



CHANGES TO THE FORM I-485, APPLICATION FOR ADJUSTMENT OF STATUS

Overview of changes to the new Form I-485, with a closer look at a few questions

U.S. Citizenship and Immigration Services (USCIS) recently updated the Form I-485, Application to Register Permanent Residence or Adjust Status.¹ The instructions for the Form I-485, as well as the two supplemental forms, Supplement A and Supplement J, have also been revised.² This advisory applies to both June 2017 and December 2017 revisions of the Form I-485.

Among the most obvious changes, the form has tripled in length from six pages to 18 pages; the form instructions have increased in length to 42 pages; and the “redesign” of the I-485 application form, instructions, and supplements incorporate several notable substantive changes. The purpose of this advisory is to provide a brief overview of these changes, and to highlight some changes—to the questions on eligibility and inadmissibility—that we think merit particular attention.³ Specifically, questions about working without employment authorization, misrepresentation, false claim to U.S. citizenship, and unlawful voting. With the exception of the misrepresentation question, these other questions are entirely new on the Form I-485.

Individuals applying for adjustment of status (a green card) based on a family-based petition under INA § 245(a), as well as U nonimmigrants applying under INA § 245(m), Special Immigrant Juveniles under INA § 245(h), and other applicants for permanent residence all use this same Form I-485. USCIS will only accept filings on the June or December 2017 editions of the Form I-485; older editions of this form can no longer be used.⁴ Beginning March 6, 2018, only the December 2017 edition will be accepted.

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I. Process Tips for Filling out the New Form I-485

A. G-325A Form No Longer Required

Even before the new Form I-485 was introduced, USCIS was transitioning away from using the G-325A Biographic Information Form. Starting in April 2017, beneficiaries of marriage-based visa petitions (I-130s) were required to fill out a new form, the Form I-130 Supplement A, in place of the G-325A. Now, the G-325A has been phased out with the new Form I-485 as well (and with the I-485, no new form or supplemental form has taken its place). The questions previously covered in the G-325A have been incorporated into the new Form I-485, so marriage-based green card applicants no longer need to submit the G-325A as part of their adjustment application.⁵

B. What Addresses May Be Listed on the New Form I-485

The new Form I-485 provides the option of listing alternate, safe mailing addresses in Part 1 on page 2. However, USCIS maintains that the applicant’s true mailing address must still be listed as well, also in Part 1.⁶ As has previously been the case, but not spelled out in the form and instructions before, USCIS will accept alternative, safe mailing addresses only for certain cases: VAWA, Special Immigrant Juvenile (SIJ), and T and U nonimmigrants. While USCIS routinely accepted safe, alternate addresses for VAWA applicants, doing so for SIJ, T, and U applicants is a new stated practice.

The new Form I-485 instructions also state that if an applicant, presumably who falls within one of these categories, does not list an alternate, safe address USCIS will attempt to send notices to the preparer’s address, if any. If there is no preparer listed, USCIS warns that even in adjustment cases for these vulnerable applicants, notices will still be sent to the mailing address listed as the only address provided. Nonetheless, mailing addresses—even for those applicants who do not qualify to use an alternate, safe mailing address—can always be an address other than a residential address where the individual physically resides. An applicant may choose to list as a mailing address a P.O. box, a relative’s address, or an attorney’s office.

C. Expanded “Application Type or Filing Category” on the New Form I-485

While the old Form I-485 had an “Application Type” section, in which the adjustment applicant would indicate the underlying basis for the adjustment filing (petition with current priority date, K-1, asylee, etc.) among eight options (with the eighth option being “other”), the new Form I-485 has expanded options and additional information depending on the basis. For instance, there are now specific boxes to check for U and T nonimmigrant adjustment applicants, INA § 245(i) penalty adjustment applicants, and other more obscure categories such as applicants adjusting via Lautenberg Parole or Indochinese Parole Adjustment Act of 2000.

D. New Form I-485 Instructions

A detailed discussion of the new Form I-485 instructions is beyond the scope of this advisory, however it is worth noting that the instructions, like the form itself, have also increased significantly in length—the form instructions for the new Form I-485 are now 42 pages. It is always important to look at the form instructions, rather than just the form itself.

Some of the increased length can be attributed to the fact that special instructions for different types of applications have been incorporated into this set of instructions. The new Form I-485 instructions include special instructions for family-based applicants, employment-based applicants, special immigrants, human trafficking victims and crime victims, asylees and refugees, as well as additional instructions for “Applicants Filing Under Special Adjustment Programs,” such as the Cuban Adjustment Act, and for “Additional Categories,” such as the diversity visa program.

