Editor's Note: The opinion of the United States Court of Appeals, Third Circuit in *United States v. Kowalchuk* published in the advance sheet at this citation, 744 F.2d 301–327, was withdrawn from the bound volume because rehearing en banc was granted and opinion vacated.

thirty days had already been imposed on her. Unlike the petitioner in *United States ex rel. Dessus v. Commonwealth of Pennsylvania*, 452 F.2d 557 (3d Cir.1971) *cert. denied*, 409 U.S. 853, 93 S.Ct. 184, 34 L.Ed.2d 96 (1972), on which the magistrate relied, Pringle's sentence was not suspended (in fact, as late as April 1983, the Court of Common Pleas indicated its intent to impose at least a three days jail sentence on Pringle), so that for her, the threat of impending incarceration was clearly present.

Once established, *habeas corpus* jurisdiction cannot be defeated by the commutation or vacation of the petitioner's sentence unless the prior conviction carries with it no substantial collateral legal consequences. *See Carafas v. La Vallee*, 391 U.S. at 238–39, 88 S.Ct. at 1559–60. The magistrate and the district court, however, reasoned that the possibility existed in Pringle's case that if she had not withdrawn her appeal of her sentence, but had been successful in it, a non-custodial sentence could have been imposed. Thus, following this rationale, a federal court could not entertain the petition. While it has been held that the imposition of a non-custodial sentence will defeat federal jurisdiction, *see Wright v. Bailey*, 544 F.2d 737 (4th Cir.1976), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 82 (1977), the circumstances requiring this result are not present here. In *Wright v. Bailey*, the sole penalty provided in the statute under which the petitioner was convicted was a cash fine. No provision for incarceration, even for non-payment of the fine, was contemplated. Accordingly, the court found that the petitioner in question was not "in custody" for the purpose of *habeas corpus* review.

In contrast, the Pennsylvania Disorderly Conduct Statute challenged by Pringle clearly provides for the penalty of imprisonment for up to a year, 18 Pa.Cons.Stat. § 5503(b); 18 Pa.Cons.Stat. § 106 (1973), and thus Pringle remains under a judgment of imprisonment. The trial court's conclusion that a non-custodial sentence might be imposed is mere speculation and is not supported by the fact that both the original and the subsequent sentences received by petitioner involved jail terms of anywhere from three to thirty days. In any event, the possibility of a future non-custodial sentence is irrelevant in view of the fact that Pringle was indeed in custody at the time her *habeas corpus* petition was filed. This was the critical point in time for the purpose of establishing federal jurisdiction.

IV

In conclusion, we find that because Pringle has met the custodial requirement of section 2254 and has adequately exhausted her state remedies with respect to the claims presented in her *habeas corpus* petition, the district court was in error in dismissing Pringle's petition. The district court's judgment of dismissal will be therefore reversed, and the cause remanded for consideration of the merits of the constitutional claims.

UNITED STATES of America

v.

KOWALCHUK, Serge, a/k/a Kowalczuk, Serhij.

Appeal of Serge KOWALCHUK.

No. 83–1571.

United States Court of Appeals, Third Circuit.

Argued April 23, 1984.

Decided Sept. 11, 1984.

Government filed suit seeking to revoke the citizenship of a naturalized citizen on ground that naturalization was procured by concealment of material fact or willful misrepresentation. The United States Dis-

trict Court for the Eastern District of Pennsylvania, John P. Fullam, J., 571 F.Supp. 72, granted the petition and revoked citizenship. Appeal was taken. The Court of Appeals, Aldisert, Chief Judge, held that: (1) the Government failed to establish that the naturalized citizen voluntarily assisted enemy forces during Nazi occupation of Ukraine town; (2) the Government failed to establish that naturalized citizen's responsibilities with the local militia assisted the enemy in persecuting civil populations; and (3) the Government failed to establish that the naturalized citizen's false statements in his visa application about his residence and occupation during the war were misrepresentations of "material facts" sufficient to have denied him a visa.

Reversed and remanded.

Rosenn, Circuit Judge, dissented with opinion.

1. Federal Courts ⇐848

For purposes of applying appropriate standards of review, "basic facts" are those primary or historical facts either elicited from direct evidence or based on recital of external events in question and which depend on credibility of their narrator.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts ⇐843

For purposes of appropriate standards of review, "inferred facts" are factual conclusions either based on circumstantial evidence or drawn from basic facts, but no legal precepts are implicated in drawing permissible factual inferences.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⇐848

For purposes of appropriate standards of review, "ultimate fact" is determination made by trial court upon which liability turns.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts ⇐850

Where either basic facts or facts permissibly inferred therefrom are found by trial court sitting as fact finder, neither may be disturbed on review unless they are deemed clearly erroneous.

5. Federal Courts ⇐754, 850

Factual components of "ultimate fact" are subject to review under clearly erroneous rule, but legal components are subject to plenary review for legal error.

6. Aliens ⇐71(20)

Ultimate findings of trial courts in denaturalization cases may be reversed if, as to legal component, there was error made in identification or application of legal precepts, or if factual components are deemed clearly erroneous when evidence in support thereof is viewed in light most favorable to defendant. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

7. Aliens ⇐71(18)

Narrative facts upon which legal conclusion that naturalized citizen "voluntarily assisted the enemy forces" while working as clerk for local militia during Nazi occupation of Ukraine town were supported by sufficient evidence in record so that they were not clearly erroneous. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a); Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

8. Aliens ⇐71(6)

To allow for denaturalization on ground that naturalized citizen assisted enemy during Nazi occupation of Ukraine town, Government was required to meet its burden of proving that naturalized citizen voluntarily assisted the enemy. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

9. Aliens ⇐71(18)

Government did not meet its high burden of proving by clear and convincing evidence that naturalized citizen's membership in local militia during Nazi occupation of Ukraine town was voluntary so as to support denaturalization. Immigration and

Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

10. Aliens ⇐71(18)

In denaturalization action, district court's factual findings with respect to naturalized citizen's responsibilities with local militia during Nazi occupation of Ukraine town were not clearly erroneous. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a); Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

11. Aliens ⇐71(18)

In denaturalization action, Government failed to establish that naturalized citizen's responsibilities with local militia during Nazi occupation of Ukraine town were of sufficient responsibility to support conclusion that naturalized citizen "assisted the enemy in persecuting civil populations" which would justify revocation of grant of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

12. Aliens ⇐71(7, 18)

To justify denaturalization based on false statements by naturalized citizen in visa application, government must prove, by clear and convincing evidence, that, had undisclosed facts been known, investigation would have been conducted and disqualifying facts would have been discovered. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

13. Aliens ⇐71(18)

Where it was not clear that naturalized citizen's membership in local militia during Nazi occupation in Ukraine town would have precluded issuance of visa, Government failed to establish that citizenship could be revoked for false statements about membership on theory that facts were suppressed which, if known, would have warranted denial of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

14. Aliens ⇐71(18)

Government failed to prove by requisite clear and convincing evidence that, had naturalized citizen divulged his actual wartime residence and occupation on his visa application, investigation would have uncovered facts that would have resulted in denial of visa and, therefore, naturalized citizen's false statements about his residence and occupation during Nazi occupation in Ukraine town did not justify revocation of grant of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

John Rogers Carroll (argued), Carroll & Carroll, Philadelphia, Pa., for appellant; Allison Pease, Philadelphia, Pa., on the brief.

Neal M. Sher, Director, Michael Wolf, Deputy Director, Jeffrey N. Mausner (argued), Kathleen N. Coleman, U.S. Dept. of Justice, Washington, D.C., for appellee.

Before ALDISERT, Chief Judge, and WEIS and ROSENN, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Chief Judge.

This appeal requires us to decide whether appellant Serge Kowalchuk was properly denaturalized in the proceeding below. In making this determination we must examine, under the appropriate standards of review, certain findings of fact and conclusions of law made by the district court. Because we conclude that the government failed to prove its charges against appellant by the requisite degree of certainty, we reverse.

I.

Appellant was born in Kremianec in the Ukraine in 1920, and later moved to Lubomyl, also in the Ukraine. Shortly after the invasion of Russia in 1941, the Nazis overran Lubomyl and took control of the local government. During the period of Nazi occupation, appellant worked as a clerk for the Lubomyl police (also known as the *schutzmannschaft* or militia) and did food distribution work. As a police clerk he occasionally wore a uniform, was aware of the restrictions placed on Lubomyl Jewish residents, and prepared duty rosters for the other militia men which included as-

signing them to patrol the Lubomyl Jewish ghetto. As in other areas under Nazi occupation, the Jews in Lubomyl were persecuted, abused, degraded and eventually killed. During the time in which the Jewish population in Lubomyl was exterminated, however, appellant was receiving special training at a school away from the town at German expense. Further, there was no evidence that appellant performed any militia patrol duties himself or that he was otherwise engaged directly in persecuting the Jewish people.

The dissent, in its rendition of the facts, attempts to paint a much harsher picture both of the Lubomyl militia in general and appellant's wartime activities in particular. We recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during wartime, in enemy territory, over forty years ago. The task is further complicated here because, as noted by the district court, "unlike virtually every other reported denaturalization case, there is in this case not one scrap of documentary evidence relating to the pertinent events." *United States v. Kowalchuk*, 571 F.Supp. 72, 75 (E.D.Pa.1983). In such cases an appellate court should adhere closely to the district court's properly found facts based on that court's determinations of witness credibility.

We note also that no party here has raised any objection to the credibility determinations made below. In light of this, we find it both logically incredible and jurisprudentially disturbing that the dissent dwells on proffered testimony which it claims "described the defendant's direct participation in the murders and brutalities against the Lubomyl Jews," dissent at 317, when it later acknowledges that this precise testimony was found credible "only to the extent that [it] described general conditions in Lubomyl . . .," *id.*, and not for what it said specifically about appellant. What must be remembered is that our concern here is with *evidence* found credible by the fact finder below, not with *testimony* offered. Our concern here is with appellant's conduct, not the general conditions in war-torn Lubomyl, as horrible as they no doubt were.

The dissent also describes at length the auxiliary role in Nazi atrocities played by "indigenous forces." *Id.* at 316. The dissent implies that the Lubomyl militia was exactly such an "indigenous force." While it is undisputed that the Nazis inflicted tyrannical horrors on many local populations, and that some "indigenous forces" aided in the commission of these atrocities, what is of concern here is neither Nazi atrocities *per se* nor the general use of "indigenous forces." What is of concern here is the Lubomyl militia, appellant's role therein, and the effect of that role on his grant of a visa. As stated by the district court below,

> Although the Nazi regime was characterized by meticulous record-keeping, not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl, the existence of a Lubomyl schutzmannschaft, the extent to which indigenous forces were used by the Germans in that area, etc. Both the Soviet Union and the western allies compiled extensive lists of persons suspected of war crimes; the defendant's name has never appeared on any such list. The Ukrainian militia was never listed as a suspect organization.

