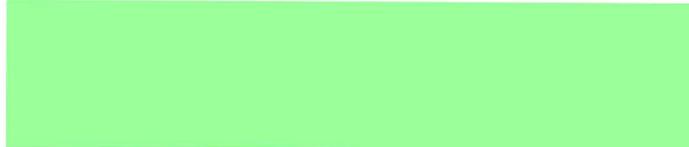


(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

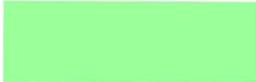


U.S. Citizenship
and Immigration
Services



DATE: OCT 29 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("the director"), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of New Jersey on April 30, 2008. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that its type of business is [REDACTED] and that it employs six personnel. The petitioner reported a gross annual income of \$940,779 and a net annual income of \$61,246 when the petition was filed. It seeks to employ the beneficiary as its president and chief executive manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On December 6, 2012, the director denied the petition based on a determination that the petitioner failed to establish that it had been doing business. Consequently, the director found that the beneficiary is ineligible to be classified as a multinational executive or manager. The director also denied the visa petition with a finding of fraud.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserted that the director failed to provide proper notice of derogatory information and used that derogatory information to deny the petition. To provide the petitioner the opportunity to rebut the derogatory information, the AAO issued a Notice of Derogatory Information (NDI). On September 11, 2013, the AAO received the petitioner's response.

The petitioner claims that the derogatory information, which consisted of false evidence of business transactions, was generated by its employees for their gain and without the knowledge of the petitioner or the beneficiary. The petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to establish eligibility.

I. The Law

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the

United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

II. Procedural History

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on July 19, 2010. In a letter submitted in support of the petition, the petitioner stated that the beneficiary had been employed by [REDACTED] since 2001. The petitioner noted that the foreign entity engaged in document processing, photocopying, design, drawing and related business services and that the beneficiary was the company's proprietor and chief executive officer. The petitioner provided a certified statement signed by an Indian notary certifying that the beneficiary was the sole proprietor of the foreign entity and managed the foreign entity and 13 subordinate employees. The initial record also included a translated copy of a "Certificate of Registration of Shop" signed by the [REDACTED] dated April 19, 2001.

The petitioner also provided its certificate of formation in New Jersey showing that it was established on September 8, 2008, as well as showing that the beneficiary, a proprietor of the foreign entity, is the sole member of the petitioner's limited liability company with a capital contribution of \$10,000. The record also included a ledger showing that the beneficiary, as the foreign entity proprietor, contributed an additional \$229,838 to the petitioner between November 2008 and January 2009. The petitioner claimed that its principal business includes dealing in marketing and export of pre-owned and new photocopiers and related business machines from the United States to India and other Asian countries.

On the petitioner's certificate of formation in New Jersey, the petitioner identified its main business address as [REDACTED]¹ With respect to the petitioner's business location(s), the record included evidence related to the following: purchase of a

¹ The Form I-140 identified the petitioner and the beneficiary's address as the subleased premises in [REDACTED] Maryland. The petitioner periodically refers to its registered address as [REDACTED]

Housing and Urban Development (HUD) single family home in Buffalo, New York in March 2010; purchase of a HUD single family home in [REDACTED] New York in February 2010; lease of premises located in [REDACTED] New Jersey, beginning April 1, 2010; and sublease of premises in [REDACTED] Maryland, also beginning on April 1, 2010. As the director noted, the lease and sub-lease are written in the same font and contain identical terms and conditions, save for the designation of one as a lease and one as a sub-lease. The petitioner also provided its business plan for 2009 to 2011.

The petitioner's organizational chart depicted the beneficiary as the president/chief operating manager directly over the vice-president position. The vice-president is depicted as supervising a marketing manager and an engineering manager. The organizational chart shows that the vice-president, marketing manager, and engineering manager also supervise contractors, professionals, consultants, dealers, and distributors. It appears from the structure of the organizational chart that a financial/legal officer and an assistant officer also report to the vice-president. The petitioner also provided an overview of the duties of the claimed subordinate employees. The petitioner submitted photocopies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2010. Each Form 941 showed the petitioner employing six individuals and the taxable wages reported as \$6,578 and \$6,570, for each quarter respectively.

The petitioner further included a photocopy of an uncertified IRS Form 1065, U.S. Return of Partnership Income, for the 2009 year which showed that the petitioner had gross receipts or sales of \$940,779 and had paid salaries and wages (other than to partners) in the amount of \$3,050. The IRS Form 1065 also shows that the petitioner paid \$22,620 in rent for the 2009 year.

The director, in a request for evidence (RFE), notified the petitioner that the initial evidence presented did not provide sufficient probative evidence to demonstrate eligibility for this visa classification. The director requested, among other things, that the petitioner clarify its business address and provide documents demonstrating the petitioner's premises were zoned for commercial use. The director also requested that the petitioner submit evidence establishing that it had been doing business for at least one year. The director asked that the petitioner provide documentary evidence establishing it had paid contractors and documentary evidence of the compensation paid to its employees. The director further requested evidence of the beneficiary's pay and income.

