EVALUATING AND DEFENDING FALSE CLAIMS TO U.S. CITIZENSHIP

by Michael H. Davis

For most immigration lawyers and their clients, achieving U.S. citizenship through naturalization (or, in other cases, acquiring evidence of U.S. citizenship through some other lawful means) is the pinnacle of success, the happy ending to the often long and difficult U.S. immigration process.

U.S. citizenship offers many obvious benefits including, but not limited to, the right to vote and hold certain sensitive public and private sector jobs, the ability to qualify for certain public benefits, and the right to file immediate relative petitions for parents and children. While the joys associated with the acquisition of citizenship are the dream of most immigrants, there are few legal nightmares as potentially devastating to these aspirations as false claims to U.S. citizenship (false USC claims).[1]

Until enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) on September 30, 1996,[2] only material and willful misrepresentations (including false USC claims) made to a U.S. immigration or consular officer in connection with an application for a visa, admission to the United States, or related immigration benefit rendered foreign nationals inadmissible to the United States under the former Immigration and Nationality Act (INA) §212(a)(6)(C).[3] As such, immigration-related misrepresentations made to private entities, such as employers, banks, or airlines, generally did not result in inadmissibility under the statute. Further, the process of obtaining a discretionary waiver of inadmissibility for misrepresentation was relatively easy under the former version of INA §212(i) because persons with a U.S. citizen or lawful permanent resident (LPR) spouse, parent, or child could qualify for a waiver based on extreme hardship to said relative (as could a foreign national whose misrepresentation was more than 15 years old without any qualifying relative or showing of hardship) and, pursuant to the administrative case law, the act of "fraud" that required the waiver to be filed could not be considered as an adverse discretionary factor.[4]

However, the enactment of IIRAIRA and the subsequent legal landscape changed these provisions in draconian ways. Not only was the INA §212(i) waiver provision amended so that USC or LPR children no longer qualified as "anchor" relatives for waiver purposes, but the 15-year period was also eliminated so that a misrepresentation became a lifetime bar. Further, the lenient administrative waiver holdings in §212(i) waiver cases were overturned by the U.S. Supreme Court so that the misrepresentation itself could indeed be considered to be a serious adverse factor in determining discre-

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[1] *See* Immigration and Nationality Act (INA) §212(a)(6)(C)(ii) (deeming inadmissible a foreign national who falsely represents or has falsely represented him- or herself to be a U.S. citizen for any purpose or benefit under the INA or any other federal or state law); INA §237(a)(3)(D)(i) (deeming deportable a foreign national who falsely represents or has falsely represented him- or herself to be a U.S. citizen for any purpose or benefit under the INA or any federal or state law).

[2] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

[3] *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991).

[4] *Matter of Da Silva*, 17 I&N Dec. 288 (Comm'r 1979); *Matter of Alonzo*, 17 I&N Dec. 292 (Comm'r 1979).

tionary waiver eligibility.[5] But, of all the changes, the one with the potentially greatest significance was the addition of a new ground of inadmissibility to INA §212(a)(6)(C)(ii), which specifically states:

> (I) In general. – Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 274A) or any other Federal or State law is inadmissible.
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> (II) Exception. – In the case of an alien making a misrepresentation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adopted parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

Similarly, a new ground of deportability/removability, INA §237(a)(3)(D)(i), was also added that closely mirrors the above inadmissibility provision.

These provisions apply to all false USC claims made on or after September 30, 1996 and, of even greater significance, do not allow for any discretionary waiver (unless the client is able to qualify for asylum or some other relief, such as cancellation of removal). This is indeed ironic since many aspiring immigrants who have been convicted of serious crimes involving moral turpitude, such as theft, fraud, and sexual assault may apply for a waiver of inadmissibility, whereas persons who simply checked the "citizen or national" box on the Form I-9, Employment Eligibility Verification, to obtain employment may be removable and/or permanently inadmissible to the United States. That is why attorneys must understand the nuances of this critical statute, including the relevant case law and potential defenses to false USC claim allegations. While the issue is particularly serious within the jurisdiction of the U.S. Court of Appeals for the Eighth Circuit,[6] it applies to all U.S. jurisdictions, including cases at all U.S. consulates worldwide.

