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Practical Analysis of Immigration and Nationality Issues

FRAUD AND MISREPRESENTATION IN THE INA

*By Simon Azar-Farr**

Fraud or misrepresentation is explicitly mentioned in the following places in the Immigration and Nationality Act (INA) and Title 8 of the C.F.R.:

- 8 U.S.C.A. § 1101(a)(43)(M)(i), defining as an "aggravated felony" an offense "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000."[1]
- 8 U.S.C.A. § 1101(a)(43)(P), defining as an "aggravated felony" "an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months . . . ."
- 8 U.S.C.A. § 1101(f)(6) states that a person does not have "good moral character" if, during the qualifying period, he or she gave "false testimony for the purpose of obtaining any benefits under this chapter."
- 8 U.S.C.A. § 1154(c) prohibits approval of any relative visa petition "if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." The regulations require denial of the petition for any alien "for whom there is substantial and probative evidence of such an attempt or con-

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*Simon Azar-Farr is a nationally respected immigration defense and federal criminal defense lawyer. He is also a noted appellate lawyer. Mr. Azar-Farr's offices are in San Antonio and Houston, Texas. He may be reached at 210-736-4122 or simon@simonazarfarr.com.

spiracy, regardless of whether that alien received a benefit through the attempt or conspiracy" and further provide that "it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy," but require "the evidence of the attempt or conspiracy [to] be contained in the alien's file."[2]

- 8 U.S.C.A. § 1155 permits the Attorney General to revoke an approved visa petition "at any time, for what he deems to be good and sufficient cause." This is sometimes used when there is a finding that the alien obtained the petition through fraud or misrepresentation.

- 8 U.S.C.A. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii) and 8 C.F.R. § 1208.16(d)(2) make any alien convicted of a "particularly serious crime" ineligible for asylum and withholding of removal. Courts have included fraud (including marriage fraud) as a "particularly serious crime."[3]

- 8 U.S.C.A. § 1158(d)(6) makes an alien whom the Attorney General has found to have "knowingly made a frivolous application for asylum" "permanently ineligible for any benefits" under the INA. "For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated."[4]

- 8 C.F.R. §§ 208.24 and 1208.24 authorize an asylum officer to terminate asylum or withholding of removal that was granted by U.S. Citizenship and Immigration Services (USCIS) if, after an interview, the asylum officer finds "a showing of fraud in the alien's application" rendering him or her ineligible for the relief at the time when the relief was granted. The alien will then be placed into removal proceedings. Alternately, an immigration judge (IJ) or the Board of Immigration Appeals (BIA or Board) can reopen a case to terminate asylum or withholding or terminate such relief in conjunction with immigration proceedings.[5]

- 8 C.F.R. § 216.3(b) authorizes institution of rescission or removal proceedings against an alien spouse who "obtained permanent resident status through a marriage which was entered into for the purpose of evading the immigration laws" after the conditional basis of his or her permanent resident status was removed.

- 8 U.S.C.A. § 1186a(b)(1)(A)(i) requires termination of the conditional resident status of an alien whom the Department of Homeland Security (DHS) determines entered into the qualifying marriage "for the purpose of procuring an alien's admission as an immigrant." The alien is thereafter deportable.[6]

- 8 U.S.C.A. § 1160(a)(3)(B) provides that the agency may "deny adjustment to permanent status and provide for termination of the temporary resident status" granted to a special agricultural worker alien if it "finds by a preponderance of the evidence that the adjustment to temporary resident status was the result of fraud or willful misrepresentation as set out in section 1182(a)(6)(C)(i) . . . ."

- 8 U.S.C.A. § 1160(b)(7) imposes criminal penalties for an alien who, in applying for adjustment

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of status under the special agricultural worker program, "(i) knowingly and willfully falsifies, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, or (ii) creates or supplies a false writing or document for use in making such an application." Aliens convicted under this provision are rendered inadmissible under 8 U.S.C.A. § 1182(a)(6)(C)(i).

- 8 C.F.R. § 217.4(a)(1) provides that an alien who applies for admission under the Visa Waiver Program "who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission into the United States and removed."

- 8 C.F.R. § 236.18(a)(1) provides that benefits under the Family Unity Program of the Immigration Act of 1990[7] may be terminated if they "were acquired as the result of fraud or willful misrepresentation of a material fact."

- 8 U.S.C.A. § 1227(a)(1)(A) renders deportable an alien "who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time." The government has charged this provision for aliens whom it considers to have been inadmissible at the time of their adjustment of status because they attempted to procure immigration documents by fraud.

- 8 C.F.R. § 214.1(f) establishes that "[w]illful failure by a nonimmigrant to register or to provide full and truthful information requested by the Service (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act (8 U.S.C. 1227(a)(1)(C)(i))."[8]

- 8 U.S.C.A. § 1227(a)(1)(G) renders an alien deportable "as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title)" if "(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or (ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant."

- 8 U.S.C.A. § 1227(a)(2)(A)(i) to (ii) render deportable an alien who has committed qualifying crimes involving moral turpitude (CIMTs). Fraud crimes categorically are considered CIMTs "simply by virtue of their fraudulent nature."[9] So is making a false statement under 18 U.S.C.A. § 1001(a)(2).[10]

- 8 U.S.C.A. § 1227(a)(3) renders deportable an alien who has been convicted under INA § 266(c) [8 U.S.C.A. § 1306(c)][11] or 18 U.S.C.A. § 1546,[12] who is subject to a final order for violation of INA § 274C [8 U.S.C.A. § 1324a] (all relating to falsification of documents), or who "falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a[13] of this title) or any Federal or State law" (subject to a narrow exception).

- 8 C.F.R. § 1245.10(a)(1)(i)(B) permits grandfathering on the basis of a petition or labor certification application that was "approvable when filed." Section 1245.10(a)(3) defines that term as meaning, inter alia, that the application or petition "was non-frivolous ('frivolous' being defined herein as patently without substance)." "[A] labor certification is 'meritorious in fact' if it was 'properly filed' and 'non-frivolous,' so long as a

bona fide employer/employee relationship exists where the employer has the apparent ability to hire the sponsored alien and where there is no evidence that the labor certification is based on fraud."[14]

- 8 U.S.C.A. § 1255a(c)(6) subjects an applicant for legalization under the Immigration Reform and Control Act of 1986 (IRCA)[15] who "knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry" to criminal penalties under Title 18, United States Code. The regulations provide that the "Service" will refer anyone who does so to the U.S. Attorney,[16] exempting them from the confidentiality rules that ordinarily obtain.[17] Family unity benefits may also be terminated.[18] Apart from misrepresentations in the application, certain IRCA applicants must also obtain a fraud waiver because of their manner of entry.[19]

- 8 U.S.C.A. § 1306(c) provides that an alien who attempts to comply with the alien registration requirements by filing an application or registration containing statements that he or she knows to be false, "or who procures or attempts to procure registration of himself or another person through fraud," will be subject to criminal prosecution and removal.

- 8 U.S.C.A. § 1324c penalizes falsely making or using falsely made documents, or documents issued to another, to satisfy any requirement or obtain any benefit under the INA, including doing so to satisfy 8 U.S.C.A. § 1324a(b) (employment requirements). It also penalizes showing entry documents to a common carrier and then failing to present the same documents to immigration officers, though the alien can receive a waiver if awarded asylum or withholding of removal.[20]

- 8 U.S.C.A. § 1325 imposes criminal penalties on an alien who "attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact," on aliens who have committed marriage fraud, and on an individual "who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws."

- 8 U.S.C.A. § 1429 prohibits naturalization unless the candidate "has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter." If the adjustment of status was acquired through fraud, then it was not legally valid, and the candidate is not eligible to naturalize.[21]

- 8 U.S.C.A. § 1451(a) requires revocation proceedings in district court for naturalizations that were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation." This includes those who naturalized based on lawful permanent resident (LPR) status for which they weren't eligible, and which was subsequently rescinded under 8 U.S.C.A. § 1256(b).[22] The USCIS will make a recommendation to the U.S. attorney if it perceives a prima facie case for revocation to exist and will also recommend prosecution under 18 U.S.C.A. § 1425 "for unlawful procurement of citizenship or naturalization" if the facts warrant.[23]

- 8 U.S.C.A. § 1453 authorizes the DHS to cancel an alien's naturalization certificate or other document regarding citizenship status "if it shall appear to the Attorney General's satisfaction that such document or record was illegally or fraudulently obtained from, or was created through illegality or by fraud practiced upon, him or the Commissioner or a Deputy Commissioner." The cancellation pertains only to the document, however, "and not the citizenship status of the person in whose name the document was issued."

- 8 U.S.C.A. § 1504(a) does the same for U.S. passports or consular reports of birth.

- 8 C.F.R. §§ 1003.2(c) and 1003.23(b)(1) waive the time limitations for motions to reopen filed by the DHS on the basis of "fraud in the original proceeding."

- There are also discussions about fraud or misrepresentation in less commonly cited provisions, such as certain nonimmigrant designations,[24] alien victims of human trafficking or crimes,[25] habitual residents,[26] replenishment agricultural worker petitions,[27] orphan petitions,[28] and the Guam CNMI[29] Visa Waiver Program.[30]

- Though not part of the INA, the labor certification regulations authorize denial or invalidation of a labor certificate by the Department of State, Department of Labor, or the DHS upon a finding of fraud or willful misrepresentation.[31]

INA § 212(a)(6)(C)

The most important fraud or misrepresentation provision is INA § 212(a)(6)(C) [8 U.S.C.A. § 1182(a)(6)(C)], which has two sub-parts. The first renders an alien inadmissible for procuring or seeking to procure "a visa, other documentation, or admission into the United States or other benefit provided under this [Act]" through fraud or by willfully misrepresenting a material fact. The second renders inadmissible "[a]ny 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 [Act] (including section 1324a of this title) or any other Federal or State law" unless the alien's parents were citizens, the alien had lived in the U.S. before the age of 16, and the alien reasonably believed that he or she really was a citizen as well.

HISTORY

Judicial and Legislative History

The current version of the provision, with its bifurcation of misrepresentations regarding citizenship and all other material misrepresentations, was enacted through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[32] However, there is a long prior history under the law of using misrepresentation as a ground of excludability or deportability.

Long before the INA penalized misrepresentation, the courts had already established that visas obtained through the provision of false evidence were invalid. They based this holding on the INA's requirement that an immigrant must obtain a proper visa to be admitted. The reasoning went that a visa obtained on the basis of fraudulent information was essentially no visa at all.[33] Aliens who falsely claimed citizenship were also considered deportable as having entered without inspection.[34]

The INA of 1952 codified the holding regarding general misrepresentation (as opposed to misrepresentations as to citizenship) under § 212(a)(19), which barred admission to "[a]ny alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact."[35] Note that this provision penalizes document fraud at any time, but it penalizes entry fraud prospectively only.[36]

Amendments in 1986 broadened the scope of this provision, extending excludability for already-completed entry fraud as well as any other benefit under the INA:

> the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . . (19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter.[37]

Changes to the INA in 1990 resulted in the provision's re-designation as INA § 212(a)(6)(C), but these changes did not alter the substance of the provision.[38]

The current inadmissibility provision was enacted in 1996 with the passage of IIRIRA.[39] This was the first time that the inadmissibility provisions separated out false representations as to citizenship for different (and harsher) treatment than other representations. INA § 212(a)(6)(C)(ii) [8 U.S.C.A. § 1182(a)(6)(C)(ii)] only applies prospectively, however, so false claims to citizenship made before September 30, 1996, fall under § 212(a)(19)—which means that a waiver for this type of misrepresentation

is still available.[40] The general misrepresentation provision, subpart (i), was also amended slightly in 1996, changing "entry" to "admission."

ELEMENTS OF INA § 212(a)(6)(C)(I) [8 U.S.C.A. § 1182(a)(6)(C)(I)]

Misrepresentation and Fraud Compared

A *willful misrepresentation* requires proof of the following:

> (1) the alien misrepresented a fact; (2) to an authorized official of the United States; (3) the fact was material; (4) the alien did so willfully; and (5) for the purpose of obtaining a visa, other documentation or entry into this country, or to obtain some other immigration and naturalization benefit.[41]

Fraud has been held to involve the same elements as misrepresentation plus two more: the false representation must have been "made with knowledge of its falsity and with intent to deceive the other party," and "[t]he representation must be believed and acted upon by the party deceived to his disadvantage."[42] No court seems overly troubled by the fact that this definition renders the fraud provision superfluous as there will never be a finding of fraud that does not encapsulate the elements of misrepresentation.

