

No. 09-3600

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ALEJANDRA SANDOVAL,
Agency No. A029-303-178,**

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

**ON PETITION FOR REVIEW FROM A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS**

BRIEF FOR RESPONDENT

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**DJ #: 39-39-1263.02
Date: May 21, 2010**

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SUMMARY OF THE CASE AND STATEMENT OF ORAL ARGUMENT

A. Introduction

In this petition for review, Alejandra Sandoval challenges the Board of Immigration Appeals' ("Board") October 8, 2009 decision finding her statutorily ineligible to adjust her status to that of a lawful permanent resident because she had falsely claimed to be a United States citizen. Administrative Record ("AR") 2-6. *See* INA § 212(a)(6)(C)(ii). The Board concurred with the Immigration Judge that Sandoval was inadmissible under INA § 212(a)(6)(C)(ii) despite her claim that the statute should not apply because she was sixteen years of age at the time she made the false representation. AR 4. Specifically, the statute applies to "any alien" and does not contain any applicable waivers. *See* INA § 212(a)(6)(C)(ii).

B. Statement Regarding Oral Argument

Counsel for Respondent does not request oral argument. Counsel believes that the briefs and record adequately present the facts and legal arguments, and that oral argument is therefore unnecessary. However, if the Court finds that oral argument would be of assistance, Respondent requests the opportunity to be heard.

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Respondent.

**ON PETITION FOR REVIEW OF THE DECISION
OF THE BOARD OF IMMIGRATION APPEALS**

BRIEF FOR RESPONDENT

Statement of Jurisdiction

Alejandra Sandoval seeks judicial review of an October 8, 2009, final order of the Board of Immigration Appeals (“Board”) finding her removable from the United States. *See* AR 2-6. The Board’s decision found Sandoval inadmissible and therefore, unable to adjust to the status of a permanent resident due to her false claim of United States citizenship under INA section 212(a)(6)(C)(ii). AR 2-6. The Board’s jurisdiction derives from 8 C.F.R. sections 1003.1(b)(3) and 1240.15, which

grant the Board appellate jurisdiction over decisions of an immigration judge in removal proceedings.

This Court's jurisdiction arises under section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252, *as amended by* the REAL ID Act, Pub. L. No. 109-13, Div. B, section 106(a), 119 Stat. 23 (May 11, 2005), which confers exclusive jurisdiction on the courts of appeals to review final orders of removal.

On November 6, 2009, Sandoval timely filed a petition for review challenging the Board's decision, within thirty days of the Board's final order of removal. INA § 242(b)(1). Venue is proper in this Court because the proceedings before the immigration judge were completed in Bloomington, Minnesota. AR 97; *see* INA § 242(b)(2).

Restatement of the Issues

Issue One: Whether the record compels reversal of the Board's finding that Sandoval failed to meet her burden of establishing that she was not inadmissible for making a false claim to citizenship and further failed to timely retract her false claim making her ineligible to adjust status where substantial evidence supports the determination that she attempted to enter the United States by using her sister's birth certificate and did not retract her false claim until after it was discovered by immigration inspectors?

Most Apposite Authorities:

- INA §212(a)(6)(C)(ii)(I);
- *Matter of M-*, 9 I & N Dec. 118 (BIA 1960)

Issue Two: Whether the Board reasonably interpreted INA §212(a)(6)(C)(ii)(I) as applying to all aliens including unaccompanied minors where the statute categorically states that it applies to “any alien” making a false claim to citizenship and does not create any such exception?

