# 03-4733-ag(L)

*To Be Argued By*:
DOUGLAS P. MORABITO

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# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 03-4733-ag(L)**
**03-4734-ag(CON), 03-41186-ag(CON)**

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MICHAEL DAISODOV &
YAKA PANKER, a/k/a Yafa Daisodov,
*Petitioners,*

-vs-

ALBERTO GONZALES, ATTORNEY GENERAL,
*Respondent.*

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ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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## BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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## STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(b) (2006), to review Petitioners' challenge to the Board of Immigration Appeals' March 19, 2003, final orders dismissing their appeals from a November 5, 1999, order of an Immigration Judge finding them deportable as charged in their respective orders to show cause. This Court also has jurisdiction to review Petitioners' challenge to the Board of Immigration Appeals' December 3, 2003, denial of their motion to reopen. This Court, however, lacks jurisdiction to review the Immigration Judge's discretionary denial of a fraud waiver under INA § 241(a)(1)(H). *See* 8 U.S.C. § 1252(a)(2)(B)(ii).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether substantial evidence supports the Immigration Judge's and Board of Immigration Appeals' conclusion that Petitioners were deportable for fraud?

2. Whether this Court has jurisdiction to review the discretionary denial of Petitioners' request for a fraud waiver under § 241(a)(1)(H)?

3. Whether the BIA abused its discretion in denying Petitioners' motion to reopen?

4. Whether Petitioners' due process rights were violated by the Board of Immigration Appeals' summary affirmance of the Immigration Judge's decision?

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## BRIEF FOR ALBERTO GONZALES
## Attorney General of the United States

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### Preliminary Statement

Michael Daisodov, a native of the former Soviet Union and a citizen of Israel, and Yafa Panker, a native of India and citizen of Israel, petition this Court for review of the March 19, 2003, decisions of the Board of Immigration Appeals ("BIA"). (Special Appendix ("SA") 5-6). The BIA affirmed the November 5, 1999, decision and order of

an Immigration Judge ("IJ"), which concluded Petitioners were deportable for fraud, denied their applications for fraud waivers under INA § 241(a)(1)(H), and ordered them deported from the United States. (SA 7-15 (IJ's decision and order)). Petitioners also seek review of a December 3, 2003, decision of the BIA denying their motion to reopen. (SA 1-4).

Substantial evidence supports the IJ's and the BIA's conclusion that Petitioner Michael Daisodov was deportable for fraud; the evidence showed that he misrepresented a material fact on his visa application. Furthermore, the BIA properly issued decisions summarily affirming the IJ's order and denying Petitioners' motion to reopen. Finally, this Court lacks jurisdiction to review the IJ's decision denying their applications for fraud waivers under § 241(a)(1)(H). For all these reasons, this Court should deny the petitions for review.

## Statement of the Case

On or about May 25, 1995, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause ("OSC") to Petitioner Michael Daisodov, charging him with being deportable principally as an alien who procured a visa by fraud or by willfully misrepresenting a material fact. (Joint Appendix ("JA") 768-75). On or about June 5, 1995, the INS issued an OSC to Petitioner Yafa Daisodov charging her with being deportable on the same grounds. (JA 698-704).

After several hearings, on November 5, 1999, Immigration Judge Margaret McManus issued a written decision finding Petitioners deportable for fraud and denying their request for a fraud waiver under former INA § 241(a)(1)(H). (SA 7-15).

Petitioners filed timely notices of appeal to the BIA and on March 19, 2003, the BIA issued separate decisions affirming, without opinion, the IJ's decision and dismissing the appeals. (SA 5-6). On April 15, 2003, Petitioners filed timely petitions for review of the BIA's decisions.

On June17, 2003, Petitioners filed a motion to reopen (JA 8) and on December 3, 2003, the BIA denied this motion (SA 1). The BIA issued a written opinion in which it upheld the IJ's findings of deportability and the denial of Petitioners' applications for a waiver of deportability under § 241(a)(1)(H) of the INA. On December 22, 2003, Petitioners filed a timely petition for review of the BIA's denial of their motion to reopen.

## Statement of Facts

### A. Petitioners' Entry into the United States

Petitioner Michael Daisodov is a native of the former U.S.S.R. and a citizen of Israel. He first entered the United States in 1986 at the age of 22. (SA 9). Shortly thereafter a man who claimed to be an immigration lawyer helped Mr. Daisodov obtain a fake birth certificate, which he then used to procure a United States passport. (SA 10).

Petitioners were married in London in 1987, after which Mr. Daisodov returned to the United States and petitioned for a visa for his wife as the spouse of a United States citizen. (SA 8, 10-11). In 1989, female Petitioner Yafa Daisodov, a native of India and a citizen of Israel, was admitted to the United States using an alien registration card issued to her as the wife of a United States citizen. (SA 8, 10).

In 1991, the Federal Bureau of Investigation contacted Mr. Daisodov regarding his fraudulently obtained passport. (SA 10). Mr. Daisodov relinquished his passport and returned to Israel, although no criminal charges were filed against him at that time. (SA 10). While in Israel, he applied for – and was granted – an employment-based immigration visa from the United States Embassy in Tel Aviv. (SA 10). In the application for his employment-based visa, Mr. Daisodov fraudulently indicated that he was single and unmarried. Based on this visa, he was admitted to the United States as a lawful permanent resident on or about September 18, 1992. (SA 8). At that time, Mrs. Daisodov was living in the United States based on her fraudulent claim that she was married to a United States citizen. (SA 10-11).