The new form instructions also provide links and more detailed information regarding concurrent filings for immediate relatives, how to figure out one’s I-94 number and access an electronic I-94, and when to submit the I-693 medical exam. The new instructions also make it clear that adjustment applicants are eligible to submit Forms I-765 and I-131 at no additional cost.

Page 13 of the new Form I-485 instructions addresses the types of records USCIS requires for any criminal or delinquent conduct. Look for the ILRC’s upcoming advisory on how to address delinquent conduct and the new Form I-485.

II. Overview of Changes to the Form I-485 Section on Eligibility & Inadmissibility

Some of the changes to the Form I-485 are entirely new questions that appear in other immigration forms such as the DS-260 Immigrant Visa Application or N-400 Application for Naturalization, but were not previously included on the Form I-485. Other seemingly new questions simply break up formerly complex, multi-part questions into separate questions. Still other questions, while not new, have been reworded, possibly to make them easier to understand.

See the next section, Section III, for a closer look at some of the changes that we believe warrant additional discussion: new questions about working without authorization, false claims to U.S. citizenship, and unlawful voting, and a reworded question about misrepresentation.

A. New Questions

Some of the questions in Part 8 of the new Form I-485, General Eligibility and Inadmissibility Grounds, are new and were not included on earlier versions of the form. They include the following:

- Ever denied visa or admission to the United States: **Questions 14-15**
- Ever worked without authorization: **Question 16** (discussed in Part III, Section A of this advisory)
- Ever violated the terms or conditions of a nonimmigrant visa: **Question 17**
- Ever had prior grant of LPR status rescinded: **Question 21**
- Ever had prior grant of relief in exclusion/deportation/removal proceedings, including grant of voluntary departure but failed to timely depart: **Questions 22-23**

- Involvement in human trafficking: **Questions 41-44**
- Activities that could pose a threat to “general welfare, safety, or security” or have “adverse foreign policy consequences” for the United States: **Questions 46d & 47**
- Ever committed or attempted to commit or advocated certain crimes, including kidnapping, political assassination, etc. or belonged to any organization that espoused such activities: **Questions 48-50**
- Spouses or children of wrongdoers: **Questions 51a-51f**
- Failure to attend removal proceedings (post-April 1, 1997): **Questions 63a-63c**
- False claim to U.S. citizenship: **Question 66** (discussed in Part III, Section C of this advisory)
- Entry without inspection (EWI): **Question 71**
- Unlawful presence: **Questions 72-73**
- Accompanying someone who needs protection/guardianship but who is inadmissible: **Question 75**
- Unlawful voting: **Question 77** (discussed in Part III, Section D of this advisory)

B. Reworded and/or Expanded Questions

Other questions in Part 8 of the new Form I-485 are different versions of questions that previously were included. They include the following:

- Expanded questions about prior exclusion, deportation, or removal proceedings and/or orders: **Questions 18-20**
- Expanded questions about J nonimmigrant visa: **Questions 24a-24c**
- Expanded questions about criminal conduct, including expanding the question about whether ever committed a *crime of moral turpitude or drug-related offense* for which applicant was not arrested, to whether ever committed *any* crime for which was never arrested: **Questions 25-31, 39**
- Expanded questions about drug trafficking: **Questions 32-34**
- Reworded questions about prostitution, including removing “within ten years” language, and adding query regarding child pornography and “other commercialized vice”: **Questions 35-38**
- Reworded questions about public assistance (compound question split into two separate questions): **Questions 61-62**
- Reworded question about misrepresentations: **Question 65** (discussed in Part III, Section B of this advisory)
- Reworded question about alien smuggling (adding term “alien smuggling” in parenthetical following description, replacing “foreign national” for “alien,” and adding “to enter or try to enter” in place of “try to enter”): **Question 68**
- Expanded questions about draft evasion and U.S. military exemption, desertion, etc.: **Questions 79-80**

Note that many of the questions throughout the new version of the Form I-485 have been reworded and this list may not be exhaustive but attempts to bring the most notable to the reader's attention.

III. Important Changes to the Form I-485: A Closer Look at a Few Questions

While the new form is much longer, particularly Part 8, the expanded section on general eligibility and inadmissibility issues, USCIS representatives have stated that they do not anticipate adjustment interviews taking much more time than they did before, as both then and now the interviewing officer needed to cover these issues.⁷ In practice, however, some adjustment interviews may take more time now, especially where issues arise due to the wording of some of the new questions that may require follow-up questions and clarification, as discussed further below. It will now also take longer than before to prepare the Form I-485, since it is so many more pages in length and requires so much more detail than previous versions.

