U.S. Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQ 70/21.1
AD07-18

Interoffice Memorandum

To: Field Leadership

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum & International Operations Directorate

Donald Neufeld /s/
Associate Director
Domestic Operations Directorate

Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: March 3, 2009

Re: Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators

Revisions to the Adjudicator's Field Manual (*AFM*) to Include a New Chapter 40.6 (*AFM* Update AD07-18)

1. Purpose

This memorandum provides guidance, through the creation of a new chapter 40.6 of the Adjudicator's Field Manual (*AFM*), regarding the interpretation of the grounds of inadmissibility contained in section 212(a)(6) of the Immigration and Nationality Act (the Act), addressing illegal entrants and immigration violators.

2. Background

Section 212(a)(6) of the Act lists various grounds of inadmissibility. Aliens are inadmissible under section 212(a)(6) of the Act as follows:

- Section 212(a)(6)(A) of the Act – Aliens who are present without admission or parole or who arrived in the United States at a place other than an open port-of-entry;
- Section 212(a)(6)(B) of the Act – Failure to attend a removal proceeding;
- Section 212(a)(6)(C) of the Act – Fraud or misrepresentation; falsely claiming citizenship;
- Section 212(a)(6)(D) of the Act – Stowaways;
- Section 212(a)(6)(E) of the Act – Smugglers;
- Section 212(a)(6)(F) of the Act – Subject of civil penalty;
- Section 212(a)(6)(G) of the Act – Student visa abusers.

Over the past years, USCIS has provided field guidance through several memoranda assisting with the interpretation of some of these grounds of inadmissibility. This memorandum consolidates these field guidance memoranda into new *AFM* chapter 40.6 and provides additional guidance.

To the extent that any provision of new *AFM* chapter 40.6 may conflict with any prior policy memorandum, this *AFM* chapter 40.6 is controlling. Prior policy memoranda shall be deemed to be rescinded or modified as necessary to be consistent with chapter 40.6.

3. *AFM* Update

Accordingly, the *AFM* is updated as follows:

40.6 Section 212(a)(6) Of The Act – Illegal Entrants and Other Immigration Violators

40.6.1 Introduction and Overview

(a) **General**. Any alien who is subject to one or more of the grounds of inadmissibility under section 212(a)(6) of the Act is ineligible to receive a visa or to be admitted to the United States.

Section 212(a)(6) of the Act covers the following grounds of inadmissibility:

- Section 212(a)(6)(A) of the Act – Aliens present without admission or parole
- Section 212(a)(6)(B) of the Act – Failure to attend removal proceeding
- Section 212(a)(6)(C) of the Act – Misrepresentation
- Section 212(a)(6)(D) of the Act – Stowaways
- Section 212(a)(6)(E) of the Act – Smugglers
- Section 212(a)(6)(F) of the Act – Subject of civil penalty
- Section 212(a)(6)(G) of the Act – Student visa abusers

The grounds of inadmissibility may apply when determining eligibility for benefits such as adjustment of status to lawful permanent resident status, adjustment to temporary resident status, change of nonimmigrant status, extension of nonimmigrant stay, or when applying for an immigrant or nonimmigrant visa abroad with the U.S. Department of State. Inadmissibility under section 212(a)(6) of the Act may also impact the exercise of discretion for non-status conferring benefits, such as parole under section 212(d)(5) of the Act.

(b) **Inapplicability of Section 212(a)(6) of the Act to Registry Applicants under Section 249 of the Act (Except Section 212(a)(6)(E) of the Act)**. Inadmissibility under section 212(a)(6) of the Act (other than section 212(a)(6)(E) of the Act) does not make an alien ineligible for Registry under section 249 of the Act. No separate waiver is required for the alien to apply for and obtain Registry because the statute itself makes inadmissibility under section 212(a)(6) of the Act irrelevant to the alien's eligibility. Note, however, that an alien who is inadmissible under section 212(a)(6)(E) of the Act (relating to alien smugglers) is ineligible for Registry.

(c) **Overview of Available Waivers**
(For a more detailed analysis of available waivers for a particular ground of inadmissibility, the adjudicator should refer to section 40.6.2 of this *AFM* chapter.)

(1) Nonimmigrants in General. Section 212(d)(3) of the Act provides broad discretion to admit aliens as nonimmigrants who are inadmissible under most provisions of section 212(a) of the Act, including under section 212(a)(6) of the Act. As a practical matter, relief under section 212(d)(3) of the Act generally would not be of any benefit to an alien, who is inadmissible under section 212(a)(6)(A)(i) of the Act. See *AFM* chapter 40.6.2(a).

Note: Depending on the particular nonimmigrant category, individuals inadmissible under section 212(a) of the Act, including section 212(a)(6) of the Act, may obtain a waiver of inadmissibility under additional provisions of section 212 of the Act. For example, S nonimmigrant applicants may seek a waiver under section 212(d)(1) or section 212(d)(3) of the Act. If such an individual applies for adjustment of status after having been granted a waiver under section 212(d)(1) or (3) of the Act, as outlined in section 245(j) of the Act and 8 CFR 245.11, the alien does not need to apply for a waiver again. Please check the particular nonimmigrant category in 8 CFR 214 to determine additional waiver provisions.

(2) Immigrants. Please *see* chapter 40.6.2 of the *AFM* chapter that discusses the individual grounds of inadmissibility under section 212(a)(6) of the Act, and waivers that may be available to immigrants who are inadmissible under that section.

(3) Asylees and Refugees Seeking Adjustment of Status. Section 212(a)(6) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. They may apply for a waiver by filing Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, however, an adjudicator has discretion to grant the waiver without requiring the filing of Form I-602, as specified at *AFM* chapter 41.6(b)(1).

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who approved the waiver, a waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* chapter 23.6 (Asylee and Refugee Adjustment).

(4) Continued Availability of Section 212(c) of the Act for Certain Aliens. Former section 212(c) of the Act provided broad discretion to waive most grounds of inadmissibility for aliens who had already been lawfully admitted for permanent residence, and who had been domiciled in the United States for at least seven (7) years, but who had become subject to removal. Congress repealed this provision, and the repeal took effect on April 1, 1997. In *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), however, the Supreme Court held that this repeal did not preclude certain aliens who, before April 1, 1997, had become subject to removal based on certain criminal convictions, from applying for relief under section 212(c) of the Act. Relief under section 212(c) of the Act is not available to any alien who incurred inadmissibility under any provision of section 212(a)(6) of the Act, if the conduct that makes the alien inadmissible occurred on or after April 1, 1997.

An adjudicator may encounter a case in which an alien applies for relief under former section 212(c) (Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile) to obtain a waiver for conduct occurring before April 1, 1997, that renders the alien inadmissible under some provision of section 212(a)(6) of the Act. Unless the alien is also inadmissible on the basis of a criminal conviction that was entered before April 1, 1997, it is not clear whether the alien can claim the benefit of former section 212(c) of the Act. The adjudicator should consult with the appropriate regional or service center counsel concerning the availability of relief under former section 212(c) of the Act in these cases.