Most Apposite Authorities:

- INA §212(a)(6)(C)(ii)(I)
- *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 46 U.S. 837 (1984)

Statement of the Case

This is an immigration case in which Sandoval, a native and citizen of Mexico, sought to adjust her status to that of a lawful permanent resident on September 6, 2002 based on her marriage to a United States citizen. AR 1541-1546. On February 18, 2004, the United States Citizenship and Immigration Services denied her claim based on her having previously falsely represented herself to be a United States citizen. AR 1516-1517. On the same date, the Department of Homeland Security issued a Notice to Appear charging Sandoval as inadmissible and subject to removal based on her false representation, wherein it was claimed that she used her United

States citizen sister's birth certificate, in order to seek entry into the United States at Dallas-Fort Worth International Airport on January 10, 1998. AR 1569-1570, 1531-1532; *see also* INA § 212(a)(6)(C)(ii)(I). On December 20, 2004, the DHS leveled two additional charges of removability against Sandoval: 1) that on October 13, 1997, she falsely represented herself to the state of Minnesota by presenting her sister's birth certificate in order to obtain a Minnesota identification card; and 2) that she fraudulently represented herself and obtained a second Minnesota identification card by presenting the original fraudulently obtained document. AR 1059-1060.

Following a merits hearing, an immigration judge found that Sandoval was not inadmissible on the false claim of citizenship charge, because she was an unaccompanied minor at the time of the false claim, and granted her adjustment of status. AR 424-426. DHS subsequently appealed the immigration judge's decision, and, on September 28, 2007, the Board remanded the case to the immigration court for further proceedings consistent with its ruling that no "bright line rule" existed for finding that minors lacked capacity to engage in false claims to citizenship. AR 325-326. On remand, the immigration judge found Sandoval inadmissible and ineligible for a waiver concluding that she had knowledge that at the time she misrepresented herself she was aware of her actions and that she further failed to timely retract her claim. AR 98-117. Following Sandoval's appeal, the Board

affirmed the decision of the immigration judge finding her inadmissible under INA § 1182(a)(6)(C)(ii) based on her false claim to citizenship, and, as such statutorily barred to adjust status. AR 3-6.

Statement of the Relevant Facts

On January 10, 1998, Sandoval, a native and citizen of Mexico, boarded American Airlines flight 1423 in Guadalajara, Mexico for Chicago, Illinois. AR 1531, 1312. The flight included a stop-over at Dallas Fort-Worth International Airport where Sandoval was required to go through customs. AR 1531, 1313. It was during that stop-over in Dallas where immigration officials discovered that Sandoval was attempting to enter the United States by falsely claiming to be a United States citizen. AR 1531,1313-1314.

By way of background, Sandoval attested that she had previously arrived in the United States in June of 1996. AR 1311; affidavit of Sandoval. At that time, Sandoval's sister, Sandra, a United States citizen, traveled to Tijuana, Mexico and helped her sister illegally enter the United States. *Id.* Sandoval stated that Sandra "told me to go through a separate, faster line for Americans and an immigration officer asked everyone if they were Americans and waiving them by. I answered yes and I was waived by with everyone else." *Id.* Sandoval ultimately settled in Minnesota where two of her sisters lived including, Sandra. AR 1312.

During late 1997, Sandoval wanted to return to Mexico in order to visit her grandmother. *Id.* However, Sandoval, who was sixteen years old at the time, did not have any documentation or identification that would enable her to travel. *Id.* Therefore, Sandoval “decided to get an ID from Minnesota and try to travel using (her) sister Sandra’s documents.” *Id.* Using her sister’s birth certificate, Sandoval obtained a Minnesota identification card. *Id.* Then with the assistance of an ex-boyfriend Sandoval purchased a plane ticket to Guadalajara and used her new identification card to board the plane. *Id.*

On January 10, 1998, Sandoval returned to the United States. AR 1313. In an I-213, Record of Deportable/Inadmissible Alien completed on the date Sandoval entered the United States, immigration officer Teresa Vega wrote that Sandoval applied for entry into the United States claiming to be Sandra Sandoval. AR 1531. The narrative in the I-213 added that while in secondary inspection it was discovered that she had receipts under the name of Alejandra Sandoval and was wearing a ring that bore the initials A.S.V. (Alejandra Sandoval Vasquez). *Id.* It was then that Sandoval admitted that she was using her sister’s birth certificate. AR 1531. Based on this entry, Sandoval was charged with being subject to removal under section 212(a)(6)(C)(ii) of the INA for falsely representing herself to be a United States citizen for a purpose or benefit under the INA or any Federal or

State law. AR 1569. Subsequently, additional charges of removability were leveled against Sandoval. AR 1513, 1368, 1315. Sandoval conceded that she was removable under section 212(a)(7)(A)(i)(I) of the INA because she was not in possession of a valid entry document at the time she applied for admission and section 212(a)(6)(A)(i) of the INA based on her presence in the United States without having been admitted or paroled. *See* Form I-261 at AR 1513 and concession of charges by counsel at AR 504-505.