Note that this provision generally only applies to false statements made to gain one's own admission.[43] The alien smuggling provisions cover the case of false statements made to procure admission of another person.[44]

Factual Misrepresentation

To qualify as a misrepresentation, a statement must be false.[45] A fact may be misrepresented in either oral or written form, and the misrepresentation can occur through either an affirmative statement or an omission.[46]

Misrepresentation to a Government Official

"It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made *to an authorized official of the United States Government* in order for excludability under section 212(a)(19) of the Act [the predecessor of the current provision] to be found."[47] The recipient is an essential prerequisite; "an alien is not excludable under section 212(a)(19) of the Act for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations *to an authorized official of the United States Government* in an attempt to enter on those documents."[48]

What this means is that merely possessing fraudulent immigration documents does not cause an alien to run afoul of § 212(a)(6)(C)(i), nor does using those documents to board a plane bound for the United States since at that point the only individuals checking the documents are employees of the airline.[49] The first point at which the falsified documents give rise to a § 212(a)(6)(C)(i) charge is if the alien attempts to use those documents at the border to evade detection by U.S. immigration officials.[50]

For instance, in *Matter of Y- G-*, the IJ had found the applicant to be inadmissible under the predecessor to § 212(a)(6)(C)(i) after he had admitted at the immigration hearing that "he presented a Haitian passport and temporary resident card under the [false] name of Bython Lacoste upon his arrival in the United States on December 3, 1990."[51] The BIA reversed. It noted that the alien:

> applied for admission as a temporary resident and that he made an admission against interest "by stating his true name is Yvon Guillaume and that the documents he presented as his own were in fact obtained illegally and made to fit his likeness in an effort to defraud the U.S. government." . . . [T]he applicant testified that when he came to the United States, he did not lie, but instead gave his real name, stated that the documents he possessed were not his own, and gave the address of family members who would help him.[52]

The BIA found that this does not constitute fraud or misrepresentation under the INA. Likewise, misrepresentations made to obtain bank accounts, state driver's licenses, and the like should be legally irrelevant as they are not made to U.S. government officials.[53]

Materiality

Congress has declared that an alien is only inadmis-

sible if he seeks to procure an immigration benefit "by fraud or willfully misrepresenting a *material* fact."[54] "The statute requires that the willful misrepresentation be material to the procurement of a visa."[55] If the misrepresentation is not material, then it does not render the alien inadmissible under § 212(a)(6)(C)(i).

The Supreme Court's test for "whether concealments or misrepresentations are 'material' is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, *i.e.*, to have had a natural tendency to affect, the Immigration and Naturalization Service's decisions."[56] This tendency arises "if honest representations 'would predictably have disclosed other facts relevant to [the applicant's] qualifications.' "[57] As stated by the Attorney General, a finding of inadmissibility is appropriate "if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded."[58]

The Attorney General has set out a three-part test to guide this inquiry:

> First, does the record establish that the alien is excludable on the true facts? If it does, then the misrepresentation was material. If it does not, then the second and third questions must be considered.
>
> Second, did the misrepresentation tend to shut off a line of inquiry which is relevant to the alien's eligibility? . . .
>
> Third, if a relevant line of inquiry has been cut off, might that inquiry have resulted in a proper determination that the alien be excluded?[59]

The degree to which the misrepresentation must have affected the decision is not altogether clear. The Supreme Court intentionally left the degree of certainty unsettled, finding the test to be better left loosely defined.[60] The Court did eschew a simple "but for" test of materiality:

> But if the ultimate question is "natural tendency to influence," it would seem to make little difference whether the probabilities of investigation and resulting disclosure, respectively, are 100%-20%, 20%-100%, 51%-51%, or even 30%-30%. It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation.[61]

Accordingly, the Fourth Circuit has ruled that "finding that a misrepresentation is material does not require concluding that it necessarily would have changed the relevant decision."[62] There, the court found that an alien's failure to disclose the fact of a prior marriage " 'had a natural tendency to influence' the evaluation of her application for LPR status . . . by 'shut[ting] off' inquiry into the propriety of her second marriage," and was therefore material, "whether or not the true facts would have actually led to denial of her application."[63]

That, however, may be taking the proposition too far. After all, the Supreme Court did not abandon causality altogether.

> We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.[64]

Recently, the Supreme Court further elucidated this standard in the context of 18 U.S.C.A. § 1425(a), the criminal denaturalization provision. The Court rejected the government's argument that the provision did not require any causal link between the illegal act and the procurement of naturalization.[65] It then discussed how to apply this decision in a case in which an applicant made a misrepresentation to government officials.

> Accordingly, the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.[66]

The Court deemed this a simple exercise when "the facts the defendant misrepresented are themselves disqualifying," such as an applicant's lie intended to

conceal her lack of qualifications. When dealing with the situation of *Kungys*, however—namely, that the true facts concealed by the misrepresentation, while not themselves disqualifying, might "throw investigators off a trail leading to disqualifying facts"—the Court declared:

> [T]he Government must make a two-part showing to meet its burden. As an initial matter, the Government has to prove that the misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation. If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit. As to that second link in the causal chain, the Government need not show definitively that its investigation would have unearthed a disqualifying fact (though, of course, it may). Rather, the Government need only establish that the investigation "would predictably have disclosed" some legal disqualification. If that is so, the defendant's misrepresentation contributed to the citizenship award in the way we think § 1425(a) requires.[67]

In other words, it is not enough to show that the investigators would have dug deeper had the misrepresentation not been put forward; the government must also show that there was something for them to find.

In so doing, the Court threw its weight behind Justice Brennan's formulation of the materiality test, which was the narrowest ground of agreement in the fractured *Kungys* opinion.[68] It also reaffirmed that the applicant can overcome the two-part showing described above by proving that she was in fact eligible for naturalization.

> When addressing the civil denaturalization statute, this Court insisted on a similar point: . . . we gave the defendant a chance to establish that she was qualified for citizenship, and held that she could not be denaturalized if she did so—even though she concealed or misrepresented facts that suggested the opposite. And indeed, all our denaturalization decisions share this crucial feature: We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. We will not start now. Whatever the Government shows with respect to a thwarted investigation, qualification for citizenship is a complete defense to a prosecution brought under § 1425(a).[69]

The Attorney General's formulation continues to be quoted alongside *Kungys* without attempting to characterize how, if at all, it differs from the Supreme Court's test. The Attorney General noted that "where the government officials have made an adequate investigation after the misrepresentation became known, or have had reasonable opportunity to do so, an unrefuted showing of eligibility by the alien may be highly persuasive that the misrepresentation was not material."[70] Moreover, the Attorney General's test has been interpreted as requiring a showing of "some reasonable possibility that the applicant would have been denied admissibility."[71] At times, this does seem to approach a "but for" test: in *Bosuego*, the BIA asserted that to demonstrate inadmissibility in immigration court, the government must show by clear and convincing evidence "that facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation."[72]

The Fifth Circuit has not recently addressed this issue, though in an unpublished decision from the 1990s, it appeared open to this interpretation.[73] On the other hand, in a more recent decision, the BIA stated, "It is not necessary for the Government to show that the statement actually influenced the agency, only that the misrepresentation was capable of affecting or influencing the governmental decision."[74] However, the State Department has directed its officers that the line of inquiry that is cut off must have not been independently available for investigation.[75]

The materiality test means that false statements do not always constitute fraud or willful misrepresentation, even when they appear to go to the heart of a claim. Take, for instance, the recent case of an applicant for temporary protected status (TPS) who was eligible for relief on the basis of his Haitian citizenship. He reported that he had been born in Haiti when, in fact, he was actually born in the Bahamas. Even though his TPS application falsely reported his place of birth, the Administrative Appeals Office found this statement to be immaterial and therefore not a material misrepresentation under § 212(a)(6)(C)(i) because, as his parents were Haitian, he was still eligible for relief. "While willful, the Applicant's claim that Haiti was

his birthplace is not material, as it cannot be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting his eligibility for TPS, given other evidence showing he is a national of Haiti."[76] Consequently, he could not be found inadmissible.

Additionally, there is the case of a man who applied for asylum using a false name, fearing attack from Bangladeshi opponents if they learned his true identity.[77] He received employment authorization cards from the INS in the false name and also used the name for non-immigration-related matters. The IJ concluded that these activities rendered the alien inadmissible under § 212(a)(6)(C)(i), holding that "petitioner has not only violated the Immigration laws, but has violated and continues to violate federal laws related to mortgages, credit, and taxation."[78] The BIA affirmed, but the Second Circuit vacated this decision, noting that misrepresentations of identity, as with any other misrepresentation, must be material before they render an alien inadmissible—in other words, they must influence the decision to grant him or her benefits. Without such an impact, the fact that he provided a false identity to the INS did not render him inadmissible under § 212(a)(6)(C)(i).[79] A " 'harmless' misrepresentation that does not affect admissibility is not 'material.' "[80] Likewise, an applicant for naturalization who had used an alias and failed to disclose a juvenile conviction had not committed a material misrepresentation as, at one point, the DHS approved his naturalization application despite its awareness of these anomalies, demonstrating that the information could not have been material.[81]

On the other hand, the Fifth Circuit found (in an unpublished opinion) that an applicant's failure to disclose his six children on his I-485 constituted a material misrepresentation under § 212(a)(6)(C)(i) since, although the existence of the children would not disqualify him, "the misrepresentation did tend to deflect a line of inquiry which could have led to investigation of his fraudulent marriage and might have led to his exclusion" as it would have led the INS to begin "an investigation into his relationship with the children's mother."[82]

One aspect of materiality has shifted considerably over the years. The BIA used to take the position that a misrepresentation as to identity rendered an individual deportable per se while a misrepresentation as to all other information must be judged according to the materiality standard.[83] The reasoning as to the former was that Congress had expressed its belief that "the identity of the alien was considered material" to the determination of whether to grant a visa and that failing to disclose identity foreclosed a thorough investigation of the individual's background and qualifications.

> What is the fraud which vitiates an immigration document? It is deceiving this Government by posing as someone else. Suppose upon examination in this country, the individual appears to have been eligible for the same document under his own name, but for some personal reason or misconception of the law found it expedient to obtain the documents in the name of another, has the Government been deceived to its detriment? It has, because the Government has been deprived of its right prescribed by statute to examine his qualifications for admission abroad at the time and place he applies for the visa. There the evidence he submits to establish his admissibility may be verified. His statements concerning his activities and background may be checked against local records. It is particularly unsound to attempt to determine in a deportation proceeding that all the evidence available abroad, 5, 10, or 15 years before, would have shown that the subject was as eligible for an immigration document as the individual he impersonated.[84]

Regarding all other information, however, "a false statement in an application will not invalidate an immigration visa or other immigration document if it appears that the person would have been equally entitled to what he obtained had he told the truth."[85]

The Attorney General eventually amended this interpretation to make representations as to identity subject to the same standards of materiality as other kinds of statements.[86] Thus, concealment of a false name could be material if it affected the alien's admissibility, for instance, if she had earlier been refused admission using her own name,[87] if he had engaged in persecution, or if they had firmly resettled in another country before coming to the U.S.[88] The alias would not affect admissibility, however, if "the false identity was adopted for reasons unrelated to obtaining admis-

sion into the United States and the name had been used for a prolonged time prior to entering this country."[89]

Procurement

Related to the notion of materiality is that of procurement. *Kungys* established a burden-shifting analysis whereby once the government showed materiality, that finding created a presumption that the benefit was procured because of the misrepresentation.[90]

> So a majority of the Justices agreed that "materiality" and "procurement" are separate elements, and satisfaction of one does not necessarily mean satisfaction of the other. A majority also agreed that, at a minimum, the procurement requirement "demands . . . that citizenship be obtained as a result of the application process in which the misrepresentations or concealments were made." The Court split, however, over what else procurement means. Justice Stevens, speaking for two others, advocated what amounts to a "but for" test—that the government has to establish that citizenship would not have been conferred but for the misrepresentation. Justice Scalia, joined by two others, rejected this construction because it would make the materiality requirement meaningless, "requiring, in addition to distortion of the decision, a natural tendency to distort the decision." But Justice Scalia and company did agree that procurement requires more than just obtaining citizenship "as a result of the application process in which the misrepresentation or concealments were made." To them, proof of a material misrepresentation created a presumption that citizenship was procured on that basis. However, the citizen could rebut that presumption by showing that she was actually eligible for citizenship.[91]