(5) Legalization Applicants under Section 245A, Legalization Applicants under Section 1104 of the Legal Immigration Family Equity (LIFE) Act, PL 106-553, and the LIFE Act Amendments, PL 106-554 (December 21, 2000) (Including CSS/LULAC, Zambrano Class Settlements) and subsequent Class Settlements relating to Section 245A. Section 212(a)(6) grounds of inadmissibility may be waived by filing Form I-690, Application for Waiver of Grounds of Inadmissibility under Sections 245A or 210 of the Immigration and Nationality Act. The waiver may be granted in the discretion of the Secretary of

Homeland Security (Secretary), if granting the waiver will serve humanitarian purposes, or assure family unity, or if the waiver is in the public interest. *See* 8 CFR 245a.2(k)(2), 8 CFR 245a.3(g)(2), and 8 CFR 245a.18(c)..

(6) Special Agricultural Worker (SAW) Applicants. Section 212(a)(6) grounds of inadmissibility may be waived pursuant to section 210(c)(2)(B)(i) of the Act and 8 CFR 210.3(e), by filing Form I-690, Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act. *See* 8 CFR 210.3(e)(2). The waiver may be granted in the discretion of the Secretary, if granting the waiver will serve humanitarian purposes, assure family unity, or if granting the waiver is in the public interest. *See id.*

(7) Applicants for Temporary Protected Status (TPS) Pursuant to Section 244 of the Act. TPS applicants may apply for a waiver of inadmissibility under section 212(a)(6) of the Act. The waiver may be granted in the exercise of discretion, if the Secretary of Homeland Security determines that granting the waiver will serve humanitarian purposes, or assure family unity, or if granting the waiver would be in the public interest. The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* 8 CFR 244.3(b).

While section 244(c)(2)(A)(ii) of the Act indicates that the Secretary or Attorney General (AG) may waive certain sections of 212(a) of the Act, section 244(a)(5) of the Act indicates that an alien cannot be denied TPS on account of his or her immigration status. Therefore, USCIS deems section 212(a)(6)(A) of the Act to be inapplicable to TPS applicants; if an individual is inadmissible under section 212(a)(6)(A) of the Act, he or she is not required to file a waiver application.

40.6.2 Individual Grounds of Inadmissibility Under Section 212(a)(6) of the Act

(a) Section 212(a)(6)(A) of the Act: Aliens Present Without Admission or Parole

(1) General. Section 212(a)(6)(A)(i) of the Act makes inadmissible an alien who is present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than designated by the Secretary of Homeland Security. Therefore, the alien can trigger section 212(a)(6)(A)(i) of the Act if:

- The alien is present without being admitted or paroled, regardless of how the alien actually arrived in the United States (first part of section 212(a)(6)(A)(i) of the Act);

OR

- The alien arrived in the United States at any time or place other than through a designated port of entry that was open at the time of the alien's arrival (second part of section 212(a)(6)(A)(i) of the Act).

Depending on the specific facts of the case, an alien may be inadmissible under only one part of section 212(a)(6)(A)(i) of the Act or under both parts.

Example: Alien A arrives in the United States at the port of entry at Sweet Grass, Montana. He is denied admission and detained. He escapes from detention, however, and makes his way into the interior of the United States. He is *not* inadmissible under the second part of section 212(a)(6)(A)(i) of the Act, since he arrived through an open port of entry. However, he is inadmissible under the first part of section 212(a)(6)(A)(i) of the Act because he is present in the United States without having been admitted or paroled.

Example: Alien B arrives in the United States by crossing the border undetected 25 miles east of the port of entry at Sweet Grass, Montana. Alien B is inadmissible under *both* parts of section 212(a)(6)(A)(i) of the Act, since Alien B arrived other than at a port of entry and is present in the United States without having been admitted or paroled.

Example: Alien C arrives in the United States by crossing the border undetected 25 miles east of the port of entry at Sweet Grass, Montana. Some time after the alien's arrival, a Customs and Border Protection (CBP) officer takes Alien C into custody. Because of the specific facts of this case, DHS determines as a matter of discretion that urgent humanitarian reasons justify Alien C's parole into the United States under section 212(d)(5)(A) of the Act. Once paroled, Alien C is *no longer* inadmissible under the *first* part of section 212(a)(6)(A)(i) of the Act because the alien has been paroled under section 212(d)(5)(A) of the Act. However, Alien C remains inadmissible under the *second* part of section 212(a)(6)(A)(i) of the Act since he or she had arrived other than at a port of entry.

Example: Alien D arrives in the United States by crossing the border undetected 25 miles east of the port of entry at Sweet Grass, Montana. Some time after his or her arrival, a CBP officer takes custody of Alien C and places him/her in removal proceedings. DHS determines that Alien D may be released from custody on posting a bond pursuant to section 236 of the Act (conditional parole). Alien D seeks a bond hearing before the immigration judge, who reduces the amount of the required bond. Alien D remains inadmissible under *both prongs* of section 212(a)(6)(A)(i) of the Act. Release under conditional parole pursuant to section 236 of the Act *is not* parole. Please *see* (2)(ii) below for an explanation why conditional parole under section 236 of the Act is not equivalent to a parole under section 212(d)(5) of the Act. Thus, even after Alien D's release, it remains

the case that Alien D arrived at a place other than an open port of entry and that Alien D has not been admitted or paroled.

(2) Definitions

(i) Admission. Section 101(a)(13)(A) of the Act defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." The provision also makes clear that "parole" is not admission.

Before April 1, 1997, an alien who made an "entry without inspection" into the United States was a deportable alien under former section 241(a)(1)(B) of the Act. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (Division C of PL 104-208 (September 30, 1996)) amended section 101(a)(13)(A) of the Act by removing the definition of the term "entry" and replacing it with a definition of the terms "admission" and "admitted." IIRIRA provided, in section 235(a) of the Act, that an alien who is present without admission is deemed an applicant for admission, and thus is subject to removal as an inadmissible, not a deportable, alien. IIRIRA also added section 212(a)(6)(A)(i) of the Act, which provides the relevant inadmissibility ground.

(ii) Parole. Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be in the United States. By statutory definition, parole is not admission. *See* section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

Parole may be granted for "urgent humanitarian reasons" (humanitarian parole) or for "significant public benefit." Deferred inspection, 8 CFR 235.2, and advance parole, 8 CFR 212.5(f), are types of parole, as are individual port of entry paroles and paroles authorized while the person is overseas. For purposes of section 212(a)(6)(A)(i) of the Act, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5)(A) of the Act, see *AFM* chapter 54.

> Note: Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(6)(A)(i) of the Act. In an April 1999 Memorandum, and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), legacy INS suggested that a release pursuant to section 236 of the Act (conditional parole) could also be considered parole for purposes of adjustment of status under the Cuban Adjustment Act (CAA).

The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. *See Matter of Ortega-Cervantes,* 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act is not parole for purposes of adjustment of status. *See* Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1120 (9th Cir. 2007).