On October 15, 2004 and March 18, 2005, hearings were held regarding the Government's charge of removability under section 212(a)(6)(C)(ii) of the INA for falsely claiming citizenship and Sandoval's application for adjustment of status. The first witness called to testify was Teresa Vega on behalf of the Government. AR 465-500. Ms. Vega has been an immigration inspector since February 1991. AR 467. She undertook significant training for this position and speaks both English and Spanish. AR 467-468. In 1998, Ms. Vega was assigned to Dallas-Fort Worth International Airport where she served as a special operations immigration inspector. AR 468. Her duties required her to inspect incoming passengers, conduct secondary inspections, draft notices to appear and expedited removal orders. *Id.*

Ms. Vega testified that she first came into contact with Sandoval during a secondary inspection. *Id.* Sandoval was brought in for secondary inspection after another inspector had noticed a ring on her finger with a different name and date of birth than the documents submitted contained. AR 468-469. Ms. Vega stated that she was informed by the immigration officer accompanying Sandoval to secondary inspection that Sandoval had not revealed her true identity even though there was reason to believe she was not who she purported to be. AR 469. Vega stated that if she would have admitted her identity during primary inspection then the procedure would lead to a confiscation of the birth certificate, withdrawn her application for admission and removed her to Mexico. AR 469-470. However, according to Ms. Vega, who was conducting her inspection in Spanish, Sandoval continued to insist that she was Sandra Sandoval. AR 470. It was only after repeated questioning that Sandoval finally admitted her true identity. AR 470-471. Ms. Vega was questioned regarding Sandoval's assertion in her affidavit that she informed the primary inspector about her true identity, Ms. Vega responded that had Sandoval actually done so it would have been indicated in the record. AR 472; *see* AR 1531 indicating that Sandoval admitted her true identity during

secondary inspection.¹

Sandoval was also called as a witness by the Government and presented testimony surrounding the events of January 10, 1998. Sandoval admitted that she presented her sister's birth certificate to immigration inspectors in an attempt to enter the United States. AR 512. Sandoval further admitted that she was aware that she was not a United States citizen when she entered the inspection line for citizens only at Dallas-Fort Worth International Airport. AR 516. After inspection, Sandoval was unable to remain in the United States and returned to Mexico. AR 518. However, with the assistance of a "coyote" she was able to enter the United States illegally in Arizona before making her way to Minneapolis.

¹Sandoval's opening brief attempts to impeach the credibility of Ms. Vega's testimony. *See* Petitioner's Opening Brief at 7-8 (stating that Vega "had no genuine independent recollection of Sandoval or the events of January 10, 1998" and added that when questioned "about some of these inconsistencies, she said 'I don't remember. I don't want to lie. I don't remember.'").

As an initial matter, Sandoval mischaracterizes the context in which Ms. Vega made the remark. She was simply responding to the following question asked by Sandoval's attorney: "[w]hen she was put under oath, were you present, were you present when she was under oath, in addition to when -?" Further, it is insincere to assume that Ms. Vega would independently recall all of the events that transpired on January 10, 1998 when she testified on October 15, 2004. Nevertheless, Vega actually did state that she had independently recalled the events when she testified:

What made me remember this inspection was the, about the ring. She had to take off the ring. That's when everything came back and I remembered who she was and I remembered that she did false claim and she was, she did not want to admit who she was because she was trying to get in. AR 473.

Id. After returning to the United States, Sandoval stated that she again used her sister's birth certificate in order to obtain a Minnesota identification card. AR 520-521.

