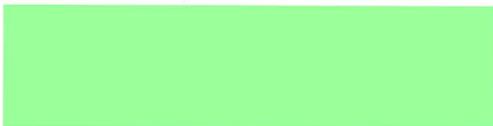




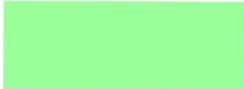
U.S. Citizenship
and Immigration
Services

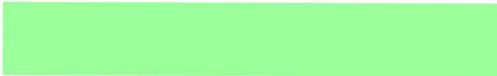
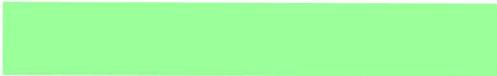
(b)(6)



DATE: FEB 01 2013

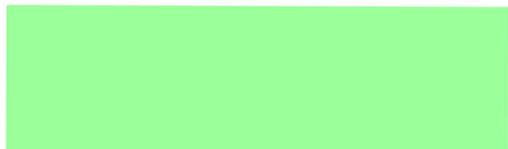
Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to
 Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal based on its withdrawal. The AAO will also enter a separate administrative finding of willful material misrepresentation.

The petitioner seeks classification as an “alien of extraordinary ability” in the arts as a conductor, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel submitted a brief and additional evidence. The AAO notes that counsel, who was retained for the first time on appeal, stated that he “does not have a copy of the record of proceedings” and indicates that he had made a Freedom of Information Act (FOIA) request for a copy of the record and requests an extension of time to respond. There is no statutory or regulatory provision that requires the AAO to hold an appeal in abeyance while a FOIA request is pending.

On December 24, 2012, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), the AAO issued a notice advising the petitioner of derogatory information indicating, in part, that he falsely claimed to have received two international awards for conducting. The notice specifically stated that the petitioner “signed the Form I-140 petition under penalty of perjury that the petition and the evidence submitted with it... are all true and correct.”

On January 14, 2013, counsel responded to the notice by requesting that the appeal be withdrawn. Counsel’s request will be granted. A withdrawal may not be retracted and may not be refused. 8 C.F.R. § 103.2(b)(6); *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). The appeal will be dismissed based on its withdrawal.

Although the AAO acknowledges the withdrawal, the remaining issues that must be addressed are: (1) whether the petitioner sought to procure an immigration benefit through willful misrepresentation of a material fact; and, if so, (2) whether the withdrawal of the appeal constitutes a timely recantation of the misrepresentation.

(b)(6)

I. MISREPRESENTATION

A. Legal Authority

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – 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 admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term “willfully” means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which “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.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

B. Analysis

The AAO is making a formal finding of willful misrepresentation of a material fact that should be considered in any future proceeding where the petitioner’s admissibility is an issue.¹

Regarding the [REDACTED] award, the AAO’s notice stated:

¹ It is important to note that while it may present the opportunity to enter an administrative finding of willful material misrepresentation, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to that of a permanent resident. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a).

[Y]ou submitted a color photocopy of the award, but your name is handwritten in original ink. Although no translation was provided as required by regulation, it appears to state that it is for third place at the [REDACTED] in the year 2000. However, the award also states that it was signed on September 16, 2004 in Trento, Italy. In addition, according to the official website at [REDACTED] not only was there not a competition held in 2000 (there was one in 1999 and one in 2001), but it appears that 2004 was the 8th annual competition. Furthermore, your name does not appear on the website's list of winners for any year. According to the website, the third place winner for the [REDACTED] award in 2004 is listed as [REDACTED] Mr. [REDACTED] website at [REDACTED] contains a photograph of the certificate he received. In comparing the photograph of the award received by Mr. [REDACTED] with the copy you submitted, including the signatures, it appears they are identical except that both the name of the winner and the year of the award have been changed (from 2004 to 2000).

Regarding the [REDACTED] award, the AAO's notice stated:

[I]n the original filing, you provided a signed certificate. On appeal, you submitted an unsigned copy of the same certificate. On appeal, you submitted an email from [REDACTED] with information regarding the purported judges of the 2001 festival. On page 1 of the email, the author provides the website for the festival. According to the website at [REDACTED] it appears that the first time the festival was held was 2010, not 2001 as claimed. Furthermore, the information provided in the email regarding the judges of the purported 2001 festival matches the information on the website at [REDACTED] about the judges of the 2011 festival. Finally, according to the website at [REDACTED] there are numerous categories in which prizes are awarded and first place winners are awarded a statue. The certificate you provided does not list the category for which you supposedly won, rather it simply states that you and your choir were "awarded a First Prize."

The AAO notice also stated that "[y]ou signed the Form I-140 petition under penalty of perjury that the petition and the evidence submitted with it are all true and correct. The derogatory evidence discussed above raises serious concerns regarding the credibility of the remaining evidence."