In response, the petitioner indicated that its administrative and controlling office is located in an apartment at [REDACTED] Maryland and provided a copy of its sub-lease for the premises.² The petitioner stated that its "selling office" is located in a house at [REDACTED] New York. The petitioner attached a photocopy of an April 6, 2011 letter purportedly from the [REDACTED] Licensing Office confirming that a business license or variance was not required for the business activities that the petitioner conducted on the premises. The first paragraph of the letter addressed to the petitioner reads:

Please be advised that currently the [REDACTED] **Office of Licenses** does not license business of marketing used office equipments [*sic*] as stated in the letter of [the

² This is the address on the Form I-140 filed July 19, 2010.

petitioner] who are doing business there at, also variance of purpose from the city is not needed for this usage by them. . . .

The letter is signed by [REDACTED] Office of Licenses. The petitioner stated that it currently employed three individuals at the [REDACTED] New York office and three individuals at the [REDACTED] Maryland office. The petitioner claimed that the employees "may be kept rotated, according to need of the hours" and that all the employees are full-time and permanent.

The petitioner also submitted two invoices: (1) a March 14, 2011 invoice from [REDACTED] a Pennsylvania company, addressed to the petitioner at the [REDACTED] Maryland address which billed the petitioner \$53,125 for 125 assorted copiers; and (2) a March 11, 2011 invoice from the petitioner for the sale of 90 copiers to [REDACTED] in New York for \$46,950. The record also included an April 3, 2011 letter signed by the president of [REDACTED] claiming that it regularly purchased equipment from the petitioner, noting that it had purchased \$112,134 worth of equipment in 2011.

The petitioner's photocopy of an uncertified IRS Form 1065, U.S. Return of Partnership Income, for the 2010 year showed the company had gross receipts or sales of \$1,618,022 and had paid salaries and wages (other than to partners) in the amount of \$32,866 and rent in the amount of \$26,325. The petitioner also provided an IRS Form 1099, Miscellaneous Income, issued by the petitioner to [REDACTED] a company located in Pennsylvania, for \$11,256. The petitioner provided copies of its IRS Forms W-2, Wage and Tax Statement for 2010. The Forms W-2 were issued to: (1) the beneficiary in the amount of \$14,560 at the [REDACTED] Maryland address; (2) the individual in the position of accountant in the amount of \$2,260 at the [REDACTED] Maryland address; (3) the individual in the position titled marketing manager in the amount of \$2,490 at a different address in [REDACTED] Maryland; (4) the individual in the position titled finance/legal officer in the amount of \$2,450 at a [REDACTED] Maryland address; (5) the individual in the position labeled superintending engineer in the amount of \$2,390 at a [REDACTED] Maryland address; and (6) the individual in the position labeled vice-president in the amount of \$2,138 at an address in [REDACTED] New Jersey. The wages paid for the 2010 year as reflected on the Forms W-2 totaled \$26,288; or \$11,728 excluding the wage paid to the beneficiary as a member of the company.

On December 5, 2011, the director issued a Notice of Intent to Deny (NOID) the petition. Among other things, the director advised the petitioner that it is unclear how the petitioner conducted business out of the residential addresses, given its need for the accommodation and storage of new and used office equipment. The director questioned the validity of the petitioner's lease agreements as the forms were identical in format even though the documents were for locations in different states. The director also noted that the petitioner's six employees earned the majority of their 2010 income in the month of June and that the wage compensation detailed did not support the petitioner's staffing levels as described. The director noted further that the petitioner had not provided evidence explaining the miscellaneous income payment to Supreme, Inc. as denoted on the IRS Form 1099. The director requested certified tax records as well as evidence establishing the petitioner's actual staffing level, utilization of contractors, professionals, consultants, dealers and distributors. The director requested probative evidence to establish that the petitioner is conducting business and had

been conducting business for at least one year prior to filing the instant petition on July 19, 2010. The director advised the petitioner that failure to rebut the derogatory information in the file could result in a finding of fraud or misrepresentation.

In response to the NOID, the petitioner stated that it used the services of [REDACTED], an inventory management firm, so it did not require a large space to store or process the inventory it purchases and sells. The petitioner provided a diagram of how it purchased and sold inventory with explanatory steps of how it conducted business. The petitioner provided a copy of its May 27, 2010 contract with [REDACTED] wherein [REDACTED] as the service provider included its scope of services to the petitioner. The scope of services included inspecting used copiers and similar business machines, ascertaining cost of refurbishing and repairing the inventory identified for purchase by the client, providing expert personnel to carry out the refurbishing and repair with full supervision, safekeeping the inventory, providing transportation services, providing unskilled workers to carry out refurbishing and repair with full supervision, providing expert opinions on purchase transactions, and providing parts for refurbishing and repair.

The petitioner explained that it had offices in various geographical locations to reduce inventory acquisition cost and provide better customer service. The petitioner reiterated that its business premises were used to manage or administer the business rather than for storing inventory. The petitioner provided Excel printouts for its claimed sales and purchases for the 2009 and 2010 years, and for the first 11 months of the 2011 year. The petitioner also provided a list of companies from which it purchased used copiers and to which it sold used copiers in 2010 and 2011.

