



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 10946748

Date: MAY 5, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a violinist, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center initially approved the petition, but later revoked that approval on notice, under the provisions of section 205 of the Act, 8 U.S.C. § 1155, and 8 C.F.R. § 205.2. The Director concluded that the petition had been approved in error, because the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. The Director also concluded that the Petitioner had provided false information to U.S. Citizenship and Immigration Services (USCIS) regarding her plans to continue working in the area of claimed extraordinary ability. The matter is now before us on appeal.

After a preliminary review of the record, we issued a notice of our intent to dismiss (NOID) the appeal, notifying the Petitioner of various adverse findings outside the record of proceeding. The Petitioner subsequently asked to withdraw the appeal. The Petitioner's request to withdraw the appeal is granted; however, notwithstanding the withdrawal of this appeal, we will enter a separate finding of willful misrepresentation of a material fact against the Petitioner.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability if:

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. REQUEST FOR WITHDRAWAL OF THE APPEAL

As noted above, we issued a NOID, notifying the Petitioner of various adverse findings outside the record of proceeding. The Petitioner subsequently asked to withdraw the appeal. She did not acknowledge, discuss, or dispute the adverse findings in her withdrawal request.

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). Accordingly, the Petitioner's request will be granted and the appeal will be dismissed based on that withdrawal.

III. MATERIAL MISREPRESENTATION

For the reasons discussed below, we find that the Petitioner willfully misrepresented information about her prior employment and claimed recording career, which was material to the adjudication of the petition.

A. Evidence of Record

The Petitioner claimed to be an alien of extraordinary ability in the arts, specifically as a violinist. As examples of her work, the Petitioner submitted what purport to be images of the front and back cover art of several compact discs (CDs) of her recorded work. The Petitioner also claimed to have been a professor

of Music at [redacted] since 2011; she claimed no other employment during that period.

Further research, however, calls these claims into question.

On January 30, 2016, the Petitioner applied for a nonimmigrant visa at the U.S. Embassy in [redacted] Ukraine. At that time, she indicated that she was employed as “Head of Department of Advertising” at [redacted]. This information contradicts her later claim to have worked as a music professor since 2011.

The CD back cover art the Petitioner submitted derives from altered images taken from real CD packaging. The purported packaging for [redacted] shows a catalog number and artwork corresponding to a compilation album called *Дискотека Авария – Все Хиты: Авария Против!*.¹

The purported back cover of [redacted] shows the logo of the [redacted] label; a bar code numbered [redacted] and the catalog number [redacted]. The last two numerals printed with the bar code have been altered; the bar code itself actually scans as 4607115072715, which corresponds to *Гарем*, an album by Reflex.² Text and logos in the submitted image match elements of the Reflex album. The catalog number, also altered, corresponds to the compilation album *XXXL 15 - Максимальный*.³

The purported back cover of [redacted] shows a blurred photo of trees; a bar code reading [redacted] logos for Fiction Records, Polydor, and Universal; and the web address “www.thecure.com.” The text also provides separate catalog numbers for “DISC ONE” and “DISC TWO,” although [redacted] purportedly has only 10 tracks. The back cover text (except for the Petitioner’s name, in a mismatched font) and the tree image correspond to a 2-CD reissue of *Seventeen Seconds* by the Cure.⁴

The Petitioner has submitted no credible evidence that her claimed CDs actually exist. (The Petitioner did not submit the actual CDs themselves, or their original packaging.) Her reliance on falsified images of packaging indicates that she did not actually release the claimed CDs. Because the artwork from three of her claimed CDs has been falsified, there is reason to question the origin and authenticity of the submitted artwork for several other claimed CDs. Doubt cast on any aspect of a petitioner’s proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). We note, here, that the Director of the Nebraska Service Center previously concluded that the Petitioner submitted “digitally manipulated” images relating to awards and media coverage. The Petitioner did not dispute this conclusion when given the opportunity to do so.

Our NOID gave the Petitioner an opportunity to respond to the adverse information, as required by 8 C.F.R. § 103.2(b)(16)(i). We also advised the Petitioner that, if she did not overcome this

¹ Source: <https://www.discogs.com/Дискотека-Авария-Все-Хиты-Авария-Против/release/11669604> (last visited Feb. 2, 2021).

² Source: <https://www.discogs.com/Reflex-Гарем/release/5405130> (last visited Feb. 2, 2021).