According to USCIS, one of the main purposes of the June 2017 Form I-485 revision (encapsulating the greatest changes to the form compared to older versions) was to more comprehensively address all inadmissibility grounds in INA § 212(a).⁸ Previously, many inadmissibility grounds were not reflected in the form's questions. Now, questions regarding various inadmissibility categories are divided into separate subsections within Part 8, such as all health-related grounds or all security-related grounds, and very loosely track the statute at § 212(a). Other questions, such as failing to pay taxes or fulfill military service, go to the discretionary element of adjustment of status. In total, the questions on general eligibility and inadmissibility went from 18 questions (contained in Part 3, "Processing Information," on the prior version of the I-485) to more than 80 questions in Part 8, "General Eligibility and Inadmissibility Grounds," in the new I-485.

The following discussion refers to Part 8 of the new Form I-485 (both rev. 6/26/17 and rev. 12/13/17, collectively referred to in this advisory as "New Form I-485"), which spans pages 9-14 on the new form, with comparisons to the January 2017 version of the Form I-485 (rev. 01/17/17, referred to in this advisory as "Old Form I-485").

A. Working Without Authorization (Question 16 on Page 10)

NEW FORM I-485

16. Have you *EVER* worked in the United States without authorization?

OLD FORM I-485

No comparable question-

Working without employment authorization, in other words without a valid, unexpired work permit, is not a ground of inadmissibility but it can bar certain individuals from applying for adjustment of status. Some individuals are ineligible for INA § 245(a) adjustment of status if they have worked without employment authorization, according to INA § 245(c)(2) & (8). Specifically, INA § 245(c)(2) provides that INA § 245(a) adjustment is not available to any individual, besides immediate relatives or special immigrants, "who hereinafter continues in or accepts unauthorized employment . . ." and INA § 245(c)(8) says the same for "any alien who was employed while the alien was an unauthorized alien . . ."

As noted above, section 245(c) of the INA does not apply to immediate relatives, or VAWA- and SIJS-based adjustment applicants.⁹

While this bar to adjustment for those who have worked without authorization existed even before the latest I-485 form revision, the fact that the new form specifically requires that an applicant check a box stating “yes” or “no” regarding whether they have ever worked without permission raises two main issues.

One, it specifically flags this issue for an interviewing USCIS officer when before it may not have come up, and/or USCIS officers often seemed to look the other way on this issue.

Two, it may lead to follow-up questions and actions if elsewhere in the application package, such as under the employment history section, the applicant has listed employment, but indicates at question 16 on the new I-485 that they have worked without authorization. An interviewing officer may now be more likely to ask what kind of documentation the adjustment applicant provided to obtain that unlawful employment. This follow-up could even lead to the officer requesting Form I-9s from employers, and potentially revealing that an applicant may have falsely claimed to be a U.S. citizen on the I-9 form. While USCIS is always able to undertake such an investigation, in the majority of cases they do not endeavor to do this. The new form may make these questions about documentation provided at time of seeking employment more common, potentially revealing serious inadmissibility issues that applicants need to be aware of.

At a minimum, with this and other questions in Part 8 on the new Form I-485 that have serious inadmissibility implications, it is important for applicants to fully understand the legal significance of the answers that they are providing.¹⁰

B. Misrepresentation (Question 65 on Page 13)

NEW FORM I-485

65. Have you EVER lied about, concealed, or misrepresented any information on an application or petition to obtain a visa, other documentation required for entry into the United States, admission to the United States, or any other kind of immigration benefit?

OLD FORM I-485

9. Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act (INA) for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States, or any immigration benefit?

The main difference between the wording about misrepresentations on the old I-485 and the new I-485 is that previously, it explicitly asked about “misrepresentation of a *material fact*” (emphasis added) whereas the new form asks about *any* misrepresentation. The distinction between material and immaterial misrepresentations is critical because only material misrepresentations trigger the inadmissibility ground in INA § 212(a)(6)(C)(i). It may be that by asking for all misrepresentations, USCIS wants the interviewing officer to determine whether the misrepresentation in question is material, rather than having the applicant (and/or attorney or other legal representative assisting with the form) do so. It appears that it is now more important than ever for anyone considering

checking “yes” to this question be prepared with defenses and arguments explaining why an affirmative answer to this question does not trigger inadmissibility under INA § 212(a)(6)(C)(i).

