IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Case No. 09-10005-01-MLB
	)	
LAZARE KOBAGAYA,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29 AS TO COUNTS ONE AND TWO

The United States of America, by and through its undersigned attorneys, files this response to Defendant's Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29. The crux of Defendant's arguments is that the Government failed to present sufficient evidence at trial that would allow a reasonable trier of fact to convict the Defendant. Because the Government presented sufficient evidence at trial to have allowed a reasonable jury to convict on Count One and to support the jury's conviction on Count Two, Defendant's motion should be denied.

I. PROCEDURAL HISTORY

On January 13, 2009, a grand jury returned a sealed Indictment charging the defendant, Lazare Kobagaya, with unlawful procurement of citizenship or naturalization (naturalization fraud), in violation of 18 U.S.C. § 1425(a) (Count One) and fraud and misuse of visas, permits, and other documents (visa fraud), in violation of 18 U.S.C. § 1546(a) (Count Two). *See* Doc. 1. The Indictment was unsealed on April 23, 2009. Trial commenced on April 26, 2011. The

Government offered the testimony of 13 witnesses and submitted 70 exhibits into evidence. Defendant presented 19 witnesses and submitted 24 exhibits. On May 31, 2011, the jury returned a guilty verdict on Count Two (18 U.S.C. § 1546(a)) and informed the Court that it was unable to reach a unanimous verdict on Count One (18 U.S.C. § 1425(a)). The Court declared a mistrial as to Count One.

At the close of the Government's evidence, Defendant made an oral motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(a). The Court denied that motion, finding sufficient evidence upon which a rational trier of fact could convict Defendant on all counts. Defendant renewed the motion at the close of the defense case, and the Court reserved ruling at that time. Upon the return of the guilty verdict, defense filed a "Memorandum in Support of Motion for Judgment of Acquittal Pursuant to Federal Rule Criminal Procedure 29 as to Counts 1 and 2" (hereinafter referred to as "Def. Mot.").

II. LEGAL STANDARD

Rule 29(c)(2) of the Federal Rules of Criminal Procedure provides in relevant part:

> If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

A judgment of acquittal should be granted only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *See United States v. McKissick*, 204 F.3d 1282, 1289-90 (10th Cir. 2000)*; see also United States v. Carter*, 130 F.3d 1432, 1441 n.2 (10th Cir. 1997). When considering a motion for judgment of acquittal based on the sufficiency of the evidence, the Court must view the evidence in the light most favorable to the Government. *McKissick*, 204 F.3d at 1289-90. Indeed, the Court's review of the Government's case is "highly deferential" and includes an assessment of all direct and circumstantial evidence, taking all

reasonable inferences in the light most favorable to the Government. *United States v. Bowen*, 527 F.3d 1065, 1076 (10th Cir. 2008) (citing *United States v. Dowlin*, 408 F.3d 647, 657 (10th Cir. 2005)).

In applying this standard of review, the Court "'may neither weigh conflicting evidence nor consider the credibility of witnesses.'" *McKissick*, 204 F.3d at 1289 (quoting *United States v. Pappert*, 112 F.3d 1073, 1077 (10th Cir. 1997)); *Bowen*, 527 F.3d at 1076 (Rule 29 motion does not allow for questioning "the credibility of witnesses or weigh[ing] conflicting evidence, as these tasks are exclusively for the jury") (citing *United States v. Banks*, 451 F.3d 721, 725-26 (10th Cir. 2006)). The burden is high for a party challenging a jury verdict due to a "deep respect for the fact-finding function of the jury." *United States v. Evans*, 42 F.3d 586, 589 (10th Cir. 1994).

In this case, the Government introduced evidence sufficient to have allowed a reasonable trier of fact to find Defendant guilty of Count One and sufficient to convince a unanimous jury that Defendant was guilty of Count Two beyond a reasonable doubt. For these reasons, Defendant's motion should be denied.