The petitioner provided documentary evidence of only one completed transaction to support its claim that it purchased and sold inventory. The documentary evidence of this transaction included correspondence among the petitioner, [REDACTED] and [REDACTED]. The correspondence showed: that the petitioner purchased 90 copiers from [REDACTED] inspected and shipped the 90 copiers on the petitioner's behalf; and the 90 copiers were resold to [REDACTED]. In the correspondence the petitioner included: a March 2, 2011 letter from [REDACTED] of [REDACTED] thanking the petitioner for its inquiry regarding used copiers which had an attached list of [REDACTED] inventory; a March 4, 2011 letter addressed to [REDACTED] from the petitioner's engineering manager requesting that [REDACTED] let its agent inspect [REDACTED] inventories and once a final inspection report from [REDACTED] is received confirm the order; a March 7, 2011 letter from the petitioner to [REDACTED] agreeing to purchase 90 copiers; and an invoice from [REDACTED] to the petitioner for the sale of the copiers. According to this documentation, [REDACTED] charged the petitioner a total of \$10,465 for refurbishing services and service fees, and an additional \$4,410 as reimbursement for shipping charges. It is noted that the payment requested by [REDACTED] for its services related to this single sales transaction exceeded the total payments the petitioner made to [REDACTED] in 2010.

In addition, the petitioner submitted two ledgers which summarized the petitioner's purchase transactions with [REDACTED] in 2010 and 2011. According to these ledgers, the petition made 12 purchases from [REDACTED] in 2010, totaling \$222,231, and made eight purchases through November 2011, totaling \$166,374.

The petitioner's response to the NOID included a similar description of the beneficiary's duties adding the allocation of time to each of the individual duties. The petitioner indicated that the beneficiary supervised five employees, three of whom are managerial or supervisory employees. The petitioner provided notarized copies of its IRS Forms 1065 for the 2009 and 2010 years and explained that although it had requested and paid for certified copies of these returns from the IRS, the IRS had not yet provided them.

Upon review of the petitioner's rebuttal to the NOID, the director determined that the petitioner failed to resolve the discrepancies in the record. The director concluded that the petitioner's use of an apartment and single family residences for its business operations was not supported in the record. The director also noted that the record did not support the petitioner's employment of full-time staff as claimed.

The director also informed the petitioner that [REDACTED] confirmed to United States Citizenship and Immigration Services (USCIS) the following information: that it did not have a business relationship with the petitioner; that the letter from [REDACTED] is not written on its company's letterhead and the signature does not belong to [REDACTED] thus the letter was fabricated; and that the invoice allegedly prepared by [REDACTED] is not in a format used by [REDACTED]. The director determined that the petitioner, accordingly, had submitted fraudulent evidence to show that it had been conducting business. The director determined that the petitioner had not submitted evidence establishing that the beneficiary is eligible to be classified as a multinational executive or manager. The director also found that the petitioner had filed a petition and submitted falsified documents in order to obtain a benefit under the Act through fraud and misrepresentation of a material fact. The director denied the petition with a finding of fraud.

On appeal, the petitioner asserted that the director failed to give it proper notice of derogatory information and used that derogatory information to deny the petition. The petitioner contended that the director "jumped on to the alleged conclusion" without considering the other evidence in the record, such as: the fact that the purchased material from [REDACTED] was handled by a third party; the reported transactions in the petitioner's certified/notarized tax returns; and the banking transactions.

The petitioner also provided its response to the derogatory information regarding the [REDACTED] transaction. The petitioner submitted "its finding and results of investigation into the purchase transaction with [REDACTED]." The petitioner stated that it had "purchased inventories in question from said [REDACTED] through intervention of an intermediary who sourced the goods for us, taken the delivery from the [REDACTED] on [its] behalf and the [sic] delivered the so purchased inventory directly to [its] customers." The petitioner alleged that its initial investigation revealed that the intermediate broker, an independent contractor, purchased the goods from various sources cheaper than what was invoiced to the petitioner through [REDACTED] "impugned" invoice, passing on a higher purchase price to the petitioner. The petitioner averred that it did not establish "personal contact with said [REDACTED]." The petitioner also contended that no other invoices or purchase or sales transactions were found to be false, fabricated, or fraudulent.

The petitioner further asserted that the director erred in law and fact in denying the petition with a finding of fraud. The petitioner asserted that the record includes corresponding reported sales of the same inventory; banking transactions for the purchase and corresponding sales documents proving handling of purchase inventories and delivery of goods by a third party directly to the petitioner's customers and money received from the customers; sales and purchase registers; financial statements; income tax statements; and books of accounts. The petitioner did not submit further documentation but rather asserted that the current record is sufficient to establish eligibility.

As the director did not issue a second NOID informing the petitioner of the derogatory information USCIS had received from its contact with the [REDACTED] representative, the AAO issued an NDI in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i). The AAO repeated the information the director had obtained from the [REDACTED] representative regarding the letters allegedly sent by [REDACTED] to the petitioner.