Though he agreed with this burden-shifting framework, Justice Brennan wrote separately to clarify "that in my view a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed."[92]

> It is this fair inference of ineligibility, coupled with the fact that the citizen's misrepresentation necessarily frustrated the Government's investigative efforts, that in my mind justifies the burden-shifting presumption the Court employs. Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right, and as such should never be forfeited on the basis of mere speculation or suspicion.[93]

As the justice who supported the opinion on the narrowest grounds, Justice Brennan's view has been held to control.[94] "At the end of the day, then, the government only wins if it shows that the citizen misrepresented a material fact and it is 'fair to infer that the citizen was actually ineligible.' "[95]

Thus, "where an immigration court finds that an alien has made a material misrepresentation, the IJ must also determine whether that alien has rebutted the resulting presumption that he or she would have been removable if the true facts had been known to the INS."[96]

Willfulness

The element of "willfulness" requires the knowing, deliberate, and voluntary provision of false information.[97] The State Department defines "willfully" as "knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement."[98] This is consistent with the Fifth Circuit's interpretation.[99]

Innocently submitting a document with some technical defect, prepared by a lawyer's careless staff, arguably does not satisfy this element. "[A]n accidental statement or one that is the product of honest mistake is not considered to be a 'willful' misrepresentation."[100]

The USCIS Policy Manual observes, "A person's silence or failure to volunteer information does not, in and of itself, constitute fraud or willful misrepresentation because silence itself does not establish a conscious concealment."[101] However, if "it is clear from the evidence" that the silence or omission was in order to consciously conceal information—"that the person was reasonably aware of the nature of the information sought and knowingly, intentionally, and deliberately concealed information from the officer"—then a finding of misrepresentation should be made.[102]

The Manual provides the following example:

> An applicant is legally married but has lived apart from his spouse for 20 years. During that time apart, the applicant lived with another person for 10 years as domestic partners until the other person died. A few years later, having been in touch with his legal spouse by letter, the applicant states in his application for admission to the United States that he is coming to join his wife.
>
> Although the applicant did not reveal the complications in his marital status during the past 20 years, the applicant was not specifically asked any questions relating to these facts. As a matter of law, the applicant is still married to the spouse, and there is no evidence that he married the spouse to obtain an immigration benefit. Since the applicant gave reasonably accurate and correct answers, his failure to disclose his complicated marital situation did not constitute conscious concealment of facts.[103]

On the other hand, a person who applied for a visa and, when asked to report his past memberships and affiliations, including military service, disclosed that he served in the Russian army but not that he was captured by Germans and forced to act as an armed guard at a concentration camp did make a material misrepresentation through his silence since his "unreasonably narrow response to a general question" renders it "likely that the person was fully aware that his time at the concentration camp was pertinent to the response and information sought by the officer." Therefore, through his "partial response, he concealed information knowingly, intentionally, and deliberately."[104]

As an aside, note that at least one court has held that a material misrepresentation that is not willful, and therefore does not violate INA § 212(a)(6)(C)(i), may still vitiate an adjustment given that 8 C.F.R. § 103.2(a)(2) "requires the applicant to certify that all information contained in the application 'is true and correct,' " which a misrepresentation, willful or not, obviously is not.[105] However, the court did hold that 8 C.F.R. § 103.2(a)(2) is subject to an implied limitation concerning materiality.[106]

Documentation or Other Benefit

Section 212(a)(6)(C)(i) only penalizes misrepresentations made to obtain "a visa, other documentation, or admission into the United States or other benefit provided under this Act." Visas and admission are fairly self-explanatory, but "other documentation" and "other benefit" leave some room for interpretation.

The USCIS has defined "other documentation" as those "documents required when a person applies for admission to the United States. . . . include[ing], but not limited to: re-entry permits; refugee travel documents; border crossing cards; and U.S. passports."[107] Note that, according to (old) BIA precedent, "[d]ocuments evidencing extension of stay are not considered entry documents."[108]

> Similarly, documents such as petitions and labor certification forms are documents that are presented in support of a visa application or applications for status changes. They are not, by themselves, entry documents and therefore, they are also not considered "other documentation."
>
> However, if such documents are used in support of obtaining another benefit provided under the INA, they may be relevant to a finding of willful misrepresentation or fraud.[109]

The State Department takes a broader view, holding:

> Documents, such as Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students, petitions, and labor authorization or certification forms, among others, are considered documents in support of a visa application. If a visa applicant makes a willful and material misrepresentation to obtain such a document they will be ineligible under INA 212(a)(6)(C)(i).[110]

"Other benefit" has been interpreted much more broadly. The USCIS considers it to include requests for extension of nonimmigrant stay (8 C.F.R. § 214.1), change of nonimmigrant status (INA § 248 [8 U.S.C.A. § 1258]; 8 C.F.R. § 248), permission to reenter the United States, waiver of the two-year foreign residency requirement (INA § 212(e) [8 U.S.C.A. § 1182(e)]), employment authorization (INA § 274 [8 U.S.C.A. § 1324]; 8 C.F.R. § 274a.12), parole (INA § 212(d)(5) [8 U.S.C.A. § 1182(d)(5)], 8 C.F.R. § 212.5); voluntary departure (INA § 240B [8 U.S.C.A. § 1229c]; 8 C.F.R. §§ 240.25, 1240.26), requests for stays of deportation, and adjustment of status (INA § 245 [8 U.S.C.A. § 1255]).

The State Department defines "other benefit" as:

> any immigration benefit listed in the INA, including, but not limited to requests for extension of stay, change of status, consent to reapply for admission, waivers, employment authorization, advance parole, voluntary departure under sINA 240B, and adjustment of status.[111]

The cases have distinguished between a false identity used to facilitate entry into the United States (which falls under the statute) and one used for other reasons (which does not).[112] Courts have found immigration benefits to include entry into the United States,[113] immigrant visas and transit without visas,[114] temporary protected status,[115] and legal permanent resident status.[116] Courts have also found employment authorization to fall within this category.[117]

On the other hand, courts have specifically *refused* to find that false statements made simply to gain employment run afoul of the statute. For example, in *Matter of Cervantes-Gonzalez*, the BIA found that the alien had sought an immigration benefit when he used a fraudulent birth certificate to obtain a social security number and used both the fraudulent birth certificate and the fraudulently obtained social security number to obtain a U.S. passport "to be able to travel into and out of the United States and to aid him in obtaining employment."[118] The majority held that obtaining a passport constitutes both "documentation" and "other benefits" under the statute and found him inadmissible on that ground.[119]

Two concurring opinions sought to clarify the majority's holding regarding what a "benefit provided under this Act" refers to. Board Member Gustavo D. Villageliu, joined by Chairman Paul W. Schmidt, clarified that "working in the United States is not 'a benefit provided under this Act,' " and expressed concern that "[t]he majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act."[120] In a concurring and dissenting opinion, Board Member Lory Diana Rosenberg refined this distinction even further, saying that "neither employment, nor the ability to travel, necessarily constitutes a 'benefit under this Act.' [T]he reach of the Immigration and Nationality Act . . . does not extend to the constitutional rights to work and to travel."[121]

This case was appealed to the Ninth Circuit, which upheld the BIA's decision that Cervantes was inadmissible under § 212(a)(6)(C)(i).[122] The court made it clear that the alien was inadmissible for procuring a passport for the purpose of travel out of the United States, an *immigration* benefit and *not* for fraudulently procuring a social security number for the purpose of obtaining employment, saying:

> [Cervantes] purchased a false Texas birth certificate from a street vendor so that he could obtain employment. He later used the false birth certificate to procure an actual social security card, also to enable him to work. . . . Through the use of a fraudulently obtained Texas birth certificate and social security card, Cervantes-Gonzalez attempted to obtain a passport so that he could enter the United States after traveling abroad. Although Cervantes-Gonzalez contends that he sought to procure a passport simply to make it easier for him to obtain employment, the record shows that he was the member of a band that traveled internationally and would need the passport to gain entry back into the United States. Using fraudulent documents to obtain a passport is conduct that is clearly covered under the Act, thus rendering Cervantes-Gonzalez inadmissible.[123]

The court's language distinguishes obtaining the passport for *employment* purposes versus for *gaining entry* into the United States (an *immigration* benefit).

This line of reasoning is followed in other cases as well. In *Matter of Tachiwana*, the BIA affirmed the IJ's finding that "the provisions of section 212(a)(6)(C) do not apply to the respondent because his misrepresentation in order to gain employment was not for a 'benefit provided under this Act.' "[124] The BIA upheld this finding, in part due to a procedural default on the part of the government, but also cited to Board Member Rosenberg's dissent in *Cervantes*, discussed above, for the proposition that employment is not a benefit under the Act.[125] Likewise, the Second Circuit held that using an alias to obtain social security cards, as well as to pay taxes and a mortgage, was not in and of itself a violation of the statute.[126]

That § 212(a)(6)(C)(i) refers only to immigration benefits, and not to non-immigration benefits for personal or financial gain, is demonstrated by comparison of the text of this section with that of other, more

explicit provisions. Take, for instance, § 212(a)(6)(C)(ii), which renders inadmissible an 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 Act . . . or *any other Federal or State law*."[127] This language sweeps much more broadly than § 212(a)(6)(C)(i), which bars only making a material representation for a "benefit provided under *this* Act."[128]

Viewing these two subsections together, it is clear that Congress intended to ban entry to aliens who misrepresented themselves as *citizens* in order to obtain *any* legal benefit, and to ban entry to aliens who made a *lesser* misrepresentation only if they sought to obtain an *immigration* benefit.

A Tenth Circuit decision renders the distinction between those two statutes quite clear. In *Rana v. Gonzales*, the respondent alien, Rana, testified before the IJ that, although he was in the country past the expiration of his student visa, he had represented himself as a "legal permanent resident" on an I-9 form submitted to his employer "in order to gain employment."[129] Rana was not found to be inadmissible for this misrepresentation. However, when it was later determined that he had not checked the "lawful permanent resident" box on the I-9 but, instead, checked the box indicating that he was a "citizen or national" of the United States, he was found to have made "false representations of citizenship [which] constituted an unwaivable ground of inadmissibility" under § 212(a)(6)(C)(ii)(I) [8 U.S.C.A. § 1182(a)(6)(C)(ii)(I)]. Consequently, the IJ ordered Rana deported.[130] This was upheld by the BIA and the Tenth Circuit.[131]

The criminal provision 18 U.S.C.A. § 1546(a) penalizes the mere possession of fraudulent immigration documents. This provision targets activity "regardless of whether the proscribed acts were performed for personal use to procure an immigration benefit or merely for personal gain, financial or otherwise."[132] Section 212(a)(6)(C)(i), by contrast, "refers to fraud or misuse of entry documents as it relates to procuring entry into the United States or another *immigration benefit*," omitting any mention of employment or personal gain.

