

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

LIN 06 173 52053

Office: NEBRASKA SERVICE CENTER

Date: DEC 19 2008

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided the case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).



John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. On November 5, 2008, the petitioner, through counsel, requested that the appeal be withdrawn. The appeal will be dismissed based on its withdrawal by counsel. The AAO will also enter a separate administrative finding of fraud and material misrepresentation.

On October 20, 2008, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), this office issued a notice advising the petitioner of derogatory information indicating that he had made material misrepresentations regarding his accomplishments in support of his petition. The notice specifically observed that the petitioner signed the Form I-140, thereby certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct." With respect to the material misrepresentations, the AAO noted that correspondence from prior counsel, [REDACTED], falsely attributed authorship of three published articles to the petitioner, when in fact those articles were the work of another author. Two of the published articles first appeared, respectively, in 1992 and 1993, before the petitioner was sixteen years old.

In response to the AAO's notice, the petitioner disclaims any knowledge of the documents submitted in support of his petition and asserts that prior counsel acted without his knowledge or consent. As will be discussed, we are not persuaded by the petitioner's attempt to shift accountability to his prior attorney or his claim regarding the ineffective assistance of his prior attorney.

In order to enter a finding of fraud, we must first consider whether the misrepresentations regarding the petitioner's past accomplishments were material to establishing eligibility for the requested classification.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now CIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In this case, prior counsel's introductory statement of May 1, 2006, submitted with the initial filing of the petition, contained two references to the petitioner's published work as evidence of his eligibility. On pages 8-9, prior counsel stated that the petitioner "has authored and co-authored many original research papers; they were either published by the top academic journals or presented in prestigious academic conferences." Counsel then listed three articles as follows:

- [REDACTED], Aroonchat Chatchaikarn, etc. "A new traveling wave matching structure for enhancing the bandwidth of MMIC broadband amplifiers," has been accepted by IEEE, *Microwave Wireless Components Letters*.
- [REDACTED] "The Analysis of the Hybrid Distributed Amplifier," *Microwave and Optical Technology Letters*, 1993, March, pp. 221-223
- [REDACTED], "The Theory of the Active Microwave Transmission Line," *Proceedings of Conference on Microwave Measurement*, Zhu'hai, P.R. China, June, 1992

(Counsel's emphasis.) Clearly, consideration of these articles is material to consideration of whether the alien's past accomplishments are a gauge of future benefit to the national interest. However, as the AAO noted in its notice of derogatory information, the beneficiary was born in 1977, and was therefore unlikely to have been producing scholarly articles and conference presentations in 1992-1993. In an effort to ascertain whether the above citations might contain errors, such as incorrect dates, the AAO searched <http://scholar.google.com> for the above titles. The AAO's searches revealed that the first two listed articles were actually co-authored by one [REDACTED], whose name was replaced with the petitioner's name in the above citations.¹ The AAO could not locate any reference to the third article, but the petitioner (who was fourteen years old in June 1992) now acknowledges that he did not write that article.

The other reference to the petitioner's published work is on page 16 of prior counsel's statement, at which point counsel stated that the petitioner "has authored and co-authored nearly two dozens of scholarly articles. . . . The following is a list of [the petitioner's] publications." The list consists of only three items (one journal article and two conference presentations), all dating from 2005. The two lists, therefore, contradict one another.

In response to a March 5, 2007 request for evidence (RFE), the petitioner again provided an undated letter from prior counsel, reiterating claims that the petitioner authored the above three articles which were in fact authored by [REDACTED]

In response to the October 20, 2008 AAO notice, the petitioner denies that he was aware of these material misrepresentations regarding his past accomplishments, and states: "I spoke with [REDACTED] by phone and by email only, and I never met him in person." The petitioner also states:

¹An abstract of the IEEE article can be found at http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=1471726. An abstract of the 1993 article is available at <http://doi.wiley.com/10.1002/mop.4650060403> (both visited March 28, 2008). The AAO located the articles by searching for their titles at http://scholar.google.com/advanced_scholar_search.