In a rebuttal, dated September 9, 2013, the petitioner claims that it "was defrauded by couple of its employees by colluding with other independent service provider i.e. [REDACTED]. The petitioner asserts that two of its employees purchased inventories from sources other than [REDACTED] at a lower price and then reported that the inventories had been purchased from [REDACTED] at a higher price and doctored the invoice allegedly from [REDACTED]. The petitioner states that the checks drawn in favor of [REDACTED] "were found to have discounted by these duo and new instruments have used to pay the actual vendors." The petitioner attached a "Special Investigations Report" allegedly prepared by [REDACTED] dated September 4, 2013. The report is not on letterhead, is not signed, and does not identify the names of the fraud investigators or provide their contact information. The petitioner did not provide a copy of an agreement employing [REDACTED] did not provide invoices received from [REDACTED] for its services, and did not provide evidence that it had paid [REDACTED] for its services.

The petitioner asserts that based on the Special Investigations Report: (1) it cannot be concluded that the petitioner had not actually received and sold the used copiers covered by the Southwest invoice; (2) the fabricated [REDACTED] invoice "does not distort the purchases of the said copiers but only revealed the fraud by [the petitioner's] employees"; (3) the financial statements and balance sheets still reflect the correct and submitted position; (4) the certified tax returns have not been proven false or otherwise incorrect; and (5) banking records show the stated payments for the "impugned purchases" have been made by the petitioner.

III. The Issues on Appeal

A. Doing Business

The first issue is whether the petitioner has provided sufficient evidence that it was doing business for one full year prior to filing the instant petition.

Section 204.5(j)(3) requires as initial evidence in pertinent part:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

(D) The prospective United States employer has been doing business for at least one year.

Section 204.5(j)(2) defines doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petition in this matter was filed July 19, 2010; accordingly, the petitioner must establish that it has been doing business for at least one year or since July 19, 2009. Despite the director's request in the RFE and in the NOID for the petitioner to establish it had been doing business for one year prior to filing the Form I-140 petition, the petitioner provided no probative evidence, other than its uncertified, self-prepared IRS Form 1065 tax return for 2009 to establish this fact. The petitioner stated in response to the NOID that it had requested certified copies of its Forms 1065 from the IRS in December 2011, but failed to provide certified tax returns with its appeal filed in December 2012, over one year later. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). The petitioner's lack of certified tax returns from the IRS creates a presumption of ineligibility. The only other information in the record regarding the last half of the 2009 year is the petitioner's self-prepared Excel statement. Said statement is not supported with any documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner's response to the RFE included evidence that the petitioner had sub-leased premises in an apartment complex in [REDACTED] Maryland for its administrative offices on April 1, 2010. The response also indicated that the petitioner had purchased a HUD single family residence on March 10, 2010 for its "selling office." The petitioner does not provide any evidence of the properties it allegedly rented for \$22,620 for the 2009 year as denoted on its uncertified IRS Form 1065.³ The

³ The petitioner's initial claimed place of business, [REDACTED] New Jersey, appears to be an [REDACTED] a location that provides shipping and mailbox services for FedEx and UPS. This same address is listed on the petitioner's IRS Forms 1065 for the 2009 and the 2010 year. See [REDACTED] See also <https://maps.google.com>. As noted earlier, the petitioner also sometimes refers to its place of business as [REDACTED] New Jersey.

petitioner does not provide any evidence of where or how it conducted business prior to March or April of 2010.

The petitioner's claim that it employed five individuals, other than the beneficiary, is supported only by IRS Forms 941 for the first and second quarter of 2010 and IRS W-2s for 2010. These forms do not establish that the individuals were employed prior to 2010 or full-time for the 2010 year.⁴ Moreover, the wage and salary information reported on the petitioner's 2010 IRS Forms W-2, Forms 941, and Form 1065 is inconsistent. 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. 582, 591-92 (BIA 1988).

The petitioner submitted photocopies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2010. Each Form 941 showed the petitioner employing six individuals and the taxable wages reported as \$6,578 and \$6,570, for each quarter respectively.⁵ Accordingly, the total in salaries and wages paid the first and second quarters of 2010 is \$13,148; however, the Forms W-2s submitted for 2010 show the petitioner paid a total of \$11,728 in salaries and wages excluding the income paid to the beneficiary as a partner of the limited liability company. Further, the uncertified Form 1065 for the 2010 year shows \$32,866 was paid in salaries and wages (other than to partners). The record does not include consistent, probative evidence that the petitioner employed individuals to carry out the petitioner's business in the six months immediately preceding the filing of the petition. The petitioner's claim that it used contractors is supported only by an IRS Form 1099 for 2010 in the amount of \$11,256 and a contract entered into with the recipient of the Form 1099 on May 27, 2010, approximately two months prior to filing the petition. The record does not include probative evidence that the petitioner utilized the services of other contractors prior to May 27, 2010.