## B. The Deportation Proceedings

On or about May 25, 1995, the INS issued an OSC to Mr. Daisodov.[1] (JA 768-75). The INS issued an OSC to Mrs. Daisodov on or about June 5, 1995. (JA 698-704). Both Petitioners were charged with deportability as aliens who, at the time of entry, were within one or more classes of aliens excludable by law under INA § 241(a)(1)(A).[2] Petitioners were excludable at the time of entry because they procured or sought to procure a visa, other documentation, or entry into the United States by fraud or by willfully misrepresenting a material fact pursuant to INA § 212(a)(6)(C)(i), and lacked a valid immigration visa pursuant to INA § 212(a)(7)(A)(i)(I). (JA 774, 703). The INS charged that Mr. Daisodov willfully misrepresented a material fact when he indicated that he was single on his employment-based visa application (JA 771), and that Mrs. Daisodov committed fraud when she signed an application for permanent residence indicating that she was married to a United States citizen, and failed to disclose to the United States Embassy in Tel Aviv that she

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[1] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement. *Id.* For convenience, this brief will refer throughout to the INS.

[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 re-designated § 241 of the INA as § 237. For convenience, this brief will refer to § 241.

was not in fact the spouse of a United States citizen (JA 700).

The parties appeared before IJ Margaret McManus on numerous occasions between February 14, 1996, and September 15, 1997. At a pre-trial conference on March 26, 1996, counsel for Petitioners conceded that Mr. Daisodov knowingly and fraudulently indicated that he was single on his employment-based visa application, but argued that it was an immaterial fact, and that even if material, he was still eligible for a waiver under § 241(a)(1)(H). (JA 306-07, 310).

On May 6, 1996, the pleadings were taken and Petitioners denied the allegations that they were deportable. At this time, the INS objected to Petitioners' request for a waiver of deportability pursuant to 8 U.S.C. §1251(a)(1)(H). (JA 330-33).

During a hearing on May 12, 1997, counsel for Petitioners conceded Mrs. Daisodov's deportability, but argued that the IJ needed to address her adjustment of status claim, as well as her eligibility for a waiver of deportability. (JA 351, 362). At a continued hearing on June 17, 1997, Petitioners submitted additional documentary evidence as well as country reports on Israel. (JA 513-92). The parties also discussed Mrs. Daisodov's adjustment of status application. (JA 442-46).

On July 14, 1997, the parties requested that IJ McManus render a decision on Petitioners' applications for a waiver pursuant to 8 U.S.C. §1251(a)(1)(H), and also

make a determination on Mrs. Daisodov's application for adjustment of status, if necessary. Because the IJ wanted to further question Petitioners, the hearing was adjourned and no decisions were rendered. (JA 467-76).

Petitioners were questioned by IJ McManus during hearings on August 12, 1997, and September 15, 1997. In April 1999, at the request of the IJ, Petitioners submitted further briefing on their case in light of the BIA decision in *In re Tijam*, 22 I. & N. Dec. 408 (BIA 1998). (JA 732-47).

### 1. Testimony of Mr. Daisodov

Michael Daisodov was born in Russia and emigrated to Israel at the age of five. (JA 368). In 1986, after finishing his service in the Israeli Army, he came to the United States for the first time. (JA 369). In the United States, Mr. Daisodov stayed with his sister and worked as an assistant doing window treatments. He eventually became a partner and purchased the business, which is located in New Jersey. Mr. Daisodov testified that he does not believe there is a market for his work in Israel, and that he would have to find a new line of work if forced to move there. (JA 370-73, 375-76). Outside of his Army service, Mr. Daisodov has never been employed in Israel. (JA 369).

Shortly after entering the United States, Mr. Daisodov sought the assistance of one Mr. Gazbari to help him become a United States citizen. (JA 379). Through Mr. Gazbari, Mr. Daisodov was able to acquire a fake United

States birth certificate which he later used to procure a United States passport. Mr. Daisodov testified that he believed Mr. Gazbari to be an immigration lawyer, and that Mr. Gazbari conned him "for a lot of money." (JA 378). Mr. Daisodov admitted, however, that he knew something was wrong in "the back of [his] mind" the entire time. (JA 483).

Mr. Daisodov testified that he is now married with one son and one daughter. (JA 373). He speaks Hebrew, English, and some Russian. (JA 375). He testified that he brought his daughter to Israel on one occasion, but that his son has never been. He believes that both of his children, and his daughter in particular, are very "Americanized," and that it would be difficult for them to move to Israel. (SA 10, JA 383-84). Mr. Daisodov's closest relative is a sister who lives in the United States. In Israel he has two aunts, one of whom is a teacher, and one of whom is retired, and one uncle who is in the military. Both of Mr. Daisodov's parents are deceased. (JA 375, 381).

Regarding the fraudulent application that he filed on behalf of his wife, Mr. Daisodov testified that he had been conned and that he was afraid. He stated that he agreed to go through with it because his attorney assured him the fraud was not uncommon and that everything would be fine. (JA 482).

In 1991, while Petitioners were living together in the United States, the FBI sent a letter to Mr. Daisodov regarding his fraudulently obtained passport. In response to this letter, Mr. Daisodov contacted the FBI and

explained to them how he obtained the passport. Eventually, he helped the FBI find Mr. Gazbari. According to Mr. Daisodov, the FBI informed him that he could voluntarily leave the United States and that no charges would be filed against him. (JA 421-24). At this time, Mr. Daisodov returned to Israel and filed for an employment-based immigration visa to return to the United States. When asked why he wrongfully indicated he was single on his application, Mr. Daisodov testified that he did not know why and that his attorney had filled out the application. (JA 424-28). Eventually, however, Mr. Daisodov testified that he and his attorney may have had a discussion about it being easier for a "single guy" to get a green card. (JA 487-88).