Misrepresenting a material fact means more than simply telling a lie—materiality goes to whether that lie could make a difference in the government's decision in an immigration matter, such as a visa, admission, or other application for immigration benefits. In other words, if the lie was not material—important to deciding the case—the person is not inadmissible.

USCIS officers are instructed to follow a materiality “test” from the U.S. Supreme Court case *Kungys v. United States*, 485 U.S. 759 (1988).¹¹ The test explains that in order for false statements to be material, they must have been “predictably capable of affecting” the decisions of the agency.¹² The policies further instruct officers in applying this standard to consider whether either 1) the noncitizen is inadmissible, removable, or ineligible for the benefit sought under the true facts; or 2) 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.”¹³

The wording on the new form also removes the word “willful,” another important modifier because it distinguishes between misrepresentations that are not willful, and thus do not make someone inadmissible under INA § 212(a)(6)(C)(i), and those that do. In addition to a misrepresentation only making someone inadmissible if it was *material*, it can also only trigger inadmissibility if it was *willful*, meaning that it was “deliberate and voluntary.”¹⁴ Consequently, a misrepresentation cannot be based on an “innocent mistake, negligence or inadvertence,”¹⁵ and the person must *know* that the statement was false at the time she made it.¹⁶

The words “willful” and “material” are part of the legal definition and interpretation of what constitutes a material misrepresentation under INA § 212(a)(6)(C)(i). This means that there are conceivable factual scenarios in which an adjustment applicant who may have lied or misrepresented something on an immigration application could check “no” to the question about misrepresentation on the prior form as long as it was not willful or material. Now, theoretically, that same person will have to check “yes” and be prepared to explain that this does not mean the applicant is inadmissible under INA § 212(a)(6)(C)(i).

It is critical that the applicant fully understand the implications of checking “yes” or “no” to the new, broader question on the I-485 regarding misrepresentations. If USCIS determines that the adjustment applicant has made a material misrepresentation under INA § 212(a)(6)(C)(i), her application will be denied unless she is granted a waiver of the misrepresentation.¹⁷

Note, however, that the law has not changed. Only fraud and *material* misrepresentations make someone inadmissible under INA § 212(a)(6)(C)(i). If an applicant must mark “yes” to the new question, it is important to provide an addendum with arguments that any misrepresentation was not willful or material. (Indeed, some practitioners may continue to check “no,” taking the position that no matter the wording used, the question is really asking about inadmissibility under INA § 212(a)(6)(C)(i).)

Arguing no inadmissibility for fraud or misrepresentation:

Individuals seeking an immigration benefit, such as adjustment of status, must prove by a preponderance of evidence that they do not fall under any ground of inadmissibility. Absent evidence that the applicant used fraud or misrepresentation to obtain an immigration benefit, the applicant will have met the burden of proving she is not inadmissible under INA § 212(a)(6)(C)(i).¹⁸ Where evidence exists that suggests that an applicant may be inadmissible under INA § 212(a)(6)(C)(i), the applicant has the burden of proving by a preponderance of the evidence any one of the following:

- There was no fraud or misrepresentation;
- Any fraud or misrepresentation was not intentional or willful;
- Any fraud or misrepresented fact was immaterial;
- The fraud or misrepresentation was not made to procure a visa, admission, or some other benefit; or
- The misrepresentation was not made to a U.S. government official.¹⁹

If the applicant successfully proves any one of the foregoing elements, she will not be found inadmissible under INA § 212(a)(6)(C)(i).

Practitioners will want to be very cautious about checking “yes” to this question on the new form without having a clear case strategy; the practitioner must have strong arguments that the misrepresentation was not willful or material or, in contrast, determine that the applicant did make a material misrepresentation that triggers inadmissibility. If there is a question about a finding of inadmissibility under INA § 212(a)(6)(C)(i), the practitioner must also be prepared to submit a waiver, should USCIS reject their arguments (and make sure that the applicant is eligible for a waiver).²⁰

C. False Claim to U.S. Citizenship (Question 66 on Page 13)

NEW FORM I-485

66. Have you EVER falsely claimed to be a U.S. citizen (in writing or any other way)?

OLD FORM I-485

No comparable question/false claims to U.S. citizenship presumably fell under Question 9 on the old form, about misrepresentations in general-

Anyone who admits to having ever falsely claimed to be a U.S. citizen, by checking “yes” to Question 66 on the new Form I-485, will be denied adjustment, as this ground of inadmissibility has *no waiver*.²¹ The applicant could also be placed in removal proceedings for having made a false claim to U.S. citizenship, with extremely limited defenses or forms of relief available. The old Form I-485 had no separate question about falsely claiming to be a U.S. citizen; presumably, false claims would have been included under the question about fraud or misrepresentation.