RETRACTION

Must Be Timely

An alien is not inadmissible for fraud or willful misrepresentation if he or she timely retracts the assertion. "The basic principle of timely retraction or recantation is that where an alien voluntarily retracts a false statement before its falsehood is exposed (or about to be exposed), the effect of the false statement is cancelled out."[133] "The doctrine of timely recantation is of long standing and ameliorates what would otherwise be an unduly harsh result for some individuals, who, despite a momentary lapse, simply have humanity's usual failings, but are being truthful for all practical purposes."[134]

The retraction essentially demonstrates that the alien lacked the requisite intent to make a false statement. "If the witness withdraws the false testimony of his own volition and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn."[135] Thus, the State Department advises its consular officials that "[a] retraction that is timely and voluntary may serve to purge a misrepresentation and remove it from further consideration as a ground for the INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) inadmissibilities."[136]

Timing is crucial here. Affirmatively volunteering the true information upon the alien's first encounter with immigration officers (as when the alien has boarded the plane with a false passport but, as soon as she reaches customs, tells officials that it is not hers) or during the same conversation or encounter as the false representation was made qualifies as a timely retraction.[137] On the other hand, admitting the falsity of the representation only after a delay does not qualify as timely.[138] Admitting falsity only after (even if immediately after) being confronted with the truth by immigration officers is also not timely, though a "retraction can be voluntary and timely if made in response to an officer's questions during which the officer gives the applicant a chance to explain or correct a potential misrepresentation."[139]

The Foreign Affairs Manual offers the following guidance concerning timely retractions:

> Whether a retraction is timely depends on the circumstances of the particular case. Generally, a retraction is timely if it is made at the first opportunity and before the conclusion of the proceeding during which an individual made the misrepresentation . . . . If the applicant has personally appeared and been interviewed, the retraction must have been made during the initial interview with the officer. If the misrepresentation has been noted in a "mail-order" application, the applicant must be called in for an interview and the retraction must be made during the course thereof.[140]

Even the trip from primary to secondary can constitute too long a delay for the State Department, which generally considers retractions at that time to be too late.[141]

STANDARD AND BURDEN OF PROOF FOR INA § 212(a)(6)(C)(I)

Burden of Proof

In removal proceedings for deportable aliens, it is the government's burden to prove the charges by "clear, unequivocal, and convincing evidence."[142] Thus, if the government brings charges under INA § 212(a)(6)(C)(i), it must prove the elements listed above.[143] As explained above, the Supreme Court has created a burden-shifting analysis under which, if the government proves that the respondent has willfully made a false statement (or omission) that is material, the burden shifts to the respondent to show that he or she did not procure the documentation or immigration benefit by means of that representation.[144] Before receiving the benefit of a presumption of inadmissibility under § 212(a)(6)(C)(i), the government must "produce [] evidence sufficient to raise a fair inference that a statutory disqualifying fact *actually* existed. . . . Evidence that simply raises the *possibility* that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption . . . ."[145] Only then does the burden shift to the alien, who may then still demonstrate that he or she would not be removable on the true facts.[146]

On the other hand, an arriving alien carries the burden of showing that he or she "is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212" or that he or she "is lawfully present in the United States pursuant to a prior admission."[147] In that case, if the government raises the issue of fraud or misrepresentation in removal proceedings, the alien must show that that provision does not apply.[148]

Finally, the alien bears the burden of production and persuasion concerning requests for relief, both in removal proceedings and before the USCIS.[149] Consequently, when the alien must demonstrate that he or she is not inadmissible (as, for instance, when applying for adjustment of status), he or she must demonstrate that he or she did not commit fraud or a willful misrepresentation if there is a suggestion of such in the record.[150]

Because of this variation in burdens of proof, there are some cases in which the immigration court has found that the government failed to prove that the respondent is removable under INA § 212(a)(6)(C)(i) and also that the respondent cannot demonstrate eligibility for immigration relief.[151]

Adequacy of Evidence

Regardless of the burden of proof, the BIA has admonished that any "factual basis for a possible finding of excludability under this provision" must be "closely scrutinize[d] . . . since such a finding perpetually bars an alien from admission."[152] Facts should not be lightly assumed, "particularly . . . where the alleged fraud or misrepresentation involves a disputed issue with respect to an alien's subjective intent."[153] The BIA has not hesitated to credit an alien's account of the facts, even on a disputed record, when the alien bears the burden of proof.[154]

For example, the BIA has warned against discounting a petitioner's evidence regarding a good-faith marriage, even when the timing of the marriage creates a rebuttable presumption of fraud.

> In order to have any possibility of rebutting the presumption by that high standard, a petitioner in a case under section 204(a)(2)(A) of the Act must be accorded the same fair and reasonable evaluation of his evidence and factual situation as that given to any petitioner in

> visa petition proceedings. Simply because there is a statutory presumption that a petitioner's prior marriage was fraudulent, it should not be presumed that the petitioner's evidence is false or contrived or that any possible adverse inference which may be drawn applies to the sequence of events surrounding the prior marriage. For example, because documents showing joint income tax returns and bank accounts are generally considered to be evidence supportive of a bona fide marital relationship, in the absence of an objective basis in the record for discrediting the evidence, dismissal of such evidence as indicative of a financial but not necessarily a marital commitment, as argued by the Service in the case before us, would be unwarranted.[155]

Impact of Prior Proceedings

The question of whether INA § 212(a)(6)(C)(i) applies often arises on the basis of prior proceedings in which the decision maker made findings regarding (or at least suggesting) fraud or misrepresentation. While such prior determinations are certainly relevant to later proceedings, they are rarely determinative. The BIA has directed that, in general, a decision maker "should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the evidence before him."[156] It is only when the findings are sufficiently explicit—such as when "the beneficiary has previously been found deportable based on a determination, supported by clear, unequivocal, and convincing evidence, that that beneficiary became a party to a fraudulent marriage for the purpose of entering the United States as an immigrant"—that the prior decision should dictate the result of the subsequent analysis.[157] Thus, even if a visa petition had previously been revoked on a *suspicion* of marriage fraud, a subsequent petition for the same beneficiary should not be automatically revoked on that basis; instead, the decision maker should undertake an independent review of "whether there is, at present, sufficient evidence, inclusive of evidence relied upon in the determination of the first visa petition, to support the contention that the beneficiary's previous marriage to a United States citizen was entered into for purposes of evading the immigration laws."[158]

Accordingly, a prior adverse decision that implied fraud or willful misrepresentation should not be enough to create a preclusive effect for future determinations.

> [U]nlike an express finding of fraud or willful misrepresentation, the insinuations contained in the AAO's decision do not require the USCIS to deny every future petition or application submitted by Mohammad or plaintiff, and a denial based on the AAO's decision in this case would not be proper unless it was supported by other evidence in the record.[159]

In fact, the cases tend to disapprove of the practice of suggesting fraud or misrepresentation without making actual findings on that basis. As the Department of Labor announced in a decision dealing with the credibility of a labor certification application:

> [T]he Board [of Alien Labor Certification Appeals] . . . does not operate under a preconception that employers routinely engage in fraud or other willful misconduct in attempting to obtain labor certification . . . [A certifying officer] who finds that evidence submitted by an employer is not genuine, must expressly state that finding and adequately support it with probative evidence. Absent such evidence, it is irresponsible to allege, whether directly or by implication, that an employer is engaged in fraudulent conduct in attempting to obtain certification.[160]

Thus, in order to establish inadmissibility under INA § 212(a)(6)(C)(i)—and in order to affect the outcome in subsequent proceedings—any allegations of fraud or willful misrepresentation must be made explicitly and on the basis of adequate proof.[161]

Since discussions of fraud or misrepresentation do not give rise to a preclusive effect in the absence of a definite finding, it should be obvious that the mere fact that a petition has been revoked cannot do so. The INA and accompanying regulations permit a petition to be revoked for what the Secretary of Homeland Security "deems to be good and sufficient cause,"[162] which may arise simply because the petitioner failed to meet his burden of proof.[163] A finding of fraud or willful misrepresentation is not required. Denial based on the petitioner's failure to meet its burden of proof as to eligibility does not, of course, carry any collateral consequences for future requests for immigration relief.[164] Also, the agency cannot "make an adverse finding against the petitioner" for not producing documentation or other evidence that it had no legal obligation to retain.[165]

Even if a prior petition or application contains inaccuracies, this alone is not enough to support a finding that § 212(a)(6)(C)(i) has been violated. "Not every factual assertion in an applicant's testimony or application that turns out to be incorrect will support a finding of fraud."[166] Discrepancies might not even support an adverse credibility finding.[167] Even if they do, however, "there is a qualitative difference between alleging fraud and finding that an employer's position is not credible."[168] As the Fifth Circuit explained:

> A finding that testimony lacked credibility does not alone justify the conclusion that false testimony has been given. False testimony means knowingly giving false information with an intent to deceive. A lack of credibility does not necessarily stem from a conclusion that the speaker intends to deceive. As a California district court stated, to assume that "a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character . . . is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founded."[169]

Imputation and Opportunity to Rebut

An issue frequently arises of whether to attribute the false statements of another—for example, the petitioner or the alien's lawyer—to the alien. It is, of course, the petitioner who manages both the visa petition and labor certification process, not the beneficiary. The beneficiary is in fact prohibited from intervening during the application process, the revocation, and any appeal.[170]

There is a serious question as to whether a decision rendered after the *petitioner* failed to meet its burden of proof can be held against the *beneficiary*, who was neither informed of the allegations nor given legal standing to contest them. The AAO has attempted to rectify this injustice by giving the beneficiary an opportunity to rebut any allegations concerning fraud or misrepresentation.

> Alien beneficiaries do not normally have standing in administrative proceedings. Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. Moreover, there are no due process rights implicated in the adjudication of a benefits application. However, since a fraud finding affects an alien's admissibility, USCIS should permit the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. Therefore, the beneficiary should be provided separate notice, and the response by beneficiary will be considered herein.[171]

Further, courts are justifiably reluctant to impute fraudulent intent to an individual on the basis of another individual's disclosures (or omissions) in the absence of strong evidence demonstrating the individual's knowledge of and participation in the scheme. For instance, the Sixth Circuit has warned that "the decision to remove [the defendant] on the basis of acts that she herself did not commit—and by implication, on the basis of knowledge and intent that she did not have—cannot withstand the close scrutiny that the BIA's own precedents demand."[172] Likewise, in a hiring case in which the employer complied with the INA's verification requirements, the Ninth Circuit held that the doctrine of constructive knowledge must be "sparingly applied," refusing to hold the employer accountable for accepting counterfeit paperwork that appeared to be genuine.[173]

Thus, while some courts will hold an alien to a representation on a form regardless of how it was drafted, others will not presume that his or her signature alone constitutes proof of his or her complicity with any false or erroneous statements contained therein. Rather, the decision maker must analyze whether other evidence in the case supports the conclusion that the alien colluded in the misstatement.[174]

INA § 212(a)(6)(C)(II)

Purpose or Benefit

Under INA § 212(a)(6)(C)(ii), an individual is inadmissible for misrepresenting his or her citizenship to any individual for any purpose or benefit under the INA or any other federal or state law.[175] The representation must be both false and knowing, and it must be material to the purpose or benefit sought.[176] Benefits include things directly related to immigration, such as a passport or entry into the United States, as well as things not directly related but for which citizenship or legal status is a requirement, such as employment or

loans,[177] but does not apply to statements made for no "purpose or benefit under the law."[178] The representations may be made to private individuals, such as prospective employers.[179]

Evidence of a criminal conviction under 18 U.S.C.A. § 911 (falsely and willfully representing oneself to be a U.S. citizen) is sufficient proof to warrant a finding of inadmissibility under INA § 212(a)(6)(C)(ii).[180]

Note that the law recognizes a distinction between U.S. citizens and U.S. nationals. Claims to be a U.S. national may implicate INA § 212(a)(6)(C)(i) but not INA § 212(a)(6)(C)(ii). The I-9 Employment Eligibility Verification form, as used before April 3, 2009, had a single box for both designations, and so an individual who checked that box would not necessarily be inadmissible under INA § 212(a)(6)(C)(ii).[181]

The USCIS Policy Manual indicates that the timely retraction jurisprudence relates to this ground of inadmissibility, as well.[182]

ENDNOTES:

[1]*Mowlana v. Lynch*, 803 F.3d 923, 929 (8th Cir. 2015) ("The Supreme Court recently clarified, however, that 8 U.S.C.A. § 1101(a)(43)(M)(i) 'is not limited to offenses that include fraud or deceit as formal elements [but also includes] offenses that involve fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful conduct.' ") (citing *Kawashima v. Holder*, 565 U.S. 478, 484, 132 S. Ct. 1166, 182 L. Ed. 2d 1, 63 A.L.R. Fed. 2d 735 (2012)).

[2]8 C.F.R. § 204.2(a)(1)(ii).

[3]*Shahla v. U.S. Atty. Gen.*, 648 Fed. Appx. 812, 818 (11th Cir. 2016) (per curiam) (unpublished) (dismissing appeal of the BIA's application of the "particularly serious" designation to marriage fraud); *Zhong Qin Yang v. Holder*, 570 Fed. Appx. 381, 385 (5th Cir. 2014) (per curiam) (unpublished) (upholding BIA's application of this provision to prior convictions for conspiracy to commit access device fraud and aggravated identity fraud).

[4]8 C.F.R. §§ 208.20, 1208.20; see also *Yousif v. Lynch*, 796 F.3d 622, 627 (6th Cir. 2015).