DHS, moreover, no longer adheres to the 1998 INS opinion's indication that release under section 236 of the Act is the same as parole under section 212(d)(5)(A) of the Act. DHS/Office of General Counsel (OGC) reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, DHS/OGC issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5)(A) of the Act. *See* September 28, 2007, Office of the General Counsel of the Department of Homeland Security, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act.* Adjudicators, therefore, may not find that release under section 236 of the Act qualifies as parole under section 212(d)(5) of the Act.

(3) Applicability

(i) After April 1, 1997. The effective date for section 212(a)(6)(A) of the Act was April 1, 1997. Section 212(a)(6)(A) of the Act does not apply to applications for admission or adjustment of status adjudicated by an immigration judge in deportation or exclusion proceedings commenced prior to April 1, 1997.

(ii) Only Applies to Individuals Present in the United States. Section 212(a)(6)(A)(i) of the Act only applies to individuals who are present in the United States in violation of section 212(a)(6)(A)(i) of the Act. Inadmissibility does not continue after the alien has departed the United States. Therefore, section 212(a)(6)(A)(i) of the Act does not apply to individuals who apply for a visa; however, these individuals may be inadmissible under sections 212(a)(9)(B) or (C)(i)(I) of the Act.

Note: If an alien is granted TPS, he or she is in lawful status for adjustment of status purposes pursuant to section 244(f) of the Act. However, despite section 244(f) of the Act, the requirements of section 245(a) of the Act still apply at the time of adjustment of status. *See* Virtue, General Counsel Opinion, No. 91-27, March 4, 1991. Section 244(f)(4) of the Act does not make lawful the alien's unlawful entry or presence in the United States prior to granting TPS. *See id.* For example, an alien who is granted TPS after having entered without being admitted or paroled, will be inadmissible pursuant to section 212(a)(6)(A)(i) of the Act at the time of adjustment of status despite the wording of section 244(f) of the Act.

(4) Exemptions and Waivers

(i) Exemptions. In addition to the special waivers mentioned in section 1(b) or 1(c) of this *AFM* chapter, inadmissibility under section 212(a)(6)(A)(i) of the Act does not make an alien inadmissible for the following benefits (by virtue of the statutory provisions governing these benefits):

- Adjustment of status pursuant to section 245(i) of the Act;
- Adjustment of status under section 245(a) of the Act, if the applicant is an approved VAWA self-petitioner or the child(ren) of an approved VAWA self-petitioner (*see AFM* chapter 23.5(k));
- Adjustment of status pursuant to section 245(h) of the Act;
- Adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act (HRIFA);
- Adjustment of status under section 202(b) of the Nicaraguan Adjustment And Central American Relief Act (NACARA);
- Adjustment of status under section 249 of the Act (Registry);
- Family Unity under section 301 of the Immigration Act of 1990 (IMMACT);
- Legalization under section 245A, and CSS, LULAC or other section 245A Class Settlements;
- Change of status to V nonimmigrant status (section 214(q) of the Act and 8 CFR 214.15);
- Temporary Protected Status under the interpretation of section 244(a)(5) of the Act
- Asylum (Sections 208(a)(1) and (2) and 208(b)(2) of the Act; 8 CFR 208.13(c)).

(ii) Partial Exception for Adjustment Cases under the Cuban Adjustment Act of 1966. The fact that an alien arrived in the United States other than at an open port of entry, and that he or she is inadmissible under the second part of section 212(a)(6)(A)(i) of the Act, does not make the alien ineligible for adjustment of status under the Cuban Refugee Adjustment Act of 1966, PL 89-732 (Nov. 2, 1966)(CAA), as amended. *See* April 19, 1999, Commissioner's memorandum, *Eligibility for permanent residence under the Cuban Adjustment Act despite having arrived at a place other than a designated port of entry.* However, even though inadmissibility under the second part of section 212(a)(6)(A)(i) of the Act does not make the alien ineligible for adjustment of status under CAA, the alien must still establish that he or she was inspected and admitted or paroled into the United States (first part of section 212(a)(6)(A)(i) of the Act) in order to be eligible for adjustment under the CAA. *See id.*

> Example: A Cuban citizen or native entered the United States other than through an open port of entry, but then surrendered him or herself to the appropriate DHS authorities. The DHS paroled the alien into the United States under section 212(d)(5) of the Act, as evidenced by the Form I-94, Arrival/Departure Record.

Since the alien was paroled, the alien may now, after one (1) year of physical presence (including any physical presence that occurred before the grant of parole), apply for adjustment under the CAA. Although he or she is inadmissible for having arrived at a place other than a port of entry, this inadmissibility does not preclude the possibility of being granted the adjustment application.

Example: A Cuban citizen or native entered the United States other than through an open port of entry, but then surrendered him or herself to the appropriate DHS authorities. DHS released the alien on bond under section 236(a)(2) of the Act. Since the alien has *not* been paroled, the alien's release will not make the alien eligible to apply for adjustment under the CAA.

Example: A Cuban citizen or native entered the United States other than through an open port of entry. He or she voluntarily comes to a CBP, ICE, or USCIS office to ask about his or her case, and then leaves as freely as he or she came. The DHS office does not parole him, and no Form I-94 evidencing parole is issued. Since the DHS office did not actually parole the alien, his departure from the DHS office cannot be considered as having put the alien in a parole status. Because the alien was not paroled, the alien is not eligible to apply for adjustment under the CAA.

(iii) Waivers. There are no waivers available to applicants inadmissible under section 212(a)(6)(A)(i) of the Act other than the ones described above in section (1)(b) or (c) of this *AFM* chapter.

Section 212(d)(3) of the Act provides for the discretionary admission of nonimmigrants, who are inadmissible under various provisions of section 212(a) of the Act. The precise language of section 212(d)(3) of the Act does not include section 212(a)(6)(A)(i) of the Act as one of the grounds of inadmissibility for which relief is not available. In actual practice, however, section 212(d)(3) of the Act cannot cure inadmissibility under section 212(a)(6)(A)(i) of the Act. The basis of inadmissibility under the first part of section 212(a)(6)(A)(i) of the Act is that the alien was not inspected and admitted or paroled. Only the alien's admission or parole purges the inadmissibility. But if the alien returns to a port of entry and seeks admission or parole, the first prong of section 212(a)(6)(A)(i) of the Act would no longer be applicable, and there would be no need for relief under section 212(d)(3)(A) of the Act.

For similar reasons, relief under section 212(d)(3)(A) of the Act would not be effective for an alien, who is inadmissible under the second part of section 212(a)(6)(A)(i) of the Act. To obtain relief under section 212(d)(3)(A) of the Act, the alien must be seeking admission as a nonimmigrant. But the alien's return to a port of entry to seek admission would, itself, purge the alien's inadmissibility; if the alien returns to a port of entry and seeks admission or parole, the second prong of section 212(a)(6)(A)(i) of the Act would

no longer be applicable, and there would be no need for relief under section 212(d)(3)(A) of the Act.