█ sent me his written fee agreement, which I reviewed, signed, and returned to him with a retainer check in the amount of \$1500. According to the fee agreement, I had no right to copies of the documents submitted on my behalf. Moreover, according to the agreement, █ would not permit any inspection of the documents except at the physical office of his firm. . . .

█ never let me see what he attached to [the petition] forms. . .

Although I have requested copies of my file from █ he has not responded to my requests. I therefore do not know what counsel asserted in his brief. I told Mr. █ that I published three articles in the initial I-140 petition and six additional articles at the time of the RFE [request for evidence], and I never claimed to have published more than the above. . . . I can affirm that I did not author the articles that the USCIS points out in its Notice to me. In fact, in the appeal letter I personally filed to [the] Administrative Appeal[s] Office in September 2007, I explicitly indicated that my first publication was in 2005, which is in direct contradiction to █ fraudulent statements about me and my work. My appeal letter is strong evidence that I did not know that anything other than what I provided to █ was submitted on my behalf. I agree that, if indeed such documents were submitted, they would be fraudulent, yet I do not have any knowledge of their content.

It is important to note that although the petitioner has made these claims against his former attorney and has filed a formal complaint against him, the petitioner has failed to submit any response from his former attorney or explanation for the lack of such a response. Accordingly, we are unable to make a fair and impartial assessment of the actions attributed to former counsel. It is also important to note that the petitioner's response does not challenge the AAO's finding that the record contains material misrepresentations regarding the petitioner's past accomplishments. In fact, counsel's November 5, 2008 letter states that the petitioner "does not dispute the contentions of the AAO; that in 1992 he was only 15 years old and was therefore not publishing scholarly articles on an international level." However, the petitioner's withdrawal of the appeal does not overcome or nullify the fact that he has sought to procure immigration benefits by fraud.

We cannot ignore that the petitioner signed the Form I-140, thereby certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct." Only in response to the AAO's October 20, 2008 notice has the petitioner acknowledged that his submissions contain material misrepresentations regarding his accomplishments. An alien's timely and voluntary retraction of his false statement may serve to excuse the misrepresentation, but the retraction may not simply be in response to the actual or imminent exposure of his falsehood. *See Rahman v. Mukasey*, 272 Fed. Appx. 35, 39 (2nd Cir. 2008) (unpublished) (citing *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973); *Matter of Ngan*, 10 I&N Dec. 725, 727 (BIA 1964); *Matter of M*, 9 I&N Dec. 118, 119 (BIA 1960)). Until USCIS confronted the petitioner with the

misrepresentations regarding his published accomplishments, it appears that he would have been content to receive an approval of the petition based on these misrepresentations.

Counsel asserts that the petitioner “did not make a willful misrepresentation of a material fact” and that the “fraudulent conduct of [prior counsel] should not be attributed to [the petitioner] because he had no knowledge of the fraud.” Counsel submits a copy of the “Attorney Fee Agreement” between prior counsel and the petitioner. This fee agreement contains a clause indicating that while an alien may inspect all writings and submissions on the attorney’s premises, “no duplication by any means or otherwise transmission to anyone by Beneficiary of all materials stated above and samples will be allowed.” Despite counsel’s assertions and the wording of this contract, the record does not establish that the petitioner had no knowledge of the fraud.

First, the petitioner signed the Form I-140 on April 30, 2006 under penalty of perjury. 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.” (Emphasis added). The actual 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 that basis alone, the petitioner must be held responsible for material misrepresentations contained within the record of proceeding.

If the petitioner was unaware of the documents and information submitted in support of his own petition, then this failure to apprise himself constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005)(unpublished)(an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application’s contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). To find otherwise would have serious negative consequences for USCIS and the administration of the nation’s immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

In addition, the Department of Justice and USCIS frequently prosecute employment-based fraud based on a petitioner’s forged signature on the employment-based petition. We note prior examples where attorneys have been convicted of various charges, including money laundering and immigration fraud, after signing immigration forms for which the alien or employer had no knowledge. *United States v. O’Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case

(E.D. Va. December 11, 2002). In contrast to those cases, the petitioner admits that he signed the Form I-140, and his own e-mail traffic indicates that he was an active participant in the preparation of the supporting evidence.

