

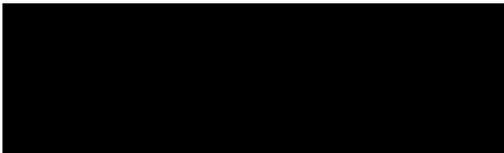
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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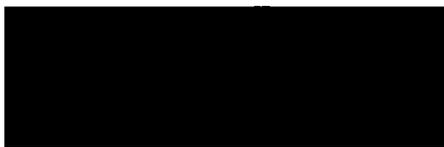
Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal based on its withdrawal by counsel. The AAO will also enter a separate administrative finding of willful material misrepresentation.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation established in July 2008, states that it intends to operate an existing gas station and convenience store owned by its claimed 50%-owned subsidiary, [REDACTED], a Texas corporation established in 2000. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. entity would support a managerial or executive position within one year of commencing operations in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserted that the director placed undue emphasis on the size and nature of the petitioner's retail business in determining whether the beneficiary would be employed in a managerial or executive capacity.

On January 5, 2012, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), this office issued a notice of derogatory information and intent to deny, advising the petitioner that the evidence in record, considered with other information available in public records, raised serious questions regarding the credibility of the evidence submitted to establish the petitioner's ownership of its claimed U.S. subsidiary. The AAO afforded the petitioner 30 days to submit documentation and explanation to address the significant discrepancies noted.

On January 26, 2012, counsel requested that the appeal be withdrawn. 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 by petitioner's counsel.

Although the appeal will be dismissed, the remaining issues that must be addressed in this matter 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.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. Discussion

The petitioner was incorporated in the State of Texas on July 18, 2008 and filed the instant petition on November 10, 2008. At the time of filing, the petitioner claimed to own a 50% interest in [REDACTED] a Texas limited liability company established in August 2000. The petitioner provided evidence that [REDACTED] was already staffed and operating a gas station and convenience store located in Vinton, Louisiana.

As evidence of the ownership of [REDACTED] the petitioner submitted the following:

1. Articles of Organization filed with the Texas Secretary of State on August 10, 2000, identifying the company's initial managers as [REDACTED]
2. Minutes of Reorganizational Meeting dated October 1, 2008, in which it was resolved that [REDACTED] will transfer his 50% ownership to [REDACTED] resulting in the following ownership:

[REDACTED]	50%
[REDACTED]	50%

In addition, it was further resolved that the beneficiary was elected as the President and CEO of the company on that date. The document was signed solely by the beneficiary, in his capacity as president.

3. Membership Certificate #1 dated July 1, 2000 indicating that [REDACTED] owns 500 membership units. The certificate bears two member signatures.
4. Canceled Membership Certificate #2 dated July 1, 2000 indicating that [REDACTED] owns 500 membership units. The certificate bears one member signature, which does not match either signature found on the previous certificate issued on the same date, but rather, closely resembles the beneficiary's signature.
5. Membership Certificate #3 dated October 1, 2008 indicating that [REDACTED] owns 500 membership units. This membership certificate bears one signature, the legible portion of which reads [REDACTED]

The record of proceeding also contains incomplete copies of [REDACTED] Forms 1065, U.S. Return of Partnership Income, for the years 2005 through 2008. In each year, the company stated that the total number of Schedules K-1 attached is three, indicating that the company had three members during each of those years. The petitioner has not submitted copies of any Schedules K-1 for [REDACTED] On the Form 1065 for 2008, at Schedule B, the petitioner identified [REDACTED] as individuals who directly or indirectly owned an interest of 50 percent or more in the profit, loss or capital of the company. Where asked to indicate whether any foreign or domestic corporation directly or indirectly owns an interest of 50% or more in the company, the company responded "No."

Upon review of the appeal, the AAO noted serious discrepancies in the evidence which led it to review public records. The AAO's notice of derogatory information specifically advised the petitioner that unresolved discrepancies in the record undermined the credibility of the evidence submitted to establish the petitioner's claimed ownership of the subsidiary, [REDACTED]. The AAO emphasized that, as the beneficiary's proposed managerial or executive employment is largely predicated on the retail operations of the petitioner's claimed subsidiary, all aspects of the beneficiary's proposed employment were in doubt.