Key Considerations

Know Your Client's Facts, Common Problematic Factual Scenarios, and Enforcement Policies Within Your Jurisdiction

Immigration practitioners routinely ask their clients basic and important questions about certain aspects of their background during the intake interviews, such as:

- The manner in which they entered the United States and when they did so;
- Arrests by the Department of Homeland Security (DHS);
- Involvement in deportation/removal proceedings;
- Removal orders
- Previous applications for immigration benefits; and
- Criminal history.

However, many fail to ask their clients equally important questions regarding:

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[5] *INS v. Yang*, 519 U.S. 26 (1996).

[6] *See Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008); *Hashmi v. Mukasey*, 533 F.3d 700 (8th Cir. 2008).

- False claims to being a U.S. citizen or national to obtain employment;
- Use of a false U.S. birth certificate to obtain a state driver's license or identification document;
- Previous applications for a student loan, in-state college tuition, or a related public benefit, including a mortgage under certain federal programs while falsely claiming to be a U.S. citizen.

The problem is often compounded by the fact that many practitioners use basic client intake questionnaires that recite, almost verbatim, the various "Yes/No" inadmissibility questions from the Form I-485, Application to Register Permanent Residence or Adjust Status, or who prepare their clients for immigration interviews using the same questions. The problem? The Form I-485 does not include any questions about false USC claims (or the closely associated issue of unlawful voting in the United States, which has similar serious adverse consequences), even though these issues frequently arise during adjustment of status interviews with U.S. Citizenship and Immigration Services (USCIS) and in adjustment hearings in immigration court. In short, the time to discover such potential issues is long before the client has filed his or her application for adjustment of status or left the United States to attend an immigrant visa interview. And many serious problems could be avoided through more careful case evaluation and client preparation.

Also, it is very important that attorneys ask clients whether they have ever been arrested under an alias and, if so, what documents they had or used with that name (including what documents or information, if any, were used to obtain the document, such as a false U.S. birth certificate); in what context they were used; and whether the alias or documents were ever presented to the police, DHS, a private employer, etc. Why? From experience, many clients have told me over the years that they assumed that when I asked them whether "they" had ever been arrested or had similar legal problems, they innocently assumed I was asking whether they, in their true names (rather than the alias), had ever had such problems, essentially believing that if the incident happened under a different name, then it happened to a different person, even where their fingerprints are one and the same!

Because false USC issues arise frequently in many jurisdictions from attestations made on Form I-9, it may be important for attorneys and their clients to try to obtain from current and past employers copies of the Forms I-9 completed at the time of hire to determine:

- Whether a Form I-9 was ever completed and, if so, which version of the form (*e.g.*, the version with the unified "citizen or national" box or the subsequent version that has the two listed separately);
- What specific "status" was claimed in Section 1 of the form;
- What documents were listed by the employer in Section 2;
- Whether the employee (or some other person who may have misunderstood the foreign national's status claim) completed the form;
- Whether the foreign national actually signed the form; and
- Whether the form was retained by the employer (*e.g.*, in case requested or subpoenaed by DHS or the immigration court).

Obtaining a copy of the Form I-9 can also help attorneys ethically prepare clients to testify during adjustment of status interviews and hearings. Solid preparation could also avoid an allegation of perjury, which could result in both criminal prosecution and a finding of bad moral character in the event that alternative relief, such as cancellation of removal, is sought.

It is equally important, in evaluating the issue and advising the client, to understand and anticipate various scenarios where an officer with USCIS or a consulate may be more likely to have concerns about the issue. For example, F-1 students who have been out of status for quite some time are more likely to be questioned about false USC claims if they are applying for adjustment of status based on, for example, marriage to a U.S. citizen, and who have listed on their Form G-325A, Biographic Information, various jobs that they had held without authorization. Why? Because many USCIS officers understand that such persons were able to obtain Social Security cards from their F-1 status (albeit with the limiting words "Authorized for employment only with DHS authorization") and have historically made false USC claims more frequently to unlawfully obtain employment (in contrast with, say, many undocumented persons from Mexico and Latin America who are historically more likely to purchase or use fake green cards for the same purpose).