(4) Citing References and Additional Materials

- March 31, 1997, Office of Programs memorandum - *Implementation of section 212(a)(6)(A) and 212(a)(9) grounds of inadmissibility*
- May 1, 1997, Office of Examinations memorandum – *Processing of section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications*
- April 19, 1999, Commissioner's memo – *Eligibility for permanent residence under the Cuban Adjustment Act despite having arrived at a place other than a designated port of entry*
- October 31, 2005, Domestic Operations memorandum – *Re: Waivers under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33)
- April 11, 2008, Domestic Operations memorandum – *Adjustment of status for VAWA self-petitioner who is present without inspection* (*AFM* Update 08-16)

(b) Section 212(a)(6)(B) of the Act: Failure to Attend Removal Proceeding

(1) General. Any alien who, without reasonable cause, fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability, and who seeks admission to the United States within five (5) years of such alien's subsequent departure or removal is inadmissible.

(2) Applicability

(i) Effective on or after April 1, 1997. Section 212(a)(6)(B) of the Act does not apply to an alien placed in deportation or exclusion proceedings before April 1, 1997, even if the alien's hearing was held after April 1, 1997. The provision applies *only* to individuals who are placed in removal proceedings beginning April 1, 1997.

An alien who failed to attend an exclusion proceeding under former section 236 of the Act, or a deportation proceeding under former section 242 of the Act is, therefore, not inadmissible under section 212(a)(6)(B) of the Act.

(ii) Only Applicable to Aliens Who Departed or Who Were Removed. Since the ground of inadmissibility applies to aliens, who '...seek admission to the United States within five (5) years of such alien's subsequent departure or removal...,' only those aliens, who actually departed or were removed from the United States after failing to attend or to remain in attendance at their removal proceedings are inadmissible. Aliens, who remained in the United States after failing to attend their hearing, are not inadmissible under this provision.

(iii) Only Applies to Aliens Seeking Admission During the Five (5)-Year Bar. This ground of inadmissibility does not apply to aliens who seek admission to the United States more than five (5) years after their departure or removal from the United States.

(iv) Notice Requirement
In order to be inadmissible under section 212(a)(6)(B) of the Act, the alien must actually have been in removal proceedings under section 240 of the Act. A section 240 removal proceeding is initiated by the filing of the Notice to Appear (NTA), Form I-862, with the immigration court. *See* 8 CFR 1003.14(a). Even if the alien was *served* with the Notice to Appear, the alien will not be inadmissible under section 212(a)(6)(B) of the Act unless the NTA was actually filed with the immigration court.

Also, even if the NTA has been filed, an alien cannot be found to have "failed to appear" unless the alien had notice of the proceeding and of the obligation to appear. If the record shows that the alien had actual notice of the date and time of the removal hearing, and that the alien failed to appear, these facts would generally be sufficient to show the alien's inadmissibility. *See Matter of G- Y- R-,* 23 I&N Dec. 181 (BIA 2001).

The alien may also be inadmissible if the alien had adequate *constructive* notice. An alien is on constructive notice if he or she is deemed to have been on notice because the notice of hearing was sent to the alien at the address that the alien provided as required by section 239(a)(1)(F) of the Act. *See id.*

In short, the alien will be found inadmissible under section 212(a)(6)(B) of the Act only if the alien failed to appear after there was notice that would be sufficient to support the entry of an in absentia removal order. This notice requirement does not mean that the alien can be found inadmissible *only if* there is an in absentia removal order. Even if the immigration judge did not enter such an order, the alien is inadmissible if the alien failed to appear after receiving proper notice of the proceedings.

(v) Effect of an In Absentia Order
An alien who failed to attend or remain in attendance at a removal may have received an in absentia order of removal under section 240(b)(5) of the Act. As noted, an alien who fails to appear after proper notice, may be inadmissible under section 212(a)(6)(B) of the Act even if the immigration judge did not enter an in absentia order.

If the immigration judge *did* enter an in absentia order, that order will generally be sufficient to establish that the alien had sufficient notice of the proceeding and that the alien can be found to have failed to attend the proceeding. Thus, an alien's departure after entry of an in absentia removal order will generally establish that the alien is inadmissible under section 212(a)(6)(B) of the Act.

If the alien departs while an in absentia order is in effect, the alien may also be inadmissible under section 212(a)(9)(A) of the Act.

(3) Exceptions and Waivers

(i) "Reasonable Cause" Exception. In addition to the general exceptions to inadmissibility noted in section 1(b) or 1(c) of this *AFM* chapter, an alien who establishes that there was a "reasonable cause" for failing to attend his or her removal proceeding is not inadmissible under section 212(a)(6)(B) of the Act.

"Reasonable cause" is defined neither in the statute nor in regulations; however, case law has provided some guidance on what constitutes "reasonable cause." In general, "reasonable cause" is something that is not within the reasonable control of the alien. *See* case law summary in section 40.6.2(b)(4) of this *AFM* chapter.

It may also be helpful to compare the alien's circumstances to the higher standard of "exceptional circumstances" required for the rescission of a removal order, as defined in section 240(e) of the Act. However, the standard of "exceptional circumstances" is a standard more stringent than the "reasonable cause"-standard. In order to justify

rescission of a removal order, an alien must establish that "exceptional circumstances" prevented his or her attendance at the removal proceeding. Section 240(e) of the Act defines exceptional circumstances as circumstances beyond the control of the alien, such as: 1) battery or extreme cruelty to the alien or any child or parent of the alien; 2) serious illness of the alien; or 3) serious illness or death of the alien's spouse, child, or parent.

Whether the alien can meet the burden of proving "reasonable cause" for failure to attend the removal proceeding is determined by the officer adjudicating an application for an immigrant or nonimmigrant visa, for admission to the United States, for adjustment of status, change of status, or extension of stay, or any other benefit under the immigration laws.

The officer determines the issue based on evidence that the alien presents in support of the pending application; **no separate application (such as a Form I-601) is needed.** In all cases, the burden of proving that the person had reasonable cause not to attend the removal proceedings rests with the alien.

(ii) Waivers. There are no waivers available for this ground of inadmissibility, other than the exceptions or waivers described in section 1(b) or 1(c) of this *AFM* chapter.

(4) Citing References and Additional Materials

- June 17, 1997, Office of Programs memorandum – *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act).*

- Some Case Law Addressing "Reasonable Cause":

- *Hernandez-Vivas v. I.N.S.,* 23 F.3d 1557, 1560 (9th Cir. 1994) - The filing of a motion to change venue does not establish reasonable cause for failure to appear at the removal hearing.
- *Wijeratne v. I.N.S.*, 961 F.2d 1344, 1346-47 (7th Cir. 1992) – The fact that the alien had moved after proceedings were commenced did not provide for reasonable cause to justify the alien's failure to appear at the removal hearing.
- *Wellington v. I.N.S.*, 108 F.3d 631, 635 (5th Cir. 1997) – The error of an applicant's counsel in misplacing the hearing notice does not constitute "reasonable cause" for the applicant's failure to appear.
- *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999) – An alien who asserted for the first time on appeal that her failure to appear at a deportation hearing was the result of ineffective assistance of counsel, but who failed to comply with the requirements for such a claim, has not shown "reasonable cause" that warrants reopening of the proceedings.

