Liebof identified his signature on the respondent's visa application and immigrant visa (Gov. Exhs. 16, 79). He testified further that standard operating procedures apparently had been observed during the processing of the respondent's visa (Tr. at 824).

On cross-examination, Liebof stated that he did not issue any more visas after he finished his tour in Melbourne in 1960; he retired from government service in 1967 (Tr. at 830-31). Liebof testified that he did not specifically remember the respondent, because Liebof had issued visas to numerous immigrants while he was in Melbourne (Tr. at 833). Liebof said that the average length of the visa interviews which he conducted was between 30 and 60 minutes (Tr. at 854). He stated that the interview might last 15 to 20 minutes in an "open and shut case" (Tr. at 855). Liebof testified that in making decisions about the issuance of visas, he consulted the Immigration and Nationality Act and the accompanying regulations (Tr. at 840-41). He also consulted a State Department visa handbook as well as circulars which were received periodically from the Visa Office (Tr. at 841-42).

THOMAS VALENZA

The Government's other witness regarding the issue of the respondent's eligibility for an immigrant visa in 1958 was Thomas Valenza, who was born in 1909. Valenza testified that he became the chief of the Department of State Visa Security Branch in 1952 or 1953, and that he retained this position until he retired from government service in 1966 (Gov. Exh. 47T at 7). He stated that his office administered the security provisions of the Immigration and Nationality Act, specifically sections 212(a)(27), 212(a)(28), and 212(a)(29) (Gov. Exh. 47T at 8). 43/ Valenza testified that his office would receive requests for advisory opinions from consular officers who had questions about an applicant's eligibility for a visa (Gov. Exh. 47T at 8).

Valenza was asked a series of hypothetical questions concerning how the Visa Security Office would have ruled on visa applications from individuals who had served in various organizations under the direction of the Nazi government of Germany (Gov. Exh. 47T at 12-27). Valenza testified that his office probably would have rendered an unfavorable advisory opinion for the following hypothetical visa applicants: an applicant who had voluntarily joined a Latvian Auxiliary Police unit and became a lieutenant during the Nazi occupation of Latvia (Gov. Exh. 47T at 17); an applicant who had served in a Latvian self-defense unit which persecuted persons based upon their political views (Gov. Exh. 47T at 19); an applicant who had served as a concentration camp guard for the Nazis (Gov. Exh. 47T at 20); an applicant who had been a

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member of a police battalion which rounded up Jews to send them to a concentration camp (Gov. Exh. 47T at 22); and an applicant who had been a member of the Latvian Legion, a "Waffen SS" military unit under the control of the German "SS" (Gov. Exh. 47T at 23). Valenza emphasized in his testimony that the applicants had the burden of establishing visa eligibility, and that if there was any doubt remaining regarding an applicant's eligibility, an unfavorable advisory opinion would be issued (Gov. Exh. 47T at 20-22).

B. Respondent's Testimony

The respondent gave testimony on two separate occasions concerning his immigration to the United States. The first occasion was when he was deposed by Jeffrey Mausner (Gov. Exh. 17). At the deposition, the respondent was shown the photograph which appears on his immigrant visa, and the respondent acknowledged that this was a picture of him (Gov. Exh. 17 at 85-86). The respondent also stated that the signature on the visa application "[l]ooks like mine" (Gov. Exh. 17 at 86).

The respondent explained in his deposition that he had learned from friends who wanted to immigrate that if they disclosed military service during World War II on a visa application, the application would be denied (Gov. Exh. 17 at 87). The respondent testified that, accordingly, when he elected to apply for immigration to Australia, he decided that he "would list [his] occupation as a civilian" (Gov. Exh. 17 at 87). He testified further that when he later applied to immigrate to the United States, he had no choice other than to "use the same story" (Gov. Exh. 17 at 88).