Further, while the false USC grounds of removability and inadmissibility apply equally in all jurisdictions, including all U.S. consulates worldwide, the reality is that the issue tends to rear its ugly head more frequently in certain jurisdictions. For example, the USCIS Field Office in Minnesota, which covers Minnesota, the Dakotas, and the Western Wisconsin area, has a reputation for aggressively pursuing the issue, as do the DHS trial attorneys in removal cases arising within the jurisdiction. On the other hand, the issue is rarely problematic in other parts of the country unless there is clear evidence of a false USC claim, such as a documented border incident, false U.S. passport application, or criminal case where false USC documents or claims were at issue and are specifically mentioned in the police or court records. By knowing local policies from experience or consulting with other immigration practitioners, you can anticipate the level of risk associated with a case, determine whether the client should or should not pursue certain benefits, such as adjustment of status or naturalization, or deem it best for the client to relocate to another location where the issue is less likely to be problematic.

Understand the Law, Including All Potential Defenses and Alternative Options

As noted above, potential false USC claims may arise in various ways and the first step, of course, is to evaluate whether a false USC claim has been made and, if so, whether removability and/or inadmissibility is triggered. The false USC claim provisions apply only to claims made on or after the effective date of September 30, 1996.[7] Further, most immigration judges, DHS trial attorneys and adjudicators, and consular officers agree that the false USC claim must have been willful, although the statute does not specifically state that intent or materiality is required (unlike the general misrepresentation ground of inadmissibility[8]). This is highly relevant because there are many instances where a person may have innocently, yet falsely, claimed U.S. citizenship, including adopted children and others who mistakenly believed they were U.S. citizens,

[7] IIRAIRA §344(c).

[8] *See* INA §212(a)(6)(C)(i).

as well as persons who presented a green card (whether genuine or fake) or a related document to an employer when completing a Form I-9, but mistakenly checked the U.S. citizen/national box on the form.

1. False USC Claims by Minors

False USC claim situations frequently arise where a foreign national entered (or attempted to enter) the United States as a child by falsely, but intentionally, claiming to be a U.S. citizen at the port of entry. Traditionally, in most such cases, minors have not been considered to have the required legal capacity to make a willful misrepresentation, particularly if they were under age 18 at the time of the false claim. However, practitioners should be aware that the U.S. consulate in Ciudad Juarez, Mexico, which processes more immigrant visa cases than any other consulate, changed its opinion in recent years on this issue and has taken the position that the false USC claim provision, is essentially a strict liability statute that also applies to minors unless they can show that they mistakenly believed they were U.S. citizens at the time of the false claim.[9]

Early last year, the Department of State (DOS) announced that following consultations with DHS (which would be implementing the same changes), the *Foreign Affairs Manual* (FAM) was specifically being amended to state that:

> 1) Only knowingly false claims to U.S. citizenship would support a finding of inadmissibility (with the foreign national bearing the burden of proving "clearly and beyond doubt" that the false claim was not knowing); and
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> 2) A separate affirmative defense was available to individuals who were (a) under age 18 at the time of the false USC claim; and (b) at the time lacked the capacity to "understand and appreciate the nature and consequences" of the false claim (again, with the individual bearing the same burden of proof).[10]

Under this guidance, individuals who were previously deemed inadmissible would be eligible to be re-interviewed to determine their admissibility. However, DOS subsequently advised that the above changes to the FAM were being withdrawn, and to date USCIS has yet to amend its *Adjudicator's Field Manual*[11] to implement these new standards which, as of this writing, remain unresolved.

2. Timely Retraction

An important potential defense in certain false USC claim cases, especially those involving claims arising at ports of entry along the border, as well as for persons apprehended by DHS or other law enforcement within the United States, is timely retraction of the false claim. However, in order for a false claim to be considered "timely retracted," the retraction must have been made voluntarily and before the misrepresentation

[9] S. Schreiber & C. Wheeler, Update from Ciudad Juarez, *available at https://cliniclegal.org/November2011/Juarez* (Nov. 2011).

[10] *See* DHS and DOS letters to Senator Harry Reid dated Sept. 12 and Aug. 29, 2012, *published on* AILA InfoNet at Doc. No. 13092060 (*posted* Sept. 20, 2013).