Significantly, it appears that the petitioner was the author of at least one of the documents containing the misrepresentations regarding his accomplishments. The director's RFE was issued on March 5, 2007. According to an e-mail from the petitioner around May 1, 2007, he drafted the "petition letter" response and left "highlighted parts...to be finished or verified" by prior counsel. On May 4, 2007, he gave prior counsel the following instructions: "About the petitioner letter I have made some minor changes and verified some of the highlighted parts. If you plan to make changes on the petitioner letter, please use this updated one (attached with this e-mail)." The petitioner failed to provide USCIS with a copy of the attachment; however, it is clear that he not only drafted the response that was ultimately provided to USCIS, but that he edited his own attorney's work. We acknowledge the prior counsel failed to provide the petitioner with a final copy of the letter (*see* e-mail of May 18, 2007 at 9:10 PM); however, this does not establish that the letter provided to USCIS was other than the version prepared by the petitioner.

Finally, although the petitioner claims that prior counsel was difficult to contact and unresponsive, the e-mails provided by the petitioner reveal a lengthy history of detailed communications between the petitioner and prior counsel. These communications span a period of nearly 18 months and reflect only "a couple of weeks" in which the petitioner complained that he had experienced difficulty in reaching his attorney by telephone. (*See* e-mail of May 19, 2006, 2:59 PM). The petitioner's prior attorney promptly responded to this May 19, 2006 e-mail the next morning, a Saturday. Overall, these communications reveal that the petitioner played a major role in preparing the cover letters provided with the initial Form I-140 and the response to the RFE, and in preparation of all of the supporting exhibits, down to oversight of the quality of the photocopies. (*See* e-mail of May 4, 2007, 5:34 PM and email of May 8, 2007, 1:28 AM). The additional submissions from the petitioner do not establish that he was a passive or unwitting victim of his prior attorney.

We note that in the course of performing their duties under the immigration laws and the *Administrative Procedure Act (APA)*, immigration officers are charged with reviewing evidence and making factual determinations or "findings" related to the adjudication of immigration benefits. Under section 557 of the APA, immigration officers are obligated to ensure that all decisions are a part of the administrative record and that the decisions include "a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 582, 591.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.²

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regards to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that the documentation supporting the petitioner’s I-140 petition contains material misrepresentations regarding the petitioner’s past accomplishments, a finding that the petitioner confirms in his response to the AAO’s October 20, 2008 notice.

As it relates to the petitioner’s claim of ineffective assistance of counsel, given that the petitioner appears to have been an active participant in the preparation and defense of his petition, we find his attempt to transfer blame to his former counsel at this time to be disingenuous. Regardless, based upon the record before us, we find the petitioner has failed to establish an ineffective assistance of counsel claim. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that

² It is important to note that while it may present the opportunity to enter an administrative finding of fraud, 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 permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a).

counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO must first determine whether the petitioner's response to the AAO's notice complies with *Lozada*. The first part of the *Lozada* test requires "an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard."

The petitioner has not submitted such an affidavit. In compliance with 28 U.S.C. § 1746, the AAO will accept an unsworn written declaration or statement as the legal equivalent of an affidavit if the declaration or statement is dated and subscribed as true under penalty of perjury. The written declaration or statement should comply with the following form:

(1) If executed outside of the United States:

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths:

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

The petitioner's October 29, 2008 declaration meets the requirements of 28 U.S.C. § 1746. Accordingly, the petitioner has met the first prong of the *Lozada* requirements.