The respondent insisted that he had done farm labor between the years of 1941 and 1944 in Latvia (Gov. Exh. 17 at 88). He stated that he did farm work for "small periods" during "really bad times," and during vacation periods when he was a student (Gov. Exh. 17 at 88-89). He could not recall the names of the farms or owners of the farms where he worked because "there were quite a few places;" he did recall, however, that he had worked on a farm near Litene and also in the area where he was stationed with the Red Army (Gov. Exh. 17 at 89-90). The respondent said that he did farm labor in order to get food (Gov. Exh. 17 at 89, 90). He could not state how much time he spent doing farm work in 1941 and 1942, but he said that he did the work whenever the need for food arose (Gov. Exh. 17 at 91). 44/ He stated that when he did farm labor, he performed simple tasks such as gathering hay and wood, and taking care of horses (Gov. Exh. 17 at 91).

44/ At his deportation hearing, the respondent did specify areas where he claimed to have performed farm labor, and he maintained that during the period after his service on the eastern front in 1942 but before his entry into the Latvian Legion in 1944, his time was divided equally between studying and doing farm work (Tr. at 1163-66).

The respondent testified that he did not disclose his service in a police battalion in his visa application because he believed such persons were not permitted to immigrate (Gov. Exh. 17 at 92). He reiterated that he did not tell the Australian authorities about his police or military service so that he would be allowed to immigrate (Gov. Exh. 17 at 92).

The respondent also testified about his immigration to the United States at his deportation hearing. He stated that a "middle-aged or elderly lady" at the American Consulate in Melbourne helped him in processing his visa application; he added that this woman was "very much in charge" of his case (Tr. at 1179, 1181). The respondent recalled meeting with a consular officer who was a man, but he stated that this meeting lasted only for a minute and that the officer merely wished the respondent good luck in going to the United States (Tr. at 1180, 1182, 1283). The respondent stated that he remembered signing his visa application before a consular officer, but he added that he did not specifically remember Jack Liebof, who testified at the respondent's hearing (Tr. at 1284-85). Finally, the respondent stated that he could not remember what questions he was asked while his visa application was being processed (Tr. at 1181). He also claimed, however, that he was not questioned about prior military service (Tr. at 1181).

C. Analysis

The immigration judge concluded that the Government had met its burden of proving that the respondent is deportable because he willfully misrepresented a material fact when he obtained his visa (i.j. dec. at 37). To support this conclusion, the immigration judge relied on the respondent's admission that he intentionally did not disclose his military and police service during the war in his visa application. The immigration judge relied further on the testimony of Liebof and Valenza to establish the respondent's deportability. The immigration judge, citing the Supreme Court's decision in Kungys v. INS, supra, and this Board's decision in Matter of Bosuego, 17 I&N Dec. 125 (BIA 1980), held that the respondent's willful and material misrepresentation in his visa application rendered him inadmissible under section 212(a)(19) of the Act, and consequently deportable as charged under sections 241(a)(1) and 241(a)(2) of the Act.

The respondent's initial argument on appeal regarding the material misrepresentation issue is that the Board should not adopt the Kungys "materiality" standard as applied in Matter of Laipenieks, A11 937 435 (BIA, 8-31-88) (unpublished). The respondent asserts that if the Board were to apply the Kungys standard as interpreted in Laipenieks, he would be placed in an unfair position. The respondent contends that the Laipenieks analysis places the burden on him to rebut evidence of inadmissibility under section 212(a)(19), and that this "newly announced standard" should not be applied to the respondent's case at this stage of the proceedings. Respondent's brief at 53.

The short answer to the respondent's Laipenieks argument is that the Laipenieks decision which he relies on was not designated as a precedent decision. It is accordingly not binding in the respondent's case. 8 C.F.R. § 3.1(g); Matter of Medrano, Interim Decision 3138 (BIA 1990, 1991). For the reasons set forth below, however, we find that the Supreme Court's decision in Kungys v. INS, supra, should be applied here in assessing the "materiality" of the respondent's misrepresentation in his visa application.