The petitioner has submitted no invoices or other documentary evidence to establish that it conducted business by regularly, systematically, and continuously providing goods and/or services in the latter half of 2009. The limited information provided to establish that the petitioner had been doing business in 2010 prior to filing the petition does not establish that the petitioner's conduct of business was regular, systematic, and continuous. The Excel printouts for the petitioner's claimed sales and purchases for the 2009 and 2010 years are not supported by probative documentary evidence. Without supporting documentary evidence, the petitioner has not met its burden of proof. *Matter of Soffici, supra*. The petitioner's "business plan" covering the years 2009 – 2011 is insufficient to establish that the petitioner's plan came into fruition. Accordingly, the record in this matter does not include sufficient probative evidence to establish that the petitioner conducted business, as that term

⁴ The petitioner's uncertified IRS Form 1065 for 2009 showed the petitioner had paid salaries and wages (other than to partners) in the amount of \$3,050. However, the petitioner does not provide a copy of a certified Form 1065 showing it was actually filed with the IRS and does not provide copies of W-2s or other probative evidence establishing that these salaries and wages were actually paid and to whom they were paid.

⁵ The Forms 941 do not identify the employees paid by name.

is defined in the regulations, for one year prior to filing the petition. The record is simply deficient in this regard. For this reason, the petition may not be approved.

Moreover, we observe that the director provided the petitioner opportunity on two occasions (in the RFE and in the NOID) to provide evidence that it had been conducting business for one full year prior to filing the petition. The petitioner failed on both occasions to provide probative evidence of its conduct of business in the year prior to filing the petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). We also find that the director emphasized the petitioner's failure to provide probative evidence that it was doing business and denied the petition based on those stated reasons.

B. Finding of Fraud/Willful Misrepresentation

The second issue in this proceeding is whether the director properly entered a finding of fraud.

The director's decision gave notice of derogatory information found regarding the petitioner's conduct of business in 2011, specifically, the documentation purportedly memorializing its business dealings with [REDACTED] which was submitted for the first time in response to the NOID. As discussed above, the petitioner's response to the NOID failed to adequately rebut the director's initial findings that the petitioner was not doing business for one year at the time the petition was filed, and the director had sufficient grounds to deny the petition on that basis alone.

However, the petitioner correctly asserts that the director should have issued a third notice to the petitioner advising of the derogatory information that came to light when USCIS attempted to verify the validity of the claimed transaction between the petitioner and [REDACTED] prior to entering a finding of fraud. *See* 8 C.F.R. § 103.2(b)(16)(i). Also as noted above, the AAO remedied the director's error by issuing an NDI, repeating the information the director had obtained from the [REDACTED] representative regarding the letters allegedly sent by [REDACTED] to the petitioner. The AAO also attached copies of the documentary evidence the petitioner had submitted in response to the NOID regarding the claimed transaction for the petitioner's review.

The petitioner submitted a rebuttal to the AAO claiming that it was a victim of fraud perpetrated by two of its employees and a third party contractor, [REDACTED]. The petitioner attached a Special Investigations Report allegedly prepared by [REDACTED] dated September 4, 2013 to support its claim that the petitioner and the beneficiary were unaware that the petitioner's employees had not purchased merchandise from [REDACTED] and that the invoice and letter from [REDACTED] were not legitimate. The petitioner asserts that as it was unaware of its employees' duplicitous actions, it cannot be proven that it did not receive and sell used copiers that are listed on the doctored [REDACTED] invoice. The petitioner also contends that the "certified tax returns" have not been proven false or otherwise incorrect. Accordingly, the petitioner contends that the derogatory information has been rebutted.

Upon review of the director's decision, we find that the director erred when determining that the petitioner's submission of fabricated documentation provided sufficient grounds for a finding of

fraud. A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that an individual alien sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the alien is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

Misrepresentation. – (i) In general. – 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.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. t 288.

An immigration officer will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The director determined that the petitioner had submitted fraudulent evidence that it had been conducting business. First, as previously discussed, the petitioner submitted a letter and an invoice from an independent company, which were confirmed to be patently false. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the submission of fabricated letters in support of an I-140 visa petition constitutes a false representation to a government official.

As noted above, the petitioner, in its initial response to the director's decision, indicated that it had investigated the purchase transaction with [REDACTED] and found that [REDACTED] an independent contractor, had falsified the [REDACTED] invoice and had passed on a higher purchase price. The petitioner stated that it did not have personal contact with [REDACTED] but instead had relied on its intermediary, the independent contractor. The petitioner also complained that the director had not provided the documentation upon which he had relied when finding that the petitioner had submitted falsified documents.

When informed by the AAO that the letters the petitioner itself had submitted showed the petitioner had contact with [REDACTED] the petitioner changed its claim and placed blame for the preparation of the fabricated letters on two of its alleged employees. As observed above, the petitioner provided a Special Investigation Report allegedly prepared by an independent firm, [REDACTED] to establish that it had been the victim of fraud. However, the report is not on the investigative firm's letterhead and does not include any signatures. The report does not identify the fraud investigators by name or provide their contact information. Moreover, the petitioner did not provide a copy of any agreement establishing that it hired [REDACTED] for its services. The petitioner did not provide invoices received from [REDACTED] for its services and did not provide evidence that it had paid [REDACTED] for its services. Accordingly, the record does not include evidence substantiating the independence of the report. Without documentary evidence supporting the independence of the report, the report is not probative in establishing that the petitioner was a victim of fraud by two of its employees and a third party intermediary. *Matter of Soffici, supra*.