During questioning by her own attorney, Sandoval stated that when she first disembarked in Dallas, she proceeded to a line for customs and inspection. AR 523-524. Sandoval testified that she did not remember any questions but was directed to a "big room" where she met with a male immigration officer. AR 524-525. Sandoval stated that on the first line she was not sure if she showed documentation, including her birth certificate, to the inspectors and could not recall any interaction (stating "To be sure, I don't remember). *Id.* Once she met with the male inspector, she provided him with the birth certificate and continued to claim to be her sister, Sandra. AR 527. She then stated that after his repeated questioning she began crying and admitted that she was, in fact, not Sandra. *Id.* After admitting her true identity, Sandoval testified that two female inspectors continued to question her during secondary inspection. *Id.*² Sandoval testified

²The immigration judge engaged in a conversation with Sandoval's counsel about her claim that the male inspector was a primary inspector. AR 530-531. The immigration judge stated that it appears that Sandoval's "mixing the first line with the second line" because it seemed implausible that she would be moved to a second line without at least showing some documentation on the first line. Counsel responded "That, that's possible, Your Honor." *Id.*

that during this part of the inspection the immigration officials did not believe that she was actually Alejandra Sandoval so in an attempt to prove her real identity she showed them her ring and the receipts. AR 532-533.

On October 11, 2005, the immigration judge rendered his initial decision. AR 406-428. After providing a recitation of the facts and documentary evidence, the immigration judge stated that he believed that Sandoval had misrepresented herself as that of her sister when she arrived for primary inspection. AR 419-420. This was clear based on her submission of her sister's birth certificate and identification documents. AR 420. Furthermore, Sandoval continued to misrepresent her own identity when she was initially examined by a secondary inspector. *Id.* The immigration judge noted that it was only after her initial misrepresentation that she informed the secondary inspector of her true identity. *Id.* Nevertheless despite the fact that it was clear that Sandoval engaged in misrepresentation, the analysis conducted by the immigration judge related to whether an unaccompanied minor could be found inadmissible under the false claim charge. *Id.* It was noted that when Sandoval made her first misrepresentation in order to obtain a Minnesota identity document she was sixteen years of age. AR 420-421. Similarly when she attempted to enter the United States on January 10, 1998, using documents in her sister's name and purporting to be her sister, she was sixteen years of age. AR 421. The

immigration judge identified the Supreme Court's logic in *Roper v. Simmons*, 543 U.S. 551 (2005) and stated that "juveniles had diminished culpability because of their susceptibility to immature and irresponsible behavior." *Id.* The immigration judge then noted that under 8 C.F.R § 1240.10(c) an immigration judge may not accept an admission of removability from one under eighteen unless accompanied by an attorney or other representative. AR 422. The immigration judge followed by likening the death penalty and grounds of excludability, which are unwaivable. *Id.* The immigration judge proceeded to find that an unaccompanied minor engaging in a false claim of United States citizenship should not be permanently barred from the United States. AR 423. The Court stated that there should be a "bright-line" rule that minors not suffer such extreme immigration consequences. *Id.*

DHS appealed the immigration judge's decision, and, on September 28, 2007, the Board remanded the case to the immigration court for further proceedings consistent with its ruling. AR 325-326. The Board observed that there was "no legal authority or support for the immigration judge's 'bright line rule'" and finding that those under the age of eighteen lack the capacity to engage in a false claim of United States citizenship. AR 325. Therefore, the Board reversed the immigration judge's finding and remanded for a determination as to whether Sandoval is inadmissible based on her false claim. AR 326.

On remand, the immigration judge found Sandoval inadmissible and ineligible for a waiver. AR 98-117. Consistent with the Board's finding that a "bright line rule" could not be applied, the immigration judge concluded that Sandoval had knowledge that at the time she misrepresented herself she was aware of her actions. AR 113-114. Further, the immigration judge did not believe that she timely retracted her false claim. AR 114; *citing Matter of M-*, 9 I & N Dec. 118 (BIA 1960). It was noted that in order to timely retract, the retraction must occur prior to "[e]xposure of the underlying misrepresentation." AR 114. In this instance, Sandoval only retracted her claim when she was presented with evidence from immigration officials that she had presented false documents. AR 114.