[5]8 C.F.R. § 1208.24(a)(1)(f).

[6]INA § 237(a)(1)(D)(i) [8 U.S.C.A. § 1227(a)(1)(D)(i)].

[7]Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029-30 (Nov. 29, 1990).

[8]8 U.S.C.A. § 1227(a)(1)(C)(i) reads: "Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status, is deportable."

[9]*Linares-Gonzalez v. Lynch*, 823 F.3d 508, 514 (9th Cir. 2016), for additional opinion, see, 642 Fed. Appx. 771 (9th Cir. 2016).

[10]This provision criminalizes knowingly and willfully falsifying material facts, making "any materially false, fictitious, or fraudulent statement or representation" and making or using "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." See *Sellers v. Lynch*, 630 Fed. Appx. 464, 467 (6th Cir. 2015) (unpublished) (respondent's conviction for false statements concerning a sham marriage is a CIMT); *Matter of Pinzon*, 26 I. & N. Dec. 189, 2013 WL 4434347 (B.I.A. 2013) (conviction for entering the U.S. with a passport obtained via a false birth certificate).

[11]The provision reads: "Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter." INA § 266(c) [8 U.S.C.A. § 1306(c)].

[12]The provision is too long to include here but involves forging or using forged or false or otherwise improper immigration documents, impersonating another for purposes of entry, or falsely swearing to a material fact in any immigration application or affidavit.

[13]Pertaining to employment of aliens.

[14]*Matter of Butt*, 26 I. & N. Dec. 108, 2013 WL 1703554 (B.I.A. 2013).

[15]Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

[16]8 C.F.R. §§ 245a.1(e), 245a.4(a)(5).

[17]8 C.F.R. §§ 245a.2(t)(4), 245a.3(n)(3), 245a.4(b)(23)(iii), 245a.21(c).

[18]8 C.F.R. § 245a.37(a)(1).

[19]8 C.F.R. § 245a.2(b)(9) to (10) (requiring a fraud waiver for "[a]n alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival Departure Record, in order to return to an unrelinquished unlawful residence").

[20]The regulations further provide, "The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence." 8 C.F.R. § 1270.2(j). However, they warn that "[o]ther acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties." Id.

[21]*Kadirov v. Secretary U.S. Dept. of Homeland Sec.*, 627 Fed. Appx. 125, 127-28 (3d Cir. 2015) (unpublished) (citing *Gallimore v. Attorney General of U.S.*, 619 F.3d 216, 223 (3d Cir. 2010) ("Thus, an alien whose status has been adjusted to LPR—but who is subsequently determined to have obtained that status adjustment through fraud—has not been 'lawfully admitted for permanent residence' because the 'alien is deemed, *ab initio*, never to have obtained [LPR] status.' ") (quoting *Matter of Koloamatangi*, 23 I. & N. Dec. 548, 551, 2003 WL 77728 (B.I.A. 2003)); *Matter of Longstaff*, 716 F.2d 1439, 1441, 77 A.L.R. Fed. 803 (5th Cir. 1983) ("Admission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity . . . .")).

[22]INA § 246(b). The Supreme Court has held that § 1451(a) "requires misrepresentations or concealments that are both willful and material," and "contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment." *Kungys v. U.S.*, 485 U.S. 759, 767, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). There is also a criminal naturalization fraud provision, 18 U.S.C.A. § 1425(a), and another provision which criminalizes making false statements under oath regarding naturalization, 18 U.S.C.A. § 1015(a).

[23]8 C.F.R. § 340.2.

[24]INA § 212(n)(2) [8 U.S.C.A. § 1182(n)(2)]; INA § 214(c)(14)(A) [8 U.S.C.A. § 1184(c)(14)(A)].

[25]8 C.F.R. §§ 212.14(h)(2)(i)(C), 214.11(t), 214.14(i).

[26]8 C.F.R. § 214.7(e)(1)(ii).

[27]8 C.F.R. § 103.5(c).

[28]8 C.F.R. § 204.2(a)(1)(ii)(k)(2).

[29]Commonwealth of the Northern Mariana Islands.

[30]8 C.F.R. §§ 212.1(c)(2)(iv), 212.1(q)(8)(i)(A).

[31]20 C.F.R. §§ 656.30(d), 656.31(a), (g).

[32]Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[33]*Matter of B- and P-*, 2 I. & N. Dec. 638, 640-41, 1946, WL 6072 (A.G. 1947); *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263 (C.C.A. 7th Cir. 1938).

[34]*Matter of B- and P-*, 2 I. & N. Dec. 638, 645 n. 5, 1946 WL 6072 (A.G. 1947) ("Where the charge is based upon the provision of the Immigration Act of 1917 rendering deportable aliens who entered without inspection, the question is whether the 'false and misleading statements' were such as to defeat completely the inspection required by the 1917 act. We have taken the view that only where a person falsely claims United States citizenship, so that he is not inspected as an alien will we sustain a charge that he entered by false and misleading statements, thereby entering without inspection.") (citing *Matter of C---V---*, 56131/567 (Jan. 12, 1943)).

[35]INA § 212(a)(19) [8 U.S.C.A. § 1182(a)(19)] (West 1970).

[36]*League of United Latin American Citizens v. I.N.S.*, 1989 WL 252578, at *25 n. 10 (C.D. Cal. 1989) ("Consequently, an alien who lawfully obtained a non-immigrant visa would have been excludable at the time he fraudulently reentered the United States; but, having accomplished the entry, the alien was no longer excludable under § 1182(a)(19)."); *Matter of Y-G-*, 20 I. & N. Dec. 794, 796, 1994 WL 213250 (B.I.A. 1994) ("[T]he Attorney General held that the first clause of section 212(a)(19), relating to documents, was both prospective and retrospective, but the second clause,

relating to entry into the United States, was prospective only. Consequently, an alien whose fraud or material misrepresentations related to the procurement of documents was forever barred from admission, unless a waiver was obtained, while a fraud or misrepresentation which related to an alien's entry invalidated only that entry and did not preclude a subsequent entry that was otherwise regular.") (citing *Matter of M-*, 6 I. & N. Dec. 752, 1955 WL 8743 (B.I.A. 1955); *Matter of M-*, 6 I. & N. Dec. 149, 1954 WL 7829 (B.I.A., A.G. 1954); *Matter of Shirdel, et al.*, 19 I. & N. Dec. 33, 1984 WL 48579 (B.I.A. 1984)).

[37]Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537, 3543-44 (Nov. 10, 1986).

[38]*Witter v. I.N.S.*, 113 F.3d 549, 551 n. 1 (5th Cir. 1997) (noting that the government's error in charging a violation of INA § 212(a)(6)(C)(i) [8 U.S.C.A. § 1182(a)(6)(C)(i)] rather than § 212(a)(19) caused the respondents no prejudice, since the provisions "are identical in all relevant respects"); *Matter of Y-G-*, 20 I. & N. Dec. 794, 795 n. 2, 1994 WL 213250 (B.I.A. 1994) ("We note that the revision made to this exclusion ground by the 1990 Act was cosmetic in nature and that the result in this case is the same under both versions of the law.").

[39]Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title III, § 308(f)(1)(D), 110 Stat. 3009-621 (Sept. 30, 1996).

[40]INA § 212(a)(6)(C)(ii) [8 U.S.C.A. § 1182(a)(6)(C)(ii)]; IIRIRA § 344(c).

[41]*Rahman v. Mukasey*, 272 Fed. Appx. 35, 38 (2d Cir. 2008) (unpublished).

[42]*Matter of G-G-*, 7 I. & N. Dec. 161, 164, 1956 WL 10246 (B.I.A. 1956); see also *Ortiz-Bouchet v. U.S. Atty. Gen.*, 714 F.3d 1353, 1356-57 (11th Cir. 2013); compare *Matter of Kai Hing Hui*, 15 I. & N. Dec. 288, 290, 1975 WL 31499 (B.I.A. 1975) (finding that willful misrepresentation does not require proof either of an intent to deceive or that the other party acted upon the misrepresentation).

[43]*Matter of M- R-*, 6 I. & N. Dec. 259, 260, 1954 WL 7856 (B.I.A. 1954) ("A careful reading of this section makes it clear to us that the bar to admission applies only to that alien who caused the procurement *to gain his own admission.*").

[44]See, e.g., INA § 212(a)(6)(E) [8 U.S.C.A. § 1182(a)(6)(E)] ("Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.").

[45]See *Forbes v. I.N.S.*, 48 F.3d 439, 442 (9th Cir. 1995) (holding that the provision requires "knowledge of the falsity of a representation"); see also Black's Law Dictionary 1016 (7th ed. 1999) (defining "misrepresentation" as "[t]he act of making a false or misleading statement about something, usu. with the intent to deceive").

[46]*United States v. Golding*, 162 F. Supp. 3d 1285, 1293 (S.D. Fla. 2016) ("There are two allegedly 'false statements' or omissions from Golding's paperwork that must be evaluated for materiality."); *Parlak v. Holder*, 578 F.3d 457, 465 (6th Cir. 2009) ("Omissions of material facts can be material misrepresentations. . . . [T]he respondent's initial failure to mention the soldiers' deaths in the asylum application and his negative response to the question of whether he had ever been arrested in the other applications shut off a relevant line of inquiry . . . .") (alteration in the original); *Matter of D-R-*, 25 I. & N. Dec. 445, 450, 2011 WL 1341569 (B.I.A. 2011) ("We agree with the Immigration Judge that the respondent's omission from his application for refugee status that he served as a special police officer in the Republic of Srpska constitutes a willful misrepresentation of a material fact, which renders him removable under section 237(a)(1)(A) of the Act as an alien who was inadmissible at the time of entry.").

[47]*Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, 411, 1991 WL 353529 (B.I.A. 1991) (emphasis added).

[48]*Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, 412, 1991 WL 353529 (B.I.A. 1991) (emphasis added).

[49]*Matter of Kasinga*, 21 I. & N. Dec. 357, 368, 1996 WL 379826 (B.I.A. 1996); *Matter of Y-G-*, 20 I. & N. Dec. 794, 797, 1994 WL 213250 (B.I.A. 1994); *Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, 412-13, 1991 WL 353529 (B.I.A. 1991).

[50]*Ymeri v. Ashcroft*, 387 F.3d 12, 15 (1st Cir. 2004); *Matter of Kasinga*, 21 I. & N. Dec. 357, 368, 1996 WL 379826 (B.I.A. 1996); *Esposito v. I.N.S.*, 936 F.2d 911, 912 n. 1 (7th Cir. 1991).

[51]*Matter of Y-G-*, 20 I. & N. Dec. 794, 797, 1994 WL 213250 (B.I.A. 1994).

[52]*Matter of Y-G-*, 20 I. & N. Dec. 794, 797, 1994 WL 213250 (B.I.A. 1994).

[53]*Matter of Y-G-*, 20 I. & N. Dec. 794, 796, 1994 WL 213250 (B.I.A. 1994); see also *Matter of L- L-*, 9 I. & N. Dec. 324, 327, 1961 WL 12167 (B.I.A. 1961)

("The statute, as we read it, contemplates . . . willfully misrepresenting a material fact to an officer of the United States Government duly authorized to issue said documentation, and not to an individual who has no official connection with the Government and, therefore, [is] not authorized to issue visas or other entry documents.") (internal citation omitted).

[54]INA § 212(a)(6)(C)(i) [8 U.S.C.A. § 1182(a)(6)(C)(i)] (emphasis added).

[55]*Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997).

[56]*Kungys v. U.S.*, 485 U.S. 759, 760, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988).

[57]*Kungys v. U.S.*, 485 U.S. 759, 783, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (Brennan, J. concurring); see also *U.S. v. Puerta*, 982 F.2d 1297, 1303-04 (9th Cir. 1992) (concluding that Justice Brennan's view of materiality controls).

[58]*Matter of S- and B-C-*, 9 I. & N. Dec. 436, 447, 1960 WL 12154 (A.G. 1961).

[59]*Matter of S- and B-C-*, 9 I. & N. Dec. 436, 448-49, 1960 WL 12154 (A.G. 1961).