In Kungys v. INS, supra, the Supreme Court grappled with the issue of whether the petitioner's citizenship had been "illegally procured . . . by concealment of a material fact or by willful misrepresentation . . . ." See section 340(a) of the Act, 8 U.S.C. § 1451(a). Justice Scalia, writing for a majority on the issue of the appropriate "materiality" standard, held that the proper test for materiality under section 340(a) of the Act is "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision." Kungys v. INS, 108 S.Ct. at 1547. The Court reaffirmed that this standard must be met with evidence that is "clear, unequivocal, and convincing." Id.

We find no procedural or substantive error in the immigration judge's reliance on Kungys v. INS, supra, in his decision. The Supreme Court's decision in Kungys was issued on May 2, 1988, nearly 6 months prior to the immigration judge's entry of a decision. Thus, the respondent had ample opportunity at the trial level to consider the impact of the Kungys decision and to argue against its applicability. We find no merit to the respondent's argument on appeal that the Kungys analysis unfairly places the burden on him to rebut evidence of section 212(a)(19) inadmissibility. 45/ The concept of an alien submitting evidence to rebut a section 212(a)(19) charge is hardly novel. In Matter of Bosuego, supra, at 131, we discussed the principle of law that after the Government demonstrates in a deportation case that an alien made a material misrepresentation to obtain a visa or admission to the United States, the burden then shifts to the alien to prove that he would have been admissible even if the true facts had been known. See also Matter of S-- and B--C--, 9 I&N Dec. 436 (BIA 1961). Irrespective of the Kungys decision, the respondent ought to have come forward at his deportation hearing with any evidence that he had relevant to the charge that he was excludable under section 212(a)(19) at the time of his entry. We therefore find no procedural irregularity in the immigration judge's application of the Kungys decision in this case.

45/ The respondent contends that the "materiality" standard developed by the Supreme Court in Chaunt v. United States, 364 U.S. 350 (1960), should be applied in his case. In Kungys v. INS, 108 S.Ct. at 1545-47, however, the Court clearly criticized, if it did not overrule, the Chaunt analysis.

The respondent has reserved, but not raised, a substantive argument against the application of the Kungys "materiality" standard in a deportation proceeding. Respondent's brief at 52 n.6. We find no valid reason not to apply the Kungys "materiality" standard in the instant case. We do not consider the slight difference in the language employed in the denaturalization and deportation statutes to be sufficient to warrant entirely separate "materiality" standards for those proceedings. Cf. section 340(a) of the Act with former section 212(a)(19) of the Act ("concealment of a material fact or . . . willful misrepresentation" vs. "fraud or willfully misrepresenting a material fact"); see also Schellong v. INS, supra, at 659-60. Moreover, in Kungys the Court expressed a desire to develop a more uniform "materiality" standard by equating the standards that had arisen in the criminal and denaturalization contexts. 108 S.Ct. at 1546. The consequences of a deportation proceeding may be equally as serious as the consequences of a criminal or denaturalization proceeding, and thus the Court's rationale for adopting a uniform "materiality" standard in criminal and denaturalization cases should logically extend to deportation cases as well. Id. We accordingly cannot infer from the Kungys decision a sound reason not to apply its "materiality" standard to a visa fraud issue in a deportation proceeding. Nor are we aware of a post-Kungys federal court decision which expressly declined to apply the Kungys "materiality" standard to a deportation proceeding.