Although the question on the new Form I-485 asks about false claims at any time (“ever”), INA § 212(a)(6)(C)(ii) only applies to false representations of U.S. citizenship made *on or after September 30, 1996*. False claims prior to that date may fall within the visa fraud

misrepresentation ground of inadmissibility at INA § 212(a)(6)(C)(i) instead, but as explained in the previous section there is at least a waiver available for INA § 212(a)(6)(C)(i). There is no waiver for INA § 212(a)(6)(C)(ii).

Section 212(a)(6)(C)(ii) of the INA punishes people for claiming U.S. citizenship for entry into the United States, and for any other purpose under any federal or state law. By its plain language, the false claim to U.S. citizenship ground enacted in 1996 requires a showing that the false representation was made for a specific purpose—to satisfy a legal requirement or obtain a benefit that would not be available to a noncitizen under the INA or any other state or federal law. As written, DHS could have applied these provisions to a broad range of scenarios, including someone who is underage and uses the U.S. passport of an older friend to get into a bar and order a drink, someone who votes in an election not realizing that she is not permitted to vote, or even someone who came to the United States as a baby and believes herself to be a U.S. citizen (however, there is an explicit exception for false claims made unknowingly by certain children of U.S. citizens, discussed below).²²

Fortunately, the U.S. government clarified in 2014 that the person must have *knowingly* made the false claim to U.S. citizenship to fall within this ground. A noncitizen claiming not to know that the claim to citizenship was false has the burden of proof to establish this affirmative defense.²³

It also matters to whom the false claim of U.S. citizenship is made. According to several circuit courts and USCIS, the person to whom the false claim to citizenship is made does not have to be a U.S. government official, but can be for purpose of private employment, where the misrepresentation is on a Form I-9 or sworn statement.²⁴ Courts have found the following acts to constitute false claims to U.S. citizenship:

- Falsely representing oneself as U.S. citizen to obtain a U.S. passport;²⁵
- Using a false U.S. passport to enter the United States;²⁶
- Using a false U.S. passport to obtain a state driver’s license;²⁷
- Falsely representing oneself as a U.S. citizen to avoid removal proceedings;²⁸ and
- Claiming U.S. citizenship in an attestation or I-9 for private employment.²⁹

Some other examples of false claims to U.S. citizenship that the government may also charge include: oral statements made in response to questioning by an officer to obtain a benefit such as entry into the United States; a signature on a voter registration card that specifically asked the question “Are you a U.S. citizen?”; false declarations of citizenship to obtain a credit card, bank financing, mortgage, student financial aid, or health insurance; and any other declaration under oath or penalty of perjury, in writing or orally, that the noncitizen was a U.S. citizen in order to obtain a benefit under the INA or other state or federal laws.

However, some limitations have been placed on the application of this provision even though understandably this complexity is not captured on the Form I-485. For example, one court found that a false claim of U.S. citizenship to a police officer was not made for any purpose or benefit under the INA, even though the individual in question was undocumented, because the assumption that anyone who is undocumented would be making a false claim for any benefit or purpose under the Act was too speculative.³⁰ In addition, in an unpublished BIA decision, a conditional resident’s purchase of a firearm by making a false claim to U.S. citizenship was not considered for “any

purpose or benefit” under the Act because the person in question did not gain any benefit from the false claim, since he was eligible to purchase a firearm as a conditional permanent resident.

There are also some limited exceptions and defenses to a false claim to U.S. citizenship. There is a limited statutory exception for certain children of U.S. citizens, at INA § 212(a)(6)(C)(ii)(II). To qualify for the exception, which if applicable cures false claims that took place on or after September 30, 1996, the person must meet the following requirements:

1. Each natural/adopted parent of the person is or was a U.S. citizen;
2. The person began to reside permanently in the United States before the age of sixteen; and
3. The person reasonably believed at the time of such statement, violation, or claim that he or she was a citizen of the United States. (A reasonable belief must take into consideration the totality of the circumstances.)