[60]*Kungys v. U.S.*, 485 U.S. 759, 771, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) ("while the *Chaunt* formulation may be an adequate explanation of why the misrepresentation in that case was judged not to have had a natural tendency to influence the decision, it does not necessarily facilitate judgment in the infinite variety of other factual patterns that may emerge"); *Maslenjak v. U.S.*, 137 S. Ct. 1918, 1929, 198 L. Ed. 2d 460 (2017) ("While § 1425(a) clearly imports some kind of causal or means-end relation, Congress left that relation's precise character unspecified. The open-endedness of the statutory language allows, indeed supports, our adoption of a demanding but still practicable causal standard.") (citation omitted).

[61]*Kungys v. U.S.*, 485 U.S. 759, 771, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988); see also *Kalejs v. I.N.S.*, 10 F.3d 441, 446 (7th Cir. 1993) ("[t]his is most definitely not a 'but for' analysis, . . . that is, the government need not establish that 'but for' the misrepresentation" the outcome in the case would have been different); *Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 316 (4th Cir. 2013) (quoting *Kalejs*).

[62]*Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 316 (4th Cir. 2013).

[63]*Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 317 (4th Cir. 2013) (quoting *Kungys v. U.S.*, 485 U.S. 759, 772, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988), and *Matter of Kai Hing Hui*, 15 I. & N. Dec. 288, 289, 1975 WL 31499 (B.I.A. 1975)). See also *U.S. v. Ledesma*, 33 F. Supp. 3d 734, 746 (S.D. Tex. 2012) (Stating that under *Kungys*, "the proper inquiry is not whether the misrepresentation or concealment would have, more likely than not, produced a different decision or even triggered an investigation. The correct, and much less demanding, inquiry is 'whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.' ") (citation omitted).

[64]*Kungys v. U.S.*, 485 U.S. 759, 771, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). Justice Stevens would have imposed a much stricter standard: "To prove that a misrepresentation was material, the Government must prove that the statement concealed a disqualifying fact or hindered the discovery of a disqualifying fact." *Kungys v. U.S.*, 485 U.S. 759, 789, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (Stevens, J., concurring).

[65]*Maslenjak v. U.S.*, 137 S. Ct. 1918, 1928, 198 L. Ed. 2d 460 (2017).

[66]*Maslenjak v. U.S.*, 137 S. Ct. 1918, 1921, 198 L. Ed. 2d 460 (2017).

[67]*Maslenjak v. U.S.*, 137 S. Ct. 1918, 1929, 198 L. Ed. 2d 460 (2017) (citations omitted).

[68]*Maslenjak v. U.S.*, 137 S. Ct. 1918, 1929, 198 L. Ed. 2d 460 (2017) (citations omitted).

[69]*Maslenjak v. U.S.*, 137 S. Ct. 1918, 1929, 198 L. Ed. 2d 460 (2017) (citations omitted).

[70]*Matter of S- and B-C-*, 9 I. & N. Dec. 436, 449, 1960 WL 12154 (A.G. 1961).

[71]*Ampe v. Johnson*, 157 F. Supp. 3d 1, 18 (D.D.C. 2016).

[72]*Matter of Bosuego*, 17 I. & N. Dec. 125, 131, 1979 WL 44373 (B.I.A. 1979). See also 9 FAM 302.9-4(B)(5)(c)(2)(a) ("If an alien's eligibility for a visa is resolved against the alien on the known circumstances of the case, a subsequent discovery that the alien had misrepresented certain aspects of the case would not be considered material since the misrepresented facts did not tend to lead you into making an erroneous conclusion."); 9 FAM 302.9-4(B)(5)(c)(2)(b) ("If the truth of the fact being misrepresented is available to you through consular systems, or through reference to the post's own files, it cannot be said that the alien's misrepresentation tended to cut off a line of inquiry since the line of inquiry was readily available to you."); 9 FAM 302.9-4(B)(5)(c)(5) ("In order to

sustain a finding of materiality, it must be shown that the information foreclosed by the misrepresentation was of basic significance to the alien's eligibility for a visa. A remote, tenuous, or fanciful connection between a misrepresentation and a line of inquiry which [is] relevant to the alien's eligibility is insufficient to satisfy this aspect of the materiality test. The information concealed by the misrepresentation must, when balanced against all the other information of record, have been controlling or crucial to a final decision of the alien's eligibility to receive a visa. For example, if an alien was trying to establish a residence abroad by submitting false evidence of particular employment and it appeared that the alien had other ties meriting favorable consideration, then the misrepresentation would not be considered to be material."); 9 FAM 302.9-4(B)(5)(c)(6) ("An applicant will never be ineligible under INA 212(a)(6)(C)(i) if he or she can demonstrate eligibility on the true facts.").

[73]*Zamora-Santillan v. I.N.S.*, 43 F.3d 669 (5th Cir. 1994) (unpublished) ("The materiality element of section 212(a)(6)(C)(i) will be satisfied if an alien either (1) would have been excludable on the true facts or (2) the misrepresentation tended to shut off a line of inquiry which was relevant to the alien's eligibility *and which might have resulted in a determination of excludability.*") (citing *Matter of Bosuego*, 17 I. & N. Dec. 125, 1979 WL 44373 (B.I.A. 1979); *Matter of S- and B-C-*, 9 I. & N. Dec. 436, 1960 WL 12154 (B.I.A. 1960, A.G. 1961)) (emphasis added). See also *Ampe v. Johnson*, 157 F. Supp. 3d 1, 18 (D.D.C. 2016); *Forbes v. I.N.S.*, 48 F.3d 439, 443 (9th Cir. 1995) (failure to disclose alien's prior arrest on a visa application held not material because the charges would not have affected approval of the visa); *Solis-Muela v. I.N.S.*, 13 F.3d 372, 376 (10th Cir. 1993) (upholding BIA decision that applied a materiality standard requiring a showing that "either (1) the alien is excludable on the true facts or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility *and which might well have resulted in a proper determination that he be excluded.*") (citing, inter alia, *Matter of Bosuego*, 17 I. & N. Dec. 125, 1979 WL 44373 (B.I.A. 1979)) (emphasis added); *La Madrid-Peraza v. Immigration and Naturalization Service*, 492 F.2d 1297 (9th Cir. 1974) (finding that overstating the expected wages from prospective employment was not a material misrepresentation as, since the actual wage did not fall below the prevailing wage, there was no evidence that the petition would have been denied).

[74]*Matter of D-R-*, 25 I. & N. Dec. 445, 2011 WL 1341569 (B.I.A. 2011) (citing *U.S. v. Matsumaru*, 244 F.3d 1092, 1101, 56 Fed. R. Evid. Serv. 1092 (9th Cir. 2001)).

[75]9 FAM 302.9-4(B)(5)(c)(2)(b) ("If the truth of the fact being misrepresented is available to you through the consular systems, or through reference to the post's own files, it cannot be said that the alien's misrepresentation tended to cut off a line of inquiry since the line of inquiry was readily available to you.").

[76]*Matter of F-B-*, 2016 WL 2772675 (A.A.O. Apr. 26, 2016).

[77]*Rahman v. Mukasey*, 272 Fed. Appx. 35, 36-37 (2d Cir. 2008) (unpublished).

[78]*Rahman v. Mukasey*, 272 Fed. Appx. 35, 36-37 (2d Cir. 2008) (unpublished).

[79]*Rahman v. Mukasey*, 272 Fed. Appx. 35, 38 (2d Cir. 2008) (unpublished).

[80]*Matter of Tijam*, 22 I. & N. Dec. 408, 425, 1998 WL 883735 (B.I.A. 1998) (Lory Diana Rosenberg, Board Member, concurring and dissenting).

[81]*United States v. Golding*, 2015 WL 12001283 (S.D. Fla. 2015); see also 9 FAM 302.9-4(B)(5)(c)(5) ("In order to sustain a finding of materiality, it must be shown that the information foreclosed by the misrepresentation was of basic significance to the alien's eligibility for a visa. A remote, tenuous, or fanciful connection between a misrepresentation and a line of inquiry which [is] relevant to the alien's eligibility is insufficient to satisfy this aspect of the materiality test. The information concealed by the misrepresentation must, when balanced against all the other information of record, have been controlling or crucial to a final decision of the alien's eligibility to receive a visa. For example, if an alien was trying to establish a residence abroad by submitting false evidence of particular employment and it appeared that the alien had other ties meriting favorable consideration, the misrepresentation would not be considered to be material.").

[82]*Zamora-Santillan v. I.N.S.*, 43 F.3d 669 (5th Cir. 1994).

[83]*Matter of B- and P-*, 2 I. & N. Dec. 638, 640, 645, 1946 WL 6072 (B.I.A. 1946, A.G. 1947) (collecting cases).

[84]*Matter of B- and P-*, 2 I. & N. Dec. 638, 642, 1946 WL 6072 (B.I.A. 1946, A.G. 1947); but see *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263 (C.C.A. 7th Cir. 1938); *U.S. ex rel. Fink v. Reimer*, 96 F.2d 217 (C.C.A. 2d Cir. 1938).

[85]*Matter of B- and P-*, 2 I. & N. Dec. 638, 645,

1946 WL 6072 (B.I.A. 1946, A.G. 1947); see also *Matter of G-M-*, 7 I. & N. Dec. 40, 74, 1955 WL 8691 (B.I.A. 1955) ("The courts have consistently held that a misrepresentation is not material, when made during proceedings for admission into the United States, if the alien would not have been denied a visa or excluded had he told the truth.").

[86]*Matter of S- and B-C-*, 9 I. & N. Dec. 436, 447, 1960 WL 12154 (A.G. 1961); see also *Matter of Gilikevorkian*, 14 I. & N. Dec. 454, 1973 WL 29479 (B.I.A. 1973) ("Inasmuch as the respondent's use of the false identity was for a legitimate reason and was for a prolonged period prior to entry, a line of relevant inquiry was not cut off. Inquiry would have revealed no information damaging to the respondent so far as this record indicates. No ground of excludability would have been uncovered."); *Matter of Box*, 10 I. & N. Dec. 87, 1962 WL 12909 (B.I.A. 1962) ("We believe the special inquiry officer correctly disposed of this case. If both the visa and the passport had reflected the truth concerning respondent's place of birth, date of birth, parentage, prior residence, and uses of aliases, there would have been no ground of inadmissibility revealed nor would inquiry on the basis of the true facts have resulted in a proper determination of excludability.").

[87]*Emokah v. Mukasey*, 523 F.3d 110 (2d Cir. 2008) (finding materiality where the alien had previously applied for a visitor visa and been denied, then reapplied with a different name, posing as the wife of a wealthy Nigerian businessman, thus appearing less likely to illegally overstay her visa); see also *Mann v. Holder*, 2014 WL 4795032 (E.D. Cal. 2014) ("However, *Rahman* did not involve a case in which multiple names and conflicting birth documents were given. When CIS cannot determine who is actually applying for an adjustment of status due to conflicting representations and documentation provided by the applicant, it is unclear how CIS can do an appropriate investigation and vetting of an applicant . . . . Under such circumstances, . . . identity and representations thereof would have 'a natural tendency to influence the decisions' of CIS and, thus are material.").

[88]*Matter of Ng*, 17 I. & N. Dec. 536, 1980 WL 121933 (B.I.A. 1980).

[89]*Matter of Ng*, 17 I. & N. Dec. 536, 537, 1980 WL 121933 (B.I.A. 1980) (citing *Matter of Gilikevorkian*, 14 I. & N. Dec. 454, 1973 WL 29479 (B.I.A. 1973)); see also *Rahman v. Mukasey*, 272 Fed. Appx. 35, 38 (2d Cir. 2008) (unpublished).

[90]Although *Kungys* dealt with a denaturalization statute, 8 U.S.C.A. § 1451(a), its approach has been applied to § 1182(a)(6)(C)(i), as the provisions are very similar. *Monter v. Gonzales*, 430 F.3d 546, 556-57 (2d Cir. 2005).

[91]*U.S. v. Latchin*, 554 F.3d 709, 713-14 (7th Cir. 2009) (citations omitted).

[92]*Kungys v. U.S.*, 485 U.S. 759, 783, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (Brennan, J., concurring).

[93]*Kungys v. U.S.*, 485 U.S. 759, 783-84, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (Brennan, J., concurring) (citation omitted).

[94]*U.S. v. Latchin*, 554 F.3d 709, 714 (7th Cir. 2009).

[95]*U.S. v. Latchin*, 554 F.3d 709, 714 (7th Cir. 2009).