Sandoval appealed the decision of the immigration judge, and, on October 8, 2009, the Board dismissed the appeal. AR 3-6. *See also* Notice of Appeal at AR 87-89 and Appeal Brief at AR 26-65. The Board found no error with the immigration judge's finding that Sandoval was inadmissible under INA § 1182(a)(6)(C)(ii) based on her false claim to United States citizenship, and, as such was statutorily barred to adjust status. AR 4. The Board disagreed with Sandoval's argument and held that her act of presenting a birth certificate to customs officials "clearly qualifies as a representation that [she] was . . . a United States citizen." *Id.*; *citing Matter of Barcenas-Barrera*, 25 I & N Dec. 40 (BIA 2009). The Board also accepted the

immigration judge's finding that Sandoval failed to timely recant her claim and only recanted after discovery of her false claim was imminent. AR 5.

The Board further rejected Sandoval's claim that DHS was foreclosed from charging her with inadmissibility pursuant to INA § 1182(a)(6)(C)(ii) because DHS did not initially charge her under that section when the NTA was issued. AR 5. The Board dismissed this argument on multiple grounds finding: 1) that on equitable estoppel grounds there must be affirmative misconduct by the Government, which did not exist here; 2) the Board lacks the authority to prevent the Government from taking lawful action empowered by statute and regulations; 3) removal proceedings require prosecutorial discretion which the Board is not charged with reviewing; and 4) assessing the constitutionality of the law is beyond the Board's authority. AR 5. Lastly, Sandoval's due process argument was rejected as she failed to show any violation or prejudice. *Id.* She received a full and fair hearing and was assisted by counsel. *Id.* Additionally, no evidence of prejudice exists as she failed to demonstrate how any alleged errors were outcome determinative. *Id.*

As such, Sandoval's appeal of the immigration judge's decision was denied and she was granted the privilege of voluntary departure. AR 5-6. This petition for review now follows.

Summary of Argument

Substantial evidence supports and the record does not compel reversal of the of the Board's finding that Sandoval was statutorily barred from adjusting her status because she failed to meet her burden of establishing that she was not inadmissible for making a false claim of citizenship under INA §212(a)(6)(C)(ii)(I). Sandoval does not challenge that she attempted to enter the United States purporting to be her sister and the evidence further supports a finding that she failed to timely retract her claim until after it was discovered by immigration inspectors. Further, despite Sandoval's claim that INA §212(a)(6)(C)(ii)(I) does not apply to unaccompanied minors, the Board reasonably interpreted its own statute to find that no exception applies for unaccompanied minors because the statute makes clear on its face that it applies to any and all aliens.

Argument

I. The Board Properly Found Sandoval Inadmissible Based on Her False Claim of United States Citizenship

A. Scope of review

The Court reviews an order of the Board which includes an immigration judge's findings and reasoning to the extent that the Board expressly adopted

them. *Gutierrez-Olivares v. Mukasey*, 533 F.3d 946, 948-49 (8th Cir. 2008).

B. Standard of review

The Board's and the immigration judge's factual findings, such as the factual finding that an alien has falsely represented herself to be a United States citizen, is "conclusive unless any reasonable fact-finder would be compelled to conclude differently." 8 U.S.C. § 1252(b)(4). Under this standard, the Petitioner must show that "the evidence not only *supports* [reversal] but *compels* it." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (emphasis in original)

The Court reviews the Board's legal determinations *de novo* and generally defers to reasonable Board interpretations of gaps in statutes and regulations it administers because "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)). Gaps indicate that Congress delegated policymaking to administrative agencies, who have "great expertise" and who are "charged with responsibility for administering" the laws. *Godinez-Arroyo*, 540 F.3d at 850 (quoting *Chevron*, 467 U.S. at 865). The Court thus defers to agency action that "carr[ies] the force of law," such as a regulation or a

published Board decision. *Godinez-Arroyo*, 540 F.3d at 850 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[T]he [Board] should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.” (internal quotation omitted)). Furthermore, a court of appeals must apply *Chevron* deference to an agency’s interpretation of an ambiguous statute even if the court has issued contrary precedent interpreting the ambiguity. *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 980-82 (2005).