Mr. Daisodov testified that he does not want to return to Israel because of the political conflict there, and because there is no market for his work in Israel. He also expressed concern that it would be very difficult for his children to move to Israel, that he does not own a home or any land in Israel, and that he does not have much family there. (JA 380, 383-84). He also testified, however, that he still has friends in Israel with whom he corresponds. (JA 375).

Mr. Daisodov stated that he has never been arrested for or convicted of any crime, nor has he helped anyone else commit a crime. He further testified that he does not do drugs or drink alcohol, and has no known physical or mental health problems. (JA 377).

### 2. Testimony of Mrs. Daisodov

Yafa Daisodov, a.k.a. Yafa Panker, is a native of India whose family moved to Israel when she was one year old because of hostility towards Jews. (SA 11, JA 369). She testified that she first came to the United States with a fraudulent green card in 1989. (JA 382-84, 396). There was some confusion about whether she had previously entered the United States illegally in 1988, but she denied this. (JA 501-03).

Mrs. Daisodov testified that she is now a married mother of two, and a travel agent earning about $30,000 per year. (JA 382-84, 386). Like her husband, she testified that both children were "really American." (JA 381). Mrs. Daisodov stated that since moving to the United States she and her family have never been on public assistance and they have purchased their own home. (JA 386, 409). She testified that she has two sisters in Israel (one an accountant, the other a court employee) and one brother who is in the Israeli Army. (JA 405).

After Petitioners were married in 1987, Mrs. Daisodov returned to Israel and waited for her husband to file a petition on her behalf. Mrs. Daisodov was interviewed at the United States Embassy in Tel Aviv in connection with her immigrant visa application. In her testimony, Mrs. Daisodov admitted that she knew her husband was not a United States citizen, but that she did not disclose this fact in her interview because the question never arose. (JA 397). Mrs. Daisodov denied lying to the service in writing, explaining that her attorney filled out the

application, and that she and her husband never discussed the application. (JA 411). At the hearing on August 12, 1997, Mrs. Daisodov stated that she now knows what she did was wrong, and that she does not want to place the blame on anyone else. (JA 485).

### C. The IJ's Decision

The IJ issued a written opinion on November 5, 1999, holding that Petitioners were deportable, and denying their request for relief in the form of waivers pursuant to INA § 241(a)(1)(H), 8 U.S.C. § 1251(a)(1)(H). The IJ ordered that Petitioners be deported to Israel, but granted them a minimum period of voluntary departure. (SA 7-15).

The IJ's opinion begins by noting that both Petitioners conceded deportability, and therefore that deportability had been established by clear, convincing, and unequivocal evidence in conformity with *Woodby v. INS*, 385 U.S. 276 (1996). (SA 8). After reviewing the testimony in the case, the IJ turned to consideration of Petitioners' requests for discretionary waivers of fraud under § 241(a)(1)(H). The IJ set forth the legal standard for waivers under that section, noting that under *INS v. Wang*, 519 U.S. 26 (1996), and *In re Tijam*, 22 I. & N. Dec. 408 (BIA 1998), an alien's initial fraud in connection with his or her entry into the United States may be considered as an adverse factor. (SA12-13). In addition to the initial fraud, the IJ deciding on a fraud waiver may consider factors such as length of stay in the United States; existence of hardship on citizen spouse, parents, or children; employment record; criminal record; position in

the community; and in general, a "balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether a grant of relief is in the best interests of this country." (SA 13) (quoting *In re Tijam*).

The IJ concluded that both Petitioners were eligible for a waiver under § 241(a)(1)(H) as parents of United States citizen children, but that, as a matter of discretion, the waivers should not be granted. (SA 13). In reaching this decision, the IJ first rejected Mr. Daisodov's claim that his misrepresentation of his marital status on his application for an employment-based immigrant visa was immaterial. The IJ explained that "[a] misrepresentation is material . . . if it 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." (SA 13) (quoting *In re NG*, 17 I. & N. Dec. 536, 537 (BIA 1980)). The IJ noted that Mr. Daisodov's marital status would not ordinarily have been material since his immigration visa application was employment-based. However, disclosure of his marital status may have resulted in an inquiry into his wife's status, which may have revealed that she was in the United States on a fraudulently obtained green card. Because Mr. Daisodov's fraud effectively "shut off a line of inquiry" which may have resulted in a denial of the immigration visa, it is material within the meaning of INA § 212(a)(6)(C)(I). (SA 14).

In balancing the fraud committed by Petitioners with the positive equities in their case, the IJ found that

Petitioners had not been completely forthright about their understanding of their misrepresentations. The IJ further found their denial of any significant involvement in the multi-layered and continuing fraud scheme, and their insistence that they were merely victims, not to be credible. (SA 13). On the other hand, the IJ found significant weight in the fact that Petitioners had United States citizen children who had been raised in the United States.

The IJ concluded, however, that the children's hardship in moving to Israel would be minimized by their young age, the fact that their parents regularly speak Hebrew at home, and the fact that Mrs. Daisodov has family in Israel that could serve as a support system. (SA14-15). Given these findings, the IJ concluded that the mitigating factors presented by Petitioners do not outweigh their level of fraud, and therefore denied the waivers. (SA 15).

Lastly, in the exercise of discretion, the IJ granted Petitioners voluntary departure pursuant to INA § 244(e). (SA 15).

### D. BIA's Decision

On March 19, 2003, in separate orders, the BIA affirmed, without opinion, the decision of IJ McManus. (SA 5-6). Petitioners filed petitions for review of the BIA's decisions on April 15, 2003.