Kowalchuk, 571 F.Supp. at 77.

In 1944, appellant moved to the West, fleeing the advancing Russian armies, and eventually entered a displaced persons' camp in Austria. Because of his family's ardent and generally well known anti-Communist feelings, he did not wish to return to Lubomyl, then under Soviet control.[1] To

1. The dissent alleges that, as the Russian army approached Lubomyl, appellant and his family "*voluntarily* left with the German military forces." Dissent at 318 n. 6 (emphasis added). The dissent offers no support for such a positive "finding." The district court found this evidence equivocal at best, stating:

> If the defendant's activities [in the Lubomyl militia] had been as innocuous as he claims, there would have been little reason for him to

determine whether he could be classified as either a refugee or displaced person by the International Relief Organization of the United Nations (IRO), he filed a form CM/1. On this form appellant stated that during the war he lived in Kremianec, not Lubomyl, and that he worked as a tailor, not for the Lubomyl militia. He later explained that he lied on his CM/1 form because he was fearful for his family. He did not know where they were and he knew the Soviet Mission would have access to the information on the form. Moreover, he did not wish to be returned to the Soviet Union. Appellant's misrepresentations as to his residence and employment during the war, set forth on the CM/1 form, were transcribed or appended onto his United States visa application. On the basis of the facts alleged in this application, appellant was granted a visa in 1949. He emigrated to the United States and was awarded United States citizenship in 1960.

II.

Based on Russian-source newspaper articles that surfaced after appellant was awarded citizenship, the Department of Justice became aware of appellant's visa application misrepresentations and brought this denaturalization action. The district court, agreeing with at least some of the government's arguments, revoked Kowalchuk's citizenship on three grounds: (1) that as a member of the Lubomyl militia he voluntarily assisted the enemy; (2) that as a member of the Lubomyl militia he assisted the Nazis in persecuting civilian populations; and (3) that he made a willful, material misrepresentation of fact by lying about his wartime residence and employment.

The dissent goes much further than the district court. It argues that appellant made five material misrepresentations: his employment in the Lubomyl militia, his wartime residence in Lubomyl, his special schooling at German expense, his voluntary departure from Lubomyl with the German forces and his membership in the Lubomyl militia. Typescript dissent at 9. Because the dissent fails to explain the difference between membership and employment in the Lubomyl militia, and because we see no difference of significance, we will proceed as though these were substantively the same misrepresentation. As noted above, of these asserted misrepresentations, the district court expressly addressed only those concerning appellant's "residence in Lubomyl and his employment by the town government there during the German occupation." *Kowalchuk*, 571 F.Supp. at 81.

It is not surprising that the district court did not discuss appellant's special schooling or his departure from Lubomyl with the German army as material misrepresentations. First, the court did not find that appellant's leaving Lubomyl with the German army constituted voluntary departure with them. *See supra*, at 304 n. 1. The government does not assert that this lack of a finding was erroneous. Second, as to the special schooling issue, the government argued at trial, not that appellant's failure to disclose it was a material misrepresentation, but that it was "a complete fabrication," designed to provide appellant with an alibi for the time when the Nazis liquidated the Lubomyl ghetto. *Kowalchuk*, 571 F.Supp. at 76. Only the dissent, not the government, asserts either of these two alleged misrepresentations as a basis for affirming the district court's order of denaturalization. Therefore, because the factual predicate for one was not found by the fact finder, because the other runs counter to the government's case in chief at trial, and because the government has not asserted either as an alternative rationale for affirming the district court, we choose not to address either here.

leave Lubomyl with the retreating Germans. It must be admitted, however, that this argument is considerably weakened by the fact that the defendant's parents, at least, had valid reasons for leaving at that time, and it would be quite understandable that the family would wish to remain together. Moreover, flight from the advancing Russian army was a widely prevalent mode of behavior.
Kowalchuk, 571 F.Supp. at 76.

III.

In his appeal, Kowalchuk raises two arguments: (1) that the legal conclusions as to assistance to the enemy, assistance in persecuting civilians, and materiality are in error; and (2) that his due process rights were violated because he was unable to interview favorable witnesses under Soviet control. Because we determine that the legal conclusions of the district court are in error, we will not meet appellant's due process arguments.

In the present case, the government sued to have appellant denaturalized under 8 U.S.C. § 1451(a). This statute provides that a grant of citizenship may be revoked if it was "illegally procured or ... procured by concealment of a material fact ...." For a grant of citizenship to be legally procured, the applicant must have been in the country for at least five years after being lawfully admitted pursuant to a valid visa. 8 U.S.C. §§ 1181(a) and 1427(a)(1). Appellant entered the United States under a visa issued pursuant to the Displaced Persons Act of 1948 (DPA), Pub.L. No. 774, 62 Stat. 1009 (1948), which was enacted by Congress to ease the then existing quota structure and allow for increased immigration of World War II displaced persons into the United States. The DPA included in its definition of persons eligible for entry visas those persons classified as refugees or displaced persons by the IRO. The IRO guidelines excluded from eligibility any person who either "assisted the enemy in persecuting civil populations ..." or "voluntarily assisted the enemy forces ... in their operations against the United Nations." Finally, the DPA provided that anyone who made a willful misrepresentation for the purpose of securing a visa would not be admissible. Therefore, if a person either was not eligible for refugee or displaced person status under the IRO or made a material misrepresentation on his visa application, he could be denaturalized under § 1451(a). *See Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981).

IV.

Denaturalization proceedings operate with two competing interests at stake. On the one hand, a certificate of citizenship is "an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured." *Johannessen v. United States*, 225 U.S. 227, 238, 32 S.Ct. 613, 615, 56 L.Ed. 1066 (1912). And, as the Supreme Court has recognized, there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship:

> Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. As we explained in one of these prior decisions:
>
> > An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress....
> >
> > ....
> >
> > "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it ... and demand its cancellation unless issued in accordance with such requirements."

Fedorenko, 449 U.S. at 506, 101 S.Ct. at 747 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474–75, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1917) (other citations omitted).

On the other hand, however, citizenship is a precious right and, once granted, should be protected against erroneous revocation. Thus, in denaturalization proceedings, Supreme Court teachings make it clear that the government bears a heavier burden of proof than in other civil proceedings. *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943). Further, to set aside a grant of citizenship, the government's evidence must be "clear, unequivocal, and convinc-

ing" and not leave "the issue in doubt." *Fedorenko*, 449 U.S. at 505, 101 S.Ct. at 746–47 (citing cases); *see also United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964). "Any less exacting standard would be inconsistent with the importance of the right that is at stake ...." *Fedorenko*, 449 U.S. at 505–06, 101 S.Ct. at 746–47.

We must keep these interests in mind as we proceed to evaluate appellant's contentions. Yet, before so proceeding, it is necessary that we make reference to the various standards of review where, as in the case before us, the validity of both findings of fact and conclusions of law are questioned.

V.

Consistent with Supreme Court doctrine, this court has previously parsed the elements of the fact/law dichotomy and summarized the appropriate standards of review. We have said that "it is necessary to segregate three distinct concepts which are often implicated in the review of judicial findings. These concepts—basic facts, inferred facts, and ultimate facts—are fundamental to the anatomy of fact finding in the judicial process." *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir.1981). All three concepts are involved in this appeal.

A.

[1] Basic facts are those primary or historical facts either elicited from direct evidence or based on a recital of the external events in question and which depend on the credibility of their narrator. *See Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 445, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.). These facts do not require the application of a legal standard to the historical fact determinations. *Townsend v. Sain*, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963); *see also Cuyler v. Sullivan*, 446 U.S. 335, 341–42, 100 S.Ct. 1708, 1714–15, 64 L.Ed.2d 333 (1980).

[2] Inferred facts are factual conclusions either based on circumstantial evidence or drawn from basic facts. They "are permitted only when, and to the extent that, logic and human experience indicate a probability that certain consequences can and do follow from the basic facts." *Universal Minerals*, 669 F.2d at 102. As with basic facts, however, no legal precepts are implicated in drawing the permissible factual inferences. *See e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 116 (3d Cir.1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). Inferred facts are at times described as circumstantial facts.[2]

[3] Both basic and inferred facts "must be distinguished from a concept described in a term of art as an 'ultimate fact.'" *Universal Minerals*, 669 F.2d at 102. An ultimate fact is a determination made by a trial court upon which liability turns. It may either be "a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S.Ct. 569, 574, 81 L.Ed. 755 (1937); *see also Pullman-Standard v. Swint*, 456 U.S. at 286 n. 16, 102 S.Ct. at 1788–89 n. 16 (1982).

B.

[4, 5] The importance of distinguishing among the three facets of fact finding is reflected in the various standards of judicial review. Where either basic facts or facts permissibly inferred therefrom are found by the trial court sitting as a fact finder, neither may be disturbed on review unless they are deemed clearly erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948); *Universal Minerals*, 669 F.2d at 102; Rule 52(a), F.R.Civ.P.[3] A

2. What we describe as basic and inferred facts have also been described as "subsidiary facts." *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Baumgartner v. United States*, 322 U.S. 665, 671, 64 S.Ct. 1240, 1243, 88 L.Ed. 1525 (1944).

3. As we have stated in *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir.1972):

review of "ultimate facts" on the other hand "is [typically] a mixed determination of law and fact that requires the application of legal principles to the historical facts of [a] case." *Cuyler v. Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). The factual components of the "ultimate fact" are subject to review under the clearly erroneous rule. *Pullman-Standard v. Swint*, 456 U.S. at 286–87 n. 16, 102 S.Ct. at 1788–89 n. 16; *Cuyler v. Sullivan*, 446 U.S. at 342, 100 S.Ct. at 1714–15; *Neil v. Biggers*, 409 U.S. 188, 193 n. 3, 93 S.Ct. 375, 379 n. 3, 34 L.Ed.2d 401 (1972). But its legal components are subject to plenary review for legal error. *Pullman-Standard v. Swint*, 456 U.S. at 286 n. 16, 102 S.Ct. at 1788 n. 16; *Cuyler v. Sullivan*, 446 U.S. at 342, 100 S.Ct. at 1714–15. As the Supreme Court has recently stated, although the clearly erroneous test of Rule 52(a), F.R. Civ.P., "applies to findings of fact including those described as 'ultimate facts' ... [it] does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed question of law and fact ...." *Bose Corp. v. Consumers Union of the United States, Inc.*, — U.S. —, —, 104 S.Ct. 1949, 1959–60, 80 L.Ed.2d 502 (1984). Of particular importance to the case at hand, albeit premised on an analysis of the constitutional issues pertaining to *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), is the Court's conclusion that an appellate court "may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence ..." of the alleged misconduct. *Bose*, — U.S. at —, 104 S.Ct. at 1967.