The AAO requested specific independent and objective evidence to resolve the inconsistencies. The petitioner also asked the petitioner to explain: (1) why [REDACTED] issued membership certificate #3 to the petitioning company in October 2008 after indicating on its corporate tax returns in the years 2005 through 2007 that it had already had three members; (2) why the company's membership certificates do not reflect the prior ownership of the company by three members; (3) why the petitioner's purported acquisition of a 50 percent interest in [REDACTED] as of October 2008 was not reflected in [REDACTED] 2008 tax return; and (4) why the beneficiary's signature appears on a stock certificate ostensibly issued by [REDACTED] in July 2000, eight years prior to the petitioner's claimed acquisition of the company.

In addition, the AAO further advised the petitioner that public records made available by the State of Texas indicate that [REDACTED] are currently the sole officers and directors of the company. See Texas Comptroller of Public Accounts, Taxable Entities Database, <https://ourcpa.cpa.state.tx.us/coa/servlet/cpa.app.coaCoaOfficer> (accessed on February 9, 2012) (copy incorporated into the record).

In addition, the AAO advised the petitioner that the record contained no evidence to establish that the petitioner paid for its claimed 50 percent membership interest in [REDACTED]. The AAO noted that the petitioner's business plan merely states that the beneficiary made an investment to acquire majority shares of [REDACTED].

Finally, the AAO noted that the Minutes of Reorganizational Meeting of [REDACTED] did little to corroborate the petitioner's claim of ownership in the company. The AAO noted that, although the meeting was purportedly called by [REDACTED] and attended by all "shareholders" of the company, the document bears only the beneficiary's signature, and not the signature of [REDACTED] or the company's other purported member.

As discussed above, the petitioner, through counsel, responded to the AAO's notice by withdrawing the petition without explanation. The petitioner did not attempt to explain or otherwise rebut the AAO's notice of derogatory information.

A. Misrepresentation

As a preliminary matter, the AAO will address whether the evidence submitted with respect to the petitioner's claimed ownership of the U.S. company, [REDACTED] rises to the level of a misrepresentation. A misrepresentation is an assertion or manifestation that is not in accord with the true facts.¹ A

¹ The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the

misrepresentation of a material fact may lead to serious consequences, including, but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

An immigration officer will deny a visa petition if the petitioner submits evidence which contains false information. 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). 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. 582, 591 (BIA 1988).

In this case, the discrepancies and errors lead the AAO to conclude that the evidence of the petitioner's claimed ownership of [REDACTED] which is material to the regulatory criteria at 8 C.F.R. §§ 214.2(1)(3)(i), (ii) and (v), is neither true nor credible. When given an opportunity to rebut these findings, the petitioner failed to explain the inconsistencies and withdrew the petition. The AAO concludes that the petitioner submitted membership certificates and other evidence containing information which is patently false. If the petition had not been withdrawn, the petition would have been properly denied based on this misrepresentation. *See Matter of Cintron*, 16 I&N Dec. at 9; *see also* 8 C.F.R. § 103.2(b)(14).

Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that an individual alien sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the alien is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), 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).

false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

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.

First, as previously discussed, the petitioner submitted membership certificates, corporate documents, and other evidence to USCIS, in support of a visa petition, which contained information that is patently false. 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. [REDACTED] 1991 [REDACTED] (April 30, 1991). Here, the submission of corporate documents containing false information in support of an L-1 visa petition constitutes a false representation to a government official.

Second, the AAO finds that the petitioner willfully made the misrepresentation. The petitioner has not asserted that it accidentally or inadvertently claimed that the corporation holds a 50 percent ownership interest in [REDACTED] or that it honestly believed that it had acquired such ownership interest. When given the opportunity to address the AAO's findings, pursuant to 8 C.F.R. § 103.2(b)(16)(i), the petitioner withdrew the petition rather than rebutting that the petitioner submitted the evidence accidentally, inadvertently, or in an honest belief that the facts were true. Simply withdrawing the petition, without comment on the notice of derogatory information, will not meet the petitioner's burden of proof. *See* section 291 of the Act; *see also Matter of Arthur*, 16 I&N Dec. 558 (BIA 1978).

Furthermore, the beneficiary signed the visa petition as the corporate officer of the petitioning company, certifying under penalty of perjury that the visa 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). Accompanying the signed petition, the petitioner submitted a letter dated October 15, 2008, a business plan, and an organizational chart, claiming in each document that it is the parent company of [REDACTED]. The signature portion of the Form I-129, at part 6, 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 is all true and correct." On the basis of this affirmation, made under penalty of perjury, the AAO finds that the beneficiary willfully and knowingly made the misrepresentation.