### E. BIA's Decision on the Motion to Reopen

On June 17, 2003, Petitioners moved to reopen their case before the BIA, arguing that the BIA should consider new materials, including a new psychological report on the potential impact of deportation on the Daisodov family and State Department country reports on Israel. On December 3, 2003, the BIA denied Petitioners' motion to reopen and issued a written opinion. (SA1). In its opinion, the BIA rejected Petitioners' challenge to the IJ's finding that Mr. Daisodov was deportable, and specifically rejected Petitioners' argument that his false statement about his marital status on his visa application was immaterial. Because the BIA found Mr. Daisodov's false statement material, it concluded that he was deportable as charged. (SA2).

The BIA also held that Mrs. Daisodov was ineligible for adjustment of status as an alien following to join her husband, because her husband's visa was obtained by a material misrepresentation and fraud. (SA 3). The BIA further held that both Petitioners were ineligible for suspension of deportation as a matter of law because neither Petitioner met the continuous presence requirements to be eligible for such relief. (SA 1-3).

Finally, the BIA held that the IJ reviewed the appropriate factors in considering Petitioners' application for fraud waivers under § 241(a)(1)(H). The BIA reviewed the positive and negative equities and concluded that "[u]pon considering [Petitioners'] arguments we are unpersuaded that the Immigration Judge erred by finding

[Petitioners] were deportable as charged and denying their applications for a waiver of deportability under section 241(a)(1)(H) of the Act in the sound exercise of discretion." (SA 4).

## SUMMARY OF ARGUMENT

1. The petitions for review should be denied. Substantial evidence supports the IJ's and the BIA's conclusions that Petitioner Michael Daisodov was deportable as an alien who at the time of entry was excludable as an alien who had procured a visa or other documentation by willfully misrepresenting a material fact. The government showed that Mr. Daisodov's misrepresentation about his marital status on his visa application was material because it foreclosed an inquiry into his marital status that would likely have resulted in the denial of his application.

2. Under 8 U.S.C. § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to review the discretionary denial of Petitioners' fraud waiver under § 241(a)(1)(H). Because Petitioners have failed to raise a colorable constitutional claim or question of law in their petition for review, the petition for review of the deportation order should be denied. But even if this Court were to review the decision, the IJ properly exercised her discretion to deny the fraud waivers.

3. The BIA properly exercised its discretion to deny Petitioners' motion to reopen. The BIA carefully reviewed the record and addressed Petitioners' arguments.

Although Petitioners contend that the BIA failed to consider their new evidence on the hardships deportation would cause their family, the BIA acknowledged the hardships to the family and indicated that it had considered their arguments.

4. Finally, Petitioners' due process rights were not violated when the BIA summarily affirmed the IJ's decision pursuant to its streamlining regulations. This Court has already rejected a due process challenge to the BIA's streamlining regulations, and Petitioners offer no reason for this Court to re-consider that decision, especially here, where the BIA subsequently issued a lengthy opinion on Petitioners' motion to reopen addressing the substantive issues raised by Petitioners.

## ARGUMENT

### I. THE IJ AND BIA PROPERLY DETERMINED THAT PETITIONER MICHAEL DAISODOV WAS DEPORTABLE FOR FRAUD

#### A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

#### B. Governing Law and Standard of Review

Title 8 U.S.C. § 1227(a)(1)(A) provides that "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by

the law existing at such time is deportable." As relevant here, the law provides that an alien who engages in fraud to procure admission to the United States is inadmissible. Specifically, 8 U.S.C. § 1182(a)(6)(C)(i) includes in the category of persons who are ineligible to receive visas or to be admitted to the United States "[a]ny 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 chapter" (emphasis added).

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." *In re S- and B-C-,* 9 I. & N. Dec. 436, 447 (BIA 1961). *See also Kungys v. United States*, 485 U.S. 759, 770 (1988) (stating general rule that a misrepresentation is material if it "has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body to which it was addressed"). The government bears the burden of proving by clear and convincing evidence "that facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation." *In re Bosuego,* 17 I. & N. Dec. 125, 131 (BIA 1980). The burden then shifts to the alien to demonstrate that "no proper determination of inadmissibility could have been made." *Id.*

The Supreme Court applied a similar burden-shifting framework in *Kungys*, where it analyzed a materiality

requirement in the context of judicial denaturalization proceedings brought under 8 U.S.C. § 1451(a). The Court there settled on the same uniform definition of "material" that is typically used in interpreting criminal statutes. *Monter v. Gonzales*, 430 F.3d 546, 554 (2d Cir. 2005) (quoting general rule of materiality from *Kungys*, 485 U.S. at 770). In *Kungys*, however, the Court held that finding that a false statement was "material" does not end the court's inquiry. In the context of proceedings under § 1451(a), once a court decides that the misrepresented or concealed fact is "material," this creates a presumption that the alien was disqualified from naturalization. The burden then shifts to the alien to show that in fact he or she did meet the statutory qualification that the misrepresentation had a tendency to influence. *Monter,* 430 F.3d at 554-55 (describing *Kungys*).

In *Monter*, this Court applied the *Kungys* burden-shifting framework to administrative removal proceedings under 8 U.S.C. § 1182(a)(6)(C)(i). 430 F.3d at 555-57. Thus, under *Monter* and *Kungys*, once the government proves that a misrepresentation is material, a presumption arises that the alien would have been inadmissible if the true facts had been known to the INS. The burden then shifts to the alien to rebut that presumption if he can. *Monter*, 430 F.3d at 557.

