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FILE: WAC 02 186 51889 Office: CALIFORNIA SERVICE CENTER Date: **MAY 29 2008**

IN RE: Petitioner:  
Beneficiary:



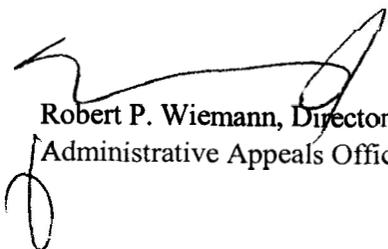
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal and enter a separate finding of material misrepresentation.

The petitioner is a new U.S. office engaged in the sale of Chinese porcelain art. It seeks to employ the beneficiary as its president-chief executive officer, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition based on an April 16, 2002 U.S. Consulate memorandum, which outlined several "fraud indicators" from a February 2002 interview with the beneficiary and a subsequent site visit to the foreign company.<sup>1</sup> Specifically, the Consulate General stated that the beneficiary had limited English skills and was unable to explain operational, management, or marketing plans for the new U.S. operation. The Consulate General also noted that following a visit to the location of the foreign company, the premises were occupied by a separate, but apparently related company, and did not display or identify the name of the beneficiary's foreign employer. In the decision, the director denied the petition, concluding that the petitioner violated section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C).

The petitioner subsequently filed an appeal.<sup>2</sup> The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that the director erred in finding that the petitioner committed fraud or willful misrepresentation in violation of section 212(a)(6)(C) of the Act. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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<sup>1</sup> The petitioner filed a previous nonimmigrant visa petition (WAC0208950887), which was approved by the California Service Center on March 15, 2002, and subsequently revoked on October 14, 2004. Prior to the visa issuance, the beneficiary attended an interview at the U.S. Consulate in Guangzhou, China, which initiated the Consulate's investigation. Counsel for the petitioner stated in a May 9, 2002 letter that the present petition was filed in order to circumvent the delay of re-adjudicating the revoked petition.

<sup>2</sup> Only the petitioner may appeal the denial of an immigrant visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The appeal was filed by [REDACTED], acting as the president and owner of the petitioning corporation. Because [REDACTED] is also the beneficiary of the revoked immigrant visa petition, the AAO will refer to him as the beneficiary throughout the decision.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

Section 212(a)(6) of the Act states that an alien who is an illegal entrant and immigration violator is ineligible to receive a visa and may not be admitted into the United States. Subparagraph (C) of section 212(a)(6), which deals specifically with misrepresentation, further states:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO will first consider whether the "fraud indicators" noted by the consulate in its investigative report, which constitute the director's basis for denial, are material to the grounds for eligibility for a nonimmigrant intracompany transferee classification, as outlined in the regulation at 8 C.F.R. § 214.2(l)(3).

In an August 8, 2002 Notice of Intent to Deny, the director outlined the memorandum from the chief of the U.S. Consulate's Nonimmigrant Visa Unit in Guangzhou, People's Republic of China, in which he noted the following "fraud indicators":

- The applicant was unable to answer questions relating to the cost of operations in the U.S., or the competitiveness of the company;
- The beneficiary has little to no English skills and explained that Americans would be hired to fulfill the company's work requirements;
  - As President of the company, the beneficiary could not elaborate on how he would manage the operation in the U.S. beyond hiring a translator and Chinese-speaking employees;
  - While insisting that a market study had been done, the subject was unable to provide any details regarding the U.S. market demand for his company's products;
  - When asked for a business card from the parent company in China, the beneficiary gave the officer an apparently outdated card with incorrect contact information.

The memorandum also contained the following account of a March 2002 site visit conducted by a consular officer at the address of the foreign company:

The parent company's address is the same as that of another company that is also supposedly owned in whole or in part by the beneficiary. The office itself only displays the name of the other company and has no identifiers as being the headquarters of the parent company listed in the petition. Furthermore, the office itself contained nothing that would demonstrate that the alleged parent company (Shenzhen Saichen Investment Company) is actually operated out of the premises. There were no documents (such as brochures or informational material) or letterhead that listed the alleged parent company.

Additionally, the consular officer noted that a reverse directory search of the petitioner's telephone number indicated that the number belonged to two companies that did not appear to have any business relationship with the petitioning organization.

Relying on the above-referenced memorandum, the director issued a notice of intent to deny. The director found that the petitioner violated section 212(a)(6)(C) of the Act and determined that the beneficiary did not qualify for classification as a nonimmigrant intracompany transferee. The director provided the petitioner with thirty days within which to reply to the director's findings.