- *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999) - Reasonable cause" is a standard less stringent than the one of "exceptional circumstances;" the alien had provided sufficient and credible evidence that supported the applicant's contention that she was suffering from a serious illness, which necessitated surgeries later on.
- *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997) – An applicant's general assertion that he was prevented from reaching his hearing on time because of heavy traffic does not constitute reasonable cause that would warrant reopening of his in absentia exclusion proceedings.
- *Matter of Patel*, 19 I&N Dec. 260, 262 (BIA 1985) – Filing a request for a continuance is not a reasonable cause for the alien's failure to appear.
- *Matter of Ruiz*, 20 I&N Dec. 91, 93 (BIA 1989) – Illness, properly documented by a physician's letter, was a valid excuse for the failure to appear.

(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:

1) that the alien made a false representation of a material fact;
2) that the false representation was made with the alien's knowledge of its falsity;
3) that 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);

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:

1) that the alien made a false representation of a material fact;
2) that the misrepresentation was willfully made;
3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

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, please proceed to 2.

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 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 there was no fraud or misrepresentation; or
  - That any fraud was not intentional or with the intent to deceive, or that the misrepresentation was not willful; or
  - That any fraud or any concealed or misrepresented fact was not material; or
  - That 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 *never* 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. The misrepresentation must have been made before an official of the U.S. government, that is, generally an immigration or consular officer. 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).

(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-Senarillos,* 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 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 D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991) and *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994) – Fraud or misrepresentation must be made to an authorized official of the U.S. Government in an attempt to enter the United States or obtain some other benefit under the Act.
- *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.
- June 20, 1997, Office of Programs memorandum – *New Waiver Provisions, INA 212(i)*
- April 6, 1998 - *Office of Programs memorandum – Section 212(a)(6)(C)(ii) 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

(2) Section 212(a)(6)(C)(ii)(I) of the Act: Falsely Claiming Citizenship

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. Please *see* part 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[1] (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.

(iv) 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. 911or 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

[1] 8 U.S.C. 911 Citizen of the United 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.

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)(I) of the Act. There is no waiver available, except for the exceptions or waivers referred to in section 40.6.1(b) or 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-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 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 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

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

(d) **Section 212(a)(6)(D) of the Act: Stowaways**

(1) General. An alien who is a stowaway is inadmissible under section 212(a)(6)(D) of the Act.

(2) Definitions

(i) Stowaways. Section 101(a)(49) of the Act defines stowaways as "any alien who obtains transportation without the consent of the owner, charterer, master, or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft." A passenger who boards with a valid ticket is not to be considered a stowaway.

(3) Applicability

(i) A Stowaway Is Not An Applicant for Admission. Pursuant to section 235(a)(2) of the Act, a stowaway is not an applicant for admission and may not be admitted to the United States. A stowaway shall be ordered removed upon inspection by an immigration officer. If during this inspection, the alien indicates that he or she intends to apply for asylum, the inspector should refer the alien for a credible fear interview. A stowaway may only apply for asylum if the stowaway is found to have a credible fear during this interview. In no case may a stowaway be considered an applicant for admission or be eligible for a hearing under section 240 of the Act (Removal proceedings).

(ii) Ineligible to Adjust Status under Section 245 or Section 245(i) of the Act or to Change Status under Section 248 of the Act. As a practical matter, this ground of inadmissibility usually applies to aliens who are encountered at the time of an attempted

entry into the United States. However, this ground of inadmissibility also applies to an alien who traveled to the United States as a stowaway, entered the United States, and is attempting to adjust status to lawful permanent residence or to change status while in the United States.

Section 245(i) of the Act provides authority to grant adjustment to certain aliens who are not eligible for adjustment of status because they are unable to meet the requirements of section 245(a) of the Act or are subject to the bars of section 245(c) of the Act. Namely, certain eligible aliens, despite having entered without inspection (under section 212(a)(6)(A)(i) of the Act) or despite ineligibility according to the grounds listed in section 245(c) of the Act, may apply for adjustment of status under section 245(i) of the Act. Nothing in section 245(c) of the Act, however, applies specifically to stowaways, and stowaways, as noted, are inadmissible under section 212(a)(6)(D) of the Act. Thus, a stowaway is not eligible for adjustment under section 245(i) of the Act.

(iii) Ineligible For Removal Proceedings Under Section 240 of the Act. Even if the alien has been found to have a credible fear after the credible fear interview and is allowed to file an application for asylum, the stowaway is ineligible for proceedings under section 240 of the Act.

(4) Waivers And Exceptions

(i) Exceptions. In addition to the general exceptions noted in section 40.6.1(b) of this *AFM* chapter, a stowaway may

- be paroled into the United States pursuant to section 212(d)(5) of the Act for various purposes, including for the alien to apply for asylum;
- may seek adjustment of status under section 245(h) of the Act.

(ii) Exception for Returning Legal Permanent Residents. The only exception to the summary removal provision of stowaways is the provision providing relief to lawful permanent residents returning from a brief, temporary absence. *See* section 101(a)(13)(C) of the Act.

(iii) Waivers. Other than the ones noted in section 40.6.1(c) of this *AFM* chapter, there is no waiver available.

(e) **Section 212(a)(6)(E)(i) of the Act: Smugglers**

(1) General. Any alien, who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law, is inadmissible.

(2) Definitions

(i) Knowingly. For section 212(a)(6)(E)(i) of the Act to apply, the alien must "knowingly" encourage, induce, or assist an illegal alien to enter the United States. The term "knowingly" means that the alien must be aware of facts sufficient that a reasonable person in the same circumstances would conclude that his or her encouragement, inducement, or assistance could result in the illegal entry of the alien into the United States. Furthermore, the smuggler must encourage, induce, or assist with the intent that the alien achieve the illegal entry. The mistaken belief that the alien was entitled to enter legally can be a defense to inadmissibility for suspected smugglers.

> Example: In *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir. 2005), the alien drove his friends from Canada to the United States. He knew that one (1) of them was not a U.S. citizen or national, and that this friend had been living in the United States illegally. However, at the time of the trip, the alien believed that the friend's pending adjustment of status application made it lawful for the friend to return to the United States. The court held that he did not knowingly assist the friend to reenter illegally.

> Example: In *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005), the applicant was a guest rider in a car. During the ride, she knew that someone was hiding in the trunk. The court found that, even though the individual had knowledge of the presence of the illegal alien, she was not inadmissible under section 212(a)(6)(E) of the Act because she herself did not perform any affirmative act to aid or abet the alien smuggling.

(ii) Encourage, Induce, Assist, Abet, or Aid. Any affirmative action that leads an applicant to enter the United States illegally can be classified as "encourage, induce, assist, abet, or aid."

> Examples: (1) Offering a job to an alien under circumstances that make clear that the alien will have to enter illegally to accept the job offer; (2) physically transporting or bringing the alien across the border; or (3) making a false written or oral statement on behalf of another alien at the time of entry; (4) filing an immigrant or nonimmigrant visa petition for an alien, knowing that the alien does not have the necessary qualifying relationship to the individual (for a family-based petition) or (for an employment-based petition) that the petition does not rest on a bona fide job offer, investment plan, or other set of circumstances that qualifies the alien for the immigrant or nonimmigrant classification that is sought.