Applying, therefore, the Kungys "materiality" standard to the instant case, the precise issue is whether the Government has established by clear, unequivocal, and convincing evidence that the respondent made a willful misrepresentation in his visa application which had a "natural tendency to affect" the decision to issue him a visa. We find that the record supports the immigration judge's conclusion that the respondent "willfully" misrepresented a material fact when he secured his immigrant visa. According to his own testimony, the respondent did not disclose his war-time activities in his visa application because he believed this information would prevent him from immigrating to the United States. See Federenko v. United States, 449 U.S. 490, 508 (1981); Matter of Kulle, supra, at 335; Kulle v. INS, supra, at 1196. Under these circumstances, where the respondent clearly intended to withhold information from a consular officer, we find that his misrepresentation regarding his war-time occupation was "willful." Moreover, we find that the information which the respondent misrepresented in his visa application did have a "natural tendency to affect" the decision to issue him a visa, and that his misrepresentation accordingly was "material."

Jack Liebof testified consistently in these proceedings that the war-time activities of persons of European descent was a sensitive and significant issue when he was screening visa applicants at the American Consulate in Melbourne. He testified without equivocation that if he had learned that a visa applicant had been a member of an organization which engaged in persecution under the

direction of the Nazi government, he would have referred the matter to the Visa Security Office in Washington, D.C., for an advisory opinion. Thomas Valenza, in turn, testified that the Visa Security Office would most likely have issued an unfavorable advisory opinion, binding on the consular officer, for a visa applicant who had served as a concentration camp guard under the Nazis or had been a member of a police battalion which engaged in persecution under the direction of the Nazi government. The testimony of these former government officials, who were charged with the responsibility of administering the provisions of the Immigration and Nationality Act during the period that the respondent immigrated to the United States, establishes that if there was any indication that a visa applicant had belonged to an organization under the direction of the Nazi government, this matter would have been carefully scrutinized in determining the applicant's eligibility for a visa. See Federenko v. United States, supra, at 513-14; Kulle v. INS, supra, at 1196; United States v. Schellong, 717 F.2d 329, 335 (7th Cir. 1983). We therefore find the testimony of the former government officials in this case to constitute clear, unequivocal, and convincing evidence that the respondent's willful failure to disclose the true nature of his war-time activities had a natural tendency to influence the decision to grant him a visa, and that the respondent accordingly misrepresented a "material" fact in order to obtain his immigrant visa.

We wish to emphasize that while the Government has relied on the testimony of State Department officials whose employment was contemporaneous with the respondent's immigration to the United States, it does not seem necessary to us for the Government to produce the actual consular officer who reviewed the alien's visa application in order to establish that alien's deportability based on a misrepresentation of a material fact in the application. The proper inquiry in the "misrepresentation" analysis is to examine whether the misrepresentation had a "natural tendency to affect" a reasonable consular officer's decision to issue an immigrant visa. Since the standard is, in our view, objective in nature, the Government's practice of presenting the particular consular officer who issued the immigrant visa seems superfluous. The testimony of an expert witness should suffice to establish State Department policy during a given era, especially when contemporaneous officials cannot be located or are deceased. See Federenko v. United States, supra, at 498-99. Having made this observation, we reiterate that the testimony of Liebof and Valenza here did establish the respondent's deportability by clear, unequivocal, and convincing evidence.

For his part, the respondent asserts that the testimony of Valenza and Liebof was insufficient to establish the respondent's deportability based on the visa fraud charge. He contends that the testimony of Valenza should be given no weight. The respondent points to two of the answers which Valenza gave to the hypotheticals posed to him as alleged evidence that Valenza's testimony was wholly unreliable. First, the respondent argues

that Valenza's testimony that the Visa Office probably would have rendered an unfavorable advisory opinion for a visa applicant who had been a member of a Latvian Auxiliary Police unit is "clearly wrong," because it was established in such cases as United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985), that Latvians who had served as policemen during the Nazi occupation of Latvia were not ineligible for immigrant visas merely because of that police service. Respondent's brief at 53. Second, the respondent argues that Valenza's testimony that the Visa Office would have rejected the visa application of a former member of the Latvian Legion is also wrong, because it was established in prior war-crimes cases that service in the Latvian Legion did not render a visa applicant ineligible for immigration to the United States.