The second part of the *Lozada* test requires "that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond." *See also N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997) (any subsequent response from counsel, or report of counsel's failure or refusal to respond should be submitted with the motion). The petitioner provides a copy of a State Bar of California/California Attorney Complaint Form that he completed on October 29, 2008. He also provides a copy of a DHL shipping receipt that appears to show that his current attorney provided a copy of this State Bar complaint to prior counsel. However, the petitioner failed to submit "[a]ny subsequent response from counsel, or report of counsel's failure or refusal to respond." The record contains no discussion of a response or lack of response from prior counsel. As previously stated, the lack of evidence regarding counsel's response

and whether he disputes the petitioner's assertions is of particular importance in this case given the petitioner's attempt to disclaim any responsibility for the fraudulent submissions. Accordingly, we find that the petitioner has not met the second prong of the *Lozada* test.

The third part of the *Lozada* test requires "that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not." The petitioner provides a copy of a State Bar of California/California Attorney Complaint Form that he completed on October 29, 2008, and a copy of a DHL shipping receipt that appears to show that his current attorney provided a copy of this State Bar complaint to the California Bar Association. Given this information, it is clear that the petitioner complied with the literal requirements of the third prong of *Lozada*. However, given the passage of merely one week's time from the date that current counsel filed the complaint and the petitioner's November 5, 2008 response to the AAO's notice, we find that former counsel was not afforded adequate time to respond to the allegations against him. We reiterate that, based upon the serious allegation of fraud made by the petitioner against his former counsel in this case, counsel's response to these allegations is a critical piece of evidence that must be considered. Accordingly, we find the petitioner has also failed to meet the third prong of the *Lozada* test. He has, therefore, failed to establish a claim of ineffective assistance of counsel.

Moreover, in addition to meeting the three-prong test, an alien claiming ineffective assistance of counsel must also show that he was prejudiced by his representative's performance. *Lozada*, 19 I&N Dec. at 638, *Mohsseni Behbahan v. INS*, 796 F.2d 249 (9th Cir. 1986). In this case, the petitioner has asserted but not demonstrated that his prior counsel was responsible for the misrepresentations. Based on the record before us, the petitioner was responsible for the misrepresentations and, therefore, was not prejudiced by prior counsel's conduct.

Finally, even if the petitioner had established that prior counsel was responsible for the material misrepresentations regarding the petitioner's accomplishments and that the petitioner was unaware of these misrepresentations, this fact would not relieve the petitioner from the obligation of ensuring that all of the representations and evidence were true and correct. *See Hanna v. Gonzales*, 128 Fed. Appx. at 480; *Bautista v. Star Cruises*, 396 F.3d at 1301; *United States v. Puente*, 982 F.2d at 159. As previously noted, the petitioner signed the Form I-140, thereby certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct." *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

In this case, we find that there is substantial and probative evidence to establish that the petitioner knowingly and willfully submitted fraudulent documentation in support of his petition. The petitioner filed the instant petition supported by documentation containing material misrepresentations on May 24, 2006, and submitted additional documents containing material misrepresentations in response to the director's RFE on May 25, 2007. Given that the petitioner's signature appears on the Form I-140 petition and that he engaged in preparation of at least one of the two letters containing the material misrepresentations, we find it implausible for counsel to argue

that the petitioner “has not engaged in any act that would constitute fraud or willful misrepresentation.”

In our October 20, 2008 notice, the AAO advised the petitioner that the withdrawal of his appeal would not prevent a finding of fraud. The regulation at 8 C.F.R. § 103.2(b)(15) provides: “Withdrawal or denial due to abandonment shall not itself affect the new proceeding; *but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition.*” (Emphasis added.)

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.

Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is 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 S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960, A.G. 1961).

By filing the instant petition and submitting documentation containing material misrepresentations regarding his accomplishments, the petitioner has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that he submitted falsified documentation, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. While the petitioner has chosen to withdraw his appeal, this does not negate our finding that he has sought to procure immigration benefits through fraud.

ORDER: The appeal is dismissed based on its withdrawal by the petitioner with a finding of fraud and willful misrepresentation of a material fact.

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