This Court reviews the IJ's and BIA's factual findings under the substantial evidence standard, and as such, "a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales v. INS*, 331 F.3d

297, 307 (2d Cir. 2003) (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)). This Court reviews questions of law and constitutional questions *de novo*, but accords deference to the Board's interpretation of the INA. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). The proper construction of a statute is a question of law, subject to *de novo* review. *See United States v. Tang*, 214 F.3d 365, 370 (2d Cir. 2000).

The scope of this Court's review under the substantial evidence test is narrow. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). Where, as here, the government bears the burden of proof, this Court does not overturn an agency determination unless it finds that "any rational trier of fact would be compelled to conclude that the proof did not rise to the level of clear and convincing evidence." *Francis v. Gonzales*, 442 F.3d 131, 138-39 (2d Cir. 2006).

## C. Discussion

Substantial evidence supports the IJ's and the BIA's conclusions that Petitioner Michael Daisodov was deportable for fraud based on the material misrepresentation he made in his visa application.[3] Although the IJ incorrectly stated in her written opinion that Mr. Daisodov had conceded deportability, later, the IJ fully addressed Petitioner's claim that his misrepresentation about his marital status was immaterial. The IJ explained that "[a] misrepresentation is material . . . . if it 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." (SA 13). The IJ noted that ordinarily, Mr. Daisodov's marital status would not have been material since his immigration visa application was employment-based. However, the IJ concluded that because disclosure of his marital status could have resulted in an inquiry into his wife's status, which could then have resulted in the denial of his immigrant visa, the misrepresentation was material. (SA 14).

The BIA reached the same conclusion when it addressed this question in its decision on Petitioner's motion to reopen. In that opinion, the BIA held that Mr. Daisodov's statement that he was single on his visa application "cut off inquiry into his wife's status," and that

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[3] Mrs. Daisodov conceded that she was deportable as charged in the OSC and accordingly does not challenge that conclusion here.

this inquiry likely would have revealed that she was living in the United States based on Mr. Daisodov's fraudulent claim that he was a United States citizen. Because the "consular official could have properly denied [Mr. Daisodov's visa based on that inquiry as a matter of discretion and initiated an investigation of his wife's status," the BIA concluded that Mr. Daisodov's misstatement was material. (SA 2).

Mr. Daisodov argues that the IJ and BIA erred in finding his false statement material because the issuance of his employment visa was not legally contingent on his marital status. In other words, according to Mr. Daisodov, because he was statutorily eligible for an employment-based visa regardless of his marital status, his false statement about that topic was not material.

This argument sets the bar for materiality too high. The question is not, as Mr. Daisodov would have it, whether his false statement concealed a fact that would have made him statutorily ineligible for the visa. The question, rather, is whether his misstatement was capable of influencing the decisionmaker. *Kungys*, 485 U.S. at 771; *see also Monter*, 430 F.3d at 557-58. Here, the statute sets forth eligibility criteria for an employment visa, but the consular official is free to exercise his discretion in approval of these petitions. *See Ahmed v. Gonzales*, 447 F.3d 433, 438-39 (5th Cir. 2006) (explaining process for obtaining visa on basis of labor certification and emphasizing that process is discretionary). And because evidence of Mr. Daisodov's ongoing fraud with respect to his and his family's entrance into the United States would almost

certainly influence a decisionmaker empowered to exercise his discretion on an employment visa, Mr. Daisodov's concealment of a fact that could have revealed that fraud was material.

Based on the proper conclusion that Mr. Daisodov willfully misrepresented a material fact on his visa application, a presumption arises that he obtained his visa based on this fact. *Monter*, 430 F.3d at 554-55. Because he makes no attempt to rebut that presumption, the IJ's and BIA's decisions should be upheld.

## II. THIS COURT LACKS JURISDICTION TO REVIEW THE DISCRETIONARY DENIAL OF PETITIONERS' APPLICATION FOR A FRAUD WAIVER PURSUANT TO § 241(a)(1)(H)

### A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

### B. Governing Law and Standard of Review

#### 1. Section 241(a)(1)(H)

Petitioners applied for waivers of deportation under § 241(a)(1)(H). That section provides that the Attorney General *may* waive deportability, "in [his] discretion," for aliens, like Petitioners, who are removable for fraud or misrepresentation under 8 U.S.C. § 1182(a)(6)(C)(i) and who are parents of United States citizen children. *See* 8

U.S.C. § 1227(a)(1)(H). The BIA has identified several factors to be considered in deciding whether to grant a waiver under this Section as a matter of discretion, including the alien's fraud, the length of stay in the United States, the existence of hardship to citizen or lawful permanent resident children, spouse, or parents, the alien's employment record, the alien's criminal history, and the alien's position in the community. *In re Tijam*, 22 I. & N. Dec. at 412-13. Finally, the IJ should consider in general, a "'balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether a grant of relief is in the best interests of the country.'" (SA 13) (quoting *Tijiam*, 22 I. & N. Dec. at 412).

### 2. Standard of Review

INA § 106, 8 U.S.C. § 1105a (1994), originally provided the procedure allowing aliens to petition for judicial review of a final order of deportation. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, repealed § 106. IIRIRA § 306(b). IIRIRA created "transitional rules" narrowing court jurisdiction to review deportation orders entered after October 20, 1996, in cases initiated prior to April 1, 1997. Because Petitioners were placed in deportation proceedings prior to April 1, 1997, the transitional rules were applicable to their case.

