

Authorities Affecting False Testimony Determinations (Attachment 2)

Step #1: Has the self-petitioner ever given “false testimony” for purposes of 101(f)(6):

False written statements that appear in an application, even if the application bears a statement of oath, do not constitute testimony within the meaning of section 101(f)(6). *Matter of L-D-E-*, 8 I&N Dec. 399 (BIA 1959).

False statements uttered orally under oath at a deportation hearing constitute false testimony within the meaning of section 101(f)(6) of the Act. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1998).

False oral statements made under oath to an asylum officer can constitute "false testimony" under section 101(f)(6). *In re R-S-J*, 22 I&N Dec. 863 (BIA 1999).

Note: The Ninth Circuit, in which *In re R-S-J* arose, has held that oral statements must be made "to a court or tribunal." *Phinpathya v. INS*, 673 F.2d 1013, 1018-19 (9th Cir. 1981, rev'd on other grounds, 464 U.S. 183 (1984)). However, in a more recent case, the Ninth Circuit held that false statements made under oath during a naturalization examination constitute false testimony within the meaning of section 101(f)(6). *Bernal v. INS*, 154 F.3d 1020 (9th Cir. 1998). In deciding *In re R-S-J*, the BIA concluded that an asylum officer is a member of a "tribunal" for purposes of the false testimony bar to establishing good moral character under section 101(f)(6), as that provision has been construed in the Ninth Circuit.

Outside the Ninth Circuit, false statements need not be uttered in administrative or judicial proceedings to constitute "false testimony" under section 101(f)(6), but can include statements made under oath to government officials, including Service officers and consular officials. *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973) (false statement under oath to a border patrol agent); *Liwanag v. INS*, 872 F.2d 684 (5th Cir. 1989) ("false testimony" to a Service officer during an investigation).

Step #2: Was the false testimony material for purposes of 212(a)(6)(C)?

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 have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536 (BIA 1980); see also *Matter of Bosuego*, 17 I&N Dec. 125, 130 (BIA 1979, 1980) (A misrepresentation made in connection with a visa application is material if the misrepresentation 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).