[11] *Adjudicator's Field Manual*, *available at http://agora.aila.org/product/detail/1246*.

was exposed by the immigration officer.[12] Retractions made at almost any point thereafter will not be considered timely and will result in permanent inadmissibility.[13]

3. Purpose or Benefit under the INA or Other Law

For removability or inadmissibility to be triggered under INA §237(a)(3)(D)(i) and INA §212(a)(6)(C), respectively, the false USC claim must have been made "for any purpose or benefit" under the INA, or under any other federal or state law. Since this statutory wording is extremely broad, it may be applied to a vast array of scenarios, including:

- Misrepresentations of identity and citizenship status at the border;
- Applications for U.S. passports, state driver's licenses, federal mortgages, in-state university tuition (including financial aid), other state or federal benefits that are restricted to U.S. citizens, and voter registration (where a declaration of U.S. citizenship is required).

While many of the original federal decisions, such as the Eighth Circuit's decision in *Ateka v. Ashcroft*,[14] specifically left unanswered the question of whether completion of a Form I-9 in the employment context is a "purpose or benefit" under the INA, other cases in several circuits have settled that issue.[15] Note that the scope of the "purpose or benefit" section of the statute is still subject to interpretation in many jurisdictions, especially where the foreign national did not make the false USC claim when applying for admission to the United States or an affirmative immigration benefit, and is typically very fact-specific.[16] However, there are potential contexts, particularly where the foreign national has not affirmatively applied for any government benefit, where it may be argued that the false USC claim was not made under the INA or some other federal or state law. For example, I represented an individual who was accused of making a false USC claim after he circled "U.S. citizen" on a jail intake questionnaire that he was required to complete when beginning a short workhouse sentence. He testified that he circled "U.S. citizen" because he thought that the questionnaire was asking whether he was authorized to work in the United States—which he was—and because there was no other clear choice on the form that addressed his specific circumstances.

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[12] *Matter of M-*, 9 I&N Dec. 118 (BIA 1960).

[13] *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973) (retraction not made until one year after false claim); *Angeles-Robledo v. A.G.*, No. 05-2765 (3d Cir. May 12, 2006) and *Valadez-Munoz v. Holder*, 623 F.3d 1304 (9th Cir. 2010) (retraction of false USC claim not timely when not made until second immigration interview and confronted with evidence of false claim).

[14] 384 F.3d 954 (8th Cir. 2004).

[15] *Ferrans v. Holder*, 612 F.3d 528, 532–33 (6th Cir. 2010); *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080, 1085 (10th Cir. 2007); *Theodros v. Gonzales*, 490 F.3d 396, 402 (5th Cir. 2007).

[16] *Richmond v. Holder*, No. 12-1395-ag (2d Cir. Apr. 30, 2013) (case remanded to BIA to determine scope of statute where the foreign national made false USC claim to DHS officer while incarcerated); *Castro v. Holder*, 671 F.3d 356 (3d Cir. 2012) (foreign national not inadmissible for false USC claim made to local police at time of arrest).

4. False USC/Nationality Claims on the Form I-9

Frequently, in recent years, the false USC claim issue has most commonly arisen where the foreign national has misrepresented his or her status on a Form I-9 to gain employment by falsely attesting in Section 1 under penalty of perjury that he or she is "A citizen *or* national of the United States" (emphasis added). This is a common occurrence because employers are generally prohibited from requesting further documentation from the prospective employee once documentation of his or her identity and right to accept employment (most typically a state-issued driver's license and Social Security card) have been presented. To specifically limit the "citizen/national disjunctive" defense discussed below, in April 2009 DHS put into effect a new Form I-9 that has four separate attestation options for the employee to select in Section 1 that specifically separate "citizen" and "noncitizen national" as separate options.[17]

For cases involving the previous version of the Form I-9, the most common defense emphasized the ambiguous nature of the Form I-9 attestation and whether the person had in fact falsely claimed to be a U.S. citizen, a U.S. national,[18] or something else. In that regard, it is critical to note that INA §212(a)(6)(C)(ii) punishes only false USC claims, not false claims to U.S. nationality. Since the two terms are separately defined under the INA and involve highly complex (and usually misunderstood) differences, attorneys could argue that it is unclear whether the person had been claiming to be a U.S. citizen or U.S. national, and, therefore, that a false USC claim was not made absent clear evidence to the contrary. Related arguments to refute false USC allegations include:

- The fact that the terms "citizen" and "national" are commonly used interchangeably by U.S. immigration officials and attorneys, and are accordingly ambiguous and/or vague[19];
- The difficulty in determining which status the person was claiming when he or she presented only a driver's license and Social Security card—as opposed to a U.S. passport or birth certificate—in support of the Form I-9; and
- The rule of lenity, which says that because of the draconian impact of the false USC statute, any ambiguity should be resolved in favor of the foreign national.[20]

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[17] USCIS, Questions and Answers: USCIS Revises Employment Eligibility Verification Form, *available at http://www.uscis.gov/archive/archive-news/questions-and-answers-uscis-revises-employment-eligibility-verification-form*.

> Q. In Section 1 – Employee Information and Verification, of the revised Form I-9, an employee can now attest to being either a citizen or noncitizen national of the United States. Who is a noncitizen national?
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> A. Noncitizen nationals are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad. More information on U.S. noncitizen nationals can be found by clicking the U.S. Department of State Web site link in the "Related Links" section.

[18] INA §101(a)(22) (the phrase "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States).

[19] Today almost all nationals are citizens; the few who are not are almost entirely natives of American Samoa and Swains Island. Since the number of noncitizen nationals is so small, and since their rights so closely resemble those of citizens anyway, the terms "national" and "citizen" are often used interchangeably." S. Legomsky, *Immigration and Refugee Law and Policy* 4 (Foundation Press 3d Ed. 2002).

[20] *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

For several years, legacy Immigration and Naturalization Service (INS) and USCIS[21], the Board of Immigration Appeals (BIA)[22], and the federal courts[23] generally accepted this line of defense, particularly where the foreign national could articulate his or her ignorance of the meaning of the various terms and his or her unequivocal intent to have never affirmatively claimed to be a U.S. citizen. In fact, legacy INS Texas Service Center (TSC) said during its April 9, 2001 liaison meeting with the American Immigration Lawyers Association (AILA) that it recognized the citizen/national I-9 distinction and would only consider an adjustment applicant to be inadmissible if there was other specific evidence of a false claim to U.S. citizenship.[24] Further, the BIA specifically recognized the same citizen/national "disjunctive" defense in various nonprecedent decisions, including *Matter of Oduor*.[25] Certain federal circuit courts of appeals did, as well, in cases such as *United States v. Karaouni*[26] and *United States v. Mulumba*[27] (both cases involved criminal prosecution for a false attestation on the Form I-9).

Similarly, *Ateka v. Ashcroft*[28] specifically recognized the citizen/national distinction and held that, due to the ambiguous nature of the form, for a foreign national to be inadmissible, there must have been independent corroborating evidence showing that he or she intended to claim U.S. citizenship. In that case, the foreign national had testified to an immigration officer during his adjustment of status interview that he had falsely claimed to be a U.S. citizen when completing various I-9 forms to gain employment. His application for adjustment of status was, therefore, denied due to the false USC claim. He was placed in removal proceedings, where he renewed the application before the immigration court. Although he argued that his actions (merely checking the ambiguous Box 1 on Form I-9) did not constitute a false USC claim, the immigration judge, Board of Immigration Appeals, and Eighth Circuit each ruled that his previous testimony to the immigration officer stating that he had claimed to be a U.S. citizen to gain employment provided independent corroboration of his intent. This case clearly underscored the importance of clients being carefully prepared for adjustment of status interviews, as the issue may have been avoided had the foreign national clearly understood the distinction between the terms "citizen" and "national,", and that his mere placement

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[21] The INS (now USCIS) Texas Service Center, in its April 2001 written response to liaison questions posed by the American Immigration Lawyers Association (AILA), specifically stated: "The TSC recognizes the distinction between 'citizen and national' of the United States. The TSC will continue to favorably adjudicate otherwise approvable 485 applications where the alien has checked the referenced 'citizen or national' block of the I-9 unless there is other specific evidence of a false claim to U.S. citizenship." AILA, AILA/TSC Liaison Questions & Answers (Apr. 9, 2001), *published on* AILA InfoNet at Doc. No. 01041902 (*posted* Apr. 19, 2001).