III. THE GOVERNMENT INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT A VERDICT ON COUNT ONE

Although the jury was unable to reach a verdict as to Count One, the Government presented sufficient evidence to have allowed a reasonable trier of fact to find Defendant guilty on Count One. Count One charged the Defendant with Unlawful Procurement of Naturalization, in violation of 18 U.S.C. § 1425(a). In order to find Defendant guilty on Count One, the jury was required to find: (1) Defendant knowingly made one or more false statements in his N-400 naturalization application and/or in his naturalization interview; (2) the statements were material;

and (3) Defendant knowingly procured his naturalization contrary to law. The Government presented ample evidence of Defendant's guilt of this charge. The Government presented nine Rwandan witnesses who testified about Defendant's personal role in crimes during the genocide in Rwanda and about his persecution of Tutsi during that time. *See, e.g.* Trial Tr. at 155-95; 420-21; 503-570; 679-81; 739-57; 798-823; 875-99; 950-60; 1067-73. The witnesses testified that Defendant encouraged, organized, and ordered the killing of numerous Tutsi. For example, Faustin Barahandwa and Cyprien Kayitankore testified that Defendant oversaw the killing of a local Tutsi man, Appoloni Nduwumwami, and his two daughters. The witnesses described in detail how the victims were taken from their hiding place in a neighbor's home and beaten to death on Defendant's orders. Trial Tr. at 796-809; 875-885. Joseph Yandagiye, the neighbor who had been hiding Nduwumwami and his children, testified that Defendant attempted to have Yandagiye killed because he had allowed Nduwumwami to hide in his house. Trial Tr. at 750-752. Barahandwa and Kayitankore further testified that later that same afternoon, Defendant led a hunting party in search of additional Tutsi suspected to be in hiding. When the group found Jacqueline, a Tutsi woman, Defendant encouraged the crowd to kill her, stating words to the effect that when killing rats you should not spare the pregnant ones. Trial Tr. at 816-820; 886-890.

Three other participants in the genocide, Valens Murindangabo, Jean-Marie Byiringiro, and Emmanuel Nzabandora, testified that Defendant was part of the burning of Tutsi homes on the morning of April 15, 1994. Trial Tr. at 108-135; 153-161; 415-430; 501-513. Murindangabo further testified that Defendant ordered the murder of a Tutsi woman named Beatrice and her baby, and the murder of a Tutsi man near a local water hole. Trial Tr. at 173-175; 191–194. Nzabandora further testified that Defendant stabbed him in the leg when he initially refused to

participate in the killing. Trial Tr. at 517-536. Murindangabo, Nzabandora, and Barahandwa each described their participation in a massacre on Mt. Nyakizu that killed thousands of Tutsi men, women and children, and each of them described how Defendant helped to mobilize the local men to participate in the massacre. Trial Tr. at 181-189; 538-556; 891-896. Another man, Paul Karasira, testified that Defendant forced him to kill a Tutsi man by threatening to have his wife killed if he refused. Trial Tr. at 952-956.

The testimony against Defendant by his fellow genocidaires was corroborated by the testimony of the survivors. Two surviving victims of the genocide, Valerie Niyitegeka and Apollinaire Rugimbana, testified that as they were fleeing on the morning of April 15, 1994, they saw Defendant at the head of a crowd of armed Hutu men. Trial Tr. at 670-682; 1073-1088. Rugimbana also testified that he saw Defendant on the evening of April 13, 1994, with a group of Hutu men who were beating a group of Tutsi seeking to flee to Burundi. Trial Tr. at 1067-1073.