"In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are 'left with a definite and firm conviction that a mistake has been committed.'" *Speyer, Inc. v. Humble Oil and Refining Co.*, 403 F.2d 766, 770 (3d Cir.1968). It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the fact found by the trial court.

[6] Therefore, we may reverse ultimate findings of trial courts in denaturalization cases if, as to the legal component, there was error made in the identification or application of legal precepts, or if the factual components are deemed clearly erroneous when the evidence in support thereof is viewed in the light most favorable to the defendant. *Schneiderman v. United States*, 320 U.S. at 122, 63 S.Ct. at 1335; *United States v. Anastasio*, 226 F.2d 912, 917 (3d Cir.1955). With these precepts in mind, we turn our attention to reviewing the findings and conclusions reached below.

VI.

We consider first the district court's determination that appellant "voluntarily assisted the enemy forces." This is an ultimate finding, and is a mixed question of law and fact. The legal component, that part of the mix subject to our plenary review, is the question of whether the government met its burden at trial of proving a violation of the statute by clear, unequivocal, and convincing evidence so as not to leave the issue in doubt.

[7, 8] We conclude that the narrative facts, upon which the legal conclusion rests, are supported by sufficient evidence in the record so that they are not clearly erroneous. *Krasnov v. Dinan*, 465 F.2d 1298, 1302–03 (3d Cir.1972). It is essentially undisputed that appellant did work for the Lubomyl militia and that this organization was a component of the Nazi-sanctioned local government. Further, it is a permissible inference to conclude that the militia provided at least some level of assistance to the enemy. But, to prove a violation of the statute and allow for denaturalization, the government had to meet its

burden of proving that appellant *voluntarily* assisted the enemy.

The government argues that because appellant was not forced to work for the militia, his membership therein was, *ipso facto*, voluntary. It rests its case on the testimony of a Mr. Thomas, a United Nations official in charge of immigration eligibility matters during the period in question. Mr. Thomas's recollection was that such voluntary membership would have been sufficient evidence of assistance to the enemy to bar issuance of a visa. Appellant, however, argues that the term "voluntary" means more than mere membership and requires an element of intent-to-aid and purposefulness-of-assistance, neither of which was proven by the government. In support of this, appellant cites the IRO Manual in force at the time which, contradicting Thomas's recollections, indicated that voluntariness requires proof of intent or purpose. Brief for appellant at 24. Appellant also relies on language of the Supreme Court in *Fedorenko*, 449 U.S. at 512, 101 S.Ct. at 750, to support the proposition that "voluntariness" means more than simply membership in the militia or minimal assistance to the enemy.

[9] As we have stated, in a denaturalization case, "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *United States v. Anastasio*, 226 F.2d at 917 (footnotes omitted). Viewing the evidence in this light, we believe appellant's arguments undercut the Thomas testimony and at least raise a substantial question whether membership alone, even if unforced, would have been sufficient to constitute voluntary assistance to the enemy. At a minimum, the government's case on voluntary assistance was inconclusive and not "beyond doubt." Therefore, we conclude, as to the legal component of this ultimate finding, the government has not met its high burden of proof by clear and convincing evidence.

The dissent forcefully disagrees. It argues that membership in the Ukrainian militia would have either led to a presumption of voluntary assistance or constituted grounds for *per se* ineligibility for a visa. Dissent at 319. We consider these to accord with the same rigid definition of "voluntary assistance" advanced by the government at trial. They ignore the facts, found by the court below, that: (1) notwithstanding massive amounts of Nazi record-keeping "not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl [or] the existence of the Lubomyl schutzmannschaft ...," *Kowalchuk*, 571 F.Supp. at 77; (2) "the defendant's name ... never appeared on any ... list" of suspected war criminals compiled by the allies following the war, *id.*; (3) "[i]t is not at all clear that, in 1949, membership in or employment by the schutzmannschaft at Lubomyl would have precluded the issuance of a visa," *id.* at 82; and (4) the government was unable to cite to a single instance, prior to the 1950 amendments to the DPA, where a visa applicant was rejected solely because of his association with the Ukrainian militia, *id.* Therefore, even though the dissent's assertions are based on credible evidence, that is not enough. The law requires the government to prove its denaturalization case by clear, unequivocal, and convincing evidence so as not to leave the issue in doubt. When all the evidence is considered here, a cloud of doubt continues to hang over the government's case.

VII.

We now examine the district court's conclusion that appellant "assisted the enemy in persecuting civil populations." This is an ultimate finding and we are required to observe the same analysis here as we did in reviewing the question of voluntary assistance to the enemy. As with voluntary assistance, we believe that the question of whether the basic facts prove the requisite assistance in persecuting civilian populations is one that implicates a legal component. And here again, the legal precept is whether the government met its high burden of proof.

A.

[10] Appellant argues that he performed only clerical duties for the militia and that he, personally, was not actively involved in any actual persecutions. Here it is important to emphasize the findings of the district court on basic and inferred facts. Specifically, the court found that "defendant was responsible for the distribution of food and other supplies to persons entitled to receive the same by virtue of their employment as part of the local government ...." *Kowalchuk*, 571 F.Supp. at 80. It also found that "defendant did occupy a position of some responsibility with the schutzmannschaft. He had his own office there ...; he typed up and issued duty rosters; he typed the daily reports of police activity, etc. He probably wore a police uniform of some kind, during at least some of his duty hours at the police station." *Id.* at 81. Finally, the court noted "that the evidence is plainly insufficient to constitute clear and convincing proof of defendant's involvement in the massacre [of Lubomyl's Jewish population]." *Id.* These factual findings are not clearly erroneous. *See Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir.1972).

We find it significant that there were no findings that appellant made any substantive decisions in either his food distribution or clerical positions. Although he did distribute food, he did not decide to whom such distribution would be made. Although he typed the duty rosters, which included assigning patrols within the Jewish ghetto, he did not decide who should go on these patrols, when they should occur, or even that they should occur at all.[4] Therefore, although his position in the local militia was "of some responsibility," the responsibility was simply that of a clerk and not that of a decisionmaker. The government does not dispute this but rather responds that this alone is sufficient to prove, by the requisite degree of certainty, that appellant was involved in persecuting the civilian population.

No reported case has yet held this level of involvement to be sufficient assistance in persecution of civilian populations to constitute grounds for denaturalization. The leading Supreme Court case is *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). There, the Court found that a person could be denaturalized where he failed to disclose on his visa application that he had been an armed guard at a Nazi concentration camp. The Court concluded, as a matter of law, that being an armed concentration camp guard constituted sufficient assistance in the persecution of civilians, that, had it been known at the time, would have precluded the issuance of a visa. By way of comparison, the Court speculated that "an individual who did no more than cut the hair of female [Jewish] inmates before they were executed [by the Nazis]" would not have been found to have assisted in the persecution of civilians. 449 U.S. at 512 n. 34, 101 S.Ct. at 750 n. 34. In *United States v. Dercacz*, 530 F.Supp. 1348 (E.D.N.Y.1982), sufficient evidence of assistance in persecution was found where the defendant was a uniformed Ukrainian militiaman who actually went on patrols and rounded up local Jews who violated restrictions. Finally, in *United States v. Osidach*, 513 F.Supp. 51 (E.D.Pa.1981), denaturalization was ordered upon proof that defendant was in the local militia, working as *both* a patrol officer and a clerk/interpreter.

Osidach, at present, represents the lowest level of activity that a federal court has found sufficient to constitute assistance in the persecution of civilian populations. We do not believe that appellant's conduct herein is of the same character as that in *Osidach*. On the other hand, it is not as blameless as the individual, referred to in

4. As noted by counsel for appellant during a colloquy with the bench at oral argument:

> THE COURT: [The district court] did not find then that [defendant] assigned patrols?
>
> MR. CARROLL: Quite the contrary, sir. The evidence was that Mr. Kowalchuk typed the rosters *prepared by someone else.*

Transcript of oral argument at 42 (emphasis added). This was not controverted by the government.

Fedorenko, "who did no more than cut ... hair...." That this case falls in between makes our task all the more difficult.

B.

The horrors of tyranny inflicted upon civil populations in territories controlled by occupying Nazi forces during World War II are so notorious that no citation is necessary. News accounts, official histories, and thousands of articles, dramas, novels, motion pictures, and television documentaries bear witness to this universal tragedy. Although the holocaust suffered by six million Jews is the apogee of Nazi degeneracy, the Nazis did not limit their ruthless murders, tortures, and terror to members of one particular religious faith. It is a matter of record that 20 million Soviet citizens—civilian and military—perished by the sword of the Third Reich. To a lesser numerical extent, Polish, French, Belgian, Danish and Italian civilians were slaughtered by random firing squads as punishment for violating rules of occupying armies.

The atrocities carried out by the Nazis against the general populations of occupied countries is further evidenced in a contemporaneous Czechoslovakian account:

> The German terror ... expressed itself immediately.... From the first day [of occupation] mass arrests began among all classes of Czech society.... And so in the course of not quite two months some 12,000 Czechs found themselves in prison, to remain there for short or long terms; there were among them politicians, journalists, teachers and professors.... The persecution was, however, directed with special emphasis against the supporters of [the pre-occupation government], against judges, Social Democratic politicians and members of factory committees, and finally against officers of the former Czechoslovak army....

Czechoslovak Ministry of Foreign Affairs, *Two Years of German Oppression in Czechoslovakia* 48 (Unwin Brothers Ltd., Great Britain 1941).

To facilitate their abilities to persecute local populations, the Nazis took special interest in the local police departments. The Nazis would, of course, oversee all police activities, maintaining more direct involvement in selected police functions, "especially in the sphere of the secret state police and the criminal police ... while internal security and public order ... [would be left] in principal to be maintained by the ... [local] police...." *Id.* at 32–33. As Nazi occupation continued, their control over the subject areas tightened and the suffering of local populations grew. Additional pressures were applied through the local police and, if the police resisted Nazi directives, pressure was applied directly on them. The Czech experience is, again, instructive. There, "[t]he German ferocity ... cruelly affected the leading officials of the Czech police. As they would not lend themselves to the persecution of their fellow-citizens and would not help in the barbarous treatment of the prisoners, they were themselves arrested and treated with incredible cruelty." *Id.* at 50.