We note initially in response to this argument that Valenza's testimony that a former member of a Latvian Auxiliary Police unit probably would have been ineligible for an immigrant visa does not appear to be inaccurate. While it is true as a factual matter that the defendant in United States v. Sprogis, supra, disclosed his Latvian police service in his visa application and was nonetheless granted a visa pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 ("DPA"), the government officials who have testified about this issue in deportation and denaturalization cases have indicated that a visa applicant who disclosed police service in an area occupied by Nazi Germany during World War II would have had his visa application rejected outright, or that at least a further inquiry would have been conducted concerning the applicant's eligibility. See United States v. Kowalchuk, 773 F.2d at 497; Maikovskis v. INS, supra, at 442; United States v. Koziy, 728 F.2d at 1320; United States v. Osidach, supra, at 103. Valenza's testimony appears to be consistent with the testimony of the government officials offered in these precedent cases.

Moreover, assuming arguendo that the respondent's assertion is correct that mere membership in the Latvian Legion did not disqualify an alien for an immigrant visa to enter the United States, we are not persuaded that Valenza's testimony to the contrary renders all of his testimony unreliable. Valenza's testimony was consistent that his office would most likely have rendered an unfavorable advisory opinion for a visa applicant who had been a member of an organization involved in persecution under the direction of the Nazis; when his testimony is considered in conjunction with Liebof's, who testified consistently that an applicant's disclosure of membership in an organization which had engaged in Nazi persecution would have triggered a request for an advisory opinion, the conclusion is inescapable that if the respondent had listed his actual war-time occupation in his visa application, this information "would predictably have disclosed other facts relevant to his qualifications." Kungys v. INS, 108 S.Ct. at 1548. The issue of the respondent's inadmissibility due to his membership in the Latvian Legion is at best peripheral when compared to his inadmissibility due to his membership in the "Arajs Kommando" and his service at a concentration camp under the

direction of the Nazis. We therefore assign minimal significance to Valenza's testimony regarding the admissibility to the United States of a former member of the Latvian Legion.

The respondent argues further that Liebof's memory had faded, and that his testimony is not the "best evidence" concerning the respondent's admissibility to the United States at the time he obtained his visa. Respondent's brief at 57. The respondent asserts that the State Department visa handbook and Visa Office circulars, to which Liebof made reference in his testimony, should have been submitted by the Government as its evidence of the respondent's inadmissibility to this country. As discussed above, we have found Liebof's testimony in these proceedings to be clear and convincing. He demonstrated a firm recollection of the visa-issuing process as it operated when he was employed at the American Consulate in Melbourne. Both Liebof and Valenza displayed in their testimony a solid familiarity with the provisions of the Immigration and Nationality Act.

With respect to the visa handbook and circulars which the respondent urges ought to have been produced, there is no indication in the record that the Government had access to these materials, or that these materials are still in existence. There have been numerous cases where the Government has relied on the testimony of former government officials, without presenting State Department manuals as evidence of an immigration policy, to establish that an individual involved in Nazi activities made misrepresentations to secure an immigrant visa or citizenship. See Kulle v. INS, supra, at 1195-96; United States v. Schellong, 717 F.2d at 334; Maikovskis v. INS, supra, at 438, 442; United States v. Baumann, 764 F.Supp. 1335, 1336 (E.D.Wis. 1991); United States v. Palciauskas, 559 F.Supp. at 1299; United States v. Linnas, 527 F.Supp. at 439 n.34. We therefore find no merit to the respondent's argument that the testimony of Liebof and Valenza was inadequate to prove the "materiality" of the respondent's misrepresentation in his visa application.