The Government then presented evidence that Defendant made false statements about his involvement in these events when he applied to become a U.S. citizen and again when he was interviewed about his application by failing to disclose his actions during the genocide. *See* Gov. Ex. 9; Trial Tr. at 1386-89. Specifically, the Government admitted into evidence Defendant's naturalization form and the testimony of Jeryl Bean, the naturalization examiner who adjudicated Defendant's application. Finally, Ms. Bean testified that, had Defendant admitted his involvement in persecution, crimes, or previous lies to U.S. government officials, his application to naturalize would not have been granted, thus meeting the materiality standard.[1] Trial Tr. at

[1] The Court instructed the jury that "A false statement is material if:
(1) Defendant would not have been able to be naturalized based on the true facts; or

1394-95. Based on the substantial amount of evidence presented at trial, any contention that "no reasonable jury could have found Defendant guilty beyond a reasonable doubt" is utterly without merit. *See McKissick*, 204 F.3d at 1289-90.

Defendant makes four arguments in support of his motion for judgment of acquittal as to Count One. First, Defendant argues that the evidence was insufficient to support a conviction on Count One because "the character evidence of Mr. Kobagaya's peaceful and loving nature was unrefuted." Def. Mot. at 3. In essence, Defendant is asking the Court to disregard the Government's evidence, revisit the credibility of the witnesses, and credit only Defendant's character evidence.

Nine witnesses testified about Defendant's involvement in heinous crimes, violence, and persecution. This is more than sufficient for a reasonable jury to find that Defendant participated in the genocide. Defendant would have this Court find that he could not have engaged in genocide because Defendant's witnesses provided character evidence; however, a jury would be entitled to disregard the character evidence offered by Defendant and find Defendant guilty as charged. *See United States v. Hutchinson*, 573 F.3d 1011, 1033 (10th Cir. 2009) ("[W]e ask… only whether the government's evidence, credited as true, suffices to establish the elements of the crime."). Defendant's argument that evidence of "his peaceful and loving nature" was unrefuted is plainly incorrect and does not present grounds for an acquittal as it is clearly a request to the Court to weigh the credibility of the numerous Government witnesses who testified

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(2) the false statement tends to shut off a line of inquiry which is relevant to Defendant's eligibility and which might well have resulted in a proper determination that he be excluded; or
(3) the concealment of the fact or the willful false statement had a natural tendency to influence, or was capable of influencing, the decision maker, i.e. the immigration authorities. It is not necessary that the decision maker was in fact influenced. *See* Jury Instructions at 21 [Doc. 371].

Defendant participated in the Rwandan genocide. *See Bowen*, 527 F.3d at 1076 (weighing credibility of witnesses is exclusively for the jury).

Defendant's second argument as to Count One is similarly unavailing. Defendant attempts to relitigate the issue of the applicability of Rwandan law, arguing that there was no evidence or allegation in the Indictment that a violation of a foreign law could serve as a basis to deny a citizenship application and, therefore, it was improper to instruct the jury on Rwandan law. Def. Mot. at 6. As outlined in the Government's previous filings, the Court was correct to instruct the jury on Rwandan law. *See* Doc. Nos. 300, 320, and 348. In short, as alleged in the Indictment, proof that Defendant knowingly concealed a material fact on his naturalization application was a basis for the jury to find Defendant guilty of naturalization fraud. *See United States v. Amouzadeh*, 467 F.3d 451, 457 (5th Cir. 2006). The Government charged, *inter alia*, that Defendant concealed the material fact that he had committed one or more crimes for which he was never arrested. *See* Indictment ¶¶ 7-8. One way to show that this statement was false is to show that Defendant committed crimes in Rwanda. In order to show that Defendant committed crimes in Rwanda, the jury was required to consider whether Defendant's actions violated Rwandan law. Accordingly, the instruction on Rwandan law (the substance of which Defendant did not object to) was necessary and proper.

Defendant attempts to argue, without citing any authority, that only evidence of a *conviction* under foreign law rather than evidence of a *violation* of foreign law could provide a basis for denying a citizenship application. Def. Mot. at 6. This argument misstates the law. The Immigration and Naturalization Act specifically states that *any* conduct or acts by an applicant may be taken into consideration when determining eligibility for naturalization. *See* 8 U.S.C. § 1427(e) (emphasis added). Visa and naturalization applicants are asked about criminal

conduct for which they have not been arrested (not just conduct for which they have been convicted) precisely because the United States is concerned with all criminal conduct committed overseas. For that reason, as Ms. Bean testified, Defendant would not have been eligible to naturalize if he had stated that he had committed a crime for which he was never arrested. *See* Trial Tr. at 1395. Because the Rwandan law instruction was appropriate and there was sufficient evidence to establish that Defendant committed crimes in Rwanda for which he was never arrested, Defendant's motion for acquittal on this ground should be rejected.