With regard to a visa application. As noted in the discussion of section 212(a)(6)(C)(i) of the Act, an alien who gave a materially false statement in support of another alien's application for an immigration benefit would not incur inadmissibility under section 212(a)(6)(C) of the Act. A materially false statement in support of another alien's application could, however, make the alien inadmissible under section 212(a)(6)(E) of

the Act for having knowingly "assisted, abetted, or aided" the other alien's unlawful entry.

(iii) An Alien. The person whom the alleged smuggler "encouraged, induced, assisted, abetted or aided" must have been an alien at the time of the smuggling. That is, the person must not have been a citizen or a non-citizen U.S. national.

(iv) Enter or Try to Enter . . . in Violation of Law. An alien may be inadmissible under section 212(a)(6)(E) of the Act as a result of "encourag[ing], induc[ing], assist[ing], abet[ing] or aid[ing]" another alien's entry into the United States without inspection at a port-of-entry or by "encourag[ing], induc[ing], assist[ing], abet[ing] or aid[ing]" the other alien in obtaining admission or parole at a port-of-entry by fraud.

(3) Applicability

(i) Inadmissible Even for Smuggling Close Family Members. Under the pre-1990 version of 212(a)(6)(E)(i) of the Act, an alien was not inadmissible, if he or she smuggled close family members based on a motive of close affection and not for financial gain. This version was eliminated with the passing of the Immigration Act of 1990 (IMMACT 90). Under current section 212(a)(6)(E) of the Act, an alien will be inadmissible even if an alien assists or causes close family members to enter the United States illegally and regardless of his or her motivation. However, to alleviate some of the harshness of the provision, a waiver is available under section 212(d)(11) of the Act. *See* (e)(4) of this *AFM* chapter, below.

(ii) Motives of the Smuggler Are Irrelevant. Under section 212(a)(6)(E)(i) of the Act, it is irrelevant what motives caused the smuggler to induce, encourage, assist, abet, or aid the alien.

(iii) "Gain" Is No Longer Required. Under former section 212(a)(31) of the Act, alien smuggling made an alien inadmissible only if the smuggling was done "for gain." *See* section 212(a)(31) of the Act (1988) or Title 8, United States Code (U.S.C.), 1182(a)(31) (1988). "Gain" is no longer an element under current section 212(a)(6)(E) of the Act.

(4) Waivers and Exceptions

(i) Statutory Exception In Section 212(a)(6)(E)(ii) of the Act for Family Reunification (Family Unity). In addition to the waivers mentioned in section 1(c) or section 2(e)(4)(ii) of this *AFM* chapter, section 212(a)(6)(E)(ii) of the Act states that an alien who has engaged in alien smuggling is not inadmissible under section 212(a)(6)(E) of the Act, if the alien is a "Family Unity" immigrant under section 301(b)(1) of IMMACT 90, and the alien:

- was physically present in the United States on May 5, 1988; and

- seeks admission as an immediate relative or as a second family-based preference immigrant (including under sections 112 or 301(a) of IMMACT 90); and
- has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of the law; and
- the smuggling occurred *before* May 5, 1988.

(ii) Waivers. In addition to the waivers described above in section 40.6.1(c) of this *AFM* chapter, section 212(a)(6)(E)(iii) of the Act allows individuals applying for a visa to apply also for a waiver of this ground of inadmissibility pursuant to section 212(d)(11) of the Act.

To be eligible for this waiver, the alien must establish that:

- He or she is a lawful permanent resident who temporarily proceeded abroad voluntarily, who is not under an order of removal, and who is otherwise admissible as a returning resident pursuant to section 211 of the Act; or
- He or she is seeking admission (or adjustment of status) as an immediate relative, or as a first, second, or third family-based preference immigrant; and
- He or she encouraged, induced, assisted, abetted, or aided the unlawful entry only of an individual who *at the time of such action* was the alien's spouse, parent, son, or daughter, and the alien has not encouraged, induced, assisted, abetted, or aided the unlawful entry of any other individual.

The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. This waiver may be granted in the discretion of the Secretary of Homeland Security to assure family unity, or when it is otherwise in the public interest.

4. References

- U.S. Department of State's 9 Foreign Affairs Manual (*FAM*) 40.65 "Smugglers" and 40.65 Notes

(f) **Section 212(a)(6)(F)(i) of the Act: Subject of Civil Penalty**

(1) General. An alien who is the subject of a final order imposing a civil penalty for violation of section 274C of the Act, is inadmissible under section 212(a)(6)(F)(i) of the Act.

(2) Definitions

(i) Final Order. What constitutes a "final order" under section 274C of the Act depends on how a violation of section 274C of the Act was adjudicated.

When the Department of Homeland Security (DHS) issues a notice of intent to fine under section 274C of the Act, the person has sixty (60) days to request a hearing before an administrative law judge. If the person does not request a hearing, the DHS decision to impose a civil penalty under section 274C is the final order. *See* 8 CFR 270.2(g) and (h).

If the person does make a timely request for a hearing before an administrative law judge, the administrative law judge's order imposing a fine is the final order unless the Chief Administrative Hearing Officer of the Executive Office for Immigration Review modifies or vacates the order, or unless the case is referred to or accepted for review by the Attorney General. *See* section 274C(d)(4) of the Act, 8 CFR 270.2(f) and 28 CFR 68.

(ii) Section 274C of the Act. Section 274C of the Act makes it unlawful for a person or entity to knowingly: (1) forge, counterfeit, alter, or falsely make any document; (2) use, attempt to use, possess, obtain, accept, or receive any forged, counterfeit, altered, or falsely made document; (3) use, or attempt to use any document lawfully issued to a person other than the possessor (including a deceased individual); for the purpose of or in order to satisfy any requirements of the Act. *See* section 274C(a)(1) through (3) of the Act. It is also unlawful to knowingly accept or receive any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with section 274A(b) of the Act or obtaining a benefit under the Act. *See* section 274C(a)(4) of the Act.

Section 274C(a)(5) of the Act prohibits the preparation, filing, or assistance to another in preparing or filing any application for benefits under the Act, or any document required under the Act, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not related to the person on whose behalf it was or is being submitted.

Finally, section 274C(a)(6) of the Act makes it unlawful for a person or an entity to knowingly present before boarding a common carrier for purposes of coming to the United States a document, which relates to the alien's eligibility to enter the United States, and to fail to present such document to an immigration officer upon arrival at the United States port of entry.

(3) Applicability

(i) Effective Date. Section 212(a)(6)(F) of the Act became effective on June 1, 1991; an alien subject to a final order imposing civil penalties under section 274C of the Act on or after that date is ineligible for adjustment and was subject to exclusion (pre-1996), or removal proceedings (post-1996).

(ii) Effect of Administrative Appeal or Judicial Review. If DHS issues a final order because the person did not request a hearing, the DHS order is final and is not subject to any administrative or judicial review. *See* section 274C(d)(2)(B) of the Act.