In a response to the director's notice of intent to deny, dated August 22, 2002, counsel claimed that the petitioner did not violate section 212(a)(6)(C) of the Act. Counsel denied the findings in the memorandum, and provided the following explanations in response to the outlined "fraud indicators": (1) the beneficiary submitted to the consular officer a budget and business plan for the U.S. entity that he drafted and finalized; (2) the beneficiary acknowledged that while his English was limited, he will be able to perform his specific job duties through a staff of both bilingual and English-speaking workers; (3) the beneficiary's limited English skills prevented him from fully explaining his plan for managing the U.S. company, but "his creation of the U.S. company's business plan and over [twenty] years of experience in business management lend support consistent with his ability to manage operations as indicated in the petition"; (4) although unable to thoroughly articulate the marketing plan, the beneficiary conducted research on the U.S. market, which is outlined in the business plan; (5) the beneficiary presented the consular officer with a business card that noted the foreign company's former address, as it is company policy to use old business cards before purchasing new cards; and (6) previously submitted phone bills confirm the location of the petitioning organization in the United States.

With regard to the location of the beneficiary's foreign employer, counsel stated that in February 2001, the foreign company moved its office to the News Building, office numbers 2507 and 2508, located in Shenzhen, China. Counsel explained that following a joint venture in March 2001 between the beneficiary's foreign employer and Central Electro-Mechanical Investment Company, Ltd., the two offices were converted into one, from which both companies operated. Counsel further explained that for publicity reasons, the name of Central Electro-Mechanical Investment Company was placed on the door of unit 2507, which is more noticeable to the public than the entrance to unit 2508, and that the foreign employer's sign was placed outside the entrance of unit 2508. Counsel submitted a copy of the building's sketch map and office listing, which he claimed verified that the two companies occupied these offices. Counsel stated that the previously submitted office lease and phone bills further substantiate the location of the beneficiary's foreign employer.

Included with the petitioner's response was the following additional documentation: (1) a translated statement from the beneficiary, in which he provided an explanation to the fraud indicators; (2) a sketch map and company listing of the foreign company's office building; (3) copies of a reverse telephone listing search for the petitioning organization; (4) the registration certificate for Central Electro-Mechanical Investment Company, which identifies its office location as room 2507 and 2508, News Building, and indicates that the

foreign company is a 35% shareholder in the organization; and (5) copies of telephone bills from the U.S. company.

In a decision dated September 6, 2002, the director concluded that the letter and documents submitted by counsel in response to the notice of intent to deny were insufficient to overcome the above-listed fraud indicators. The director likewise determined that the petitioner violated section 212(a)(6)(C) of the Act, and consequently denied the petition.

In an appeal dated October 7, 2002, counsel asserts that the petitioner did not violate section 212(a)(6)(C) of the Act. Counsel claims that the director incorrectly concluded that the beneficiary's responses during his interview at the U.S. consulate were sufficient to support a violation of fraud or willful misrepresentation. Counsel states that the director did not clearly identify in his decision any false statements or misrepresentations, and likewise, did not identify whether the misrepresentations are material, such that the beneficiary would be ineligible for the L-1A classification. With regards to each fraud indicator, counsel provides the following: (1) the beneficiary's limited English skills are not material to his ability to run the U.S. company, as is evidenced from the beneficiary's preliminary business activities with the petitioning organization; (2) the beneficiary made no misrepresentations of his ability to work as a manager or executive, and documentary evidence, such as the beneficiary's business plan, budget, and marketing study "rebut the inference that [the] beneficiary . . . was not aware of key aspects of the company"; (3) the "outdated business card and the constancy of the parent company's physical location in China do not appear to support a finding of fraud or willful misrepresentation" as other documents explaining the inconsistencies were submitted; and (4) a reverse directory search of the petitioner's telephone number is immaterial to the determination that the beneficiary is ineligible for classification as a manager or executive. Counsel contends that "[i]f any misrepresentations were made, whether purposely or inadvertently, they do not appear to meet the level of materiality sufficient to render the petitioner ineligible for a L-1A visa."

On review, the record supports a finding that the director's reasons for the denial of the present petition are material and relevant to the eligibility requirements for classification as a nonimmigrant intracompany transferee.