The AAO further advised that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. [582, 586, 591-92 (BIA 1988)]. Finally, the AAO quoted section 212(a)(6)(C) of the Act, quoted above.

The AAO concluded that by filing the instant petition and submitting the evidence described above, the petitioner appears to have sought to procure a benefit provided under the Act through misrepresentation and that, unless the petitioner is able to provide substantial evidence to overcome, fully and persuasively, all of the above findings, the AAO would dismiss the appeal and enter a formal finding of misrepresentation into the record. As noted in the AAO's previous notice, any finding of misrepresentation will be considered in any future proceeding where admissibility is an issue.

As previously mentioned, counsel responded to the notice by withdrawing the appeal. The petitioner did not attempt to explain or otherwise rebut the AAO's notice of derogatory information.

In this case, the record shows that the petitioner misrepresented the petitioner's receipt of two international awards. An immigration officer will deny a visa petition if the petitioner submits evidence that contains false information. See section 204(b) of the Act. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. See *Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003)(upholding the AAO's finding that evidence in that matter was not credible). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. See *Matter of Ho*, 19 I&N Dec. at 591.

First, the petitioner repeatedly made false claims regarding receipt of the two awards. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the petitioner's claims in support of the Form I-140 petition constitute a false representation to a government official.

Second, the AAO finds that the petitioner willfully made the misrepresentation. The petitioner signed the Form I-140 petition, certifying under penalty of perjury that the petition and the submitted evidence are all true and correct. See section 287(b) of the Act, 8 U.S.C. § 1357(b); see also 8 C.F.R. § 103.2(a)(2). More specifically, the signature portion of the Form I-140, at part 8, requires the petitioner to make the following affirmation: "I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct." On the basis of the petitioner's signed I-140 affirmation, made under penalty of perjury, the AAO finds that the petitioner willfully and knowingly made the misrepresentation. Furthermore, the regulation at 8 C.F.R. § 102.2(a)(2) provides that "[b]y signing the application or petition, the applicant or petitioner...certifies under penalty of perjury that the application or petition, and all evidence submitted with, either at the time of filing or thereafter, is true and correct."

Third, the evidence is material to the petitioner's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. See *Matter of Ng*, 17 I&N Dec. at 537.

As the false award claims relate to the petitioner's claimed eligibility for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i), it is material to this proceeding. Accordingly, the AAO concludes that the misrepresentation was material to the petitioner's eligibility.

By filing the instant petition and falsely claiming receipt of these awards, the petitioner has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Due to the AAO's finding that the petitioner made a false claim, the AAO affirms the finding that the petitioner has willfully misrepresented a material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

C. Effect of withdrawal on the AAO's finding of willful material misrepresentation

As discussed, the AAO provided the petitioner with notice of its serious doubts regarding the credibility of the submitted evidence. The petitioner did not challenge the AAO's preliminary findings.

A timely retraction of a misrepresentation can serve as a defense to inadmissibility under section 212(a)(6)(C)(i) of the Act. See *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949); *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). For the retraction to be effective, it must be done "voluntarily and without prior exposure of [the] false testimony." *Matter of R-R-*, 3 I&N Dec. at 827; see also *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that recantation of false testimony one year after the event, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was not voluntary or timely).

Here, there has been no acknowledgement of the misrepresentation on the part of the petitioner, much less a timely and voluntary correction of such misrepresentation. See *Matter of M-*, 9 I&N Dec. at 119. Without an admission to and correction of the misrepresentation, there can be no retraction or recantation. Counsel's request to withdraw the petition, without comment on the misrepresentation does not have the effect of a recantation.

Even if the petitioner had retracted the material misrepresentation following receipt of the AAO's notice, the retraction would not overcome an adverse finding since the retraction would have been made when the disclosure of the misrepresentation was imminent or under the threat of being revealed. See *Matter of Namio*, 14 I&N Dec. at 414.

The petitioner's withdrawal of the petition cannot be considered a timely and voluntary retraction of the petitioner's false testimony. As such, the petitioner's withdrawal of the petition does not overcome or nullify the fact that the petitioner has sought to procure immigration benefits by willful misrepresentation of a material fact.

II. CONCLUSION

By filing the instant petition and submitting demonstrably false evidence, the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue. While the petitioner has chosen to withdraw his petition, this does not negate the AAO's finding that the petitioner has sought to procure immigration benefits through material representation of a material fact, which may render the beneficiary inadmissible in future proceedings.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed based on the withdrawal of the petition. The AAO enters a separate finding of willful misrepresentation of a material fact.

FURTHER ORDER: The AAO finds that the petitioner knowingly misrepresented a material fact in an effort to mislead USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.