CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

ADJUSTING UNDER 245(A) DESPITE HAVING ENTERED USING A FALSE IDENTITY

Posted on May 19, 2009 by Cyrus Mehta

by

Adam Ketcher[*]

To adjust his or her status to lawful permanent resident under section 245(a) of the Immigration and Nationality Act ("INA"), an individual must show the Service,[1] or an Immigration Judge,[2] that s/he has been admitted to the United States following inspection (or parole) by and authorization from an immigration officer,[3] that s/he is eligible to receive an immigrant visa that is immediately available to her or him, and that s/he is admissible. Unless the applicant receives classification as an immediate relative under INA ¤ 201(b), or as a "special immigrant" under certain other provisions,[4] s/he must also show that s/he has not accepted unauthorized employment nor has s/he failed to maintain a lawful nonimmigrant status since his or her last entry into the United States, "other than through no fault of his own or for technical reasons."[5] Section 245 does however offer limited exceptions to ineligibility under ¤ 245(c). For example, ¤ 245(i) permits a "grandfathered" applicant to pay a penalty and adjust his or her status;[6] moreover, ¤ 245(k) forgives up to 180 days of unlawful status or unauthorized employment since the last admission to applicants who receive classification under the employment-based first, second and third preference. These and other exception provisions are beyond the scope of this article.

For purposes of this article, let us assume that a hypothetical client walks in to our office with evidence that he has entered the United States as an eleven-year old child through a B-2 visa that had been stamped into a photo-

substituted passport from a country other than his own native country. This individual had remained in the U.S. into his adult years and married a U.S. citizen. As noted above, his marriage made him eligible for classification as an immediate relative, whereby ¤ 245(c) would not preclude him from adjusting his status despite his unauthorized employment and failure to maintain a lawful nonimmigrant status since his last entry. However, the photo-substituted passport, which he continues to have in his possession,[7] may call into question whether he had actually been **"**inspected and admitted to the United States**"** such that he was eligible to adjust his status. Moreover, even if our client had been inspected and admitted, we had to ascertain whether he was admissible. Below we provide our analysis of how we would argue that he is eligible for adjustment of status, without a waiver, if we were to take on the representation.

I. A Procedurally Lawful Admission

Although there has been some recent dispute as to whether an alien who entered the U.S. through the use of a false identity document has been inspected and admitted under the law,[8] the controlling decision on this issue remains *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980). In *Areguillin*, the Board of Immigration Appeals ("BIA") held that where an applicant provides sufficient credible evidence that s/he presented him or herself for inspection at the border, and did not make a false claim to U.S. citizenship, s/he was lawfully admitted when the inspecting officer makes the determination that s/he is not inadmissible and permits him or her to pass in to the U.S.[9] The effect of this holding is that an applicant who has affected a procedurally lawful admission may qualify to adjust his or her status even though such admission may not have substantively complied with the law.

Despite the change in the law affected by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[10] wherein Congress amended INA ¤ 101(a)(13) to define the term *admission* as *inter alia* "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer,"[11] these earlier BIA decisions remain controlling today. Specifically, following the enactment of IIRIRA, the BIA held that a lawful entry required simply that the individual have been inspected by an immigration officer at the port-of-entry and authorized to enter the U.S. after such inspection.[12]

Nevertheless, in March 2008, the government argued and the Ninth Circuit Court of Appeals agreed in *Orozco*,[13] that the statutory language of INA ¤¤ 245(a) and 101(a)(13) unambiguously required an admission that was substantively as well as procedurally lawful. Under this holding, an individual who had been admitted to the United States through fraudulent means, would today be statutorily ineligible to adjust his or her status.[14] This holding was followed by district offices across the U.S. until recently, when the Ninth Circuit vacated its Orozco decision upon a joint motion by the parties. Presently, another joint motion by the petitioner and the government is pending with the BIA, requesting remand to the Immigration Judge for factual findings related to the circumstances of the petitioner's entry to the U.S.

In its legal brief in support of the motion, the government argues that the statute is ambiguous as to whether INA ¤ 101(a)(13) requires substantive compliance with the law, and to require same would make the use of the term "lawfully" in INA ¤ 101(a)(20) superfluous and would increase the burden of proof on the government in removal proceedings by requiring that it demonstrate by clear and convincing evidence that a respondent's admission was substantively legal before it can sustain charges of deportability under INA ¤ 237. It would also create an inherent conflict for the government in proceedings that ground deportability upon ¤ 237(a)(1)(A), which charges that the admission was legally ineffective, and read the related waiver out of the INA altogether.[15]

Therefore, the government has requested remand so that it may amend the Notice to Appear and charge the *Orozco* respondent with inadmissibility under ¤ 212(a)(6)(A)(i), as an alien present in the U.S. without having been admitted or paroled. The government here cleverly argues that the respondent, who claims to have used a counterfeit permanent resident card, never actually sought an admission because INA ¤ 101(a)(13)(C) indicates that "an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States" unless s/he meets one of six enumerated criteria. Thus, in contrast to the respondent in *Orozco*, the government would concede that a person who falsely enters on say a B-2 tourist visa in a photo-substituted passport would still be eligible to adjust his or her status provided that he or she is not otherwise inadmissible for using fraud or a material misrepresentation to obtain an immigration benefit.