As a threshold question in this matter, the AAO notes that the misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. First, as an evidentiary matter, the misrepresentation may impact the review and adjudication of the visa petition or immigration application. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also, Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Second, a material misrepresentation that is found to be willful under section 212(a)(6)(C) of the Act may make an alien ineligible to receive a visa and ineligible to be admitted to the United States. *See, e.g., Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). Finally, a CIS finding of willful, material misrepresentation may lead to criminal penalties. *See* 18 U.S.C. §§ 1001, 1546; *see also, U.S. v. O'Connor*, 158 F.Supp.2d 697 (E.D. Va. 2001).

With respect to the adjudication of a visa petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). If the director's denial is based on evidence not submitted by the petitioner, the director shall first "notify the petitioner of his or her intent to deny the petition and the basis for the denial," and provide the petitioner with a period of thirty days during which to rebut the evidence. 8 C.F.R. § 214.2(l)(8)(i). Moreover, the evidence upon which the director is relying must be relevant to the eligibility requirements for the visa classification sought by the petitioner, and may not be conclusory, speculative, or equivocal. *See Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) (finding that the observations of a consular officer that are conclusory, speculative, equivocal, or irrelevant to the eligibility requirements for a visa classification cannot serve as a basis for revocation, notwithstanding the petitioner's failure to timely respond to a notice of intent to revoke).

In the present matter, the director based his denial of the nonimmigrant visa petition partly on the consular officer's finding that the beneficiary's foreign employer was not operating out of the premises identified by the beneficiary as the business' location. Upon visiting the supposed site of the foreign company, the consular officer instead concluded that the premises were occupied by a related company, and that the office was devoid of any "identifiers," such as corporate brochures or informational material, that the foreign company used the premises as its office. This finding is relevant to the beneficiary's eligibility as a nonimmigrant intracompany transferee, as it refutes the petitioner's claim that the foreign company is a qualifying organization.

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The record contains the following documentation submitted by counsel with the nonimmigrant petition as evidence that the foreign company is doing business abroad: (1) a translated explanation of the business of the beneficiary's foreign employer, which appears to be from one of the corporation's brochures; (2) a photocopied registration of the beneficiary's foreign employer as a limited liability company; (3) the foreign employer's office lease for the period from December 2000 through December 2002; (4) a photocopied picture of a building, which the petitioner labeled as "Business premises: News Building"; (5) the foreign employer's balance sheet and income statement dated December 2000; (6) photocopied bank statements for accounts held by the foreign employer at two financial institutions; (7) five partially-translated invoices that identify the foreign employer as the "purchaser"; (8) a sales contract identifying a separate company, Jingdezhen Globe China Company, as the seller of goods; and (9) copies of nine bank remittances during the period of August 2001 through November 2001.

In response to the director's request for additional evidence, dated May 24, 2002, counsel provided the foreign employer's financial audit report for year 2001, including an asset and liability balance sheet, benefits and distribution, and cash flow sheet. Counsel also provided the foreign company's organizational chart.

The director issued a second request for evidence on July 11, 2002, in which he asked that the petitioner provide the following evidence that the foreign company is doing business: (1) bank statements for the past twelve months; (2) a translated copy of the foreign company's listing in the telephone directory; and (3) income tax returns for the past two years. In a July 29, 2002 response, counsel submitted the foreign company's bank statements from four financial institutions for varying time periods, a social security verification record for the foreign company, and telephone records. Counsel also submitted a photocopied "sketch map" of the building in which the foreign company is located.

The record as presently constituted does not contain sufficient documentation to refute the director's finding that the foreign company is not operating from its claimed location. As previously noted, this is significant in that there are inconsistencies as to the location from which the foreign company is operating, and whether the foreign company is in fact functioning separate from its holding companies.<sup>3</sup> Following a site visit to the supposed location of the beneficiary's foreign employer, the consular officer determined that there were no "identifiers" that the office was the headquarters for the foreign company. The consular officer noted that the office was identified only as Shenzhen Central Electro-Mechanical Industrial Inc., and that it was devoid of brochures or materials identifying the beneficiary's foreign employer.

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<sup>3</sup> The petitioner stated in a May 10, 2002 letter submitted with the nonimmigrant petition that the foreign employer conducts business investment, domestic trade, and financial consulting through its holding companies.