[22] While the BIA has yet to issue a definitive precedent ruling on the issue, it has, in several past nonprecedent decisions that preceded the recent trilogy of Eighth Circuit decisions, placed the burden on the government to prove that the applicant had clearly made a false USC claim. *See, e.g.*, *Matter of Oduor*, A75-904-456 (BIA Mar. 15, 2005).

[23] *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004). It should be noted, however, that this case involved a criminal prosecution where the government clearly had the burden of proof.

[24] AILA, AILA/TSC Liaison Questions & Answers (Apr. 9, 2001), *published on* AILA InfoNet at Doc. No. 01041902 (*posted* Apr. 19, 2001).

[25] *Matter of Oduor*, A75-904-456 (BIA Mar. 15, 2005).

[26] 379 F.3d 1139 (9th Cir. 2004).

[27] 162 Fed. App'x. 274 (5th Cir. 2005).

[28] 384 F.3d 954 (8th Cir. 2004).

of a checkmark in the "citizen/national" box on the Form I-9 did not constitute a false USC claim per se. Indeed, prior to the more recent case law, the most common and successful method of defending against a false USC allegation was the foreign national's simple explanation, something along the lines of: "When I checked the citizen/national box on the I-9 form, I was not trying to claim that I was either a U.S. citizen or national; I really did not give it any thought and simply wanted to work."

However, the Eighth Circuit's subsequent rulings in the *Rodriguez v. Mukasey*,[29] *Kirong v. Mukasey*,[30] and *Hashmi v. Mukasey*[31] decisions now make such a defense much more difficult by focusing, in particular, on the specific burdens of proof in immigration proceedings. While the decisions continue to support the well-established rule that the government bears the burden of proving the alien's *removability* by clear and convincing evidence, they simultaneously place the burden of proof squarely on the alien to establish *admissibility* clearly and beyond doubt (an extremely high evidentiary standard that is potentially more stringent that the burden of proof in a criminal proceeding). This places many adjustment of status applicants in the almost impossible position of proving that they that they had not made a false USC claim. Further, virtually all of the other federal circuits nationwide have issued rulings following this same reasoning (while the *Karaouni* decision may still be useful where the government has the burden of proving removability, it has limited value where the burden of proof rests with the alien).[32]

In *Kirong*, for example, in response to questions concerning his intent when checking the Form I-9 U.S. citizen/national box, the foreign national testified that he did not intend to claim that he was either a U.S. citizen or a national, as he was simply seeking employment. He further testified he did not know what a national was and thought a citizen was a person born in the United States. The court held that given his burden of proving "clearly and beyond doubt" that he had not made a false USC claim, he was unable to meet this burden based on his testimony. Similarly, in *Hashmi*, the noncitizen testified that when he completed the Form I-9, he thought that he was a U.S. national because he believed that the term referred to any person legally in the United States. In ruling that he did not meet his burden of proof, the court specifically said, "In any given case, the significance of the form may depend on the credibility of the alien's testimony concerning his intent in checking the box."[33] In concluding that there was substantial evidence to support the immigration judge's negative credibility ruling, the court specifically referenced Hashmi's testimony, indicating that he knew that someone born in the United States is a USC; that he falsely told his employer that he was born in Washington state; and that he checked a box asserting he was a USC when completing a new hire form with his employer.[34] Further, in a recent unpublished BIA decision, the Board held that the foreign national had not met his burden of proof after he testified that he had

[29] 519 F.3d 773 (8th Cir. 2008).

[30] 529 F.3d 800 (8th Cir. 2008).

[31] 533 F.3d 700 (8th Cir. 2008).

[32] *See Theodros v. Gonzalez*, 490 F.3d 396 (5th Cir. 2007); *Crocock v. Holder*, 670 F.3d 400 (2d Cir. 2012); *Rana v. Gonzalez*, 175 Fed. App'x. 988 (10th Cir. 2006).

[33] *Hashmi*, 533 F.3d. at 704.