Accordingly, even though the passport through which our client entered the United States bore a false name and country of citizenship, under binding BIA precedent, the use of this passport, and the B-2 entry visa stamped within, sufficiently established an inspection and admission for purposes of INA ¤¤ 245(a) and 101(a)(13). In further support of our argument that he was admitted following inspection, the Second Circuit Court of Appeals recently held that even where the circumstances through which an individual has procured his or her admission to the U.S. may render that individual inadmissible, s/he has still been "admitted" for purposes of the INA ¤ 101(a)(13).[16] The remaining question was whether our client remains admissible despite the use of a false passport to obtain an entry visa and gain admission to the U.S.

II. Arguing Admissibility

The INA renders "ny alien who, by fraud or 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" inadmissible.[17] Although a waiver of inadmissibility is available under INA ¤ 212(i), we have argued that the circumstances surrounding a client's entry (his application for the visa and his application for admission) do not warrant a finding of inadmissibility such that he should be required to obtain a waiver of inadmissibility to adjust his status to lawful permanent resident. Briefly, because our client was brought to the United States when he was only 11 years old, an age at which he was incapable of formulating the necessary intent to commit fraud or to willfully misrepresent a material fact to either the consular officer or to the port inspector, this inadmissibility provision should not apply to him.

Had our client applied for the visa and entered the United States as an adult, we would be hard pressed to show that he did not commit fraud or willfully misrepresent a material fact.[18] Most like, we would be required to demonstrate "extreme hardship" to his U.S. citizen spouse in a separate Form I-601, Application for Waiver of Ground of Inadmissibility filed contemporaneously with his Form I-485. Nevertheless, we must first determine whether the specific facts of this case support a finding of fraud or willful misrepresentation. In a recent, unpublished decision, the Second Circuit noted that to render an alien inadmissible, the Service must determine that:

1. the alien misrepresented a fact;
2. to an authorized official of the United States;
3. the fact was material;
4. the alien did so willfully; and
5. for the purpose of obtaining a visa, other documentation or entry into this country, or to obtain some other immigration and naturalization benefit.[19]

Moreover, the Service is required to interpret the term "fraud" under its "commonly accepted legal ," to include "false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party," which are "believed and acted upon by the party deceived to his disadvantage."[20] Although the BIA has since noted that "intent to deceive is no longer required before the willful misrepresentation charge comes into play,"[21] to find that an individual has made a willful misrepresentation still "requires that the alien ***knowingly*** make a **material** misstatement to a government official for the purpose of obtaining an immigration benefit."[22]

A . Our client did not willfully misrepresent a fact

As noted above, the Second Circuit has required that a misrepresentation be **knowingly** made to a government official for it to be determined by the Service to have been a "willful misrepresentation."[23] Moreover, the Ninth Circuit has held that "fraud or willful misrepresentation is satisfied by a finding that the misrepresentation was **deliberate and voluntary**."[24] We argued, therefore, that because of the young age at which our client applied for her B-2 visa and for entry into the U.S., the Service could not find that he then acted in a knowing, intentional, deliberate and/or voluntarily manner. Specifically, as a minor (under the age of 18), our client would not have been able to apply for a passport or to depart his native country without either both of his parents, or without one parent and the written authorization from the other parent, or without a third-party legal guardian and written authorization from the absent parent(s).

In support of this argument, we pasted text from the U.S. Department of

State's website related to the travel of minors into and out of our client's home country, which was posted on the date of our application and on the date of our client's admission to the U.S,[25] and concluded that as a minor under both U.S. law and the law of the relevant foreign jurisdiction, our client could not have legally acted of his own volition when a the passport was obtained for him, nor could he have acted voluntarily when this passport was used to facilitate his departure from his native country. Rather, he must have remained under the supervision and control of a legal guardian and acted through the agency of that individual.

U.S. law defines a *minor* "as someone between the ages of 12 and 16,"[26] and a *child* as "a person who is under the age 18."[27] More important, the BIA also noted, "The term 'minor' is also commonly defined as 'a person who is under the age of legal competence,' which in most States is 18."[28] In conclusion, as a 11-year-old child, our client also could not have acted knowingly in furtherance of his applications for a visa or for admission to the U.S., as he was not legally competent at that age to understand the legal significance of such actions.