Note that this exception does not apply to children of lawful permanent residents or undocumented immigrants, or children with only one U.S. citizen parent, even if they really believed themselves to be U.S. citizens. Further, the Ninth Circuit in *Romero-Ruiz v. Mukasey*, 538 F.3d 1057 (9th Cir. 2008), held that individuals born out of wedlock who reasonably believe both parents are U.S. citizens cannot fall under this exception where it can be established that either parent is not in fact a U.S. citizen.

Arguing the false claim was not made knowingly:

If a person does not fit into the exception mentioned above, but made the false claim while a minor, there is a good argument that he or she does not have the capacity to make a false claim.³¹ Since USCIS recognizes that a false claim to U.S. citizenship must be made knowingly, anyone who truly believed he or she was a U.S. citizen should not be inadmissible under this ground, even if the person does not fall under the specific exception at INA § 212(a)(6)(C)(ii)(II).³²

In fall 2013, the government announced that it will consider it as a separate and affirmative defense for minors if the person can show that she was (a) under the age of 18 at the time of the false citizenship claim; and (b) at that time lacked the capacity to understand and appreciate the nature and consequences of a false claim to citizenship.³³ The noncitizen has the burden to show that she meets both of these criteria. This policy is an interpretation in line with case law that indicates that any misrepresentation must be made knowingly. Anyone who truly believed she was a U.S. citizen should not be inadmissible in light of this policy, even if the person was not a minor.

Arguing timely retraction:

Retracting the misrepresentation in a timely manner is a defense to both general misrepresentations under INA § 212(a)(6)(C)(i) and false claims under § 212(a)(6)(C)(ii). If making such an argument, it is important to consider case law in your circuit. It may be difficult to establish that your client’s retraction was timely; cases generally find that significant delay, or retractions made after an official confirms the misrepresentation and confronts the applicant, is too late.

Nonetheless, the BIA held that a timely retraction was made where a person volunteered that he had entered the United States unlawfully before he completed his statement during an interview with an immigration officer at an airport. *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). In that interview,

he attempted to establish that he was lawfully residing in the United States. The Ninth Circuit in an unpublished opinion found that a person made an effective retraction when, after a border patrol officer asked for documentation of his citizenship, he promptly told the officer that he only had a work permit.³⁴ The Court found that he understood little English and provided clear, consistent testimony that he claimed U.S. citizenship only because he misunderstood the primary inspector's question. However, many cases have held that a retraction will not be considered timely or voluntary where it occurred long after the false statement was made or if the retraction was made after the person realized that the claim had not deceived the DHS officer.³⁵

D. Unlawful Voting (Question 77 on Page 14)

NEW FORM I-485

77. Have you EVER voted in violation of any Federal, state, or local constitutional provision, statute, ordinance, or regulation in the United States?

OLD FORM I-485

No comparable question-

As with the false claim to U.S. citizenship ground of inadmissibility, there is now a specific question about unlawful voting on the Form I-485, whereas the old I-485 had no such question. An individual can be inadmissible under INA § 212(a)(10)(D) for unlawful voting committed at any time; unlike the ground of inadmissibility for a false claim to U.S. citizenship, this ground is retroactive and therefore applies to voting before, on, or after September 30, 1996 (the date this ground was added to the INA with IIRIRA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

There is also no waiver for this provision, although there is an exception for children of U.S. citizens who have resided permanently in the United States before the age of 16, and reasonably believed that they were U.S. citizens.³⁶ This exception parallels the exception for false claims to U.S. citizenship, discussed above.

The definition of unlawful voting does not require guilty knowledge, but rather appears to include people who innocently believed that they were entitled to vote. However, a USCIS official must consider whether it was a knowing violation where a knowing violation is required by the voting law that was violated. The key is that the person must not have merely voted, but that they also did so in violation of some federal, state, or local law. Practitioners should identify and analyze the voting law that was violated, and determine if there was a requirement of guilty knowledge or some other specific intent.³⁷ On the other hand, the DHS may argue that violation of a law with no intent requirement, such as a regulation stating who can vote, will be a basis for a finding of inadmissibility for unlawful voting. For example, 18 USC § 611 makes voting by a noncitizen in a federal election unlawful, with no intent or knowledge requirement. A noncitizen, therefore, who voted in a federal election could be found inadmissible for unlawful voting even if she did not have any knowledge that she was prohibited from doing so.

