

Remember Who Has the Burden of Proof in Misrepresentation/Fraud Cases

Twelve years ago at a US Consulate overseas, “Freddy” hired a travel agent to assist him with his application for a tourist visa. Freddy’s agent completed the application form and asked Freddy to sign it. Freddy’s visa was denied and the Consular officer told him the reason for the denial was that Freddy had lied. Thus, Freddy’s reliance on a third party’s services cost him a visa denial.

Shortly after, seeking a better future, Freddy decided to enter the U.S. without inspection and began working around the clock. In 2001, Freddy filed for permanent residency under INA 245(i). After his adjustment interview, Freddy got a denial letter stating he was being placed in removal proceedings for having committed fraud during his consular interview. By now, Freddy had two US citizen children who were attending elementary school. He did not want to uproot his children and go back to his country.

Upon carefully examining the circumstances of his case, I filed a Motion requesting ICE to produce evidence of Freddy’s fraud. If my client was being accused of having lied in his consular application, I needed to carefully review the form since a critical element of fraud is that the lie or misrepresentation be **substantial**, i.e., not every misstatement constitutes fraud.

ICE Counsel refused to produce the evidence, and after much back and forth, finally admitted to not having a copy of Freddy’s Consular application form. I immediately filed a Motion to Terminate Removal Proceedings arguing that ICE would be unable to meet its burden of proof. In Removal proceedings involving fraud, the burden placed on the government is high pursuant to *Matter of G-*, 7 I&N Dec. 161, 1956, and *Ruiz-Vidal v. Gonzales*, 473 F.3rd 1072, 1076 (9th Cir. 2007). Without being able to produce evidence of Freddy’s “misrepresentation”, the government could not meet its burden. The IJ reluctantly agreed with my argument and terminated proceedings. Freddy is now a permanent resident.

I was Freddy’s 3rd attorney of record. His two previous attorneys had filed I-601 waivers of extreme hardship that were denied, and had advised my client to pack up and leave. Needless to say, Freddy is very happy he didn’t follow their advice.