[96]*Monter v. Gonzales*, 430 F.3d 546, 556-57 (2d Cir. 2005).

[97]*Wen Zhong Li v. Lynch*, 837 F.3d 127, 131 (1st Cir. 2016) (quoting *Toribio-Chavez v. Holder*, 611 F.3d 57, 63 (1st Cir. 2010)); see also *Matter of Healy and Goodchild*, 17 I. & N. Dec. 22, 28, 1979 WL 44357 (B.I.A. 1979); *Matter of G-G-*, 7 I. & N. Dec. 161, 164, 1956 WL 10246 (B.I.A. 1956).

[98]9 FAM 302.9-4(B)(4)(a).

[99]*Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997) ("The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary.") (citing *Forbes v. I.N.S.*, 48 F.3d 439, 442 (9th Cir. 1995), and *Espinoza-Espinoza v. Immigration and Naturalization Service*, 554 F.2d 921, 925 (9th Cir. 1977)); *Zamora-Santillan v. I.N.S.*, 43 F.3d 669 (5th Cir. 1994) ("The willfulness of Zamora-Santillan's misrepresentation was established through his admission that the misstatement was knowing and intentional.").

[100]*Matter of Tijam*, 22 I. & N. Dec. 408, 425, 1998 WL 883735 (B.I.A. 1998) (Rosenberg, concurring and dissenting); see also *Ampe v. Johnson*, 157 F. Supp. 3d 1 (D.D.C. 2016) ("For present purposes, the Court need not decide whether Petitioner's explanation for failing to list her child on the form or to disclose her children during her LPR interview is persuasive. Her asserted confusion is at least plausible, and thus determining whether she intentionally misrepresented a material fact or merely misunderstood what was being asked turns on her credibility. . . . Because the government has not shown that Petitioner indisputably committed fraud or willful misrepresentation, it is not entitled to summary judgment on the basis that Petitioner was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i).").

[101]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(D)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3.h tml.

[102]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(D)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3.h tml.

[103]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(D)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3.h tml.

[104]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(D)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3. html (discussing *Fedorenko v. U.S.*, 449 U.S. 490, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981)).

[105]*Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 318 (4th Cir. 2013). But see *Ampe v. Johnson*, 157 F. Supp. 3d 1, 15 (D.D.C. 2016) (disagreeing with *Injeti*'s rationale that signing under penalty of perjury can impose a penalty for an innocent mistake and pointing out that the court's interpretation "would effectively read the scienter requirement out of 8 U.S.C.A. § 1182(a)(6)(C)(i), since the *Injeti* court's interpretation would subsume all misstatements on applications for immigration benefits without requiring any scienter.").

[106]*Injeti v. U.S. Citizenship and Immigration Services*, 737 F.3d 311, 318 (4th Cir. 2013) ("[W]e do not believe a mistake or misstatement with no possible bearing on an applicant's eligibility, and which is therefore immaterial, *see Kungys,* 485 U.S. at 772, necessarily violates the duty imposed by § 103.2(a)(2).").

[107]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(B)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3.ht ml#text:note-ID0EQALW.

[108]*Matter of O-*, 7 I. & N. Dec. 486, 1957 WL 10555 (B.I.A. 1957) (holding modified by, Matter of L-D-E-, 8 I. & N. Dec. 399, 1959 WL 11588 (B.I.A. 1959)) (finding that the phrase "other documentation" "contemplates any documents with which an alien seeks to gain admission, either as an alien or as a citizen, and which normally facilitate admission"); *Matter of M-y R-*, 6 I. & N. Dec. 315, 1954 WL 7872 (B.I.A. 1954) ("the phrase 'or other documentation' in section 212(a)(19) refers to documents required at the time of an alien's application for admission to the United States, as for example, a reentry permit, border-crossing identification card or a fraudulently obtained United States passport. The applications for extension of stay are not 'documentation' ").

[109]USCIS Policy Manual, Vol. 8, Part J, Chapter 3(B)(2), available at https://www.uscis.gov/policyman ual/HTML/PolicyManual-Volume8-PartJ-Chapter3.ht ml#text:note-ID0EQALW.

[110]9 FAM 302.9-4(B)(7)(a)(2).

[111]9 FAM 302.9-4(B)(7)(b).

[112]*Matter of Gilikevorkian*, 14 I. & N. Dec. 454, 1973 WL 29479 (B.I.A. 1973) (holding that a long-term adoption of a false identity for employment purposes generated no immigration benefit); cf. *Kungys v. U.S.*, 485 U.S. 759, 780, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (Stating, regarding the intent requirement of 8 U.S.C.A. § 1101(f)(6), "It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable . . . .").

[113]*Matter of Kai Hing Hui*, 15 I. & N. Dec. 288, 289, 1975 WL 31499 (B.I.A. 1975).

[114]*Matter of Konanykhine & Gratcheva*, 28 Immig. Rptr. B1-49 (B.I.A. 2003); *Ymeri v. Ashcroft*, 387 F.3d 12, 19, n. 4 (1st Cir. 2004).

[115]*Saliba v. Attorney General of United States*, 828 F.3d 182, 190 (3d Cir. 2016).

[116]*Matter of Lira-Alvarado*, 23 Immig. Rptr. B1-134 (B.I.A. 2000); *Miller v. INS*, 1993 WL 13130527, at *7 (9th Cir. 1993).

[117]*Michel v. Holder*, 358 Fed. Appx. 980, 982 (9th Cir. 2009) (unpublished) (memorandum opinion) ("Michel's misrepresentations on his asylum application and during immigration proceedings enabled him to seek to procure, and actually to obtain, the benefit of employment authorization to which he was not otherwise entitled.").

[118]*Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 561-62, 1999 WL 332842 (B.I.A. 1999).

[119]*Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 563, 1999 WL 332842 (B.I.A. 1999).

[120]*Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 571, 1999 WL 332842 (B.I.A. 1999).

[121]*Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 575, 1999 WL 332842 (B.I.A. 1999).

[122]*Cervantes-Gonzales v. I.N.S.*, 244 F.3d 1001 (9th Cir. 2001).

[123]*Cervantes-Gonzales v. I.N.S.*, 244 F.3d 1001, 1003, 1004 (9th Cir. 2001).

[124]*Matter of Tachiwana*, 25 Immig. Rptr. B1-165 (B.I.A. 2002).

[125]*Matter of Tachiwana*, 25 Immig. Rptr. B1-165 (B.I.A. 2002).

[126]*Rahman v. Mukasey*, 272 Fed. Appx. 35 (2d Cir. 2008) (unpublished). See also *Puente Arizona v. Arpaio*, 2016 WL 6873294 *25 n. 4 (D. Ariz. 2016) ("Section 1182(a)(6)(C)(i) . . . is primarily focused on fraudulent admission to the United States or obtaining other benefits under the immigration chapter. It is not employment-specific and does not show a congressional intent to preempt regulation of employment-related fraud.").

[127]INA § 212(a)(6)(C)(ii) [8 U.S.C.A. § 1182(a)(6)(C)(ii)] (emphasis added).

[128]INA § 212(a)(6)(C)(i) [8 U.S.C.A. § 1182(a)(6)(C)(i)] (emphasis added).

[129]*Rana v. Gonzales*, 175 Fed. Appx. 988, 991 (10th Cir. 2006) (unpublished).

[130]*Rana v. Gonzales*, 175 Fed. Appx. 988, 992-93 (10th Cir. 2006) (unpublished).

[131]*Rana v. Gonzales*, 175 Fed. Appx. 988, 997 (10th Cir. 2006) (unpublished).

[132]*Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 573-74, 1996 WL 426890 (B.I.A. 1996) (emphasis added).

[133]*Eid v. Thompson*, 740 F.3d 118, 125 (3d Cir. 2014); see also *Matter of M-*, 9 I. & N. Dec. 118, 119, 1960 WL 12153 (B.I.A. 1960) (if an alien falsely represents "a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony," he or she shall not be penalized for the misrepresentation).

[134]*Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309-10 (9th Cir. 2010).

[135]*Llanos-Senarillos v. U.S.*, 177 F.2d 164, 165 (9th Cir. 1949).

[136]9 FAM 302.9-4(B)(3)(f)(1).

[137]*Costa v. Attorney General of U.S.*, 257 Fed. Appx. 543 (3d Cir. 2007) (unpublished) (alien did not give "false testimony" when he "provided inaccurate statements under oath during an asylum interview" but voluntarily "corrected these statements in a sworn affidavit" submitted before the first merits hearing); *Olea-Reyes v. Gonzales*, 177 Fed. Appx. 697, 700 (9th Cir. 2006) (unpublished) (alien who claimed to be a United States citizen during primary inspection timely retracted his misrepresentation by clarifying during questioning that he had a work permit); *Matter of Kasinga*, 21 I. & N. Dec. 357, 368, 1996 WL 379826 (B.I.A. 1996); *Matter of Y-G-*, 20 I. & N. Dec. 794, 797, 1994 WL 213250 (B.I.A. 1994); *Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, 412-13, 1991 WL 353529 (B.I.A. 1991).

[138]*Aoko v. Holder*, 518 Fed. Appx. 169, 177 (4th Cir. 2013) (per curiam) (unpublished) (finding that a retraction made before a temporary proyected status application was adjudicated on the merits was "insufficient, as recantation 'must be . . . without delay' ") (quoting *Matter of Namio*, 14 I. & N. Dec. 412, 414, 1973 WL 29467 (B.I.A. 1973)); 9 FAM 302.9-4(B)(3)(f)(1) ("The applicant must correct his or her representation . . . before the conclusion of the proceeding during which he or she gave false testimony.").

[139]9 FAM 302.9-4(B)(3)(f)(1) ("The applicant must correct his or her representation before being exposed by the officer or U.S. Government official . . . . Once the misrepresentation is discovered, if the applicant has already had an opportunity to retract the misrepresentation and has not done so, the adjudicating officer is not then required to provide the applicant an additional opportunity to make a retraction."); *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309-10 (9th Cir. 2010) ("[W]hen a person supposedly recants only when confronted with evidence of his prevarication, the amelioration is not available. . . . [R]ecantation must be voluntary and without delay. . . . And, when the so-called retraction 'was not made until it appeared that the disclosure of the falsity of the statements was imminent [, it] is evident that the recantation was neither voluntary nor timely.' ") (some alterations in the original); *Ymeri v. Ashcroft*, 387 F.3d 12, 18-20 (1st Cir. 2004) (finding fraud or misrepresentation when the respondents "did not confess the falseness of their documents until the Inspector had caught them" but "presented the false passports to the Immigration Inspector," who ascertained on his own "that the documents were false").

[140]9 FAM 302.9-4(B)(3)(f)(1).

[141]9 FAM 302.9-4(B)(3)(f)(2) ("A retraction made before a routine primary inspection at a port of entry may be timely, depending on the nature, circumstances, and timing of the specific retraction. Generally, retractions in secondary inspection based on a misrepresentation in or before primary inspection at a port of entry would not be considered timely.").

[142]INA § 240(c)(3)(A) [8 U.S.C.A. § 1229a(c)(3)(A)] ("In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."); 8 C.F.R. § 1240.8(a) ("A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.").

[143]*Matter of Pena*, 26 I. & N. Dec. 613, 619, 2015 WL 4034705 (B.I.A. 2015) (finding that the DHS had the burden of proving that the respondent is deportable as an alien who acquired lawful permanent resident status through fraud, under INA § 237(a)(1)(A) [8 U.S.C.A. § 1227(a)(1)(A)]); *Forbes v. I.N.S.*, 48 F.3d 439, 441-42 (9th Cir. 1995); *Singh v. Gonzales*, 451 F.3d 400, 404, 2006 FED App. 0201P (6th Cir. 2006); *Kalejs v. I.N.S.*, 10 F.3d 441, 446 (7th Cir. 1993).

[144]*Kungys v. U.S.*, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988); see also *U.S. v. Latchin*, 554 F.3d 709, 713-14 (7th Cir. 2009) (discussing *Kungys*).

[145]*Kungys*, 485 U.S. at 783-84 (Brennan, J., concurring) (emphasis added).

[146]*Monter v. Gonzales*, 430 F.3d 546, 557 (2d Cir. 2005).

[147]INA § 240(c)(2) [8 U.S.C.A. § 1229a(c)(2)]; 8 C.F.R. § 1240.8(b) to (c).