If the person does request a hearing, the administrative law judge's decision is the final decision unless the case is before the Chief Administrative Hearing Officer or the Attorney General for review. *See* section 274C(d)(4) of the Act.

If the person files a timely petition for review of a final order with the appropriate court of appeals, the order is not deemed final while the petition for review remains pending. *See* section 274C(d)(5) of the Act.

(iii) Other Inadmissibility Grounds May Be Applicable. Check whether other grounds of inadmissibility under section 212 of the Act exist. It is possible that an alien who is subject to a civil penalty under section 274C of the Act, may be subject to other grounds of inadmissibility, such as section 212(a)(6)(C) [Misrepresentation] or 212(a)(6)(E)[Smugglers] of the Act. If the alien was also convicted in a criminal proceeding, the conviction could make the alien inadmissible under section 212(a)(2) of the Act.

(iii) Effect of a Waiver under Section 212(i) of the Act. The Board of Immigration Appeals (BIA) held that if an alien is in removal proceedings, a waiver under section 212(i) of the Act may not be used to waive section 212(a)(6)(F) for document fraud in violation of section 274C of the Act. *See Matter of Lazarte-Valverde*, 21 I&N Dec. 214 (BIA 1996).

In *Matter of Lazarte-Valverde,* the BIA rejected the position stated in General Counsel Opinion 93-33, issued by the General Counsel of the former INS in 1993. USCIS adjudicators are bound by the BIA's decision, and must not follow the General Counsel Opinion 93-33. *See* 8 CFR 1003.1(g) (Board precedents bind USCIS officers).

(4) Exceptions and Waivers

(i) Nonimmigrants. After a final order is entered pursuant to section 274C of the Act, a nonimmigrant seeking entry may be eligible to apply for advance permission to enter the United States as a nonimmigrant despite the inadmissibility, pursuant to section

212(d)(3) of the Act. The application is filed on Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.

(ii) Waiver for Immigrants and Adjustment of Status Applicants under Section 212(d)(12) of the Act. The Secretary of Homeland Security may, in his or her discretion and for humanitarian purposes or to assure family unity, waive the application of section 212(a)(6)(F)(i) of the Act in the case of an alien, who:

(A) (i) Is already lawfully admitted for permanent residence, and who temporarily proceeded abroad voluntarily and not under an order of deportation or removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) of the Act; or
(ii) Is seeking admission or adjustment of status as an immediate relative or as a family-based preference immigrant; and
(B) Has not been the subject of any prior civil money penalty under section 274C of the Act; and
(C) Committed the offense that resulted in the civil money penalty solely to assist, aid, or support the alien's spouse or child (and not another individual).

The relationship to the supported individual had to exist at the time of the fraud, not only at the time of the waiver application. The waiver application must be filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. Also, there is no judicial review of a decision denying this waiver.

Note: The legislative history of a prior version of the bill that became IIRIRA suggests that this waiver is also available to employment-based immigrants. *See* H. Conf. Rep. 104-828 at 227 (1996). This report, however, directly contradicts the actual terms of the statute on this point. The report cannot be relied on to grant a waiver to someone who is not eligible for it under the terms of the statute. Thus, an alien who is not *already* an LPR may seek the waiver under section 212(d)(12) of the Act only if the alien is seeking to immigrate as an immediate relative or as a family-based immigrant.

(iii) No Other Waivers or Exceptions Available. Other than stated in this section or section 40.6.1(b) or 1(c) of this *AFM* chapter, there is no other waiver or exception available to an alien who is inadmissible under section 212(a)(6)(F) of the Act.

Also, as noted, the conduct that made the person subject to the civil penalty under section 212(a)(6)(F) of the Act may also make the alien inadmissible under other provisions of the Act. Just as a waiver under section 212(i) of the Act does not waive section 212(a)(6)(F) of the Act, *see Matter of Lazarte-Valverde, supra*, a waiver under section 212(d)(12) of the Act would not relieve the alien of inadmissibility under some other ground. The alien would have to apply for each separate waiver for each relevant ground of inadmissibility.

4. References and Other Materials

- U.S Department of State's *9* Foreign Affairs Manual (*FAM*) 40.66 "Subject of Civil Penalty" and 40.66 Notes
- *Matter of Lazarte-Valverde*, 21 I&N Dec. 214 (BIA 1996)

(g) Section 212(a)(6)(G) of the Act: Student Visa Abusers

(1) General. An alien who obtains the status of nonimmigrant under section 101(a)(15)(F)(i) of the Act as a student, and who violates a term or condition of such status under section 214(l) of the Act [now section 214(m) of the Act] is inadmissible until the alien has been outside the United States for a continuous period of five (5) years after the date of the violation.

Section 212(a)(6)(G) of the Act refers to the violation of conditions of admission as imposed under section 214(l) of the Act. Section 212(a)(6)(G) of the Act, and the related section 214(l) of the Act, were enacted by section 625 of IIRIRA, PL 104-208. Section 671(a)(3)(A) of the same law, however, had redesignated section 214(k) of the Act, as added by PL 103-416, to be section 214(l) of the Act. There was already a section 214(k) of the Act when PL 103-416 was enacted; its enactment resulted in *two* (2) sections 214(k) of the Act. Once PL 104-208 was enacted, there were now *two* (2) sections 214(l) of the Act. The version of section 214(l) of the Act referred to in section 212(a)(6)(G) of the Act was subsequently redesignated as section 214(m) of the Act by section 107(e)(2) of the Victims of Trafficking and Violence Protection Act of 2000, PL 106-386 (October 28, 2000). **Section 214(m) of the Act, therefore, is the provision that relates to section 212(a)(6)(G) of the Act.**

Section 214(m)(1) of the Act specifies that an alien may not be accorded F-1 student nonimmigrant status to study at a public elementary school or in a publicly funded adult education program. Study at a public secondary school is allowed as long as the aggregate period of study does not exceed twelve (12) months and the alien has reimbursed the local educational agency for the full, unsubsidized per capita cost of his or her education at the school.

Section 214(m)(2) of the Act reads:

> An alien, who obtains the status of nonimmigrant under clause (i) or (iii) of section 101(a)(15)(F) in order to pursue a course of study at a private elementary or secondary school or in a language training program that is not publicly funded shall be considered to have violated such a status, and the alien's visa under section 101(a)(15)(F) of the Act shall be void, if
>
> > 1) the alien terminates or abandons such course of study at such a school; AND

2) undertakes a course of study at a public elementary school, in a publicly funded adult education program, in a publicly funded adult education language training program, or at a public secondary school (unless the requirements of section 214(m)(1)(B) of the Act are met).

Therefore, in order to be deemed a student visa abuser under section 212(a)(6)(G) of the Act for being in violation of section 214(m)(2) of the Act, both conditions (1 and 2) must be fulfilled. The alien cannot be held to be a student visa abuser for being in violation of section 214(m)(2) of the Act, if only one condition is met. Please *see* below, section (g)(3) of this update. However, because of the wording of section 212(a)(6)(G) of the Act [which refers to 214(m) of the Act in its entirety), the individual may be deemed to be a student visa abuser for being in violation of section 214(m)(1) of the Act.