Although provided with two opportunities, the petitioner failed to submit conclusive documentation that the beneficiary's foreign employer was operating in units 2507 or 2508 of the News Building in Shenzhen, China. While the petitioner provided an office lease and a statement from the beneficiary attesting to the location of the petitioner's office, this evidence is insufficient to overcome the findings of the U.S. consular report. The AAO notes that the lease submitted in response to the director's notice relates to the purported joint venture partner, Jingdezhen Globe-China, Co, and its premises at No. 121 Zhushanzhong Road, Jingdezhen City. (Petitioner's exhibit J4.) The lease does not relate to the offices in question at Nos. 2057 and 2058 News Building. And although the petitioner submitted a copy of the lease for Nos. 2057 and 2058 News Building with the original petition, the lease expired on December 11, 2002, prior to the visit by the consulate investigator. (Petitioner's exhibit 10a.) The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the beneficiary's self-serving, unsupported statement will not be given significant weight in this proceeding. See *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972). Simply asserting on appeal that the office visited by the consular officer displayed the foreign employer's business license and pictures of the parent company's construction projects does not qualify as independent and objective evidence sufficient to overcome the consular officer's allegation that the office was not occupied by the beneficiary's foreign employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Also, the beneficiary's attempt to explain the location of the office entrances in his statement on appeal creates an additional discrepancy. The beneficiary stated that the entrance to office 2507 is more noticeable to the public, whereas office 2508, the unit occupied by the beneficiary's foreign employer, "is located at the corner of the building and is hard to be noticed [sic]." The beneficiary also noted in his statement that "it is not strange to me if on the site visit, the person from the consulate only saw the business plate of Shenzhen Central Electro-mechanical Industrial Inc., and missed the business plate of [the beneficiary's foreign employer]." In fact, a "business plate" for the beneficiary's foreign employer is shown in a photograph previously submitted with the nonimmigrant petition. Rather than being inconspicuous, as explained by the beneficiary, the sign appears to be several feet wide and is located next to two sets of large glass double doors. While the photograph may assist in demonstrating the existence of the foreign employer, it clearly contradicts the beneficiary's allegation that the consular officer could miss the entrance to the foreign employer's office.

It is also noted that the photograph does not display an address or office number of the foreign company. It is therefore questionable whether the photograph is an accurate portrayal of the foreign employer's entrance, and if so, it remains unclear where the office is actually located. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence

pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Furthermore, evidence that the petitioner creates after Citizenship and Immigration Services (CIS) points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, the incorrect address is not a minor discrepancy since it has bearing on the beneficiary's claimed overseas employment and the existence of the petitioner's alleged parent company. Anytime the petitioner fails to resolve the noted errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. *Id.* Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In this case, the discrepancy noted above leads the AAO to conclude that the evidence of the beneficiary's eligibility is not credible.

As an evidentiary matter, the petitioner's failure to resolve the alleged misrepresentation is fatal to this petition. The director's determination that the beneficiary's foreign employer is not operating from its claimed location is relevant in establishing whether the foreign company is doing business as a qualifying organization, as required in the regulation at 8 C.F.R. §214.2(l)(3). As the director satisfied his burden by notifying the petitioner of this discrepancy in both his intent to deny and decision, and the petitioner failed to provide independent objective evidence explaining the inconsistency, the AAO cannot conclude that the foreign company is doing business abroad. Consequently, the director's decision with regard to this issue is affirmed.

The beneficiary's limited English skills and the reverse directory search of the petitioner's telephone listing are not relevant to the eligibility requirements for classification as a manager or executive in a new U.S. office. As correctly noted by counsel on appeal, the petitioner need only demonstrate that within one year of approval of the petition the beneficiary would be employed in a primarily managerial or executive capacity. The director's determination that the beneficiary's limited English skills would prevent his employment in the U.S. as a manager or executive is speculative, and does not warrant the denial of the petition. Additionally, counsel submits on appeal additional documentation establishing the existence of the U.S. business and its correct telephone number. Accordingly, the director's findings on these issues are withdrawn.

The AAO will next address whether the beneficiary's statements constitute a misrepresentation as defined in section 212(a)(6)(C) of the Act, and therefore warrants the beneficiary's inadmissibility into the United States.

As previously noted, section 212(a)(6)(C) states that an alien is inadmissible into the United States if he or she seeks to procure a visa or other documentation for admission into the U.S. by fraud or willfully misrepresenting a material fact. Fraud is considered to be "a false representation of material fact with knowledge of its falsity and with the intent to deceive a consular or immigration officer," which was believed and acted upon by the officer. 9 FAM 40.63 N3 (citing *Matter of G*, 7 I&N Dec. 161 (1956)). A material misrepresentation includes a willfully-made false misrepresentation concerning a fact that is relevant to the alien's visa entitlement. *Id.*

For purposes of the Immigration and Nationality Act, the requirement of fraud or willful misrepresentation is satisfied by a finding that the misrepresentation was "deliberate and voluntary." *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). Proof of an intent to deceive is not required, but rather knowledge of the falsity of a representation is sufficient. *Id.*

In the present matter, the director concluded in his decision that the petitioner violated section 212(a)(6)(C) as a result of the statements made by the beneficiary, which the director concluded to be "fraud indicators."