On May 11, 2005, however, the President signed into law the REAL ID Act of 2005 ("REAL ID Act"), Pub. L. No. 109-13, Div. B, 119 Stat. 231. Section 106(d) of the

Act provides that a "transitional rule" case, such as Petitioners', "shall be treated as if it had been filed as a petition for review under [INA § 242, 8 U.S.C. § 1252], as amended by this section." REAL ID Act § 106(d). Thus, Petitioners' petitions for review are now treated as if filed under INA § 242, 8 U.S.C. § 1252, and the same rules of judicial review now apply to their claims. *See Elia v. Gonzales*, 431 F.3d 268, 272-73 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 2019 (2006); *Onikoyi v. Gonzales*, 454 F.3d 1 (1st Cir. 2006).

With respect to review of discretionary judgments of the Attorney General, § 1252 contains two interrelated statutory provisions: (1) the jurisdiction-denying provision located at 8 U.S.C. § 1252(a)(2)(B)(ii), and (2) the jurisdiction-restoring provision recently added at 8 U.S.C. § 1252(a)(2)(D) pursuant to § 106 of the REAL ID Act. Section 1252(a)(2)(B) eliminates federal court jurisdiction for review of discretionary determinations by the Attorney General. It provides, under the heading of "[d]enials of discretionary relief," that "[n]otwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . (ii) any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). This jurisdictional limitation was recently altered by the REAL ID Act when Congress restored jurisdiction for a limited class of issues. *Bugayong v. INS*, 442 F.3d 67 (2d Cir. 2006). Section 106 of the REAL ID Act specifies that "[n]othing in [8 U.S.C. § 1252(a)(2)(B)] or (C), or in any other provision of [the INA] (other than this section) which limits or eliminates

judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition of review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D).[4]

Construing these provisions together, in *Xiao Ji Chen v. U.S. Dep't of Justice*, No. 02-4631, – F.3d – (2d Cir. Dec. 7, 2006), this Court explained that while the REAL ID Act provides this Court with jurisdiction to review constitutional claims or questions of law, it still lacks jurisdiction to review discretionary and factual determinations by an IJ. *Id.*, mem. op. at 17; *see also Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005) (holding same); *Jean v. Gonzales*, 435 F.3d 475, 480 (4th Cir. 2006) (same); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005 (same); *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1793 (2006). In *Xiao Ji Chen*, this Court noted that the statutory term "questions of law" was ambiguous and proceeded to construe it as encompassing "the same types of issues that courts traditionally exercised in habeas review over Executive detentions." Mem. op. at 14. In that case, the Court concluded that it need not define the precise limits of this review because it was enough "to hold simply that, although the REAL ID Act restores our jurisdiction to review 'constitutional claims or questions of law,' . . . we remain deprived of jurisdiction to review decisions under

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[4] Section 106(b) of the REAL ID Act provides that the jurisdictional amendments set forth in Section 106 of this legislation are effective immediately.

the INA when the petition for review essentially disputes the correctness of an IJ's factfinding or the wisdom of his exercise of discretion." Mem. op. at 17 (citation omitted).

In determining whether jurisdiction exists to consider a petition for review, this Court looks to the arguments asserted. *Id.* "The court would need to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual findings or justification for the discretionary choices, in which case the court would lack jurisdiction, or whether it instead raises a 'constitutional claim' or 'question of law,' in which case the court could exercise jurisdiction to review those particular issues." *Id.* at 17-18. In other words, "when an analysis of the arguments raised by the petition for judicial review reveals that they do not in fact raise any reviewable issues, the petitioner cannot overcome this deficiency and secure review by using the rhetoric of a 'constitutional claim' or 'question of law' to disguise what is essentially a quarrel about fact-finding or the exercise of discretion." *Id.* at 18.[5]

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[5] Prior to the passage of the REAL ID Act, this Court would have reviewed the discretionary denial of a waiver pursuant to § 241(a)(1)(H) for abuse of discretion. *See Yang*, 519 U.S. at 28 (applying abuse of discretion review of appeal from decision made pursuant to INA § 241(a)(1)(H)(ii)).

## C. Discussion

Because Petitioners' claim that the IJ erred in analyzing their fraud waiver is, at bottom, a challenge to the IJ's exercise of her discretion, this Court lacks jurisdiction to review their claim according to the language of the REAL ID Act. Indeed, as this Court has recognized in other contexts, discretionary denials of relief are unreviewable decisions within the meaning of 8 U.S.C. § 1252(a)(2)(B). *See Bugayong*, 442 F.3d at 71-72; *De La Vega v. Gonzales*, 436 F.3d 141, 144-46 (2d Cir. 2006).

Here, the IJ and the BIA both concluded that the hardship caused by Petitioners' deportation did not outweigh the substantial negative equities on their part. (SA 16). Petitioners' claim that they satisfied their burden based on the evidence presented at their deportation hearing is nothing more than a challenge to the IJ's and the BIA's discretionary determination. At bottom, Petitioners disagree with the weight afforded to the negative and positive equities in their case and ask this Court to reweigh those equities in their favor. As such, Petitioners' challenge to the IJ's and the BIA's rulings are simply quarrels with the agency's exercise of its statutorily granted discretion. These are precisely the types of arguments that this Court lacks jurisdiction to review under the REAL ID Act. *Xiao Ji Chen*, mem. op. at 17.