The record does not include documentary evidence substantiating that the two claimed employees who allegedly concocted the fraudulent scheme were employed by the petitioner when the fabricated letters to [REDACTED] were prepared. Furthermore, the petitioner has provided no evidence that it reported the alleged fraudulent scheme to the appropriate authorities. The petitioner has not provided probative independent evidence that it was a victim of fraud perpetrated by two of its employees. The burden of proof remains with the petitioner and beneficiary to show by a preponderance of the evidence that a material misrepresentation was not committed in these proceedings. *See Matter of Ho*, 19 I&N Dec. at 589. The petitioner has not met that burden.

Accordingly, the AAO finds that the petitioner willfully made the misrepresentation. The fabricated letters were prepared and submitted by the petitioner as evidence in support of the petition. By signing the petition, the petitioner certified under penalty of perjury that the petition and all evidence submitted with it either initially or thereafter is true and correct. *See* the regulation at 8 C.F.R. § 103.2(a)(2), which states the following:

An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

The petitioner's claim on appeal that it did not have personal contact with [REDACTED] is contradicted by the very letters the petitioner submitted to show that it conducted business with [REDACTED]. The petitioner submitted letters on its letterhead signed by its employees in order to establish that it conducted business with [REDACTED] but when informed [REDACTED] repudiated the authenticity of the letters, claimed that it did not have any personal interaction with [REDACTED] but that the contact was only through a third party contractor. Thus, when given the opportunity to address the director's findings, pursuant to 8 C.F.R. § 103.2(b)(16)(i), the petitioner denied the existence of letters addressed to [REDACTED] directly from the petitioner and the invoice and letter from [REDACTED] addressed directly to the petitioner despite the fact that these documents were already in the record. In response to the AAO's NDI, the petitioner does not provide further probative evidence addressing the falsity of the letters, other than to name additional perpetrators of the alleged misrepresentation. The petitioner's willful and material misrepresentation that it purchased inventory from [REDACTED] has not been rebutted as the petitioner has provided inconsistent information on appeal and in response to the AAO's NDI.

For example, the petitioner's claimed business transactions with [REDACTED] are not limited to this single March 2011 purchase. The petitioner submitted a ledger indicating that it purchased copiers from [REDACTED] on a monthly basis between January 2010 and July 2011, with one additional transaction in October 2011, for a total of \$388,000 in purchases. The earliest transactions predate the petitioner's claimed relationship with [REDACTED], one of the alleged perpetrators of fraud against the petitioner, by four months. Moreover, the total amount the petitioner paid to [REDACTED] in 2010 was less than the amount [REDACTED] charged for the single [REDACTED] transaction in March 2011. The suggestion that [REDACTED] was involved in a long-term fraud scheme against the petitioner is simply not supported by the record.

Moreover, the employees implicated in the alleged fraud scheme against the petitioner earned only \$2,260 and \$2,390 in wages in 2010, thus raising serious doubts that they were actually employed for the entire year during which these older claimed transactions with [REDACTED] took place. The petitioner submitted paystubs for its employees for the months of June and July 2010. The paystubs indicate that the employees were paid very low "basic pay" (less than \$200 per month), but receive additional payments for health benefits, dependent care assistance, meals, educational assistance and business expenses. However, the paystubs, while signed by an officer of the petitioner, also bear the company name [REDACTED] with an address in [REDACTED] Texas. The record does not

support a finding that the two implicated employees were actually employed by the petitioner between January 2010 and October 2011, during which time the petitioner claimed to have made 20 purchase transactions from [REDACTED]

The petitioner on appeal also references its certified/notarized tax returns as evidence to show that it purchased and sold inventory even if did not purchase the equipment from [REDACTED]. The petitioner contends that USCIS has not proven that the tax returns are false or incorrect. The record in this matter, however, does not include tax returns certified by the IRS as filed. Moreover, the burden to establish eligibility is the petitioner's. Tax returns not certified as filed with the IRS are insufficient to satisfy the petitioner's burden of proof. Further, as observed above, the petitioner has submitted IRS Forms 1065, W-2, and 941 that contain inconsistent information, casting further doubt on the legitimacy of the documentation submitted. The petitioner also contends that no other invoices or purchase or sales transactions were found to be false, fabricated, or fraudulent. A review of the totality of the record shows only one other invoice submitted by the petitioner that is unrelated to the [REDACTED] transaction, an invoice dated March 14, 2011 from [REDACTED]. The petitioner does not provide the underlying correspondence or evidence of the transfer of inventory that would substantiate the validity of the invoice. Further, the validity or invalidity of this invoice is not relevant to the petitioner's false representations regarding business with [REDACTED] for the purpose of establishing eligibility for this immigration benefit. While the petitioner claims to have generated a total of over \$2.5 million in sales and made more than \$2.1 million in purchases in 2009 and 2010, the only complete purchase and sales transaction documented in the record is supported solely by fabricated evidence.