The situation was even worse in the Ukraine than in other occupied areas. Nazi occupation there was particularly exploitive because the Ukraine figured in a long-term, large-scale German colonization scheme. I. Kamenetsky, *Hitler's Occupation of Ukraine* (1941–1944) 35–38 (Marquette University Press, Wisconsin 1956). While this colonization plan, or *Lebensraum*, was pursued throughout Eastern Europe it was applied with particular zeal in the Ukraine where the Nazis

> regarded all slavs as racially inferior, in fact subhuman, and intended to achieve German objectives not by sophisticated tactics, but by sheer brute force.... During the period of German occupation, Ukraine thus became a wretched laboratory ...—[with such experiments as] the mass extermination of the Jews, [and] the deportation and brutalization of Ukrainians—and the German colonization with its inherent feature of enslavement of the inhabitants and the exploitation of the country's resources. Ukraine

> suffered probably more than any other country....
>
> Dmytro Doroshenko, *A Survey of Ukrainian History* 745 (Humeniuk Publication Foundation, Winnipeg 1975). Once the Nazis achieved control in the Ukraine they "launched a dual policy of annihilation of the politically and ethnically undesirable elements and the enslavement of the remainder." *Id.* at 748. As a result of their merciless techniques in pursuit of their goals of domination, "hundreds of thousands of Jews and Ukrainians ... were coldly and systematically butchered by the Nazis because they did not fit into Hitler's 'new order.'" *Id.*

C.

[11] Under this type of relentless pressure, and with the alternatives of arrest, torture, imprisonment, and death staring them in the face, it is hardly surprising that many inhabitants of occupied countries were passively accommodating to the Nazis. Many of these undoubtedly were government workers and civil servants who continued in or assumed government positions under Nazi occupation. Under these circumstances, if this large number of Europeans performed government or other service under Nazi occupation, no reasonable person would conclude that each of them "assisted in the persecution of civil populations" and would, thereby, be forever denied even the possibility of American citizenship. Can we say that the baker who delivered bread to the Lubomyl militia was guilty of assisting in Nazi persecutions? Or the bar maid who served beer in the militia headquarters mess hall? Or the char woman or janitor who cleaned the office where Kowalchuk toiled as a clerk? Or the office machine service man who repaired the clerk's typewriter? A line must be drawn. Although to do so is a very difficult, if not ultimately arbitrary, act, we are required to do so in this case whether we affirm or reverse the district court.

We have decided that we should not extend the *Fedorenko-Dercacz-Osidach* line of cases to the facts presently before us. That the present case would require us to redraw this line at all, that this case falls outside the ambit of previous decisions, is itself persuasive evidence that the proof offered by the government below, that appellant was guilty of assisting in the persecution of civilian populations, was not clear, unequivocal, and convincing and was not so substantial as to "not leave 'the issue in doubt.'" *Fedorenko,* 449 U.S. at 505, 101 S.Ct. at 747. Further, consistent with Supreme Court doctrine, we are required by our own decision in *Anastasio* to resolve all doubts in favor of the citizen. Measured against this standard, we conclude that the government did not meet its high burden of proof on this issue either.

VIII.

This brings us to the question of whether appellant's false statements about his residence and occupation during the war were misrepresentations of "material facts" sufficient to have denied him a visa under the DPA. Although the Supreme Court has determined what constitutes misrepresentations of material facts in a *naturalization* proceeding, it has reserved the question as to what should be the formulation in *visa* application cases: "[W]e find it unnecessary to resolve the question of whether *Chaunt's [Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960)] materiality test also governs false statements in visa applications." *Fedorenko,* 449 U.S. at 509, 101 S.Ct. at 749. In naturalization proceedings the Court has stated that, to prove misrepresentation or concealment of a material fact, the Government must prove by clear and convincing evidence:

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Chaunt v. United States, 364 U.S. 350, 355, 81 S.Ct. 147, 151, 5 L.Ed.2d 120 (1960).

The first prong deals with cases where denial of citizenship could have been premised on the undisclosed information itself. The second prong deals with cases where the undisclosed information would not, in and of itself, justify denial of citizenship but where, had it been known, other facts could have been discovered justifying a denial of citizenship.

[12] What has divided the courts of appeals in visa application cases is not the applicability of *Chaunt*, but rather the import of the second prong of *Chaunt's* denaturalization test. Some courts have held that, in visa cases, the government need only prove that, had the misrepresentation not been made, an investigation would have been conducted which *might* have uncovered facts warranting denial of a visa. *Kassab v. Immigration & Naturalization Service*, 364 F.2d 806 (6th Cir.1966); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir.1961). Other courts, including this one, require more. We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken but that it *would* have uncovered facts warranting visa denial. *See United States v. Riela*, 337 F.2d 986, 989 (3d Cir.1964); *see also La Madrid-Peraza v. Immigration & Naturalization Service*, 492 F.2d 1297 (9th Cir. 1974); *United States v. Rossi*, 299 F.2d 650 (9th Cir.1962). We believe that the most well-reasoned explication of this position is in *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir.1983). That opinion relied on the analysis of *Chaunt* provided by Justice Blackmun's concurrence in *Fedorenko*. There, Justice Blackmun reasoned that to accept a *might* standard would unreasonably dilute the protections established by prior case law. *Fedorenko*, 449 U.S. at 523, 101 S.Ct. 755 (Blackmun, J., concurring). He concluded that, to succeed in a denaturalization proceeding, under either prong of *Chaunt*, the government must prove "the actual existence of disqualifying facts—facts that themselves *would* have warranted denial of petitioner's citizenship...." *Id.* (emphasis added).

The dissent takes issue with us over the proper interpretation of the second prong of the *Chaunt* test and accuses us of misreading *Riela*. It asserts that *Riela* is fundamentally a case covered by the first prong of *Chaunt*. We disagree.

In *Riela*, the defendant entered the United States as a stowaway. He failed to disclose this on his petition for citizenship. When this misstatement was discovered, the government instituted denaturalization proceedings asserting that if Riela did enter the country as a stowaway he would not have entered legally and thus would not have been eligible for citizenship. Because lawful entry is one of the prerequisites for receiving a grant of citizenship to the United States the district court granted the government's denaturalization demand. Lawful entry is, however, an ultimate fact or legal conclusion. The fact that Riela entered the country as a stowaway, although clear evidence supporting a legal conclusion of unlawful entry, is not itself a ground for refusing naturalization. It is the legal conclusion that would justify denial of citizenship. Therefore, although the court in *Riela* did not express which prong of *Chaunt* it relied on, careful analysis shows it was the second. *Fedorenko v. United States*, 449 U.S. 490, 520–21 & n. 4, 101 S.Ct. 737, 754–55 & n. 4, 66 L.Ed.2d 686 (1981) (Blackmun, J., concurring) (accord). Moreover, the majority opinion in *Fedorenko* noted that the district court in that case "rel[ied] on decisions by the United States Court of Appeals for the Third .... Circuit [] ... and interpreted both *Chaunt* tests as requiring proof that 'the true facts would have warranted denial of citizenship.'" 449 U.S. at 502 & n. 20, 101 S.Ct. at 745 & n. 20 (citing *United States v. Riela*, 337 F.2d 986 (3d Cir.1964)).

Even if the dissent's reading of *Riela* were correct, the result we reach here would remain unchanged. The lack of unanimity, both within this panel and among the various courts of appeals that have wrestled with the second prong of *Chaunt*, bears witness to the fact that it is not an opinion whose import is clear on its face.

Chaunt states that denaturalization is justifiable if the applicant failed to disclose some fact and its "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt*, 364 U.S. at 355, 81 S.Ct. at 151. Applied literally, this does not require the government to prove that, had the truth been told, other disqualifying facts would have been discovered. Applied literally, it does not even require the government to prove that, had the truth been told, additional disqualifying facts might "possibly" have been discovered. Applied literally, all the second prong of *Chaunt* would appear to require the government to prove is that, had the truth been told, it "might have been useful" in a subsequent investigation and that the investigation might "possibly lead[ ] to the discovery" of disqualifying facts. Thus read, *Chaunt* would undermine cases from *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943), to *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), which establish that citizenship, once granted, is a precious right; that, in a denaturalization proceeding, the government bears a heavy burden; that it must prove its case by clear, unequivocal, and convincing evidence, so as not to leave the issue unclear; and that, in such cases, all doubt is to be resolved in favor of the defendant. Our research has discovered no case that has ever applied the second prong literally.

Thus, *Chaunt* must be construed beyond the literal meaning of its language. The only significant Supreme Court explication is found in Justice Blackmun's concurrence in *Fedorenko*. There, Justice Blackmun recognized the tension between the "Government's commitment to supervising the citizenship process and the naturalized citizen's interest in preserving his status." *Fedorenko*, 449 U.S. at 522, 101 S.Ct. at 755 (Blackmun, J., concurring). He noted that when "the Government seeks to revoke [a grant of citizenship], the Court consistently and forcefully has held that it may do so only on scrupulously clear justification and proof." *Id.* at 523, 101 S.Ct. at 755. In addressing the second prong of *Chaunt*, Justice Blackmun concluded that it "indeed contemplated only this rigorous standard ...," *id.*, and that under this prong the government "must prove the existence of disqualifying facts, not simply facts that *might* lead to hypothesized disqualifying facts." *Id.* at 524, 101 S.Ct. at 756. Justice Blackmun ended by stating:

> If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.

Id. at 525–26, 101 S.Ct. at 757. We think that Justice Blackmun's analysis is correct. To be consistent with the Supreme Court's prior and subsequent decisions, the second prong of *Chaunt* must be read as requiring proof, by clear, unequivocal and convincing evidence, of the existence of actual disqualifying facts. Thus, the government must prove that, had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered. Turning again to the present case, we must decide whether the government met its "rigorous standard" of "scrupulously clear justification and proof" under either prong of *Chaunt*.

[13] By the district court's own determinations and our discussion in Parts VI. and VII., *supra*, it is clear that the government did not meet its burden under the first prong of the *Chaunt* test. The district court determined that the government had not proved facts, which if known, would have warranted denial of the visa. It declared that "[i]t is not at all clear that, in 1949, membership in ... [the militia] at Lubomyl would have precluded the issuance of a visa." *United States v. Kowalchuk*, 571 F.Supp. 72, 82 (E.D.Pa.1983).