Defendant's third argument is that Count One should be dismissed because there was insufficient evidence that Defendant lied or provided false or misleading information to any U.S. government official. Defendant claims that because he did not understand English, he did not understand that the statements he made on the Optional Form 230 Application for Immigrant Visa and Alien Registration were false and misleading and, even if there was sufficient evidence that he understood the false statements, there was insufficient evidence that the false statements were material. Both of these arguments fail. First, Defendant's argument that he "spoke no English" as of the time he filled out his visa application and, therefore, could not have been convicted for lying during his naturalization process about previous lies to U.S. government officials (*see* Def. Mot. at 6-8) ignores the numerous exhibits admitted into evidence from which a jury could find that Defendant did understand English when he completed the Optional Form 230 Application for Immigrant Visa and Alien Registration. The Government admitted no fewer than nine documents, all written in English during or before 1997, all of which bear Defendant's name and some of which bear his signature. *See* Gov. Exs. 16, 17, 18, 19, 22, 23, 25, 26 and 28; Trial Tr. at 1510-27. The jury was entitled to credit this evidence, which indicated that Defendant spoke English, over the self-serving testimony of Defendant's family members.

Defendant's argument that the false statements on the Optional Form 230 Application for Immigrant Visa and Alien Registration were not material during the naturalization process also ignores the evidence and, therefore, is similarly flawed. Def. Mot. at 8-9. As the Court instructed the jury, a false statement is material if, among other things, the "Defendant would not have been able to be naturalized based on the true facts." *See* Jury Instructions at 21 [Doc. 371]. At trial, Ms. Bean testified that if Defendant had stated that he had previously lied to U.S. government officials to gain immigration benefits, he would not have been eligible to naturalize. Trial Tr. at 1395. This meets the requirement to show materiality insofar as it shows that Defendant would not have been able to naturalize based on the true facts.

Defendant's final argument relating to Count One is that any conduct prior to the five years immediately preceding naturalization cannot be considered when assessing whether a person is eligible to naturalize. Def. Mot. at 9-11. This argument is belied by a plain reading of the applicable immigration law. *See* 8 U.S.C. § 1427(e) (expressly stating that evaluation of good moral conduct for naturalization purposes is not limited to the five years preceding application). Notably, *Marcantonio v. United States*, 185 F.2d 934 (4th Cir. 1950), relied on by Defendant, actually supports the Government's position. *Marcantonio* reversed the district court for essentially finding that any criminal conviction automatically meant that a person could not be naturalized. The Court expressly found, however, that consideration of convictions sustained prior to the five year period before a citizenship application was entirely proper when considering an applicant's good moral character. *Id.* at 937 ("[T]he fact of petitioner's having committed serious crimes at any time during his life has a bearing on his character."). For purposes of this case, that means that Defendant's actions in 1994 and his subsequent lies about those actions would have been a legitimate, material consideration for the naturalization

examiner when determining whether Defendant was eligible to become a citizen. This argument, therefore, also lacks merit. For these reasons, Defendant's motion as to Count One should be denied.