The Board’s decision in this case was an unpublished decision and therefore lacks the force of law. *See Mead Corp.*, 533 U.S. at 221 (finding *Chevron* deference inappropriate because there is “no indication that Congress intended such a ruling [a tariff classification] to carry the force of law”). However, even if *Chevron* deference is inappropriate, the Board’s unpublished opinion is eligible for a lesser form of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234 (noting that “*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency. . . and given the value of uniformity in its

administrative and judicial understandings of what a national law requires” (internal citations and quotation omitted)). Under *Skidmore* deference, “the ruling is eligible to claim respect according to its persuasiveness,” *Mead Corp.*, 533 U.S. at 221, but is “worth no more than its inherent persuasive value,” *Kai v. Ross*, 336 F.3d 650, 655 (8th Cir. 2003). The opinion is afforded weight “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *Godinez-Arroyo*, 540 F.3d at 850 (citing *Skidmore*, 323 U.S. at 140; *Kai*, 336 F.3d at 655).

C. Substantial Record Evidence Supports The Board’s Finding That Sandoval Was Inadmissible under INA § 212(a)(6)(C)(ii)(I) For Falsely Claiming To Be A Citizen Of The United States

An alien applying for adjustment of status bears the burden of showing that she is “admissible to the United States for permanent residence.” INA § 245(a), 8 U.S.C. § 1255(a); 8 C.F.R. § 1240.8(d) (in removal proceedings alien bears the burden of establishing eligibility for requested relief); *Pichardo v. INS*, 216 F.3d 1198, 1200 (9th Cir. 2000) (“Critically, in removal proceedings, the alien has the burden of establishing that he is ‘clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title’”). Thus, Sandoval bears the burden of proving that none of the grounds of inadmissibility included in INA

§ 212, including INA § 212(a)(6)(C)(ii), which renders inadmissible an alien who makes a false claim to United States citizenship, apply to her. In other words, as DHS has alleged that Sandoval made a false claim of citizenship, she can rightfully be deemed inadmissible, and thus ineligible for adjustment of status, unless she produces clear evidence to the contrary showing that she did not make a false claim to United States citizenship. *See* INA § 240(c)(2)(A) (“if the alien is an applicant for admission” she has the burden of establishing that she “is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212 [1182].”). *See Pichardo v. INS*, 216 F.3d at 1200.

Section 212(a)(6)(C)(ii)(I) of the INA provides that “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 1324a of this title) or any other Federal or State law is inadmissible.” 8 U.S.C. § 1182 (a)(6)(C)(ii)(I). This section is a non-waivable ground of inadmissibility. *See* 8 U.S.C. § 1182(a)(6)(C)(iii).

In this case, substantial evidence supports and a reasonable fact finder would not be compelled to conclude that the Board’s findings of fact were in error. INA § 242(b)(4)(B). Indeed, it is undisputed that Sandoval falsely claimed to be a United States citizen before an immigration inspector, and, moreover, presented

fraudulent documents to support her false claim of being a United States citizen. *See generally* Petitioner's Opening Brief. As such, it is clear that Sandoval violated section 212(a)(6)(C)(ii) of the INA by attempting to pass herself off as that of her sister, Sandra.

Rather, in order to avoid the consequences of section 212(a)(6)(C)(ii) of the INA, Sandoval argues that she timely recanted her false claim to United States citizenship. *See* Petitioner's Brief at 35-48. The Board, however, which incorporated the immigration judge's findings on this issue correctly rejected Sandoval's argument that her recantation during a secondary inspection should excuse application of the bar of INA § 212(a)(6)(C)(ii). *See* AR 114, AR 3.