Petitioners' assertions in their brief that the IJ abused her discretion by failing to properly evaluate Petitioners' fraud waivers does not transform that denial into a "constitutional claim or question of law" within the

meaning of Section 106 of the REAL ID Act. Petitioners do not, and cannot, argue that the IJ's decision was made without rational justification or based on a legally erroneous standard. *Xiao Ji Chen*, mem. op. at 18. As this Court has consistently explained, blanket assertions of legal error "do[] not suffice to overcome the clear jurisdictional bar established by 8 U.S.C. § 1252(a)(2)(B)(i)." *Bugayong*, 442 F.3d at 72; *see also Saloum v. U.S. Citizenship & Immigration Services*, 437 F.3d 238, 243 (2d Cir. 2006); *Xiao Ji Chen*, mem. op. at 20; *De La Vega*, 436 F.3d at 141; *Jun Min Zhang v. Gonzales*, 457 F.3d 172 (2d Cir. 2006). Petitioners do not argue that they were deprived of an opportunity to present their case to the IJ or the BIA, or that they were denied a full and fair hearing before an impartial adjudicator, or otherwise denied a basic due process right. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). Petitioners fail to raise any colorable "constitutional claims or questions of law" within the meaning of § 106 of the REAL ID Act as their arguments are merely an attack on the factual findings made and the balancing of factors engaged in by the IJ.

In essence, what Petitioners are really challenging is the IJ's and the BIA's decision to weigh their negative equities (the fraud) more heavily than their positive equities (primarily their two children). In other words, Petitioners' argument is nothing more than a claim that the IJ drew the wrong conclusions from the evidence presented at the deportation hearing, a claim over which this Court has no jurisdiction. *Saloum*, 437 F.3d at 244 (holding that claims that IJ or the BIA failed to correctly

weigh the evidence, or failed to explicitly consider the evidence or simply reached the wrong outcome are nothing more than challenges to the agency's exercise of its discretion, which the Court has no jurisdiction to review); *Avendano-Espejo v. Gonzales*, 448 F.3d 503 (2d Cir. 2006) (per curiam); *Xiao Ji Chen*, mem. op. at 17-18. Accordingly, this Court lacks jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii) to review the IJ's discretionary denial of Petitioners' fraud waivers under § 241(a)(1)(H) because Petitioners fail to raise any "constitutional claims or questions of law" within the meaning of 8 U.S.C. § 1252(a)(2)(D).

Even if this Court were to conclude that it had jurisdiction to review the discretionary denial of Petitioners' fraud waivers, the IJ did not abuse its discretion in denying such relief. As the IJ discussed, Petitioners' positive factors included two United States citizen children, steady employment, the payment of taxes, and ownership of their own home. (SA 14). The adverse factors present include the initial fraud engaged in by both Petitioners, the use of a fraudulent United States birth certificate by Mr. Daisodov to obtain a United States passport, and the subsequent use of the fraudulently acquired passport by Mr. Daisodov to petition for an immediate relative immigrant visa for Mrs. Daisodov. (SA 14). Although Mr. Daisodov turned over the false passport to the FBI when confronted with his illegal conduct, he never disclosed that his wife had illegally acquired admission into the United States. Moreover, Mr. Daisodov thereafter traveled to Israel, while Mrs. Daisodov remained in the United States, and he committed

a further material misrepresentation when he stated that he was single on his employment-based visa application. Notably, Mr. Daisodov made this misrepresentation at a time when his wife was still present in the United States based on her fraudulently-obtained visa and had he disclosed that he was married the INS could have discovered this fact. (SA 14).

In sum, Petitioners intentionally and knowingly sought to repeatedly manipulate and thwart the immigration laws and regulations of this country. Mr. Daisodov knowingly obtained a United States passport by using a fake birth certificate and then used that passport to file a visa petition on behalf of his wife. Mrs. Daisodov, in turn, lied about her marital status on her consular forms. Moreover, even after Mr. Daisodov was confronted about his fraudulently-obtained passport and allowed to return to Israel without being charged for his fraudulent immigration activities, he once again chose to intentionally lie on his visa application with the intent, by his own admission, of increasing his chances of being granted a visa by stating he was single while his wife was living in the United States. Based on the foregoing, it cannot be said that the IJ abused its discretion in denying their applications for fraud waivers.

## III. THE BIA ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONERS' MOTION TO REOPEN

### A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

## B. Governing Law and Standard of Review

This Court reviews the BIA's discretionary denial of a motion to reopen for an abuse of discretion." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001). The abuse of discretion standard is a difficult one to satisfy. *Id.* "An abuse of discretion may be found . . . where the [challenged] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [agency] has acted in an arbitrary or capricious manner." *Zhao*, 265 F.3d at 93 (citations omitted). *See also Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) (IJ abuses discretion if decision rests on legal error or clearly erroneous factual finding, or if decision "cannot be located within the range of permissible decisions") (internal quotations omitted).

## C. Discussion

The BIA acted well within its broad discretion in denying Petitioners' motion to reopen based on new evidence. Petitioners' claim that the BIA failed to address all their claims raised on the motion to reopen is without merit and should be rejected by this Court.

Petitioners primarily argue that the BIA failed to take into account a declaration by Dr. Maria J. Nardone ("Nardone Declaration") about the impact of deportation on the Daisodov children. The BIA held, however, that the negative equities far outweighed any positive equities

Petitioners may have had, including the impact deportation would have on their United States citizen children. Although the BIA did not mention the Nardone declaration or the Country Reports specifically, it indicated its awareness of the central issue raised by Petitioners – the hardship that deportation would cause to their United States citizen who had spent their formative years in the United States – and stated that it had considered Petitioners' arguments. (SA 4). Other than Peitioners' unsupported assertions to the contrary, there is no evidence in the record that the BIA failed to give the Nardone Declaration adequate weight or failed to consider that document (or Petitioners' other evidence) in reaching its conclusion that Petitioners were not entitled to discretionary fraud waivers under § 241(a)(1)(H). While the BIA must consider the evidence submitted before it, *see Chen v. Gonzales*, 417 F.3d 268, 275 (2d Cir. 2005) (explaining that failure to consider all evidence deprives Court of the ability to adequately review a claim), there is no basis for concluding that the BIA failed in that task here. *See Xiao Ji Chen*, mem. op. at 28-29 n.17 (unless record compels otherwise, an IJ is presumed to have taken into account all of the evidence before him). Accordingly, the BIA here properly exercised its discretion to deny Petitioners' motion to reopen.