[14] With the first prong of the test eliminated, we turn to the second: if the facts had been disclosed would they have led to an investigation warranting denial?

We have decided that the government failed to prove that appellant's wartime activities constituted either voluntary assistance to the enemy or assistance in the persecution of civilian populations. No additional reliable evidence was presented to indicate that had the misrepresentations not been made appellant's visa application would have been rejected. Therefore, we hold, as a matter of law, that the government has failed to prove by the requisite clear and convincing evidence that, had appellant divulged his actual wartime residence and occupation on his visa application, an investigation would have uncovered facts that would have resulted in the denial of the visa. Bound as we are by this court's precedent, not rejected by the Supreme Court in *Fedorenko*, we do not meet the question of what such an investigation *might* have uncovered.

IX.

Because of the view we take, it is unnecessary to reach the question whether official Soviet restrictions, which precluded the defendant from freely interviewing favorable witnesses in the Soviet Union, amounted to a deprivation of rights under the due process clause.

The judgment of the district court will be reversed and the proceedings remanded with a direction that judgment be entered in behalf of appellant.

ROSENN, Circuit Judge, dissenting.

The majority reverses the district court's decision to revoke the defendant's citizenship. Because I disagree with the majority's characterization of the facts and its application of the law, I dissent.

The district court concluded that the defendant illegally procured his citizenship by entering this country with an invalid visa. It had two separate grounds for this conclusion. First, the defendant was not a genuine refugee of concern to the International Refugee Organization (IRO) and therefore was ineligible for admission under the Displaced Persons Act of 1948 (DPA), Pub.L. No. 80–774, 62 Stat. 1009 (1948). Second, the defendant was ineligible under section 10 of the DPA because he made material misrepresentations to obtain the visa.

The majority rejects each of these independent grounds for revoking the defendant's citizenship. I believe it distorts the district court's finding of fact with regard to the defendant's role in the Lubomyl schutzmannschaft and misconstrues the law of this circuit with regard to the materiality of the defendant's willful misrepresentations.

I.

These revocation proceedings have their genesis in Serge Kowalchuk's activities shortly after the German military forces occupied Lubomyl in June 1941. Within two or three weeks after occupation, the Germans organized the Ukrainian schutzmannschaft.[1] Shortly after, the defendant, then an able-bodied twenty-one year old man, suitable for military service, successfully sought out the collaborating mayor of the city for employment.

His first assignment was to the food distribution center serving government employees and the militia. He apparently was in charge, for the only other employee there was his assistant. In about one and one-half months, he was assigned to the schutzmannschaft headquarters across the street. He worked at the food distribution center in the mornings and at militia headquarters in the afternoons. His services were obviously impressive because, as the defendant himself testified, in August 1942 he was sent elsewhere for special training at no expense to him. He was the only selectee from the Lubomyl area in a class of between 45 and 50. Upon the conclusion of his six months "additional training in local administration," he received a certifi-

1. The Lubomyl militia was officially known as the schutzmannschaft but was interchangeably referred to by the witnesses as the Lubomyl militia or police force. Prior to the schutzmannschaft, Lubomyl had no police force or militia.

cate of completion and returned to his duties with the Lubomyl schutzmannschaft. He now worked full time with the militia.[2]

A.

To fully appreciate the defendant's role with the schutzmannschaft, an understanding of its function and its crucial importance to the Germans in carrying out the policies of the German army in the Ukraine may be helpful. The majority succinctly describes the tyrannical horrors inflicted upon civilian populations in the territories occupied by the Nazi forces. The Germans organized indigenous personnel and formed them into auxiliary bodies. The Lubomyl schutzmannschaft was precisely such a body. These organizations enabled the Nazi forces to carry out their repressive and brutal policies and, at the same time, to wage an aggressive military campaign. As the district court found, "the occupying authorities did rely upon 'indigenous forces,' i.e., segments of the local population, to carry on the functions of government and to enforce the observance of restrictive edicts." *United States v. Kowalchuk*, 571 F.Supp. 72, 80 (E.D.Pa. 1983).

According to Professor Raul Hilberg, an expert produced by the Government at trial, "the availability of an auxiliary force made of Ukrainian personnel was of crucial importance to the Germans, particularly because without them nothing at all could have been accomplished" in carrying out the policies of the German army in the occupied territories. The duties of the indigenous forces included shooting to avoid escapes, performing guard work details, including the guarding of the Jewish ghetto, enforcing the laws and restrictions, arresting violators of restrictive measures and, under certain circumstances, killing Jews. Dr. Hilberg further testified that the sheer numbers of those killed in the liquidation of the Jews required the use of indigenous personnel. As the district court found, the magnitude of the brutal plan to liquidate in one day the 5,000 to 6,000 Jews living in Lubomyl required not only the German soldiers available, but also "significant numbers of Ukrainian militiamen to assist them in escorting the Jews from the ghetto to the execution site, and to prevent escapes." *United States v. Kowalchuk*, 571 F.Supp. at 81.

Qualifications for the Ukrainian militia/police force were political reliability and physical fitness. Its members were given a certain amount of rudimentary training and they ultimately evolved a recognizable uniform. All indigenous police forces throughout the territory occupied by the German forces in the east were under the jurisdiction of Heinrich Himmler. According to Mykola Kowalchuk, the defendant's brother, the police patrolled the streets, public buildings, and the perimeters of the ghetto, carried arms, and guarded the community's Jews on their death march to the brick factory outside the city. There the Jews were executed en masse in October 1942. As the majority opinion notes, "To facilitate their abilities to persecute local populations the Nazis took special interest in the local police departments" and as the Nazi occupation continued, "the suffering of local populations grew. Additional pressures were applied through the local police." At 311.

On this record, the district court found:

> What the evidence does establish with the requisite clarity and conviction is that the Lubomyl schutzmannschaft regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of per-

2. Mykola Kowalchuk, defendant's brother, testified that after his brother's supplemental training the defendant was given additional duties in the militia. Mykola further acknowledged that in his 1981 deposition he testified that his brother at times wore a uniform, as did all the schutzmannschaft.

sons involved in black-market activities or subversive activities hostile to the German occupation forces; and that the defendant was aware of the responsibilities assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization.

... It is apparent ... that members of the schutzmannschaft accompanied the German gendarmes on the many occasions disclosed by the testimony when persons were rounded up for forced labor, or arrested for various supposed infractions; that many of the persons thus apprehended were killed soon afterward; and that members of the schutzmannschaft were present during such executions. Although the evidence does not disclose, with the requisite clarity and conviction, that the defendant personally participated in any of these individual atrocities, the evidence as a whole leaves little doubt that everyone associated with the schutzmannschaft, including the defendant, must have known of the harsh repressive measures which the schutzmannschaft were carrying out pursuant to German direction.

571 F.Supp. at 81.

B.

Upon completion of his special training, including the study of German, the defendant was assigned to full time duties with the militia/police forces, his sole employment until he left Lubomyl. The defendant, as was the case with only the commandant and the deputy commandant, had his own private office. He occupied these quarters for almost three years, the remainder of the German occupation. According to the defendant, his duties consisted of, among others, the preparation of duty rosters for patrol and guard duties for the entire city, including the ghetto. He admitted that he took the names of the militiamen and assigned them to various locations and to the patrol of the ghetto.[3]

The Government presented nine eyewitnesses to the tragic wartime experience in Lubomyl, six of whom were non-Jewish Soviet residents. Except for Getman, who appeared at trial, the others testified by videotaped deposition and all were vigorously cross-examined by defense counsel. All of these witnesses, most of whom had known the defendant before the war, testified that he served in the Ukrainian police in Lubomyl. Two of them, Fedchuk and Kotsura, served in the militia with Kowalchuk and the defendant recalled assigning them to various patrol duties.[4] Fedchuk and Kotsura also identified the defendant as the deputy commandant of the Ukrainian police in Lubomyl.

Contrary to the majority's assertion that "[t]here was no evidence that appellant ... directly engaged in persecuting the Jewish people," typescript op. at 4, many of the eyewitnesses actually testified to specific atrocities and acts of persecution performed by the defendant personally.[5] A number of them described the defendant's direct participation in the murders and brutalities against the Lubomyl Jews.

The district court credited the testimony of these nine witnesses only to the extent that they described general conditions in

3. The defendant testified:
Q: But just to return, is it your testimony that you did assign patrols that went through the Jewish ghetto of the Ukrainian militia?
A: Not only the ghetto but all parts of the city.
Q: Some were assigned specifically to go to the ghetto?
A: The ghetto.

4. Fedchuk and Kotsura were subsequently punished, presumably by the Soviets, for having rendered service in the Ukrainian militia.

5. Getman described in court in detail the role played by Serge Kowalchuk in appearing at the Getman home and ordering Getman's father ontoa truck which removed him to the Jewish cemetery. There, his father was killed. Trimovich, a deposed witness, attended school before the war with the defendant's sister and saw the defendant almost every day before the war. Trimovich testified that, among other atrocities, he personally witnessed in October 1942 the hanging of a Ukrainian woman in front of the Catholic church located near the center of town. He stated that the defendant "kicked out the stool ... from under the feet of this woman."

Lubomyl, including the atrocities and persecutions generally performed by the schutzmannschaft. The district court viewed the testimony of the Soviet witnesses with skepticism because they were made available by and were under the control of the Soviet government. For various reasons, it also discounted the testimony of the three non-Soviet survivors of Lubomyl.

C.

When the Germans retreated from the Ukraine, the defendant elected to flee with them to Czechoslovakia.[6] The defendant and his younger brother, Mykola, ultimately arrived at a displaced persons camp near Salzburg, Austria. After spending four years there, the defendant applied in November 1947 for the necessary clearance certifying that he was a refugee "of concern" to the IRO. To obtain this certification, the defendant executed a required detailed personal history form (the CM/1 form). As the majority notes, the defendant stated on this form that he lived in Kremianec, not Lubomyl, and that he worked there as a tailor. He concealed his service with the militia during the war. The district court stated: "In his CM/1 personal-history form, the defendant intentionally misrepresented and/or concealed his residence in Lubomyl and his employment with the town government there during the German occupation." 571 F.Supp. at 81.

The defendant then took the next step to gain admission to the United States as a permanent resident. For this purpose, he submitted an additional personal history questionnaire, the "fragebogen," together with his IRO documentation, to representatives of the United States Displaced Persons Commission (DPC). After the required investigation, he was duly certified in 1949 as meeting the eligibility requirements of the DPA. He then applied to the vice consul of the United States at Salzburg, Austria, and on December 29, 1949, he obtained a visa for admission to the United States for permanent residence. His petition for naturalization was granted on November 30, 1960, and he was admitted to citizenship.