[34] *Rodriguez* involved an equally complicated fact pattern where the foreign national had purchased a fraudulent U.S. birth certificate and executed a sworn statement with USCIS that he had falsely claimed to be a USC.

marked the "citizen or national" box, but argued that he completed the Form I-9 under duress (without submitting any corroborating evidence).[35]

Despite the problematic holdings in the above-referenced federal decisions, there remain potentially viable defenses to alleged false USC claims that meet the specific burden of proof requirements. Of special note—particularly for those clients whose native language is Spanish, who had limited education and/or English language skills at the time they made the alleged false USC claim, and who possessed or utilized a fraudulent U.S. birth certificate—is an important linguistic argument that focuses specifically on the root of the term "national" and common misconceptions about the term's definition. I have consistently observed that the vast majority of persons in the above category—when asked to define what they intended to claim by falsely representing themselves as persons born in the United States—state that they thought they were falsely claiming to be U.S. nationals since the Spanish noun "*nacional*" (national) is derived from the same root as the verb "nacer" (to be born). By stressing this point (and that, conversely, a person may be a U.S. *citizen* by virtue of birth in the United States, naturalization, birth abroad to U.S. citizen parents, etc.), it may be possible to credibly demonstrate that the person intended to claim U.S. nationality rather than U.S. citizenship,[36] but such a defense is, admittedly, limited to very specific factual and evidentiary situations.

In addition, another potential defense, the answer to which yet remains to be seen, is based on the Supreme Court's decision in *Chamber of Commerce v. Whiting*.[37] While that case did not deal with admissibility or removability issues (including false U.S. claims), but, instead, the possible uses of Form I-9 in other contexts, the Court stressed the plain language of INA §274A(b)(5): "A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and sections 1001, 1028, 1546, and 1621 of title 18, United States Code." As such, practitioners may attempt to argue that if there is no indication that an alien has willfully and falsely claimed U.S. citizenship in some other context, a false attestation on a Form I-9 may not be used to support a finding of removability or inadmissibility since that is arguably outside the purview of §274A(b)(5).

5. Prosecutorial Discretion to Not Enforce False USC Claim

False USC claim issues not only arise for persons seeking admission, visas, or adjustment of status, but also for persons who are already LPRs and want to naturalize. As noted above in Section A, while the Form I-485 does not specifically ask about false claims to U.S. citizenship or unlawful voting based on such a false claim, these questions are specifically asked on the Form N-400, Application for Naturalization. While legacy INS issued two memoranda[38] to be read together, endowing USCIS adjudicators

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[35] *See Matter of Dakura*, A087-673-826 (BIA Sept. 13, 2013).

[36] While there are few BIA decisions that directly address this issue, the BIA has agreed with the "nacional/nacer" linguistic defense in various nonprecedent decisions. *See, e.g.*, *Matter of A79-051-500* (BIA Apr. 27, 2007).

[37] 131 S. Ct. 1968 (2011).

[38] W. Yates, Legacy INS 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" (May 7, 2002), *published on* AILA InfoNet at Doc. No. 02050790 (*posted* May 7, 2002); Legacy

with the discretion to approve the naturalization applications of LPRs who have voted or falsely claimed U.S. citizenship, instead of placing them in removal proceedings, I have never seen a case where this has happened (other than the rare case where the client was able to credibly prove that he was unaware that he was ineligible to vote). As such, while practitioners are advised to strongly urge clients who fall under the above categories to not apply for naturalization, in cases where the client has already applied, it is definitely recommended that USCIS adjudicators be reminded of their discretionary powers under these official DHS memoranda. Similarly, if an LPR has already been placed in removal proceedings based on an alleged false USC claim, it may be worthwhile to request that DHS terminate proceedings based on its discretionary prosecution powers to allow the individual to apply for naturalization (whether this is a realistic strategy will depend on the specific facts and specific district-by-district DHS policies on prosecutorial discretion).