Although the Foreign Affairs Manual ("FAM") notes that an alien cannot insulate him or herself from liability for material misrepresentations by pursuing his or her visa application through an attorney or agent, this same note explains that the government must still establish that the alien was "aware of the action being taken in furtherance of her application."[29] In other words, the Service must still find that an applicant acted knowingly, as articulated in the case law above, regardless of whether s/he acted alone or through an agent, before it can find the applicant to be inadmissible. Again, our client, at only 11 years old, could not have possessed the requisite knowledge to have acted willfully in pursuing either his visa application or his application for admission to the United States. Moreover, as explained above, he was incapable of acting voluntarily when he made these applications.

Finally, it would be inappropriate to impute any conduct taken by the legal guardian who assisted our client in making his application for an entry visa or for admission to the U.S. Although the BIA has imputed a parent's intent to abandon lawful permanent residence upon her minor child, for example,[30] and even a parent's ineligibility for immigrant classification,[31] it has

refused to extend these holdings to impute fraudulent acts committed by a parent upon that parent's minor child such that doing so would render the child inadmissible. Rather, where the imputation of a parent's fraud to his or her minor child might be inferred from the facts of a case, the BIA has carefully explained that its holdings related solely to the children's very **eligibility** for immigrant visas, or their continued status as lawful permanent residents.[32] Nowhere has the BIA addressed a child's **admissibility** where his or her parent(s) had used fraud or willful misrepresentation to apply for the child's admission to the U.S.[33]

In *Singh*, the Sixth Circuit held that it was an unreasonable construction of INA ¤ 212(a)(6)(C)(i), and an impermissible extension of prior BIA case law, to impute inadmissibility upon a minor child based upon her parent's assumption of a false identity to apply for a visa and enter the U.S.[34] In doing so, the court distinguishing *Senica v. INS*,[35] noting that *Senica* specifically concerned the imputation of the parent's very eligibility for immigrant visa classification rather than the parent's inadmissibility resulting from the fraudulent conduct he used to obtain the visa.[36] There, the Ninth Circuit upheld the BIA's imputation of the father's ineligibility for the immigrant visa classification to his derivative spouse and children. In distinguishing this case, however, the Sixth Circuit noted that the Ninth Circuit did not address the imputation of a parent's inadmissibility based upon fraud to his or her children because the issue was not before it.

Also, in *Senica*, the government did not pursue charges of "fraud or willful misrepresentation against the children," and their mother had already conceded their removability.[37] Therefore, the Sixth Circuit held that it was improper to use the holding of *Senica* as a basis for interpreting INA ¤ 212(a)(6)(C)(i) in a manner that allowed the imputation of a parent's intent to commit fraud or make a willful misrepresentation to his or her children. Moreover, the Sixth Circuit found that such imputation was an unreasonable construction of the statute, and the BIA has since cited *Singh* several times with approval. The Sixth Circuit also distinguished *Matter of Aurelio* and *Matter of Zamora* on their facts and on the basis of their legal holdings, stating, " imput the intent to engage in a perfectly lawful act . . . is far different from imputing the intent to commit fraud," and noting that "even a parent's *negligence* is not typically imputed to a minor child."[38]

We argued that an identical distinction as the one highlighted in *Singh* applied in our client's application. As he was incapable of acting willfully then, the misrepresentations made on his behalf may not now be imputed to him. Consequently, inadmissibility under INA ¤ 212(a)(6)(C)(i) did not apply to him and he did not need a waiver of inadmissibility to adjust his status. In the alternative, we argued that the facts misrepresented, our true client's identity and citizenship, were not material to his visa application or to his application for entry to the U.S.

B. Our client did not misrepresent facts material to his visa application or his application for admission to the U.S.

As noted above, a misrepresentation must be material to an application for immigration benefits in order for it to render an alien inadmissible under INA ¤ 212(a)(6)(C)(i). A misrepresentation "is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut 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 be excluded."[39] A "harmless," or immaterial, misrepresentation is one that does not affect the alien's admissibility.[40] Closer to the issue in the present matter, the Attorney General has held that not all misrepresentations of identity are material misrepresentations,[41] and the BIA has noted that "an alien's entry as a nonimmigrant under a false identity did not constitute a material misrepresentation within the meaning of section 212(a)(19) where the false identity was adopted for reasons unrelated to obtaining admission into the United States and the name had been used for a prolonged time prior to entering this country."[42]

In our case, we argued that the use of a false identity was used to get our client out of his native country, and not necessarily to obtain a U.S. visa or gain admission to the United States. Therefore, we took the position that the misrepresentation of his name and country of citizenship at his interview and at the time of his inspection was harmless in that his true name would not have effected his eligibility for the visa or for admission to the U.S. Therefore, if there was a violation of law at the time of his admission to the U.S., such violation occurred to mislead officials from his home country, and not U.S.