In the context of the deportability ground for unlawful voting, INA § 237(a)(6), there is at least one federal case analyzing the illegal voting removal provision that practitioners should consult. In

MacDonald v. Gonzales, 400 F.3d 684 (9th Cir. 2005), the Ninth Circuit considered whether a woman was deportable for voting in violation of a Hawaii election law which provided that “any person who knowingly votes when the person is not entitled to vote” is guilty of a felony. While the Ninth Circuit did not explicitly hold that guilty knowledge or other specific intent is actually required to fall under the illegal voting ground, it did find that a court must find that the noncitizen violated all of the provisions of the law at issue to be removable and could not apply its own standard. In that case, the Court found that the immigration judge erred by applying his own knowledge standard requiring that the petitioner merely be aware that it is practically certain that her voting would result in a violation of law. The Court held that the correct standard under the Hawaiian law at issue not only required that the petitioner knowingly voted, but also that she knew she was not entitled to vote. Because the woman was not aware that she was ineligible to vote, she was not deportable for unlawful voting.³⁸

The DHS might be persuaded to recognize the unfairness in targeting individuals who made an innocent mistake when voting and did not intend to do anything wrong even if the relevant election statute does not impose a *mens rea* requirement like that in *MacDonald*. For example, advocates reported in the past that the Dallas District DHS office requested trial attorneys to move to dismiss the Notice to Appear as “improvidently issued” in the case of voters who did not have a bad intent.

Any noncitizen who voted unlawfully, however, is in danger of being denied adjustment. In order to overcome this ground of inadmissibility, the applicant must prove that he or she did not violate the particular election laws in question.

End Notes

¹ See www.uscis.gov/news/news-releases/uscis-introduces-redesigned-form-green-card-applicants.

² As in the past, the Supplement A is for adjustment applicants under INA § 245(i), and the Supplement J is for employment-based adjustment applicants who must confirm bona fide job offer or job portability. See www.uscis.gov/i-485SupA and www.uscis.gov/i-485SupJ for more information on the Form I-485 Supplements A & J, respectively.

³ For questions or more information regarding this advisory, please contact Ariel Brown at abrown@ilrc.org.

⁴ The most current version of the Form I-485 is available on the USCIS website at www.uscis.gov/i-485. To figure out a form’s edition date, look at the lower left corner on any page of the form. Most forms also list an expiration date, in the upper right corner of the first page only. Expiration dates, unlike edition dates, are not controlling and a form may be replaced by a newer version prior to the posted expiration date, or continue in use well beyond the stated expiration. For example, the previous version of the Form I-485 had a 2018 expiration date, but that version has already been replaced, twice, with newer versions in 2017. Sometimes, USCIS will allow continued usage of multiple versions of a form. On the form’s page on the USCIS website, it will indicate whether older versions are also accepted. USCIS stopped accepting the January 2017 and older versions of the Form I-485 on August 24, 2017, and will stop accepting the June 2017 version on March 6, 2018.

⁵ See Parts 1, 3 and 4 of the new Form I-485.

⁶ USCIS stakeholder call on revised Form I-485, August 3, 2017.

⁷ *Id.*

⁸ *Id.*

⁹ INA § 245(c) also does not apply to a few other less-common adjustment applicants. See INA §§ 101(a)(27)(H), 101(a)(27)(I), & (a)(27)(K).

¹⁰ See www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter6.html for more information on USCIS' definition of unauthorized employment in the context of adjustment of status.

¹¹ See also *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017) (explaining the agency's position on the *Kungys* materiality test, and declining to follow part of the test as interpreted by the Ninth Circuit in *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995)).

¹² *Kungys*, 485 U.S. at 771. See also USCIS Policy Manual, 8 USCIS-PM J.3(E); *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017).

¹³ 8 USCIS-PM J.3(E). See also *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1961).

¹⁴ *Matter of D-R-*, *supra*, at 451 n.3.

¹⁵ *Emokah v. Mukasey*, 523 F.3d 110, 117 (2d Cir. 2008).

¹⁶ See, e.g., *Atunnise v. Mukasey*, 523 F.3d 830, 834-38 (7th Cir. 2008); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *Garcia v. INS*, 31 F.3d 441 (7th Cir. 1994).

¹⁷ Only those who have a U.S. citizen or permanent resident spouse or parent are eligible to file a waiver of fraud or misrepresentation, based on extreme hardship to that relative.

¹⁸ See *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991).

¹⁹ 8 USCIS-PM J.3(A).

²⁰ Remember that only those who have a U.S. citizen or lawful permanent resident spouse or parent are eligible for a waiver of fraud or misrepresentation under INA § 212(a)(6)(C)(i).