³ Source: <https://www.discogs.com/Various-XXXL-15-Максимальный/release/2374428> (last visited Feb. 2, 2021).

⁴ Source: <https://www.discogs.com/The-Cure-Seventeen-Seconds/release/493031> (last visited Feb. 2, 2021).

information, then we would make a finding of willful misrepresentation of a material fact. We further advised that, while the Petitioner had the right to withdraw the petition, such a withdrawal would not prevent a finding of willful misrepresentation of a material fact. The Petitioner responded to the NOID with a request to withdraw the appeal, but she did not address the above-described adverse findings in any way.

B. Analysis

The facts and evidence presented in the instant matter warrant a finding of willful misrepresentation of a material fact against the Petitioner.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the foreign national willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *See 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 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).

USCIS 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 a foreign national or an employer seeking immigration benefits. *See Spencer Enters. Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner does not resolve those errors and discrepancies given the opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. at 591.

In this case, the discrepancies in the documents relating to the petition constitute substantial and probative evidence. The regulation at 8 C.F.R. § 204.5(h)(3)(x) calls for evidence of the alien’s commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales. The Petitioner submitted altered CD artwork specifically to address this regulation, and therefore evidence of a claimed recording career is material to her eligibility under section 203(b)(3)(A) of the Act. We find that the Petitioner misrepresented material facts regarding the claimed CDs.

The Petitioner’s past employment is also material to the petition, because eligibility is based on acclaim earned in one’s past career. *See* section 203(b)(2)(A)(i) of the Act. Furthermore, the Petitioner initially claimed that, as a professor, she performed in a leading or critical role for an organization or establishment that has a distinguished reputation, which relates to 8 C.F.R. § 204.5(h)(3)(viii). We find that the Petitioner misrepresented material facts relating to her past employment in Ukraine, because her own prior statements about her employment history contradict the information she provided in the petition.

When given an opportunity to rebut these findings, the Petitioner offered no rebuttal or explanation for the inconsistencies. Instead, she withdrew the appeal. If the Petitioner had not withdrawn the appeal, we would have dismissed the appeal based, in part, on these misrepresentations. *See 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 foreign national 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 foreign national 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.

To find a willful and material misrepresentation in visa petition proceedings, an immigration officer 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); *Kai Hing Hui*, 15 I&N Dec. at 288.

First, the Petitioner submitted falsified evidence (altered images of CD packaging) intended to falsely create the appearance of a recording career. The Petitioner's submission of these falsified documents in support of her immigrant visa petition constitutes a false representation to a government official. The Petitioner also made a false representation to a government official when she claimed to have been a music professor since 2011, when her own prior statements show that she was employed in an unrelated field during that time.

Next, we find that the Petitioner willfully made the misrepresentation. The Petitioner has not asserted that she believed the images of the claimed CD packaging to be authentic, or explained how she came to be in possession of the images. She has also not accounted for providing two conflicting employment histories. When given the opportunity to address our findings, the Petitioner withdrew the appeal rather than offering any explanation or rebuttal that she submitted the evidence accidentally, inadvertently, or in an honest belief that the facts previously offered in support of the petition were true.

Furthermore, the Petitioner signed Form I-140, Immigrant Petition for Alien Worker, 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 the claimed CD artwork and information about her claimed professorship, specifically citing them as evidence in support of the petition. Part 8 of Form I-140 requires a petitioner to make the following affirmation: "I certify, under penalty of perjury of the United States of America, that this petition and the evidence submitted with it are all true and correct."

On the basis of this affirmation, made under penalty of perjury, we find that the Petitioner willfully and knowingly made the misrepresentation.

Third, the misrepresented facts are material. 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). Here, the misrepresentations could have affected the outcome of the petition because they purported to address, and to satisfy, specified criteria of eligibility; as noted above, the Director initially approved the petition before revoking that approval. In light of the list of contradictory evidence and information we described above and in the NOID, we find that the Petitioner's misrepresentations were material to her eligibility.

For these reasons, we will enter a finding that the Petitioner made a willful misrepresentation of a material fact.

IV. CONCLUSION

By filing the instant petition and submitting falsified evidence relating to her claimed employment and recording career, the Petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. This finding shall be considered in any future proceeding where admissibility is an issue. While the Petitioner has chosen to withdraw her appeal, this does not negate our finding that she sought to procure immigration benefits through willful representations of material facts, which may render her inadmissible in future proceedings.

ORDER: The appeal is dismissed based on its withdrawal by the Petitioner.