IV. THE GOVERNMENT INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT ON COUNT TWO

Count Two charged Defendant with Fraud and Misuse of Alien Registration Card, in violation of 18 U.S.C. § 1546(a), which prohibits anyone from knowingly using or possessing an alien registration card, knowing it to be falsely made or to have been procured by means of any false claim or statement or to have been otherwise procured by fraud or unlawfully obtained. *See* 18 U.S.C. § 1546(a) (paragraph one). Specifically, Count Two alleged that Defendant made two false statements on his Optional Form 230 Application for Immigrant Visa and Alien Registration (hereinafter referred to as the "Visa/Alien Registration Application"): (1) he claimed to have resided in Burundi between 1993-1995 when he was, in fact, living in Rwanda in 1994, and (2) he denied having engaged in genocide when he had, in fact, participated in the Rwandan genocide of 1994. Count Two further alleged that Defendant procured his alien registration receipt card (commonly referred to as a "green card" and hereinafter referred to as the "Alien Registration Card") through the submission of his Visa/Alien Registration Application which contained false statements and that Defendant, in turn, used the Alien Registration Card when he applied for citizenship. In convicting on Count Two, the jury found that Defendant's claim on his Visa/Alien Registration Application that he resided in Burundi in 1994 was a materially false statement.

Defendant asserts that the evidence presented at trial was insufficient to support the jury's verdict of guilty on Count Two. First, Defendant argues that the Government failed to establish

that the Alien Registration Card that Defendant used in applying for citizenship was "procured" through the submission of the Visa/Alien Registration Application (in which he falsely claimed to have been in Burundi in 1994). *See* Def. Mot. at 11-15. Defendant contends that while the evidence showed that the Visa/Alien Registration Application led to the issuance of a visa, the evidence did not establish that the application led to the issuance of an alien registration receipt card. *Id.* at 14. Second, Defendant argues that there was insufficient evidence to prove that Defendant's false statement that he was residing in Burundi in 1994 was material. Both of these claims lack merit.

The jury's finding of guilt as to Count Two was amply supported by the documentary and testimonial evidence that was presented at trial. In addition, as the Tenth Circuit has noted, jurors may draw reasonable inferences from facts they have found to be proved. *See United States v. DuFriend*, 691 F.2d 948, 951-52 (10th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983). These inferences may be drawn from direct or circumstantial evidence. *See United States v. Atencio*, 435 F.3d 1222, 1231 (10th Cir.), *cert. denied*, 547 U.S. 1157 (2006). The juror's inferences may be based on their own common sense. *See, e.g.*, *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 653 (10th Cir. 2008) ("Juries may render verdict on facts and common sense inferences from those facts."). Jurors may also rely on their knowledge of human nature. *See United States v. Stapleton*, 730 F. Supp. 1375, 1378 (W.D. Va. 1990) ("A jury may properly give effect to such inferences regarding human nature as common knowledge may reasonably draw from the facts directly proved.").

In this case, both the direct and circumstantial evidence presented to the jury at trial was sufficient for the jury to reasonably find and infer, based on logic and common sense, that Defendant procured his alien registration receipt card by means of his Visa/Alien Registration

Application. Similarly, the evidence at trial and reasonable inferences therefrom were also sufficient for the jury to conclude that Defendant's false statement that he was in Burundi in 1994 was material to his Visa/Alien Registration Application. Accordingly, Defendant's motion for acquittal as to Count Two should be denied.

A. The Evidence At Trial Was Sufficient to Prove That Defendant Procured His Alien Registration Receipt Card By Means of the Visa/Alien Registration Application.

At trial, the Government introduced both documentary evidence and testimony sufficient for a reasonable jury to find Defendant guilty of Count Two. The evidence included: (1) Government Exhibit 6, Defendant's Visa/Alien Registration Application, and (2) Government Exhibit 8, Defendant's Alien Registration Receipt Card. The jury also heard testimony regarding these exhibits, *see, e.g.*, Trial Tr. at 32-34 (testimony of Mark Larkin), 1266-69 and 1397-98, and was able to inspect the exhibits during its deliberations.

In short, as alleged in the indictment, and presented through the documents and testimony at trial, Defendant falsely represented that he had lived in Burundi from 1993 to 1995 when he completed his Visa/Alien Registration Application. Based on the information contained in the Visa/Alien Registration Application (including the false statement relating to his residency), Defendant procured his Alien Registration Card. Thereafter, Defendant used the Alien Registration Card when applying for citizenship.