²¹ See INA § 212(a)(6)(C)(ii).

²² There is an exception for children that meet specific requirements. See discussion in this advisory, *infra*.

²³ 9 FAM 302.9-5; USCIS Policy Manual, Volume 8, Part K. This addition to the FAM was based on an opinion issued by the Department of Homeland Security's Office of the General Counsel on December 6, 2014.

²⁴ *Ferrans v. Holder*, 612 F.3d 528 (6th Cir. 2010); *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007).

²⁵ *Matter of Barcenas*, 25 I&N Dec. 40 (BIA 2009); see also *Jackson-Omier v. Gonzales*, 246 Fed. Appx. 1 (1st Cir. 2007) (unpublished); *Suarez v. Attorney General*, 2008 U.S. App. Lexis 24013 (3d Cir. 2008) (unpublished).

²⁶ *Almendarez v. Mukasey*, 282 Fed. Appx. 326 (5th Cir. 2008) (unpublished).

²⁷ *Lara-Rivas v. Mukasey*, 270 Fed. Appx 526 (9th Cir. 2008) (unpublished).

²⁸ *Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016).

²⁹ *Crocock v. Holder*, 670 F.3d 400 (2d Cir. 2012); *Ferrans*, 612 F.3d, cited above; *Theodros*, 490 F.3d, cited above.

³⁰ *Castro v. Attorney General of the U.S.*, 671 F.3d 356 (3d Cir. 2012).

³¹ Some practitioners have argued that if someone other than the minor indicated that the minor was a U.S. citizen by presenting invalid documents at the border, the child did not make a false claim to U.S. citizenship or engage in visa fraud, but rather made an entry without inspection. See "Children Lack Capacity to Make False Claims or Misrepresentations, IJ Holds" in 83 *Interpreter Releases* 775-776 (April 24, 2006); see also *Singh v. Gonzalez*, 451 F.3d 400, 409 (6th Cir. 2006) (holding that fraud committed by parents on the behalf of children should not be imputed to the children themselves, and cited with approval by BIA and other circuits in distinguished cases); *Sandoval v. Holder*, 641 F.3d 982 (8th Cir. 2011) (remanded to BIA to determine whether minor's status at time of misrepresentation barred application of this provision, and whether age should impact the timeliness of the retraction).

³² USCIS, Interoffice Memorandum on Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators at p. 25 (Mar. 3, 2009).

³³ Letter from Department of State to Senator Harry Reid (Aug. 29, 2013); Letter from Department of Homeland Security to Senator Harry Reid (Sept. 12, 2013).

³⁴ *Olea-Reyes v. Gonzales*, 177 Fed. Appx. 697 (9th Cir. 2006) (unpublished).

³⁵ *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (retraction after a year and where disclosure of falsity of statements was imminent not timely nor voluntary); *Matter of Ngan*, 10 I&N Dec. 725, 727 (BIA 1964) (retraction made three years later not timely); *Angeles-Robledo v. Attorney General*, 183 Fed. Appx. 159 (3d Cir. 2006) (unpublished) (not effective recantation where person did not recant her claim to U.S. citizenship until her second interview in which she was confronted with third-party evidence of her falsity and where her traveling companion was the first to inform the border authorities that she was not a U.S. citizen); *Llanos-Senarillos v. United States*, 177 F.2d 164, 165-66 (9th Cir. 1949) (retraction during examination not timely or voluntary where witness realized that the false testimony would not deceive).

³⁶ INA § 212(a)(10)(D)(ii).

³⁷ The election laws will differ depending upon location and type of election. For instance, some criminalize the actual act of voting even though the noncitizen did not know he was ineligible to vote while others require an additional finding that the individual acted “knowingly” or “willfully.” California Election Code § 18560, for example, states that, “Every person is guilty of a crime punishable by imprisonment in the state prison ... who: (a) Not being entitled to vote at an election, fraudulently votes or fraudulently attempts to vote at that election.” Therefore, in certain circumstances in order to be found inadmissible for unlawful voting in California, DHS has to prove that the person voted fraudulently.

³⁸ In *MacDonald*, the petitioner mistakenly registered to vote on a driver’s license application because she thought she was a U.S. citizen based on her marriage to one. When she received a voter registration form in the mail, after conferring with her husband, she changed her answer to say she was not a U.S. citizen. Nonetheless, she received Notice of Voter Registration and believed that the government was allowing her to vote even though it had learned she was not a citizen. She then voted and was not aware that she could not.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.