The fragebogen opened with the admonition that "all questions must be answered and all information must be complete" and concluded with the attestation that "if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States."

Kowalchuk's responses to the fragebogen were false and misleading in the following respects: (1) Once more, Kowalchuk concealed his employment in the Ukrainian schutzmannschaft by falsely stating that he was a tailor's assistant in Kremianec from 1939 to 1944. (2) Again, he concealed his residence in Lubomyl by falsely stating that he had lived in Kremianec from 1939 to 1944. (3) He only listed attendance at a trade school in Chelm, Poland, between 1936–39 and concealed his special schooling in 1942–1943. (4) He concealed his voluntary departure with the retreating German military forces from Lubomyl to Czechoslovakia, by falsely stating that he left his homeland because he was forcibly transported by the Germans. (5) In response to a question concerning membership in any

6. The record in this case leaves no doubt that the defendant departed voluntarily. The defendant testified that he left on the evacuation train with his family. (App. 1335.) His brother, Mykola, testified that they left voluntarily and "there was but two or three families" from Lubomyl on the train. (App. 1170–1171.) Mykola amplified this testimony on cross-examination with the following:

> Q. Sir, on the fragebogen ... is there a section ... in which you said you were forcibly transported by the Germans to Czechoslovakia? You used the words "forcibly transported;" is that correct?
>
> A. Yes.
>
> Q. When in fact, as you previously testified, it was your own choice to go or not to go; is that correct?
>
> A. Yes.

(App. 1173.) In its brief to this court, the Government notes, among other misrepresentations of the defendant, "[he] also claimed that he had been forcibly transported by the Germans (GA 26, 30; Gov't Ex. 15A, ¶ 42) when in fact, as he admitted at trial, he voluntarily left Lubomyl (A 1255)."

political, non-political, or paramilitary organization, he falsely replied "none," thereby concealing his membership in the schutzmannschaft.

II.

To gain lawful admission to the United States for permanent residency under the DPA, the defendant first had to establish that he was a displaced person or refugee of concern to the IRO. *See* DPA, § 2(b). The district court found that the defendant was not "of concern to the IRO" because he "voluntarily assisted the enemy forces," a determination that, under the constitution of the IRO, would have excluded the defendant from eligibility under the DPA as a bona fide refugee or displaced person.[7] The majority challenges that determination.

The majority acknowledges that the district court's determination is "supported by sufficient evidence in the record and [the facts] ... are not clearly erroneous." At 308. However, it then proceeds to exculpate the defendant on the ground that a substantial question remains whether even voluntary membership would have been sufficient to constitute voluntary assistance to the enemy. In reaching this conclusion, the majority has accepted the defendant's argument that the Government must prove the defendant's intent or purpose to aid the enemy.

The Government points to the testimony of Michael R. Thomas, co-author of the *IRO Manual for Eligibility Officers*, who testified, consistent with the *Manual*, that membership in a police force or militia raised a presumption of voluntariness and assistance to the enemy.[8] Furthermore, if an applicant left his home with the retreating Nazis, as this applicant did, he was "not of concern" to the IRO. John Chapin, the American vice consul, testified categorically that persons who served in the Ukrainian police/militia would have been ineligible for a visa. A.P. Conan, the reviewing officer, testified similarly. The applicant could only overcome the presumption against his eligibility by showing that his service was involuntary. This testimony is fully consistent with the *Manual*.

The provisions of the IRO constitution, and the testimony of Thomas, Chapin, and Conan, convincingly rebut the majority's assertion that a substantial question exists whether voluntary membership would have been sufficient "to constitute voluntary assistance to the enemy."[9] At 309.

The district court also found that Serge Kowalchuk "assisted the enemy in persecuting civilian populations," an alternative basis for its conclusion that the defendant was not a bona fide refugee of concern to the IRO. The majority finds fault with this conclusion, again on the ground that the Government did not meet its high burden of proof. The majority engages in fact-finding apparently on the basis of the self-serving statements of the defendant and finds that the defendant made no substantive decisions in rendering his services for

7. Section 2(b) of the DPA, by incorporating the definition of "[p]ersons who will not be [considered displaced persons] contained in the Constitution of the IRO," provided that individuals who "voluntarily assisted the enemy forces ... in their operations against the United Nations" were ineligible for visas under the Act.

8. The Constitution of the IRO. Annex I–Part II. reprinted in Chapter VI of the *Manual*, enumerates categories of persons who will not be the concern of the organization. Section 20 thereof excludes persons who can be shown "to have voluntarily assisted the enemy forces ... in their operations against the United Nations." A reading of sections 22 and 27 reveals that "assistance to the enemy shall be presumed to have been voluntary" by a member of either "the police, para-military [or] auxiliary organisations." Once an applicant has joined one of such organizations, the only answer for an applicant under the language of section 27 is "to disprove the voluntary nature of his enlistment."

9. The IRO Constitution, reprinted in the *Manual* at chapter VI, section 29, provides:

> The motive underlying an act of assistance to the enemy forces is irrelevant, if a person in fact assisted the enemy forces and did so voluntarily he must be assumed to have been responsible for the reasonable and probable results of his acts; an allegation that he was not pro-German so as much as anti-Communist is, even if true, entirely beside the point.

the schutzmannschaft.[10] It therefore finds that the defendant's responsibilities in the Lubomyl police were "simply that of a clerk." [11] The district court, however, found that the defendant "occupied a responsible position ... within that organization," a finding supported by the evidence, even if the Government's eyewitness testimony is ignored. The defendant concedes that he, together with his assistant, made the distributions at the food center. He acknowledged that he assigned Fedchuk and Kotsura to patrol duties. A simple clerk would not have occupied private headquarters on the same level with the commandant and deputy commandant. A simple clerk would not have been singled out from the police force for six months special training at full government expense. As the district court observed:

> It is impossible to avoid the inference that the defendant had found favor with the Nazi occupiers of Lubomyl, and was being trained for even greater service in the future.
>
> If the defendant's activities had been as innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans.

571 F.Supp. at 76. A simple clerk would not have been offered the opportunity for himself and his family to leave for Czechoslovakia with the fleeing Nazis.

Accordingly, I believe that there is no basis for rejecting the district court's findings pertaining to the defendant's assistance to the enemy in operations against the United Nations and in assisting the enemy in the persecution of civilians.

III.

A grant of citizenship may be revoked if it was "illegally procured or ... procured by concealment of a material fact...." 8 U.S.C. § 1451(a) (1982). If all the preconditions to naturalization are not met, citizenship is "illegally procured" and may be revoked. *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981). To obtain a grant of citizenship, an applicant must have entered the United States pursuant to a valid visa. An applicant ineligible under the law may not obtain a valid visa.

Kowalchuk obtained his visa and entered this country under the provisions of the DPA. Congress enacted the DPA "[t]o authorize for a limited period of time the admission into the United States of certain European displaced persons...." DPA, preamble. The Act did not provide that all qualified applicants were to be admitted. In contrast, the Act enumerated certain automatic exclusions from eligibility. Section 10 stated:

> No eligible displaced person shall be admitted into the United States unless there shall have first been a thorough investigation and written report ... regarding such person's character, history, and eligibility under this Act. The burden of proof shall be upon the person who seeks to establish his eligibility un-

10. Fedchuk, who served in the police force with the defendant after a three month training period, testified that Kowalchuk "was the deputy commandant and at the same time, the secretary." The defendant issued instructions to the rank-and-file in the force. Fedchuk further testified that the commandant and Kowalchuk issued the instructions to guard the ghetto. Kotovich, who prior to the war was a schoolmate of the defendant, also testified that Kowalchuk was the deputy commandant. Kotovich described how the defendant ordered his arrest and his beating in the defendant's private office. The district court chose to ignore this testimony and I therefore do not rely on it. Ignoring it, however, does not prove the converse—that the defendant made no substantive decisions.

11. The majority makes comparisons of the defendant's duties in the schutzmannschaft with duties performed by menial servants. Comparisons are generally risky, especially in the complex realm of human behavior. How can one compare, as the majority suggests, *see* op. at 312, a uniformed, specially trained member of an armed paramilitary organization who "occupied a responsible position" as a collaborator over a period of almost three years, with a baker who delivers bread to the militia, or a bar maid who serves beer, or a char woman who cleans the defendant's office. The latter perform menial duties; they hold no position of responsibility—not even membership—in a paramilitary organization engaged in carrying out "harsh repressive measures." 571 F.Supp. at 81.

der this Act. Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.

In this case, it is undisputed that Kowalchuk "willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person." In reversing the district court, however, the majority holds that Kowalchuk's misrepresentations about his wartime activities were not "material." [12] I disagree.

A.

In *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), the Government attempted to revoke the petitioner's citizenship on the ground that he had made several misrepresentations in his application for citizenship. The district court cancelled the petitioner's naturalization, and the court of appeals affirmed. The Supreme Court reversed, finding that Chaunt's misrepresentations were not material. At issue was Chaunt's failure to reveal arrests that were made more than five years prior to the time of naturalization. The Court stated that "[t]he totality of the circumstances surrounding the offense charged makes them of extremely slight consequence," *id.* at 354, 81 S.Ct. at 150, and therefore would not of themselves have provided a ground to deny citizenship. The Court also rejected the Government's argument that had it known of the arrests it might have investigated Chaunt further and might well have discovered a link between him and the Communist Party, explaining that the information that Chaunt had disclosed revealed a more tenuous nexus with the Communist Party than the undisclosed arrests did. *Id.* at 355, 81 S.Ct. at 150.[13] The Court then concluded that the decision to denaturalize Chaunt should be reversed because

> the Government ... failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355, 81 S.Ct. at 150–151.

The Court in *Chaunt* thereby devised a two-pronged test for materiality in denaturalization cases. Under the first prong, the Government must prove that a truthful answer to a question would have disqualified an applicant. In the alternative, the Government may prevail under the second prong. The second prong deals with a situation in which the truthful answer to a question would not by itself disqualify the applicant. The Government may still demonstrate that the misrepresentation is material if it shows that the truthful answer "might have been useful" in an investigation of the applicant "possibly leading to

12. It is worth noting that the statute on its face does not require a "material" misrepresentation to render an applicant ineligible. In *Fedorenko v. United States*, 449 U.S. 490, 507, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981), the Court interpreted the statute to include a materiality requirement. The Court analogized the DPA to the denaturalization statute, 8 U.S.C. § 1451(a) (1982), which authorizes denaturalization for "concealment of a material fact or ... willful misrepresentation." In *Fedorenko*, the Court attached the materiality standard to the DPA even though there was no mention of it in the statute. The DPA was amended in 1952 to exclude any alien who seeks to procure a visa "by willfully misrepresenting a material fact." Immigration and Nationality Act of 1952, § 212(a)(19), Pub.L. No. 82–414, 66 Stat. 163, 183 (codified at 8 U.S.C. § 1182(a)(19) (1982)). The reason for the amendment is stated in H.R.Rep. No. 1365, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.Code Cong. & Ad.News 1653, 1704, and is based on the belief that misrepresentations having no bearing on the material issues involved, such as place of birth or personal data, statements often made under duress to avoid repatriation, should not serve as a basis for exclusion.