2) Definitions

The terms used in section 214(m) of the Act are defined as follows:

Abandon: To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. To give up or to cease to use. To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert. It includes the intention, and also the external act by which it is carried into effect. *See Lee v. Mukasey,* 527 F.3d 1103 (10th Cir. 2008)*; referring to* Black's Law Dictionary (6th ed., 1990).

Public Elementary School: Kindergarten through eighth (8th) grades.

Public Secondary School: Ninth (9th) through twelfth (12th) grades (also known as "high school").

Publicly-Funded Adult Education Programs: Publicly funded adult education programs means education, training, English-as-Second-Language (ELS) or other intensive English programs operated by, through, or for a local public school district, system, agency, or authority, regardless of whether such program charges fees or tuition.

Terminate: To put to an end; to bring to an end; to end or to conclude. *See* Black's Law Dictionary (8th ed. 2004).

(2) Applicability

(i) Only Applicable to Individuals Seeking F-1 Nonimmigrant Student Status after November 30, 1996. Section 212(a)(6)(G) of the Act only applies to aliens seeking F-1 status after November 30, 1996, or aliens, whose status was extended on or after that

date. It does not apply to aliens attending public schools or programs while in other nonimmigrant status (e.g. F-2, E, H-4, J, or B-2), or to individuals out-of-status or with no status at all.

(ii) Conduct That Violates Section 214(m) of the Act. An alien admitted as an F-1 nonimmigrant student on or after November 30, 1996, violates section 214(m) of the Act, and is inadmissible under section 212(a)(6)(G) of the Act, if the alien:

- attends a public elementary school for any length of time; or
- attends a public secondary school for more than twelve (12) months, in the aggregate (even if the student pays the full unsubsidized per capita cost); or
- attends a public secondary school without paying the full unsubsidized per capita cost (even if the alien attends for less than twelve (12) months, in the aggregate); or
- attends a publicly funded adult education program for any length of time; or
- abandons or terminates enrollment in an approved school and attends a public elementary school, a publicly funded adult education program, or a publicly funded adult education language training program, or a public secondary school, in violation of the requirements of section 214(m)(1) of the Act.

Note: *See AFM* 40.6.2(g)(2)(iv) concerning the impact of the closure of a school.

These prohibitions do not apply to post-secondary schools such as public community or junior colleges, which receive public funds but charge full non-resident tuition to foreign students.

(iii) Burden of Proof. The alien bears the responsibility of documenting that a school is not considered to be a public school. The school is responsible for determining what amount constitutes the "unsubsidized per capita cost of education," and the school's estimate of its per student expenditure of public revenues (federal, state, and local). The later figure is not necessarily the school's nonresident tuition rate.

(iv) Effect of Closure of a School
In *Lee v. Mukasey*, 527 F.3d 1103, 1107 (10th Cir. 2008), the U.S. Court of Appeals for the Tenth Circuit held that an alien who quit attending his or her approved school, and enrolled in a different school in violation of section 214(m) of the Act was not inadmissible under section 212(a)(6)(G) of the Act. The basis for the Court's conclusion is that the reason the alien had left the approved school was that it had closed.

USCIS has decided to follow the *Lee* decision nationwide. An alien will not be found inadmissible under section 212(a)(6)(G) of the Act and under section 214(m) of the Act,

solely because he or she is no longer at the school for reasons that can be attributed to the school only (such as a school's permanent closing).

However, although ceasing to attend the approved school because it has closed will not make the alien inadmissible under section 212(a)(6)(G) of the Act, this fact does not mean that the alien is still in a lawful nonimmigrant status. This nonimmigrant status will have ended, and the alien will be subject to removal under section 237(a)(1) of the Act, unless the alien transfers to another approved school. The student and the new school will still have to comply with the requirements imposed by sections 101(a)(15)(F) and 214(m)(1) of the Act, as well as 8 CFR 214.2(f), in order for the alien to maintain valid nonimmigrant status. *See Matter of Yazdani*, 17 I&N Dec. 626 (BIA 1981)(An alien who, without first securing the Service's permission, transfers to a school other than that which she was authorized, is in breach of the condition of the student's status). The alien student may be subject to section 245(c)(2) of the Act or any other provisions imposing adverse consequences on aliens who are unlawfully present in the United States.

In relation to the grant of reinstatement or a student's transfer request under 8 CFR 214.2(f)(8) and 8 CFR 214.2(f)(16), the adjudicator should consider every relevant circumstance. If the adjudicator encounters difficulties, the adjudicator should contact his or her supervisor or local counsel.

An alien whose enrollment at an approved school ends because the school has closed will also be in an unlawful status for purposes of sections 245(c)(2), (7) and (8) of the Act. Thus, even if the alien is *not* inadmissible under section 212(a)(6)(G) of the Act, the alien may be precluded from adjustment of status. The decision to remain in the United States cannot be excused as a violation "through no fault of one's own" because, although the alien may not have had control over the closure of the school, the alien would also have the option of complying with the law, either by transferring to a school that the alien is permitted to attend under section 214(m) of the Act, or by leaving the United States.

Leaving the United States and returning does not cure one's adjustment ineligibility under section 245(c)(2) of the Act. *See* 8 CFR 245.1(d)(3).

(v) Individuals to Whom Section 212(a)(6)(G) of the Act Does Not Apply. Section 212(a)(6)(G) of the Act does not apply to the following individuals:

- Aliens who remained outside the United States for a continuous period of five (5) years after having violated the terms and conditions of section 214(m) of the Act;
- Aliens studying in pubic schools, who are in J-1, J-2, E, F-2, L-2, or H-4 nonimmigrant status;

- Aliens, who are studying at public schools illegally, such as B-2 nonimmigrants or aliens who are unlawfully in the United States;
- Aliens who violate the terms and conditions of their F-1 nonimmigrant student status in other ways, such as non-attendance at their approved school, working without authorization, or not maintaining a full-course of study.

(3) Exceptions and Available Waivers. Other than the general exceptions and waivers to inadmissibility noted in sections 40.6.1(b) and 1(c) of this chapter, there are no exceptions or waivers to inadmissibility for aliens who are student visa abusers.

(4) References

- 74 No. 5 Interpreter Releases 227 (February 3, 1997), *INS provides Interim Guidance on New Public School Provisions for F-1 Students* (complete reproduction of INS HQ Cable text sent to all Field offices on January 27, 1997 (File HQ 50/5.12/96ACT.011)] (Note: The text of this cable is not available on USCIS' website.)
- U.S. Department of State's 9 Foreign Affairs Manual *(FAM)* 40.67 "Student Visa Abusers" and 40.67 Notes

AD 07-18 [Date of Signature]		This memorandum creates a new **chapter 40.6** of the Adjudicator's Field Manual (*AFM*).

5. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, whether substantive or procedural in nature, enforceable by law or by any individual or other party during any benefits adjudication, in removal proceedings, in litigation with the United States, or in any other form or manner.

6. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

Distribution List: Regional Directors
District Directors

Service Center Directors
Field Office Directors
National Benefits Center Director
Asylum Office Directors