The AAO notes that the beneficiary signed the Form I-129, Petition for Nonimmigrant Worker, at Part 6, certifying under the penalty of perjury that the petition and the submitted evidence is all true and correct. The Form I-129 also reported the beneficiary's foreign employer as "Shenzhen Saichen Investment Development Co., Ltd." located at News Building, Suite 2507/08, No. 2 Shennan Mid. Road, Shenzhen, PRC. In support of this claim, the petitioner submitted a lease. (Petitioner's exhibit 10a.) A U.S. consular investigation revealed that the beneficiary's purported overseas employer was not located at the claimed address, leading the director to conclude that the petitioner and beneficiary misrepresented the location of the overseas office. As previously discussed, the petitioner and the beneficiary have failed to resolve this finding.

The beneficiary's misrepresentations were clearly material to the petition's approval. The address of the overseas employer tends to prove the beneficiary's overseas employment and the existence of the claimed affiliated company. Both of these facts are essential to the beneficiary's eligibility. See 8 C.F.R. § 214.2(l)(3). If the adjudicating CIS officer had believed that this representation was true, the officer would have likely approved the petition. "[A] concealment or misrepresentation is material if it 'has a natural tendency to influence or was capable of influencing, the decision of the decision-making body to which it was addressed.'" *Monter v. Gonzales*, 430 F.3d 546, 553 (2d Cir.2005) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). The AAO concludes that the beneficiary misrepresented a material fact, specifically the address of his purported overseas employer.

Despite our finding that the beneficiary misrepresented a material fact, the director's conclusion that the beneficiary violated section 212(a)(6)(C) of the Act was inappropriate within the context of her decision on the visa petition. The nonimmigrant visa petition is not the appropriate forum for finding an alien

inadmissible.<sup>4</sup> See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). The director's decision that the petitioner violated section 212(a)(6)(C) is withdrawn.

Instead of finding that the alien violated section 212(a)(6)(C) of the Act, the director needed only show that the petitioner or beneficiary made a material misrepresentation. This finding of fact would then be available for use in future proceedings where the alien's inadmissibility under section 212(a)(6)(C) of the Act would be a material issue, such as adjustment of status, change of status, extension of stay, or removal proceedings. See generally, §§ 240, 245, and 248 of the Act; see also 8 C.F.R. § 214.1(f). Proof that an alien has made a material misrepresentation in the course of applying for an immigration benefit creates a rebuttable presumption that the alien procured or attempted to procure the benefit by means of this misrepresentation. *Emokah v. Mukasey*, --- F.3d ----, 2008 WL 1788268 (2nd Cir.) (citing *Monter v. Gonzales*, 430 F.3d at 557-8). To rebut this presumption, the alien must demonstrate that knowledge of his true circumstances would not have led to the denial of the benefit. *Id.*

Pursuant to section 221(g) of the Act, 8 U.S.C. § 1201(g), a consular officer has the authority to deny an alien a visa or other documentation if it appears from statements in the application or in the papers submitted therewith that such alien is ineligible to receive a visa or such other documentation under section 212, or any other provision of law, or if the application fails to comply with the provisions of the Act, or the regulations issued thereunder. The AAO, as a component office of the Department of Homeland Security, makes no comment on the State Department's finding of misrepresentation under section 212(a)(6)(C) of the Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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<sup>4</sup> However, the prohibition against inadmissibility determinations in petition adjudications does not bar a "finding of fact" regarding fraud or material misrepresentation. Although the visa petition is not the appropriate forum for finding an alien inadmissible, the Administrative Procedure Act (APA) requires that the CIS decision include a statement of findings and conclusions on all material issues of law or fact, which would necessarily include findings of fraud and material misrepresentation. 5 U.S.C. § 557(c). After a CIS officer makes the finding of fraud or material misrepresentation, the alien may be found inadmissible at a later date in separate proceedings.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The director's decision will be affirmed in part and withdrawn in part, and the petition will be denied.

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The AAO finds that the beneficiary submitted a petition containing false statements in an effort to mislead CIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.