The petitioner's assertion that USCIS cannot prove that it did not actually purchase, receive and sell the used copiers that are identified on the false [REDACTED] invoice is misguided. It is not whether the petitioner purchased, received, and sold equipment that requires a finding that the petitioner has knowingly made a material misrepresentation; rather it is the manufacturing of evidence which is then submitted to USCIS to procure an immigration benefit that requires such a determination.

The derogatory information, although not material to the issue of the petitioner's conduct of business in the one year prior to filing the petition, is material to the petitioner's claim of continued conduct of business.⁶ The use of fabricated documentation to establish that the petitioner is doing business is material to the adjudication of this visa petition. The petitioner's claim in its initial brief on appeal

⁶ Not only must the petitioner establish that it has been conducting business by providing goods and/or services regularly, systematically, and continuously for one year prior to filing the Form I-140 petition, the petitioner must also establish that it continues to conduct business. Otherwise, the approval of a Form I-140 petition under section 204 of the Act would be subject to automatic revocation. The regulation at 8 C.F.R. § 205.1 provides a list of reasons for automatic revocation including termination of the employer's business in an employment-based preference case under section 203(b)(1)(C). *See* 8 C.F.R. § Sec. 205.1(a)(3)(iii)(D).

that it had not had personal contact with [REDACTED] and that its business dealings had only been through an intermediary, [REDACTED] contradicted the information in the letters regarding the transaction, letters that the petitioner had provided for the record. That is, the petitioner submitted two letters on its letterhead, signed by its employees that were addressed directly to [REDACTED] and Mr. [REDACTED]. The petitioner also appeared to have received an invoice directly from [REDACTED] accordingly the petitioner's claim that it did not establish "personal contact with said [REDACTED]" conflicted with the evidence the petitioner provided. The petitioner prepared its response to the NOID and thus knew that the letters it submitted were on its letterhead, signed by its representatives and were submitted to establish it was conducting business. Only when informed by the AAO that the letters the petitioner submitted established that the petitioner, through its representatives, had personal contact with [REDACTED] did the petitioner change its claim by alleging that the employees who signed the two letters did so for their own gain and as part of a fraudulent scheme. As set out above, the petitioner failed to rebut the derogatory evidence when provided the opportunity to do so in the NDI issued by the AAO.

The petitioner's submission of falsified documentation in support of the petition is a material misrepresentation knowingly made. The beneficiary signed the visa petition as the corporate officer of the petitioning company, certifying under penalty of perjury that the visa petition and the submitted evidence are all true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). The signature portion of the Form I-140, at part 8, requires the petitioner to make the following affirmation: "I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct." On the basis of this affirmation, made under penalty of perjury, the AAO finds that the petitioner willfully and knowingly made the misrepresentation.

The falsified evidence is material to the beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537. The misrepresentation in this matter cut off a potential line of inquiry regarding the petitioner's ongoing business activities. The petitioner submitted fabricated evidence that it was doing business in 2011. This fact is directly material to the beneficiary's eligibility under the definition of "doing business" at 8 C.F.R. §§ 204.5(j)(2) and (3). The AAO concludes that the petitioner's misrepresentations were material to the beneficiary's eligibility.

By filing the instant petition and falsely claiming it was doing business and had been doing business for the past year the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. The AAO will enter a finding that the petitioner and the beneficiary, as the corporate officer who signed the petition under penalty of perjury, made a willful material misrepresentation. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

C. Managerial or Executive Capacity for the Petitioner

Although not explicitly addressed in the director's decision, the record in this matter does not establish that the petitioner will employ the beneficiary in a managerial or executive capacity as those terms are defined at sections 101(a)(44)(A) and (B) of the Act.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The petitioner provided a description of the beneficiary's duties for the petitioner as follows:

- [The beneficiary] heads the entire organization of the Corporation and thereby make[s] or reverse[s] the business decision[s], decide[s] on the scope of the business entity and corporation at a large [*sic*], decide[s] the quantum of business investment and take[s] appropriate steps to raise the resources;
- Establishes the policies, procedures and goals for the entire organizations, which includes establishment of policies such as buying and selling policies e.g. whether to buy through open tender or through negotiated contracts, from institutional suppliers or from private organization. The goals formation includes decision as to targeted return on investment, gross margin, net margin, break-even and margin of safety, sales volume, target market and market share etc.;
- [The beneficiary] has filled in/would be filling up entire initial personnel requirements for the corporation and then continuously filling the vacancies [that] arise from time to time, he fired/would fire deserving employees and would take all necessary personnel actions, such as promotion, rotation of duties, demotion, sanction of leave etc. for the employees reporting directly to him;
- Directing the supervisory and managerial employee under him to ensure achievement of the targets and goals for the organization;
- He acts as a coordinator between the corporation and its Indian parent company;
- He is receiving reports from the current head of the Indian organization through quarterly reports and interprets it [*sic*] and directs them with proper instructions in congruence with USA entity's goal;
- Approves the purchase and sales contract with major suppliers and buyers;
- Approves the financial statements and tax and other returns for the corporation;
- Approves the business and marketing plan and all the budgets for the corporation;

- Sanction[s] the purchase of all the fixed assets and real properties including two business properties situated in upstate New York;
- Direct[s] and implement[s] quality assurance system for the corporation;
- Approves accounts and its components;
- Appoint[s] professionals and independent contractors and approve[s] the terms and conditions for that [sic] appointment;
- Lead[s] the team of subordinates keeping in mind the management culture ethos of the Indian parent company and act[s] as a bridge between local U.S. staff and Indian promoters;
- Explore[s] new business opportunities for the corporation;
- Ensure[s] compliance of the applicable laws; and
- Secure[s] recognitions and licenses for the business of the corporation.