13. The Court, however, stated: "Had that disclosure not been made in the application, failure to report the arrests would have had greater significance. It could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355, 81 S.Ct. at 150.

the discovery of other facts warranting denial of citizenship."

In *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), the Supreme Court affirmed the court of appeals' decision ordering Fedorenko's denaturalization. Without deciding the question of whether the *Chaunt* materiality test also governed false statements in visa applications, the Court reasoned: "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.* at 509, 101 S.Ct. at 749.

Since *Fedorenko*, the Eleventh Circuit has applied both prongs of the *Chaunt* test in the context of a visa case in *United States v. Koziy*, 728 F.2d 1314 (11th Cir. 1984). Koziy had failed to reveal in his visa application that he had been a member of the Ukrainian police. In affirming the revocation of Koziy's citizenship, the court of appeals stated:

> The district court found that Koziy never disclosed his membership in the Ukrainian Police Force. It ruled that if he had disclosed his connection with the police force in his visa application, his application would have been rejected outright, or at the least an investigation would have commenced which might have led to a denial of citizenship.... These findings are not clearly erroneous.

Id. at 1320.

B.

In the instant case, had the defendant revealed on December 29, 1949, the day he obtained his visa from the vice consul, the facts which he suppressed, those facts would have warranted the denial of his visa and thereby precluded him from obtaining citizenship. As previously noted, the defendant willfully concealed his voluntary membership and employment in the Ukrainian militia/police force, his attendance at the special training school during the German occupation, and his voluntary departure to Czechoslovakia with the retreating German military forces. Thomas, chief eligibility officer for the IRO in 1948, testified that under its mandate the DPC would only accept refugees who were eligible for IRO assistance. Under the IRO Constitution, he stated, persons who collaborated with the enemy were ineligible for assistance even though they were refugees. If an applicant voluntarily assisted the enemy, "he was not of concern of the IRO." The burden to prove eligibility for IRO assistance was on the applicant, and his CM/1 form became the basic document upon which the field eligibility officer depended. Membership in a police force or militia raised a presumption of voluntariness and assistance to the enemy. Furthermore, according to Thomas, if the applicant left home with the retreating Nazis, he was "not the concern" of the IRO. He also stated that membership in a police force or paramilitary organization made an applicant ineligible for assistance because such activity constituted voluntary assistance to the enemy. The applicant's functions in the police were not important in the determination of eligiblity.

Chapin, American vice consul in 1948 in Salzburg, Austria, testified that the IRO documents, the fragebogen, and the DPC's investigation and report accompanied the application for a visa. The standard procedure in every case was to read the fragebogen. Close attention was paid to the applicant's occupation and residence during the war years and the applicant had the burden under the law of proving eligibility for a visa. Persons who had served in the Ukrainian police or militia would have been ineligible.

Conan, employed by the DPC between 1948 and 1952, served a stint as the senior officer in charge of the Commission's activities for the British zone. He essentially reviewed the eligibility of those whose applications the Commission proposed to reject. He testified that an applicant who had served in the Ukrainian schutzmannschaft would have been rejected unless he overcame the presumption against his eligibility by showing that his service was involuntary and that he had not committed atrocities or persecuted any person on the

ground of religion. Such an applicant would have been rejected even if the Ukrainian schutzmannschaft were not on a list of inimical organizations. Government exhibits demonstrate that applications in fact had been rejected in 1952 by the DPC under section 13[14] of the Act on the ground of such membership. Moreover, Conan stated that applications of a member of the Ukrainian schutzmannschaft *would have been rejected prior to the 1950 amendment of the DPA.*[15]

Whatever the defendant's motivation,[16] the misrepresentations and concealment were material to the IRO's determination in 1947 of whether Kowalchuk was a bona fide refugee and "of concern" to the IRO. They were plainly material to the vice consul's determination in 1948 that declared Kowalchuk eligible for admission to the United States as a permanent resident. The evidence of willful misrepresentation, concealment, and materiality are clear, convincing, and unequivocal. Regardless of whether the defendant personally participated in the atrocities and brutalities committed by the Lubomyl schutzmannschaft, the district court found, even discounting the Government's eyewitnesses to the Lubomyl tragedies, that the "defendant was aware of the responsibilities assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization." 571 F.Supp. at 81. Truthful answers on the CM/1 and the fragebogen would have prevented the defendant from obtaining a visa under the DPA.

14. Section 13 of the DPA provides: "No visa shall be issued under the provisions of the Act to any person who is or has been a member of, or participated in, any Movement which is or has been hostile to the United States...." This section provides another independent ground for ineligibility for a visa in this case.

15. He testified:

Q. Mr. Conan, would a member of the Ukrainian schutzmannschaft have been rejected prior to the amendment of the Displaced Persons Act in June 1950?
A. Yes, he would have been rejected.

C.

Assuming *arguendo* that the defendant's misrepresentations were not material under the first prong of the *Chaunt* test, they were material under the second prong. Under the second prong of *Chaunt*, the Government must prove that the disclosure of the suppressed facts "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151. The majority misconstrues the second prong of *Chaunt* and the case law interpreting *Chaunt*: "What has divided the courts of appeals in visa application cases is not the applicability of *Chaunt*, but rather the import of the second prong of *Chaunt's* denaturalization test.... We [the Third and Ninth Circuits] require the government to prove not only that, had the correct information been available, an investigation would have been undertaken but that it *would* have uncovered facts warranting visa denial. *See United States v. Riela*, 337 F.2d 986, 989 (3d Cir. 1964)...." At 313 (citations to Ninth Circuit cases omitted).

Contrary to the majority's assertions, see op. at 313, there was no actual division in the courts of appeals prior to *Fedorenko*[17] over the interpretation of the second prong of *Chaunt*.[18] In the years following the *Chaunt* decision, the courts of appeals applied the *Chaunt* test. *See La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir.1974) (per curiam); *Kassab v. INS*, 364 F.2d 806 (6th Cir.1966); *United States v. Riela*, 337 F.2d 986 (3d Cir.1964); *United States v. Oddo*, 314 F.2d 115 (2d Cir.), *cert. denied*,

16. The defendant testified that he made the misrepresentations of residence to the IRO to conceal possible retaliation by the Soviets to his parents. However, his brother, Mykola, previously had truthfully stated his residence in Lubomyl to the IRO and the defendant knew this.

17. Except for *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir.1983), all of the cases cited by the majority are pre-*Fedorenko*.

18. Nor has any court of appeals suggested that a different standard applies in visa applications than in denaturalization cases.

375 U.S. 833, 84 S.Ct. 50, 11 L.Ed.2d 63 (1963); *United States v. Rossi*, 299 F.2d 650 (9th Cir.1962); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir.1961). In *Langhammer*,[19] *Oddo*,[20] and *Kassab*,[21] the courts applied the second *Chaunt* test and found that a misrepresentation was material if its disclosure would have led to an investigation that might have uncovered other disqualifying facts. This court in *Riela*, and the Ninth Circuit in *Rossi*[22] and *La Madrid-Peraza*,[23] used different lan-

19. A year after the *Chaunt* decision, the court in *Langhammer* ordered a deportation because an alien failed to disclose membership in the Communist Party in his application. The court rejected Langhammer's argument that the investigation that would have followed the disclosure would have revealed that his membership was involuntary and that he therefore would have been eligible as a quota immigrant. "In essence he [Langhammer] argues that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. We do not believe this to be the law...." *Id.* at 648. The *Langhammer* court thereby emphasized that the second prong in *Chaunt* did not require a showing that the disclosure of all of the facts following a full investigation would have precluded an applicant from obtaining a visa.

20. The defendant in *Oddo* claimed that his failure to disclose a series of past arrests did not justify the revocation of his citizenship because such a record would not have automatically disqualified him from obtaining citizenship. Writing for the panel, then Judge Marshall (later the author of the Supreme Court's opinion in *Fedorenko*) rejected this claim. "Failure to disclose a record of arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization closes to the Government an avenue of enquiry *which might conceivably lead to collateral information of greater relevance.*" 314 F.2d at 118 (emphasis added). The court thereby held that the Government need not prove that an applicant would have been found ineligible had the investigation occurred.

21. The court held that Kassab was subject to deportation since he had procured a visa by "fraud and willful misrepresentation of a material fact." 364 F.2d at 807. Kassab had obtained his visa because he was married to a lawful resident alien. He failed to reveal that his wife had commenced an annulment proceeding. The court cited *Langhammer* and *Chaunt* and held that it need not "be shown that petitioner *would not* have procured his visa if the true facts had been known. It is sufficient that if the fact of the annulment proceeding had been revealed, it *might* have led to further action and the discovery of facts which would have justified the refusal of the visa." *Id.*

22. Rossi had used his deceased brother's name to gain admission to the United States because he believed that the applicable immigration quota was filled and that he could not enter the country in his own name. The Government argued that Rossi's misrepresentations on a visa application justified revocation of his citizenship "without regard to the effect true answers would have had on his application." *Id.* at 651. The court properly rejected the Government's argument, holding that under the *Chaunt* test "proof of Rossi's intentional misrepresentation was not alone enough to divest him of citizenship ... [t]he materiality of the misrepresentation may be determined by the bearing it had upon his right to enter this country...." *Id.* at 652.

The language in the *Rossi* case is very confusing. A careful examination of its holding reveals that it was a prong one case, and not a prong two case. Rossi was asked his nationality and he entered a false response. According to the court, the true answer to the question would either have been material because the applicable immigration quota was filled or immaterial because it was not. There is no suggestion in the case that a truthful answer would have caused any further investigation into Rossi's background. Because the Government apparently did not assert that Rossi's misrepresentation allowed him to evade an investigation, there was no need for the court to engage in prong two analysis.