Third, the evidence is material to the beneficiary'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 cut 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.

The misrepresentation cut off a potential line of inquiry regarding the beneficiary's claimed managerial or executive employment. The petitioner submitted evidence that [REDACTED] is staffed and sought to establish that the beneficiary would supervise subordinate supervisors who would relieve the beneficiary from performing non-managerial duties associated with the operation of the business. These facts are directly material to the beneficiary's eligibility under the statutory definition of "managerial capacity" at section 101(a)(44)(A) of the Act and to the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(ii). On appeal, the petitioner asserted that it had acquired a fully-staffed and operational subsidiary with an organizational

structure capable of supporting a managerial or executive position. As the petitioner did not own [REDACTED] the immigration officer would have likely denied the petition based on the true facts. The AAO concludes that the petitioner's misrepresentations were material to the beneficiary's eligibility.

By filing the instant petition and falsely claiming ownership of a staffed and operational U.S. subsidiary that it does not in fact own, the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. The AAO will enter a finding that the petitioner and the beneficiary, as the corporate officer who signed the petition under penalty of perjury, made a willful material misrepresentation. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

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

As discussed, the AAO provided the petitioner with notice of its doubts regarding the credibility of the submitted evidence, advised the petitioner of derogatory information not contained within the record of proceeding, and requested specific evidence to explain and rebut the discrepancies. In response, the petitioner requested that the petition be withdrawn, without reference to the serious issues raised in the AAO's notice. The petitioner did not challenge the AAO's preliminary findings. Further, the petitioner failed to submit any of the documentary evidence requested by the AAO.

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. The petitioner's request to withdraw the petition, without comment on the misrepresentation with which it was confronted, 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 on behalf of the beneficiary by willful misrepresentation of a material fact.

C. Authority to Enter a Finding of Misrepresentation

A petitioner may withdraw a petition at any time up to the point that a decision is rendered by USCIS or, if the petition is approved, until the beneficiary is admitted, adjusts status, or changes status based on the approved petition. 8 C.F.R. § 103.2(b)(6). A withdrawal may not be retracted. *Id.* Once a petition is withdrawn, USCIS may not refuse the withdrawal and may not deny the petition on the merits, but the facts and circumstances surrounding the withdrawn petition shall be considered material to any new petition. *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976); *see also* 8 C.F.R. § 103.2(b)(15).

Although USCIS cannot formally adjudicate a petition once the petition has withdrawn it, whenever the evidence tends to show that a petitioner has engaged in fraud or willful material misrepresentation, USCIS will include in any notice acknowledging the withdrawal a synopsis of any alleged fraud or willful material misrepresentation. The notice will also include a description of the evidence supporting the allegation. While this synopsis may not have the same legal effect as a formal adjudication of fraud or willful material misrepresentation, the synopsis will permit USCIS to preserve the issue for any future petition or application in which the issue may be relevant. *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976), clarified.

However, only a timely and voluntary retraction of a misrepresentation can serve as a defense to inadmissibility; the simple withdrawal of a visa petition will not absolve a petitioner or beneficiary from the attempted fraud or material misrepresentation. A withdrawal will not preclude USCIS from entering a finding of fact on the record, separate and apart from a decision on the merits, based on an attempt to procure a visa, other documentation, admission, or any other immigration benefit by fraud or the willful misrepresentation of a material fact.

As immigration officers, USCIS Immigration Services Officers and Appeals Officers may enter a finding of fraud or willful misrepresentation of a material fact whenever it is discovered in the course of their duties. Immigration officers possess the full scope of authority accorded to them by the relevant statutes and regulations. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, and to make recommendations for prosecution or other “appropriate action.” DHS Delegation Number 0150.1 at para. (2)(I) (effective March 1, 2003).

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 decision in an immigration proceeding must include specific findings of fraud or material misrepresentation. Outside of the basic adjudication of visa eligibility, there are many critical DHS functions that hinge on a finding of fraud or material misrepresentation. 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. 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

² It is important to note that while it may present the opportunity to enter an administrative finding of fraud or material misrepresentation, the nonimmigrant visa petition proceeding is not the appropriate forum for finding

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

III. 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 its petition, this does not negate our finding that the beneficiary has sought to procure immigration benefits through material misrepresentation of a material fact, which may render the beneficiary inadmissible in future proceedings.

ORDER: The appeal is dismissed based on the withdrawal of the petition.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly submitted documents containing false statements in an effort to mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.

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.