenship if the applicant lacks the capacity to knowingly make a false claim, and notes that this situation would commonly arise in the case of an applicant who made the potential claim while he or she was under the age of 18.⁸ However, the manual goes on to state that the fact that the applicant was under age 18 is insufficient by itself to establish a lack of capacity and that the officer must determine whether he or she “had the maturity and the judgment to understand and appreciate the nature and consequences of . . . her actions at the time the false claim was made.”⁹

The fact that a foreign national was under 18 at the time a false claim was made should by itself establish a lack of capacity. The age of legal capacity is generally 18 years old. The United States Supreme Court has recognized that juveniles under the age of 18 have “diminished

² The Department of State released guidance on false claims to U.S. citizenship in March 2016. *See* 9 FAM 302.9-5.

³ *See Proposed Policy Manual, Volume 8 - Admissibility, Part K – False Claim to U.S. Citizenship, Chapter 3 - Adjudication, B. Burden of Proof, 1. No Evidence of False Misrepresentation.*

⁴ *Id.* at A. Evidence.

⁵ In the removal context, DHS has the “burden of production” to show that the legal elements of an inadmissibility ground are met. *Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002); *Matter of Velasquez*, 25 I. & N. Dec. 680, 687 (BIA 2012)

⁶ *Id.* at B. Burden of Proof.

⁷ *Id.* at Chapter 2 Determining False Claim to U.S. Citizenship, D. Knowledge that Claim was False, 2. Knowledge of False Claim

⁸ *Id.* at 4. Lack of Capacity.

⁹ *Id.*

culpability” and that “it would be misguided to equate the failings of a minor to those of an adult.”¹⁰ Therefore, children accused of making a false claim to U.S. citizenship prior to attaining the age of 18 should not be subject to the extreme consequences of this ground of inadmissibility.

False Claims at Time of Admission

The Policy Manual claims that a foreign national who successfully presents himself for admission as a U.S. citizen has not been “admitted” and is considered to have entered without inspection.¹¹ However, the Policy Manual fails to recognize consistent precedent case law from the Board of Immigration Appeals (BIA), dating back to 1946, that recognizes that an individual who asserts a claim to citizenship upon admission, with an honest belief that the assertion of citizenship is true, shall not be held to have entered without inspection even when it later is determined that the assertion was not correct.

The first reported case on this subject, *Matter of F--*, 9 I&N Dec. 54 (Asst. Comm. 1960), reviewed prior, unreported cases, and found that “it has been held that where a person presented himself to an immigrant inspector and stated that he was a citizen of the United States, honestly believing this to be the truth, that person did not enter without inspection.”¹² The BIA affirmed this view six years later, in *Matter of Wong*, 11 I&N Dec. 712 (B.I.A. 1966):

We have carefully considered the special inquiry officer’s statements as to why he believed that *Matter of Jun Tick Woo* had been incorrectly decided but we are not persuaded by the reasons given by him. As we have indicated above, it has been the position of the Board since 1946 that an alien who honestly believed himself to be a citizen and appeared before an immigrant inspector can properly be considered to have been inspected within the meaning of the immigration laws. If he knowingly and willfully falsely claimed United States citizenship, he was not inspected. We can perceive no valid reason for now abandoning this position. Accordingly, we rule that this respondent must be considered to have been “inspected” within the meaning of section 245 provided that she honestly believed herself to be a United States citizen and did not knowingly or willfully make a false claim to citizenship at the time of entry.¹³

¹⁰ *Roper v. Simmons*, 543 U.S. 551, 570 (2005). “The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’ *Thompson v. Oklahoma*, 487 U.S. 815, 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. *See Stanford v. Kentucky*, 492 U.S. 361, 395 (Brennan, J., dissenting).” *Roper*, 543 U.S. at 570.

¹¹ *See Proposed Policy Manual, Volume 8 - Admissibility, Part K – False Claim to U.S. Citizenship, Chapter 2 Determining False Claim to U.S. Citizenship, E. Purpose or Benefit under INA or Any State or Federal Law, 5. For Purpose of Coming into the United States.*

¹² *Matter of F--*, 9 I&N Dec. at 56.

¹³ 11 I&N Dec. 713.

USCIS should add references to this case law in Chapter 2, Section E.5. and explain that an individual who asserts a claim to citizenship upon admission, with an honest belief that it is true, shall not be deemed to have entered without inspection.

Timely Retraction

The Policy Manual acknowledges that a foreign national is not inadmissible if he or she made a timely retraction of the fraud or misrepresentation.¹⁴ However, the guidance should also acknowledge that there are numerous situations in which a prior false claim allegation is subject to review by DOS or DHS. For example, consular officers need not rely on a false claim to citizenship finding made by a DHS officer at a port of entry unless there was a formal finding of inadmissibility under INA §212(a)(6)(C)(i).¹⁵ Information such as this could help illustrate to USCIS adjudicators that they should be looking at the underlying facts and evidence in the case to determine whether a false claim was made in the first place, and whether the applicant timely retracted.

The Policy Manual also states that an applicant must correct the representation “before the conclusion of the proceedings.”¹⁶ USCIS should note that the meaning of the term “proceedings” can differ among CBP, DOS, and USCIS. For example, CBP may allow a timely retraction before or after being placed in secondary inspection. DOS typically considers a proceeding to be an interview, even when an applicant has mailed in their application. As a result, DOS states in 9 FAM 302.9-4(B)(3)(f) that the applicant is to be warned of the consequences of a false claim to citizenship after the officer becomes aware that the applicant may have made a misrepresentation that might be material.

Conclusion

Thank you for providing this opportunity to comment on the newly published sections of the USCIS Policy Manual. We look forward to a continuing dialogue on this and related matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

¹⁴ See *Proposed Policy Manual, Volume 8 - Admissibility, Part K – False Claim to U.S. Citizenship, Chapter 2 Determining False Claim to U.S. Citizenship, F. Timely Retraction*. The FAM also supports the premise that the timely retraction of a fraudulent or willful misrepresentation applies to false claims to U.S. citizenship. See 9 FAM 302.9-4(B)(3).

¹⁵ See 9 FAM 302.9-4(B)(6). In addition, the withdrawal of an application for admission as permitted by DHS at a port of entry is not sufficient by itself to establish a INA §212(a)(6)(C)(i) finding of inadmissibility.

¹⁶ See *Proposed Policy Manual, Volume 8 - Admissibility, Part K – False Claim to U.S. Citizenship, Chapter 2 Determining False Claim to U.S. Citizenship, F. Timely Retraction*.