The record amply supports, the Board's decision that Sandoval failed to timely recant. *See Matter of M-*, 9 I & N Dec. 118 (BIA 1960) (for the proposition that in order to timely retract a claim, the retraction must occur prior to "[e]xposure of the underlying misrepresentation."). Here, substantial evidence supports the Board's determination that Sandoval failed to reveal her true identity to immigration inspectors until secondary inspection. Although, Sandoval challenges the credibility and recollection of the Government's witness, Ms. Vega, the immigration court found Ms. Vega believable. *See* AR 112. The immigration judge specifically stated that the "Court believes that the testimony and statements

of the inspector is accurate, in that the respondent did not immediately reveal her true identity in secondary inspection.” *Id.* While Sandoval attempts to impeach the credibility of Ms. Vega’s statements, it is clear that her testimony, in concert with the I-213 prepared on the date of Sandoval’s entry, provide the most accurate detail of the events of January 10, 2010 and reveal that Sandoval did not retract her claim until after her false claim had been exposed.

As an initial matter, the I-213, prepared by Ms. Vega indicates unequivocally that “[D]uring secondary inspection a search through (the) applicants belongings was conducted Applicant was confronted with these facts and admitted that she asked her sister if she could borrow her birth certificate, (and) social security card.” AR 1531. At that time, Sandoval was charged with being inadmissible based on her false claim of citizenship. Sandoval attempts to challenge the accuracy of the documentation prepared by Ms. Vega because the attached form I-213 and I-275 list Sandoval’s date of birth as February 5, 1977. *See* Petitioner’s Brief at 44; *see also* AR 1529, 1531. This, however, is easily explainable as the typed birth date on both forms is that of her sister, whose identity she first claimed. *Id.* On form I-213, Sandoval’s actual date of birth of May 21, 1981 is included in the narrative and on form I-275, the date of birth is written in pencil. *See* AR 1529, 1531.

The proffered testimony also makes clear that Sandoval failed to timely retract her claim. Ms. Vega specifically testified that the retraction occurred during secondary inspection where she first came into contact with Sandoval. AR 468. She testified under oath that Sandoval had been referred to secondary inspection only after a primary inspector had reason to suspect she was not the individual listed on the birth certificate presented. AR 468-469. Ms. Vega also stated that she was informed by the primary immigration officer that Sandoval had not revealed her true identity even though there were reason to suspect she was not who she purported to be. AR 469. Ms. Vega added that while in secondary inspection Sandoval continued to insist that she was Sandra Sandoval, and, only after repeated questioning admitted that she was not. AR 470-471.

In contrast, the immigration judge noted that Sandoval “could not really recall what happened” during the inspection process. AR 103. And, her own attorney admitted that it was “possible” that Sandoval had confused the facts and circumstances surrounding her inspection. AR 530-531. In fact, Sandoval testified that she was unable to recall any questions during her initial immigration inspection and was then directed to another room for further inspection. AR 524-525. When pressed as to whether she recalled anything regarding her first interaction with immigration officials she stated “[t]o be sure, I don’t remember.”

Id. Sandoval even testified that while being inspected by a male immigration officer she continued to claim to be her sister until finally admitting her true identity after repeated questioning. AR 527.

As such, Sandoval is unable to demonstrate that she timely retracted her claim and therefore cannot meet the high standard here of showing that the Board's conclusion – that she failed to meet her burden of showing that she is clearly and beyond doubt entitled to be admitted and is not inadmissible under INA § 212(a)(6)(C)(ii) – was “manifestly contrary to law.” Accordingly, her challenge to the Board's decision should be rejected.³

³Sandoval argues that her due process rights were violated because the immigration authorities violated DHS policy regarding unaccompanied minors making false claims. Petitioner's Opening Brief at 40. Sandoval is specifically asking for a special rule regarding retraction for minors which does not and has never existed. Nevertheless, a challenge to a DHS policy regarding unaccompanied minors is not appropriate during an appeal of a specific removal order. Further, Sandoval makes no claim that her hearing violated due process, where she had counsel, admitted removability and provided testimony in support of her claim to adjust status. Nor is there any evidence, as she must show, that her hearings before the immigration judge prejudiced her claim, in any way.