Defendant argues that the Government failed to prove Count Two because it failed to establish that the Alien Registration Card he used in applying for citizenship was "procured" by Defendant's completion and submission of the Visa/Alien Registration Application. *See* Def. Mot. at 11-15. Defendant contends that the evidence presented at trial merely showed that the

Visa/Alien Registration Application led to the issuance of his visa, but not to the issuance of his Alien Registration Card. *Id.* at 14.

Defendant's argument ignores the plain language of the documents admitted during the trial and the testimony of the witnesses regarding the Visa/Alien Registration Application and the Alien Registration Card. The plain language of these two exhibits establishes the connection between them -- that the Visa/Alien Registration Application is, in fact, the document used to procure the Alien Registration Card. The document on which Defendant lied about his presence in Burundi states in large, bold-faced print on pages one and three, that it is an "**APPLICATION FOR IMMIGRANT VISA AND ALIEN REGISTRATION**." *See* Gov. Ex. 6 at 1 and 3 (emphasis added). The document itself makes it clear that Defendant was seeking to procure two items: (1) his visa, and (2) his alien registration. Three witnesses -- Agent Larkin, Andrea Lage, and Ms. Bean -- all described the document as an Application for Immigrant Visa ***and Alien Registration*** (emphasis added). *See* Trial Tr. at 33, 1267, and 1397. No additional testimony from Ms. Lage or any other witness was needed to establish the purpose of the Visa/Alien Registration Application, as the plain language of the document and its title make its purpose clear – *i.e.*, that it is used to obtain a visa as well as alien registration. Indeed, this very point was made before the jury by the Court when it explained that "the document says on its face 'Application for Immigrant Visa and Alien Registration.'" *See* Trial Tr. at 1400.

Similarly, the plain language of Government Exhibit 8, Defendant's Alien Registration Card, also speaks for itself. The document has typed on it in large bold-faced and all-caps print that it is an "**ALIEN REGISTRATION RECEIPT CARD.**" From the title of the document, the jurors could logically infer that Defendant received the card as a result of his Visa/Alien Registration Application. In short, Exhibits 6 and 8 speak for themselves.

A court reviewing a Rule 29 motion must afford due respect for the "fact-finding function of the jury," *Evans*, 42 F.3d at 589, and recognize that a jury "may render verdict on facts and common sense inferences from those facts," *Regan-Touhy*, 526 F.3d at 653. Here, the evidence was more than sufficient for the jurors to find a connection between the documents.

Moreover, the Court may take judicial notice that Defendant can only have procured his alien registration by means of his Visa/Alien Registration Application. In deciding a Rule 29 motion, trial courts may take judicial notice of relevant facts. *See, e.g., United States v. Troupe*, 307 Fed. Appx. 715, 717 (4th Cir. 2008) (observing that trial court could have taken judicial notice of facts related to venue to deny defendant's Rule 29 motion). In this case, the Court may take judicial notice that Defendant's Visa/Alien Registration Application led to his receiving his Alien Registration Card by operation of federal law. *See, e.g., Lee v. Bartlett and Co.*, 121 B.R. 872, 874 (D. Kan. 1990) (stating the court should have taken judicial notice of relevant federal statutes). The connection between Defendant's Visa/Alien Registration Application and his Alien Registration Card is set forth in the United States Code; specifically, Title 8, United States Code, Section 1301 directs that no alien shall be issued a visa for admittance into the United States until they have been registered in accordance with Section 1201(b). Section 1201(b) provides that "[e]ach alien who applies for a visa shall be registered in connection with his application." Title 8, United States Code, Section 1304 directs the Attorney General and Secretary of State "to prepare forms for the registration of aliens under section 1301." Section 1304(d) provides that every registered alien will be provided "a certificate of alien registration or an alien registration receipt card." In short, by operation of law, as a result of his approved Visa/Alien Registration Application, Defendant was registered to receive his alien registration receipt card automatically.