23. The INS found La Madrid-Peraza to be deportable because she obtained her visa through a misrepresentation in her labor certificate. In her application, La Madrid-Peraza overstated the wages that she was to receive from her prospective job. Under federal regulations, she was not eligible to receive a labor certificate if her prospective job paid less than the prevailing wage rate. Although the Government produced evidence that La Madrid-Peraza overstated her wage rate, there was no evidence that she was actually paid at less than the prevailing rate.

The court cited *Rossi* and reversed the deportation order because the Government failed to show that disclosure of her actual wages would have disqualified her. The court properly applied prong one analysis, citing *Chaunt:* "[T]he Government must prove that if the truth had been disclosed, it would have warranted denial of citizenship." *Id.* at 1298. As in *Rossi*, a truthful answer would not have led the Government to investigate the petitioner further—either it would or would not have disqualified La Madrid-Peraza. Therefore, there was no need for the court to engage in prong two analysis.

The court also cited *Rossi* for the following proposition: "a fact suppressed or misstated is

guage in their applications of the *Chaunt* test. A careful examination of these cases, however, reveals that the reason this difference arises is because the facts in these cases required only *prong one* analysis.

The majority mischaracterizes the law of this court by misinterpreting the *Riela* decision. In 1964, this court applied the *Chaunt* test in *United States v. Riela*, 337 F.2d 986 (3d Cir.1964). Riela arrived in the United States as a stowaway. He filed fraudulent papers of admission and a petition for citizenship concealing his true identity by substituting another alien's name, birthday, place of origin, time of arrival, and travel plans upon arrival. After noting that mere provision of false answers would be insufficient to revoke Riela's citizenship, the court noted that "[t]he false answers given by the defendant were material if they resulted in the suppression of facts which, if known, would have warranted denial of citizenship." [24] *Id.* at 989. The court then examined the record and found that the false answers on the naturalization documents "were material because they resulted in the suppression of facts which, if known, would have barred the naturalization of the defendant because of his obvious failure to meet the statutory requirements.". *Id.* at 989. The court thus held that the misrepresentations were such that, if the questions were answered truthfully, Riela would have been denied citizenship automatically and immediately. Because the truthful answers to the questions on the forms themselves disqualified Riela, an investigation to uncover additional facts was unnecessary. Riela was denaturalized under the first prong of the *Chaunt* test, and the court therefore did not address the second prong, an alternative ground on which to find materiality.

The majority asserts that the proper test under the second prong of *Chaunt* is whether "an investigation would have been undertaken ... that ... *would* have uncovered facts warranting visa denial." *See* op. at 313. The only Third Circuit case cited by the majority for its position is *Riela.* Because *Riela* is not relevant to a discussion of the second prong of *Chaunt*, the majority is compelled to rely on the court's reading of *Chaunt* in *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir.1983). *See* op. at 313. In *Sheshtawy*, the defendant, arrested for concealing stolen property three weeks before his naturalization hearing, failed to make this disclosure on a standard form questionnaire updating his petition for naturalization. In seeking the defendant's revocation of citizenship in *Sheshtawy*, the Government, unlike its position in this case, did not allege or produce evidence pertaining to the existence of any underlying disqualifying facts. At 313. The court in *Sheshtawy*, as does the majority here, relied on Justice Blackmun's concurrence in *Fedorenko.*

The majority's interpretation and the Tenth Circuit's reading of *Chaunt* are in direct conflict with the interpretation that has been consistently applied by five of the circuit courts of appeals. *See Koziy, supra* (11th Cir.1984); *United States v. Fedorenko*, 597 F.2d 946 (5th Cir.1979); *Kassab, supra* (6th Cir.1966); *Oddo, supra* (2d Cir.1963); *Langhammer, supra* (1st Cir. 1961). Until *Sheshtawy*, no court of appeals varied from the standard interpretation of *Chaunt.* Under the second prong of the *Chaunt* test, a misrepresentation is material if its disclosure "*might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151 (emphasis added). The majori-

not material to an alien's entry unless the truth would have justified a refusal to issue a visa." 492 F.2d at 1298. This statement is correct with regard to prong one of *Chaunt*, the relevant test applied in both *Rossi* and *La Madrid-Peraza.* There is no reason to believe that either court intended this language to apply in a case involving the second prong in *Chaunt.*

24. The court's language is almost a verbatim recital of the first prong of the *Chaunt* test. The Government may prevail in a denaturalization case if it proves "(1) that facts were suppressed which, if known, would have warranted denial of citizenship...." 364 U.S. at 355, 81 S.Ct. at 151.

ty's standard is that a misrepresentation is material if as a result of its disclosure "an investigation would have been undertaken ... that ... *would* have uncovered facts warranting visa denial." At 313. The majority has replaced a "materiality" test with an "outcome determinative" test and has thereby transformed, without any plausible explanation, the words "might" and "possibly" to "would." [25]

The majority's interpretation not only conflicts with the language of *Chaunt* and its interpretation by five circuits, but it also strays from the standard legal definition of the term materiality.

> [A] misrepresentation is generally deemed material if it is shown that the correct facts would have had a bearing on the action of a decision maker. The term "materiality" has been given this meaning in the Federal securities laws, the law of torts, and the law of contracts.... Within the immigration laws themselves a similar meaning has been given to statutory materiality requirements. *See Chaunt*....

Castaneda-Gonzalez v. INS, 564 F.2d 417, 431 and n. 29 (D.C.Cir.1977) (citations omitted).

An understanding of the policy behind the DPA also compels a rejection of the majority's proposed test. Indeed, the facts of this very case illustrate the problems with the majority's formulation. The misrepresentation and the accompanying facts in this case are in stark contrast to the inconsequential nondisclosures that Congress and the court have chosen to absolve. The majority does not deny that Serge Kowalchuk willfully misrepresented his wartime activities and that if he had disclosed the truth a further investigation would have occurred. That investigation might have revealed the evidence produced at trial or, for that matter, confirmed the eyewitnesses' testimony of Kowalchuk's personal participation in brutal atrocities.[26] Even the evidence revealed at trial would have raised, at the very least, serious questions in the mind of the vice counsel concerning whether to admit Kowalchuk.[27]

For these reasons, I believe that defendant's willful misrepresentations were material under *Chaunt's* second prong because truthful answers to the questions would have led to an investigation that might have revealed facts raising a substantial question of eligibility.

IV.

In sum, the district court revoked the defendant's citizenship on the following independent grounds: (1) The defendant was not a genuine refugee "of concern" to the IRO and therefore was not entitled to the benefits of the Displaced Persons Act because (a) he assisted the Nazis in persecuting civilians in his role as a member of the schutzmannschaft, and (b) because in such capacity he voluntarily assisted the enemy forces in their operations against the Unit-

25. *Chaunt* stands for the proposition that a misrepresentation is material if its "disclosure might have been useful in an investigation possibly leading to the discovery of other facts *warranting* the denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151 (emphasis added). "Warranting" means permitting or justifying. It does not mean requiring. *See Langhammer*, 295 F.2d at 648.

26. The majority's ruling encourages lying on application forms because no penalty whatever is paid for a misrepresentation. At worst, the majority places Kowalchuk in the same position he would have been had he told the truth, only now the burden of proof is placed on the Government not Kowalchuk. Under the majority's standard, the Government must prove, by clear and convincing evidence, that there was a willful misrepresentation, that an investigation would have occurred, that actual facts existed that would have disqualified Kowalchuk, and that they would have been uncovered.

27. Recently, Judge Tuttle, writing for the court in *United States v. Palciauskas*, 734 F.2d 625 (11th Cir.1984), emphasized that the Government is not required to prove that actual facts existed that would have disqualified the applicant. The court found that the failure of the defendant to disclose his office as mayor was material. It held that the defendant's contention that his position was impotent was for the government authorities to determine on the basis of truthful information in 1949, not for the defendant to decide for himself then, or for the court to decide now.

ed Nations, and (2) The defendant illegally obtained his visa because he made willful material misrepresentations to gain admission to the United States as a permanent resident. I believe that the record fully supports the trial judge's findings and his conclusions. I therefore dissent and would affirm the judgment of the district court.[28]

Joseph F. ECHO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, United States Department of Labor and Benefits Review Board, U.S. Department of Labor, Respondent.

No. 84-3019.

United States Court of Appeals, Third Circuit.

Argued July 17, 1984.

Decided Sept. 14, 1984.

Former coal miner applied for black lung disability benefits. Following denial of benefits by Benefits Review Board, former miner appealed. The Court of Appeals, Adams, Circuit Judge, held that failure to consider relative earnings of mining job, which former coal miner held for 12½ years, and job as a receiving clerk for a clothing manufacturer, where former miner had worked for past 26 years, in determining that employment was "comparable" and that former miner was not entitled to black lung disability benefits was error mandating vacation of judgment and remand for further findings.

Vacated and remanded.

Labor Relations ⇐31

Failure to consider relative earnings of coal mining job, which former coal miner had held for 12½ years, and job as a receiving clerk for a clothing manufacturer, where former miner had worked for past 26 years, in determining that employment was "comparable" and that former miner was not entitled to black lung disability benefits was error mandating vacation of judgment and remand for further findings. Federal Coal Mine Health and Safety Act of 1969, § 401 et seq., as amended, 30 U.S.C.A. § 901 et seq.

Frank L. Tamulonis, Jr. (Argued), Zimmerman, Lieberman & Derenzo, Pottsville, Pa., for petitioner.

28. Because I would affirm the district court, I address the defendant's contention that he was denied due process. He asserts that when his counsel was in the Soviet Union for the depositions of the government witnesses, the Soviet Union denied him the opportunity to visit Lubomyl to investigate or interview potential witnesses. However, as the district court observed, Soviet Russia also imposed the same limitations upon Government counsel. The defendant does not make any claim that he was deprived of any specific evidence or testimony. He makes no showing that any testimony has been excluded that "would have been material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982).

At one point, defense counsel informed the Government that he knew of eighteen witnesses in the Soviet Union whom he would like to call. Yet, he made no request to interview any of them or to depose them. On the other hand, the Government by letter dated March 12, 1980 informed defense counsel that it was requesting permission from the Soviet Union to bring the deposed witnesses to the United States to testify and offered "to make a similar request on behalf of the Kowalchuks that specific witnesses be produced to testify on their behalf." The defense failed to follow through on the Government's offer. Their request to interview witnesses was made only after defense counsel was in the Soviet Union and even then it was made informally. Moreover, the trial court's factual conclusions are based upon the testimony of the defendant and his witnesses or other evidence not inconsistent with that testimony. 571 F.Supp. at 80.

I see no merit to the defendant's due process contention.