II. The Board Reasonably Interpreted INA § 212(a)(6)(C)(ii)(I) As Including Minor Children

In her opening brief, Sandoval goes to great lengths to challenge the Board's interpretation of INA section 212 (a)(6)(C)(ii), a statute which it administers. Petitioner's Opening Brief at 14-34. As noted, *supra*, this Court reviews *de novo* purely legal questions and the agency's construction of the provisions of the INA and own regulations is entitled to substantial deference. *Chevron*, 467 U.S. at 842-43. If a statute is clear on its face, as it is here, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the language of a statute is not clear, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Sandoval argues that INA § 212(a)(6)(C)(ii)(I) should not apply to unaccompanied minors, however, an analysis of its plain language makes clear that it applies to any alien making a false representation. As the statute specifically reads:

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 1324a of this title*) or any other Federal or State law is inadmissible. INA § 212(a)(6)(C)(ii)(I). (Emphasis added)

Here, the statutes plain meaning, supports the Board's holding, that Sandoval was inadmissible for making a false claim of citizenship. AR 3-6. As the statute makes abundantly clear it applies to any and all aliens and creates no specific exceptions or waivers for unaccompanied minors.

Nevertheless, Sandoval argues that because a number of statutes in the INA provide different treatment to minors, this specific provision should also be read to exclude unaccompanied minors. *See* Petitioner's Opening Brief at 22-24. This argument, however, only serves to undercut her own position. Whereas in other areas of the INA, Congress has crafted specific exceptions for minors, here it has not. If Congress wanted to create an exception under the false claim provision for unaccompanied minors they could have easily done so and the absence of such an exception speaks directly to the intent of Congress.

Furthermore, Congress did create one exception under this provision and it does not afford differing treatment to unaccompanied minors.⁴ *See* INA

⁴INA § 212(a)(6)(C)(ii)(II): Exception: In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive 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.

§ 212(a)(6)(C)(ii)(II). This exception relates to an alien, whose parents are citizens and, who permanently resided in the United States prior to attaining the age of 16, and reasonably believed at the time of the false claim that he or she was a citizen. *See id.* Nowhere does Sandoval argue that this exception should apply in her case and the absence of any exception relating to unaccompanied minors is fatal to her claim.

Sandoval also references specific case law highlighting the different treatment afforded to adults and minors in the criminal context. *See* Petitioner's Opening Brief at 19-22. It is essential to distinguish, however, criminal cases from immigration proceedings, which are considered to be civil in nature. *See Negusie v. Holder*, 129 S. Ct. 1159, 1169 (2009)) (Scalia, J., concurring). As was noted in *Negusie*, the Supreme Court has consistently held that an "order of deportation is not a punishment for crime." *Id.* citing *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). Therefore, it is unreasonable to suggest that the different treatment provided to minors in criminal statutes is instructive in analyzing laws relating to minors in the civil context.

To read the statute as Sandoval suggests would effectively change the plain meaning of the statute which Congress made clear applies to any and all aliens making a false representation of United States citizenship. It is clear from the

plain meaning of the statute that it applies to Sandoval and substantial record evidence supports a finding that she was inadmissible for making a false claim of citizenship.

Conclusion

For the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionally spaced using Times New Roman 14-point typeface and contains 5,989 words of text. Respondent has used WordPerfect 12.0 to prepare this brief.

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CERTIFICATE OF FILING DISKETTE

Pursuant to Eighth Circuit Rule 28A(d), I certify that attached for filing with this brief is a 3-1/2 inch diskette containing the full text of the Brief for Respondent. I further certify that this diskette has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2010, I caused two copies of the foregoing Brief For Respondent to be served upon Petitioner by directing that they be deposited in the mail drop at the United States Department of Justice, Washington, D.C., in time for the Department's same-day mail collection service, to be sent by United States mail, first-class postage prepaid, addressed to:

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