Because the evidence presented at trial was sufficient for a reasonable jury to find that the Visa/Alien Registration Application led to Defendant procuring his Alien Registration Card and because alien registration cards were obtained through visa and alien registration applications by operation of law, Defendant's argument should be rejected.

B. The Evidence at Trial Was Sufficient for a Reasonable Jury to Find That the Defendant's False Statement Was Material.

Defendant also claims that the Government failed to prove that the false statements he made on his Visa/Alien Registration Application regarding his residency in 1994 were material. No direct testimony that Defendant's false claim to have been in Burundi rather than Rwanda in 1994 was "material" was required to convict Defendant on Count Two, as the evidence presented was sufficient for the jury to infer that Defendant's false statement that he was in Burundi in 1994 was material to his Visa/Alien Registration Application and, indeed, this is precisely what the jury unanimously found.

A statement is material if the false statement tends to shut off a line of inquiry that is relevant to a defendant's eligibility and which might well have resulted in a proper determination that he be excluded, or if the concealment of the fact or the willful false statement had a natural tendency to influence, or was capable of influencing, the decision maker, *i.e.*, the immigration authorities. *See Kungys v. United States*, 485 U.S. 759, 772 (1988); *Solis-Muela v. INS*, 13 F.3d 372, 377 (10th Cir. 1993) (citations omitted); *Lee v. INS*, 43 F.3d 1483 (Table), No. 94-9508, 1994 WL 651990 (10th Cir. Nov. 18, 1994); *see also United States v. Girdner*, 773 F.2d 257, 259 (10th Cir. 1985) (citing *United States v. Moore*, 613 F.2d 1029, 1038 (D.C. Cir. 1979), and *United States v. Masters*, 484 F.2d 1251, 1254 (10th Cir. 1973)); *United States v. Fredette*, 315 F.3d 1235, 1242 (10th Cir. 2003); *United States v. McIntosh*, 124 F.3d 1330, 1337 (10th

Cir.1997); *United States v. Brittain*, 931 F.2d 1413, 1415 (10th Cir. 1991); *United States v. Allen*, 892 F.2d 66, 67 (10th Cir. 1989). For a false statement to be material, it is not necessary that the decision maker was in fact influenced. *See, e.g., Masters*, 484 F.2d at 1254.

The verdict form asked the jurors, if they found Defendant guilty of Count Two, to mark an X next to which statements they "unanimously find to be materially false statements given by Defendant on his application for Immigrant Visa and Alien Registration, Optional Form 230." The verdict form indicates that the jurors unanimously found that Defendant's statement that he lived in Burundi from 1993 to 1995 was materially false. The evidence adduced at trial provided sufficient facts from which the jury could have reasonably reached that conclusion.

The jury heard evidence that the information contained in the standard Visa/Alien Registration Application was used to determine whether an applicant was eligible to come to the United States or was inadmissible. *See* Trial Tr. at 1266. The jury also heard testimony that a lie on an immigration form, such as the Visa/Alien Registration Application, could lead to a decision that an applicant was ineligible to come to the United States. *See* Trial Tr. at 1268. The testimony established that had an examiner known that Defendant provided a false statement on the form, that false statement could have resulted in Defendant's inadmissibility to the United States. *See* Trial Tr. at 1268.

Further, the jury heard testimony from numerous witnesses describing the genocide that occurred in Rwanda in 1994, the murderous events that occurred in and around Defendant's home village of Birambo, and Defendant's participation in those events. Importantly, the jury heard testimony that persons who participated in the genocide were unqualified for admission into the United States. *See* Trial Tr. at 1267. It was reasonable for the jury to infer, based on the evidence and their common sense, that the false statement about Defendant's residency in 1994

was material for Count Two because it could have shut off a line of inquiry about Defendant's location and activities during the genocide and additional questions that might have been asked by those evaluating and approving Defendant's Visa/Alien Registration Application. Defendant's false statement about living in Burundi in 1994 was essentially an alibi for the genocide, intended to avoid further inquiry about his activities during that time period.