6. Alternative Forms of Relief

While a false USC claim may create permanent ineligibility for adjustment of status, it does not necessarily impact eligibility for other forms of discretionary relief, such as asylum or cancellation of removal according to INA §240A(b)(1). In fact, it may be possible to use the permanent inadmissibility that results from the false USC ground to help build a stronger "hardship" argument in such cases and, in certain situations, it may even be worthwhile for the practitioner to proactively bring the issue to the attention of the immigration judge and/or DHS trial attorney to bolster credibility, including the argument that the client is permanently barred from immigrating through a family or employment petition because of the false USC claim problem. In *Matter of Guadarrama*,[39] the BIA specifically held that a foreign national who had falsely claimed to be a U.S. citizen or national on a Form I-9 was not precluded as a matter of law from establishing good moral character according to INA §101(f) and merited a grant of cancellation of removal. While the false USC claim could be considered to be a negative discretionary factor in determining good moral character or cancellation eligibility, it is unlikely in most cases (absent a record of other serious adverse conduct) to result in a negative finding, particularly if compelling family and other personal equities exist.

7. Consider Consular Processing as a Tactical Alternative

Given the severe impact of a false USC claim, and the frequency with which the issue is pursued by DHS in certain jurisdictions, there may be cases where clients who would otherwise be eligible to adjust status within the United States or apply for cancellation of removal should consider applying for an immigrant visa through a U.S. consulate abroad—even if a waiver of inadmissibility is required due to "unlawful presence")—if there is a significant likelihood that a false USC claim issue will arise with DHS and/or the immigration court. While this option may, at first reading, appear to be farfetched as a recommended strategy, it is important to note that questioning about false USC claims in the I-9 context tends to arise less frequently in the consular context. Further, while such a strategy should not be taken lightly because it involves considera-

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INS, Fact Sheet on Prosecutorial Discretion (Nov. 17, 2000), *published on* AILA InfoNet at Doc. No. 00112903 (*posted* Nov. 29, 2000).

[39] 24 I&N Dec. 625 (BIA 2008).

ble risks, including permanent inadmissibility, the inability to seek judicial review should the visa application be refused, and the possibility that a waiver (*e.g.*, for unlawful presence, if required) could be denied for lack of extreme hardship, consider the following scenarios:

Assume that your client, who resides in a jurisdiction where USCIS/DHS aggressively questions adjustment of status applicants about false USC claims in the I-9 context, is an F-1 student who (a) is married to a U.S. citizen; (b) cannot relocate elsewhere in the United States because of his spouse's employment; (c) has no adverse record other than having false claimed to be a U.S. citizen or national on a Form I-9 to gain employment; and (d) has lived in the United States for only seven years and is, therefore, several years away from being eligible for cancellation of removal. In such a case, consular processing may be a recommended alternative to adjustment of status, particularly where a waiver for unlawful presence would not be required since the client is an F-1 student who was admitted for duration of status.[40] Further, assuming the client misunderstood the technical definitions of the terms "citizen" and "national," and was not really trying to claim either status when completing Forms I-9, there should not be an ethical issue concerning preparation of this client's immigrant visa application.

Similarly, consider the common scenario faced by many of my firm's clients who (a) are married to U.S. citizens; (b) entered the United States without inspection; (c) have been continuously present in the United States for more than 10 years; (d) are now in removal proceedings; (e) and checked the citizen/national box on a Form I-9 to gain employment. Such clients have the option of applying for cancellation of removal or applying for voluntary departure to apply for an immigrant visa and unlawful presence waiver (with the added option today of seeking administrative closure to apply for a provisional unlawful presence waiver[41]). While many of these clients would, of course, prefer to pursue the cancellation application because it allows them to remain (at least temporarily and with interim employment authorization) in the United States with their loved ones while it is pending, they may be better off pursuing the immigrant visa and waiver applications given the likelihood that the false USC issue will arise *on the record* during the removal hearing and will render them permanently inadmissible should the cancellation application be denied (*e.g.*, for lack of the required high level of hardship or otherwise as a matter of discretion). Indeed, these are typically very difficult tactical decisions to make, but careful evaluation and planning is essential in all such cases.

Conclusion

While false USC claims present one of the most challenging aspects of immigration law today, careful case evaluation, preparation, and presentation (combined with good luck) can greatly help clients successfully navigate the complicated U.S. immigration system.

[40] *See* 9 FAM 40.92 N1(b)(2).

[41] *See* 78 Fed. Reg. 535 (Jan. 3, 2013).