The respondent also argues that the provision in the visa application asking the applicant to indicate his "occupation" was ambiguous, and that there is no evidence in the record that the respondent was specifically asked during his visa interview whether he had performed any military or police service during World War II. The respondent obviously did interpret the term "occupation" as a request for information about his military service, since he listed "Latvian Army" in the application as his occupation from 1929 to 1941. His testimony that he actually was involved in some farm work between 1941 and 1944 did not establish that the respondent, in good faith, could have listed "farm laborer" as his occupation during this period. 46/ The respondent

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46/ We have reviewed the testimony of the respondent's witnesses who stated that they knew the respondent between 1941 and 1944 (Namgauds, Tr. at 1052-65; Elguts, Tr. at 1070-79; Kula,

(Cont'd)

admitted that he had served on the eastern front from Winter to Fall of 1942, the evidence in the record demonstrates that the respondent was serving in the "Arajs Kommando" as a company commander in 1943 (Gov. Exh. 45), and the respondent admitted that he did not want to disclose any military or police service during the war years on his visa application. We therefore find no merit to the respondent's attempt to insert ambiguity into the term "occupation" as it appeared in his visa application. See Costello v. United States, 365 U.S. 265, 277 (1960).

Moreover, while the respondent claims that he was not asked about military service during his visa interview, he does not dispute that the visa application in the record bears his signature. He does not dispute that he executed his visa application under oath. The respondent has therefore failed to rebut the presumption of official regularity. According to this rule of law, visa applicants are presumed to be aware of the full contents of their visa application. See United States v. Kairys, 600 F.Supp. at 1267; United States v. Dercacz, 530 F.Supp. 1348, 1352-53 (E.D.N.Y. 1982); Matter of G--, 9 I&N Dec. 570, 573 (BIA 1962). One may presume, therefore, that the respondent was aware of all the information which he provided in his visa application, including his misrepresentation of his "occupation" as a "farm laborer." Although Liebof testified that he did not remember the respondent in particular, Liebof also testified consistently that he reviewed the contents of formal visa applications with all applicants, and that the war-time activities of European visa applicants were a matter subject to careful scrutiny during the visa-processing period. Specific evidence that Liebof questioned the respondent about his involvement in military or police service between 1941 and 1944 is not necessary to sustain the section 212(a)(19) charge, since the respondent's misrepresentation concerning his "occupation" may well have cut off a further inquiry about his war-time activities.

Finally, the respondent asserts that the Government did not meet its burden of proving his deportability due to visa fraud because the Government did not submit into evidence the preliminary applications which the respondent completed prior to his formal visa application. The respondent asserts further that since the American Consulate in Melbourne had access to the Australian authorities' information, he did not foreclose any investigation that the United States might have conducted into his immigration to Australia. Here again, there is no indication in the record that the Government was capable of obtaining the preliminary visa applications completed by the respondent, or that these applications are still in existence. Moreover, we are not persuaded that these preliminary applications, as well as any

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Tr. at 1105-18; Olins, Tr. at 1119-31). We do not find the testimony of these witnesses to be sufficiently specific to corroborate the respondent's claim that he was a "farm laborer" during those years.

background files that the Australian authorities might have had available concerning the respondent's immigration to Australia, would contain any evidence to exonerate the respondent. The respondent admitted that he intentionally withheld his record of military service from the Australian authorities when he immigrated there, and that he withheld the same information when he immigrated to this country. Therefore, in view of the respondent's admitted practice of withholding information in order to immigrate, it is implausible that the deep background evidence to which the respondent now points would have any bearing on the visa fraud charge in this case.

We find that the record supports the immigration judge's conclusion that the Government established by clear, unequivocal, and convincing evidence that the respondent obtained his immigrant visa by willfully misrepresenting a material fact. As discussed above, we have also concluded that the Government has established the respondent's deportability under section 241(a)(19) by clear, unequivocal, and convincing evidence. After a review of the record in its entirety, we find that the entry of an order of deportation against the respondent was correct.

Accordingly, the respondent's appeal from the immigration judge's decision ordering the respondent's deportation to Australia will be dismissed.

ORDER: The appeal is dismissed.

Mary Maguire Dunne
FOR THE BOARD