The Government notes that as part of ensuring that all potentially relevant information is disclosed, it recently provided to the defense information obtained during a telephone call with Nancy McCarthy, a consular officer listed on Defendant's immigration application.[2] During the interview, Ms. McCarthy stated that she previously had been a consular officer in Kenya and was in Kenya when the Defendant's Visa/Alien Registration Application was processed. Ms. McCarthy had no recollection of the Defendant and no recollection of having participated in the processing of the Defendant's application. She indicated that when the application paperwork was received in the embassy in Kenya, it would have already been approved by someone in the United States, and that a visa was *per se* issuable provided that the paperwork was complete and there were no concerns. Ms. McCarthy explained that when she received the application paperwork for an applicant, she would typically call the applicant into the embassy, compare the photo in the application with the passport presented by the person, have the applicant sign the biographical statement form, and explain what "sworn" meant. Ms. McCarthy stated that sometimes applicants would be accompanied by a son or daughter, and were allowed to speak

[2] Law enforcement personnel were not present during the telephone call, no memorandum of interview setting forth the information provided by Ms. McCarthy had been prepared, and the Government did not intend to call Ms. McCarthy as a witness because she did not recall Defendant or his application. As part of preparing the instant response, the Government identified Ms. McCarthy's information and the fact that it had not been disclosed previously. The Government's understanding and recollection of the substance of Ms. McCarthy's information has now been provided to the Defense, along with a copy of the contemporaneous notes written by one of the participants to the conversation.

French or Kinyarwanda. Depending on what language the applicant spoke, the process could take about 20 minutes. The Government understands that Ms. McCarthy was not in the habit of probing to assure that the applicant understood any particular question on the application, that the interview would not necessarily be a searching one, and that the interview often did not include reviewing the questions on the form in any detail.

Ms. McCarthy recalled that in September 1994, the embassy received a cable that contained a series of questions about the genocide. Ms. McCarthy recalled the questionnaire was quite long, and that it included questions about ethnicity and whether the person being questioned had participated in the genocide. Ms. McCarthy indicated that it was mandated that the questions were to be asked of Rwandan nationals applying for visas; it was not mandated that the questions should be asked of Burundian nationals. Ms. McCarthy indicated that since the Defendant was a Burundian national, the questionnaire would not have been used for the Defendant even if she knew he was in Rwanda in 1994.

As noted above, it appears that Ms. McCarthy was not the person who approved visas in the first instance, although she may have been in a position to conduct further inquiries of applicants before a visa was actually issued. It is possible that other persons involved in the review and approval process would have asked additional questions had they known Defendant was in Rwanda during the genocide, even if Ms. McCarthy would not have. It is also possible that persons could conclude that the fact that the State Department had created additional questions to be asked of Rwandans concerning the genocide could be interpreted as evidence of a desire to explore fully whether an applicant participated in the genocide. Moreover, to prove that a false statement is material, it is not necessary to prove that a decision maker was, in fact, influenced by the false statement; rather, it is sufficient to establish that the false statement *could*

have prevented a line of questioning. *See, e.g., Kungys*, 485 U.S. at 772; *Masters*, 484 F.2d at 1254. For this reason, that Ms. McCarthy may not in fact have been influenced by Defendant's false statement in deciding whether to ask additional questions does not render that false statement immaterial. And of course, the jury heard testimony that a false statement on the form could have resulted in the Defendant's inadmissibility to the United States. Accordingly, notwithstanding the inadvertent, non-disclosure of Ms. McCarthy's information, there nevertheless was sufficient evidence – particularly when viewed in the light most favorable to the Government – from which a reasonable jury could conclude that the Defendant's false statement about his residency in 1994 was material.

V. CONCLUSION

For the reasons set forth above, Defendant's Motion for Judgment of Acquittal should be denied.

Respectfully submitted,

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Date: August 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I electronically filed the foregoing Government's Opposition to Defendant's Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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