## IV. THE BIA PROPERLY AFFIRMED THE IJ'S DECISION, WITHOUT OPINION, PURSUANT TO ITS SUMMARY AFFIRMANCE PROCEDURES

### A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

### B. Governing Law and Standard of Review

The streamlining regulation at issue in this case – 8 C.F.R. § 1003.1(a)(7)(2004) – authorizes a single member of the BIA to affirm, without opinion, the results of an IJ's decision, when that Board Member determines:

> (1) that the result reached in the decision under review was correct;
> (2) that any errors in the decision under review were harmless or nonmaterial; and
> (3) that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve that application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member [Board] review is not warranted.

8 C.F.R. § 1003.1(a)(7) (2004). Once the Board Member has made the determination that a case falls into one of

these categories, the Board issues the following order: "The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. 8 C.F.R. § 1003.1(a)(7) (2004)."[6] In keeping with the spirit of resource-conservation that was the impetus for the streamlining process, the regulation explicitly prohibits Board Members from including in their orders their own explanation or reasoning. *Id.*; *see* 64 Fed. Reg. 56,137 (Oct. 18, 1999) (stating that one reason for the streamlining initiative was the fact that "[e]ven in routine cases in which Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve"). Consequently, the regulation designates the decision of the IJ, and not the BIA's summary affirmance, as the proper subject of judicial review. *See* 64 Fed. Reg. 56,137 ("[t]he decision rendered below will be the final agency decision for judicial review purposes").

This Court has joined the majority of circuits in holding that the BIA's decision to summarily affirm an IJ's decision, without opinion, in accordance with its streamlined review process does not violate due process. *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam). *See also Shi v. Board of Immigration Appeals*, 374 F.3d 64, 66 (2d Cir. 2004) (the BIA did not abuse its discretion in summarily affirming

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[6] The regulation clarifies that an affirmance without opinion "does not necessarily imply approval of all of the reasons of" the decision below. *Id.*

decision of IJ, without opinion, pursuant to streamlining regulations).

## C. Discussion

As noted above, this Court has held that the streamlining regulation at issue in this case, 8 C.F.R. § 1003.1(a)(7) (2004), expressly authorizing a single member of the BIA to summarily affirm an IJ's decision without opinion, does not violate due process. *Zhang*, 362 F.3d at 157 ("because nothing in the immigration laws requires that administrative appeals from IJ decisions be resolved by three-member panels of the BIA through formal opinions that 'address the record,' the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process"). *See also Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals."). This Court has long upheld the authority of the BIA to summarily affirm the IJ's decision even prior to promulgation of the streamlining regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered,'" *Shi*, 374 F.3d at 66 (quoting *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994)). *See also Zhang*, 362 F.3d at 158 ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted).

As in *Shi* and *Zhang*, the IJ's decision in this case clearly provides sufficient reasoning for review by this Court. The IJ's decision summarizes the evidence presented. (SA8-12). The decision also contains a recitation of the legal standard the IJ was required to follow in assessing Petitioners' claims and requested forms for relief (SA 12), as well as an analysis of the record evidence and the law. (SA 13-15). Finally, the IJ's decision contains specific and detailed reasons for her ruling on Petitioners' fraud waivers. (SA 13-15). Thus, the IJ's decision provides ample basis for review by this Court.

Although Petitioners argue that the BIA incorrectly applied the streamlining regulations, their sole basis for this argument is their assertion that their case presents substantial issues that do not qualify for summary affirmance under the BIA's streamlining regulations. The mere fact that Petitioners disagree with the BIA's assessment does not transform the BIA's decision into a due process violation. Petitioners also seem to suggest that this Court should reconsider its decision upholding the streamlining regulations in *Zhang*, but aside from their disagreement with that decision, provide no grounds for this Court to do so, even if it could. *See Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) (holding that "[a] decision of a panel of this Court is binding unless and until it is overruled by the Court en banc or by the Supreme Court").

Furthermore, even if there were some error in the BIA's decision to summarily affirm the IJ's decision, that

error was effectively cured when the BIA issued its written opinion denying Petitioners' motion to reopen. In that opinion, the BIA addressed Petitioners' substantive claims, (SA 1-4), and thus Petitioners received a substantive ruling from the BIA on their case. Petitioners should not be heard to complain about the lack of a substantive written decision from the BIA when they got that decision on their motion to reopen.

## CONCLUSION

For each of the foregoing reasons, the petitions for review should be denied.

Dated: December 13, 2006

Respectfully submitted,

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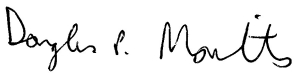

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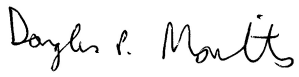
## CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,957 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



DOUGLAS P. MORABITO
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# Addendum

**8 U.S.C. § 1182. Inadmissible aliens**

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(6) Illegal entrants and immigration violators

(C) 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 chapter is inadmissible.

**8 U.S.C.A. § 1252. Judicial review of orders of removal**

(a) Applicable provisions

. . .

(2) Matters not subject to judicial review

. . .

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section

1158(a) of this title.

. . .

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

**8 U.S.C. § 1227. Deportable aliens**

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

. . .

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens, described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--

**(i)(I)** is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

**(II)** was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

**(ii)** is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

**ANTI-VIRUS CERTIFICATION**

Case Name: Daisodov v. Gonzales

Docket Number: 03-4733-ag(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 12/13/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: December 13, 2006