immigration officers. As a consequence, even if the Service could impute a misrepresentation to our client, it should not find that such misrepresentation was material to his prior applications, as he was otherwise eligible for the benefits then sought.[43]

---

[*] Adam Ketcher is an Associate at Cyrus D. Mehta & Associates, PLLC (CDMA) where he practices primarily employment- and family-based immigration law. He also assists clients in citizenship matters and removal defense. At CDMA, Adam prepares applications on behalf of Information Technology consultancies and proprietary software vendors, multinational banks and brokerages, restaurant and hotel chains, as well as engineering, construction, architecture and real estate management firms, requesting classification as multinational executive or managers, specialized knowledge employees, treaty investors or persons of extraordinary ability. Adam represents professional and other employees through all stages of their immigrant and nonimmigrant status petitions and/or consular visa applications.

Adam received his J.D. from Brooklyn Law School, where he was a recipient of the Edward V. Sparer Public Interest Law Fellowship and where he assisted a professor with research for a casebook related to international refugee and asylum law. Previously, he earned a B.A. in Cultural Anthropology from Hampshire College. Adam is admitted to practice in New York State and is a member of the American Immigration Lawyers Association, where he serves on the New York Chapter's Department of Labor Committee.

[1] Section 245 of the Code of Federal Regulations ("8 C.F.R."). The burden of proof remains with an applicant or immigrant visa petitioner to demonstrate eligibility for the immigration benefit sought. INA ¤ 291. The standard of proof for most immigration benefits is "by a preponderance of the evidence." *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The Adjudicator's Field Manual ("AFM") nicely summarizes the standard as follows:

> Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof . . . If the director

> can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

AFM ¤ 11.1(c).

[2] 8 C.F.R. ¤ 1245. Where the individual files his or her application to adjust status as relief from removal, however, the law requires that s/he meet a higher standard of proof. Although the Service bears the statutory burden in removal proceedings of establishing by clear and convincing evidence ("reasonable, substantial, and probative evidence ") "that an alien who has been admitted to the United States is deportable, which requires "substantial and probative evidence" pursuant to INA ¤ 240(c)(3)(A), an applicant to adjust status is deemed an applicant for admission, and thus, s/he must demonstrate that s/he is "clearly and beyond a doubt" "entitled to be admitted and is not inadmissible under section 212" under INA ¤ 240(c)(2). *See In re Rosas-Ramirez*, 22 I&N Dec. 616, 623 (BIA 1999) (holding that a respondent who initially entered the U.S. without inspection and then adjusted her status under section 245A, accomplished an "admission" to the United States at the time of her adjustment as that term is used in section 237(a)(2)(A)(iii)). However the issue as to the proper standard of proof for adjustment of status applicants in removal proceedings does not appear to have been fully litigated. *See Matter of Felix Rotimi*, 24 I&N Dec. 567, 570, FN3 (BIA 2008).

[3] 8 C.F.R. ¤ 245.1(b)(3). Note that a foreign national 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 as designated by the Attorney General, is inadmissible." INA ¤ 212(a)(6)(A)(i). There is a limited exception available to VAWA self-petitioners who can demonstrate a substantial connection between the battery or cruelty they endured and the alien's unlawful entry into the United States. INA ¤ 212(a)(6)(A)(i).

[4] INA ¤ 101(a)(27)(H) through (K).

[5] *See* INA ¤ 245(c).

[6] See 8 C.F.R. ¤ 245.10(a).

[7] Here we would have clear proof of the client's fraudulent entry. Some people do not present any proof at all and the attorney must be creative in meeting the standard of proof.

[8] *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008), *vacated*, *Orozco v. Mukasey.* 546 F.3d 1147 (9th Cir. 2008).

[9] *Id.* at 310.

[10] Pub. L. 104-208, Div C, 110 Stat. 3009 (1996).

[11] *Matter of Jimenez-Lopez*, 20 I&N Dec. 738, 741 (BIA 1993) (noting that prior to the enactment of IIRIRA INA ¤ 101(a)(13) defined the term "entry" as requiring the following: (1) a crossing into the territorial limits of the United States; (2) inspection and admission by an immigration officer, or the actual and intentional evasion of inspection; and (3) freedom from official restraint) *(citing Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973).

[12] *In re Rosas-Ramirez*, 22 I&N Dec. 616, 627-28 (BIA 1999).

[13] 521 F.3d 1068.

[14] *Orozco*, 521 F.3d at 1071-72.

[15] Government's Brief and Motion to Remand to Immigration Court, AILA InfoNet Doc. No. 09013069.

[16] *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008).

[17] INA ¤ 212(a)(6)(C)(i).

[18] *See Matter of NG*, 17 I. & N. Dec. 536 (BIA 1980) (holding that the misrepresentation of one's identity is only material where it precludes a line of inquiry by the examining officer that might otherwise result in a proper determination that the individual is inadmissible); *compare Matter of S--*