[148]*Matter of Y-G-*, 20 I. & N. Dec. 794, 797, 1994 WL 213250 (B.I.A. 1994).

[149]INA § 240(c)(4)(A) [8 U.S.C.A. § 1229a(c)(4)(A)]; INA § 291 [8 U.S.C.A. 1361]; 8 C.F.R. § 1240.8(d) ("The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.").

[150]*Matter of Christos, Inc.*, 26 I. & N. Dec. 537, 2015 WL 1632651 (USCIS AAO 2015) (finding that the petitioner, who had submitted an I-140, had discharged its burden of proof notwithstanding the fact that "the record contains a fictitious marriage certificate filed with the Form I-130 petition" because "the beneficiary credibly established that the purported marriage never occurred and that he did not otherwise enter into, or conspire or attempt to enter into, a marriage for the purpose of evading the immigration laws of the United States"); *Dakura v. Holder*, 772 F.3d 994, 998 (4th Cir. 2014); *Hashmi v. Mukasey*, 533 F.3d 700, 702 (8th Cir. 2008) ("Our court has held that because such an alien is in a similar position to an alien seeking entry into the United States, the decision on adjustment is governed by the standard of proof pertaining to applicants for admission, 8 U.S.C. § 1229a(c)(2)(A), and the alien must therefore show 'clearly and beyond doubt' that he is admissible.").

[151]See, e.g., *Hashmi v. Mukasey*, 533 F.3d 700, 703 (8th Cir. 2008) ("The IJ ultimately rejected the disputed charge of removability, finding that the government had not proven by clear and convincing evidence that Hashmi misrepresented himself to be a citizen when he completed the I-9 form. But the immigration judge also rejected Hashmi's application for adjustment of status, finding Hashmi had not proven, clearly and beyond doubt, the converse proposition — *i.e.*, that he did not make a false claim of citizenship on his I-9 form. On this basis, the IJ determined that Hashmi was 'inadmissible' under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), and thus ineligible for adjustment of status under 8 U.S.C. § 1255(a).").

[152]*Matter of Y-G-*, 20 I. & N. Dec. 794, 796-97, 1994 WL 213250 (B.I.A. 1994) (quoting *Matter of Shirdel, et al.*, 19 I. & N. Dec. 33, 1984 WL 48579 (B.I.A. 1984)); *Singh v. Gonzales*, 451 F.3d 400, 407, 2006 FED App. 0201P (6th Cir. 2006).

[153]*Matter of Healy and Goodchild*, 17 I. & N. Dec. 22, 29, 1979 WL 44357 (B.I.A. 1979).

[154]*Matter of Healy and Goodchild*, 17 I. & N. Dec. 22, 28, 1979 WL 44357 (B.I.A. 1979).

[155]*Matter of Patel*, 19 I. & N. Dec. 774, 1988 WL 235435 (B.I.A. 1988).

[156]*Matter of Tawfik*, 20 I. & N. Dec. 166, 168, 1990 WL 385753 (B.I.A. 1990).

[157]*Matter of Tawfik*, 20 I. & N. Dec. 166, 168, 1990 WL 385753 (B.I.A. 1990).

[158]*Matter of Tawfik*, 20 I. & N. Dec. 166, 169, 1990 WL 385753 (B.I.A. 1990). Note that in that case, "the district director involved in the determination of that petition noted that the record contained evidence, which had not been rebutted, 'from which it [could] reasonably be inferred' that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits." Nevertheless, the BIA held that "[s]uch a reasonable inference does not rise to the level of substantial and probative evidence requisite to the preclusion of approval of a visa petition in accordance

with section 204(c) of the Act." *Matter of Tawfik*, 20 I. & N. Dec. 166, 168, 1990 WL 385753 (B.I.A. 1990).

[159]*Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1347 n. 11 (N.D. Ga. 2013); *Matter of Tawfik*, 20 I. & N. Dec. 166, 166, 1990 WL 385753 (B.I.A. 1990) ("the district director must deny any subsequent visa petition for immigrant classification filed on behalf of [an] alien [who committed marriage fraud], regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative."); *Avitan v. Holder*, 2011 WL 499956 (N.D. Cal. 2011).

[160]*Matter of Uy*, 1997-INA-304, n. 27, 1999 WL 111431, 1997 (Bd.Alien Lab.Cert.App. 1999) (en banc) (citing *Matter of Yedico International, Inc.*, 1987-INA-740, 1988 WL 235773, 1987 (Bd.Alien Lab.Cert.App. 1988) (en banc)).

[161]*Matter of [redacted]*, 2012 WL 8527077 at *2 (A.A.O. 2012) (stating that "[t]he administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit" and holding that for a finding of fraud or willful mispresentation under INA § 212(a)(6)(C) "to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record").

[162]INA § 205 [8 U.S.C.A. § 1155]; 8 C.F.R. § 205.2(a).

[163]*Matter of Ho*, 19 I. & N. Dec. 582, 1988 WL 235447 (B.I.A. 1988); *Matter of Estime*, 19 I. & N. Dec. 450, 1987 WL 108945 (B.I.A. 1987).

[164]Indeed, it does not even foreclose a subsequent petition based on the same labor certification. 8 C.F.R. § 103.2(b)(15) ("Withdrawal or denial due to abandonment does not preclude the filing of a new benefit request with a new fee."); *Matter of Al Wazzan*, 25 I. & N. Dec. 359, 368, 2010 WL 4566196 (USCIS AAO 2010) ("This decision does not bar the applicant's new prospective employer from filing a new I-140 immigrant visa petition, based on an appropriate visa classification, with a new I-485 application for adjustment of status.").

[165]*Matter of [redacted]*, 2011 WL 10878498 at *7 (A.A.O. 2011).

[166]*Hailemichael v. Gonzales*, 454 F.3d 878, 885 (8th Cir. 2006).

[167]*Cao He Lin v. U.S. Dept. of Justice*, 428 F.3d 391, 394-95 (2d Cir. 2005) (instructing that the factfinder "may not engage in speculation or rely solely on minor inconsistencies to find an applicant incredible" and that if the factfinder "intends to rely on the absence of certain corroborative evidence to hold that an applicant has not satisfied his burden of proof, she must give the applicant an opportunity to explain its absence").

[168]*Matter of Uy*, 1997-INA-304, n. 27, 1999 WL 111431, 1997 (Bd.Alien Lab.Cert.App. 1999) (en banc) (citing *Rodriguez-Gutierrez v. I.N.S.*, 59 F.3d 504, 507-508 (5th Cir. 1995)).

[169]*Rodriguez-Gutierrez v. I.N.S.*, 59 F.3d 504, 507-508 (5th Cir. 1995) (quoting *Acosta v. Landon*, 125 F. Supp. 434, 441 (S.D. Cal. 1954)).

[170]INA § 204(a)(1)(F) [8 U.S.C.A. § 1154(a)(1)(F)]; INA § 214(c)(1) [8 U.S.C.A. § 1184(c)(1)]; 8 C.F.R. § 103.3(a)(1)(iii)(B) ("For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.") (emphasis in the original); 8 C.F.R. § 204.5(c); 8 C.F.R. § 214.2(l)(2); *Matter of Sano*, 19 I. & N. Dec. 299, 1985 WL 56053 (B.I.A. 1985).

[171]*Matter of [redacted]*, 2011 WL 10878498 at *13 (A.A.O. 2011) (citations omitted).

[172]*Singh v. Gonzales*, 451 F.3d 400, 408-09, 2006 FED App. 0201P (6th Cir. 2006).

[173]*Collins Foods Intern., Inc. v. U.S. I.N.S.*, 948 F.2d 549, 555, 57 Empl. Prac. Dec. (CCH) P 41065 (9th Cir. 1991); see also 8 U.S.C.A. § 1324c(a) (requiring actual knowledge to be penalized for document fraud); 8 C.F.R. § 274a.2(b)(1)(ii)(A) (requiring only that the employer "physically examine the documentation presented by the individual establishing identity and employment authorization as set forth in paragraph (b)(1)(v) of this section and ensure that the documents presented appear to be genuine and to relate to the individual").

[174]See, e.g., *Nam Sik Ji v. U.S. Atty. Gen.*, 605 Fed. Appx. 896, 898 (11th Cir. 2015) (per curiam) (unpublished) ("To be inadmissible under § 1182(a)(6)(C)(i) based on a falsified document that someone else has filed on an alien's behalf, the alien must have known of or authorized the other party's misrepresentation.") (citing *Ortiz-Bouchet v. U.S. Atty. Gen.*, 714 F.3d 1353, 1356-57 (11th Cir. 2013)); *Sultana v. Gonzales*, 236

Fed. Appx. 692, 693 (2d Cir. 2007) (summary order) (unpublished) (analyzing the evidence in the case to determine whether the alien "was ignorant and innocent of the falsification made by her former attorney").

[175]The representation must have been made "with the 'subjective intent' to obtain a 'purpose or benefit' under the Act or any other Federal or State law," but whether the "purpose or benefit" in fact exists must be determined objectively. *Matter of Richmond*, 26 I. & N. Dec. 779, 784, 2016 WL 4072941 (B.I.A. 2016), petition for review denied, 697 Fed. Appx. 106 (2d Cir. 2017).

[176]*Matter of Richmond*, 26 I. & N. Dec. 779, 786-87, 2016 WL 4072941 (B.I.A. 2016), petition for review denied, 697 Fed. Appx. 106 (2d Cir. 2017) (finding falsity and purpose to be necessary); *Matter of Barcenas-Barrera*, 25 I. & N. Dec. 40, 42, 2009 WL 1716904 (B.I.A. 2009) (assuming knowingness to be necessary).

[177]*Matter of Barcenas-Barrera*, 25 I. & N. Dec. 40, 44 and n. 6, 2009 WL 1716904 (B.I.A. 2009) ("A United States passport would also have allowed the respondent to maintain employment in this country, which is the reason she applied for it. . . . Section 212(a)(6)(C)(ii) specifically contemplates including as a 'benefit' under the Act those benefits available pursuant to section 274A of the Act, 8 U.S.C. § 1324a (2006), which relates to alien employment."); *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007) (private sector employment falls within this prohibition since "the statute imposes no requirement that the 'purpose or benefit' obtained through the false citizenship representation be obtained through a federal or state agency") (quoting the BIA); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007), redesignated as opinion and publication ordered, (Sept. 14, 2007) ("It appears self-evident that an alien who misrepresents citizenship to obtain private employment does so, at the very least, for the 'purpose' of evading § 1324a(a)(1)(A)'s prohibition on 'a person or other entity' knowingly hiring aliens who are not authorized to work in this country.").

[178]*Castro v. Attorney General of U.S.*, 671 F.3d 356, 368, 77 A.L.R. Fed. 2d 619 (3d Cir. 2012) (finding that a false statement made to police was not "made for 'any purpose or benefit' under the law"); *Hassan v. Holder*, 604 F.3d 915, 928-29 (6th Cir. 2010) (finding a false claim to U.S. citizenship on a Small Business Administration loan application was not made for a "purpose or benefit" under law, since citizenship was irrelevant to approval of the loan).

[179]*Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007).

[180]*Pichardo v. I.N.S.*, 216 F.3d 1198, 1201 (9th Cir. 2000) ("Pichardo pleaded guilty to making a false claim of United States citizenship in violation of 18 U.S.C. § 911. In finding Pichardo inadmissible, the Board took note of this guilty plea and of Pichardo's admission to using a false birth certificate when trying to enter the United States. These facts establish an independent and non-waivable ground for inadmissibility under section 1182(a)(6)(C)(ii).").

[181]See, e.g., *Crocock v. Holder*, 670 F.3d 400, 403 (2d Cir. 2012) ("Crocock correctly argues that a false claim of nationality, made either intentionally or mistakenly, does not render an alien inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii). However, the burden of demonstrating admissibility is squarely on Appellant . . . . Crocock points to no evidence beyond his testimony to demonstrate that he thought he was a national when completing the I-9.").

[182]USCIS Policy Manual, Vol. 8, Part K, Chapter 2(F), available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartK-Chapter2.html.

Readers who are interested in contributing an article or ideas for a future Briefing,
please contact: Carolyn Bower or Colleen Courtade
Telephone: (585) 627-2338 or (585) 627-2380
Email: carolyn.bower@tr.com or colleen.courtade@tr.com
50 East Broad Street
Rochester, NY 14614