The petitioner asserted that the proffered position satisfies the statutory definitions of both managerial capacity and executive capacity.

As stated above, the petitioner's organizational chart depicted the beneficiary as the president/chief operating manager directly over the vice-president position. The vice-president is depicted as supervising a marketing manager and an engineering manager and shows that the vice-president, marketing manager, and engineering manager also supervise contractors, professionals, consultants, dealers, and distributors. It appears from the structure of the organizational chart that a financial/legal officer and an assistant officer also report to the vice-president. The petitioner also provided an overview of the duties of the claimed subordinate employees. The petitioner submitted photocopies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2010. Each Form 941 showed the petitioner employing six individuals and the taxable wages reported as \$6,578 and \$6,570, for each quarter respectively. The IRS Forms 941 do not identify the employees by name. In response to the director's RFE, the petitioner provided copies of the IRS Forms W-2 for the 2010 year. The W-2 forms showed the petitioner had employed five individuals in addition to the beneficiary and that the Forms W-2 were issued to individuals in the positions of vice-president, accountant, marketing manager, finance/legal officer, and superintending engineer. As specifically set out above, the petitioner paid the subordinate employees a total of \$11,728 for the entire 2010 year.⁷ As the director noted, when comparing the IRS Forms 941 for the first and second quarter of 2010 and the 2010 Forms W-2 issued to the petitioner's employees, the petitioner's employees were employed and paid during the first two quarters of 2010 but not the remainder of the year. The record also included one IRS Form 1099, Miscellaneous Income, issued by the petitioner to [REDACTED], a company located in Pennsylvania, for \$11,256.

⁷ The petitioner's Form 1065 for the 2010 year indicates that the petitioner paid salaries in the amount of \$32,866 for the year. As this document is not certified by the IRS it is not possible to conclude that it was actually filed with the IRS. Moreover, the significant discrepancy between the salaries reported on the Form 1065 and the Forms W-2 issued casts doubt on the petitioner's proof and raises questions regarding the reliability of the evidence submitted.

In the NOID, the director also noted that the petitioner's six employees earned the majority of their 2010 income in the month of June and that the wage compensation detailed did not support the petitioner's staffing levels as described.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). As the petitioner asserts that the beneficiary's duties and responsibilities satisfy both the definition of an executive and of a manager, we review the proffered position under both definitions.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections

101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner noted that the beneficiary heads the entire organization and establishes the policies, procedures and goals for the entire organization. The petitioner indicates that the beneficiary makes or reverses business decisions, decides on the scope of the business entity, decides on business investment, takes steps to raise resources, and establishes buying and selling policies as well as petitioner's margin for a return on investment. The petitioner stated that the beneficiary directs the supervisory and managerial employees under him. However, these broadly-cast business objectives fail to inform as to the beneficiary's actual duties within the organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The few tasks actually described by the petitioner suggest that the beneficiary is actively participating in the performance of non-qualifying duties. Duties such as implementing the quality assurance system for the corporation, exploring business opportunities, ensuring compliance of the applicable laws, and securing licenses for the business of the corporation are duties of an individual performing the basic functions of the organization. Duties such as approving the purchase and sales contracts, the financial statements and tax returns, the business and marketing plans, and the budgets are tasks that relate to the duties of a first-line supervisor over non-professional employees. The petitioner has not provided probative evidence that it employs professional employees. The record in this matter also fails to support the petitioner's claim that it employs individuals in managerial or supervisory roles. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Upon review of the Forms W-2 issued by the petitioner and the Forms 941, the petitioner has not established that it employs a subordinate level of managerial or supervisory employees for the beneficiary to direct. The remuneration of the petitioner's employees does not correspond to their claimed managerial and supervisory status. The petitioner has not established that it employs sufficient personnel to allow the beneficiary to focus primarily on the broad goals and policies of the organization rather than the day-to-day operations of the business. Similarly, the record does not demonstrate that the beneficiary will primarily supervise and control the work of supervisory, professional, or managerial employees. The petitioner has not established with probative evidence that it employs personnel to perform the day-to-day operations of the business. The petitioner's payment to a third party to inspect and store merchandise purchased does not relieve the beneficiary from the day-to-day operations of the business. The record, when reviewed in its totality, does not include sufficient probative evidence to establish that the beneficiary primarily performs in the capacity of an executive or of a personnel manager as those terms are defined in the statute. The beneficiary's business acumen in performing the essential tasks to operate the business, while undoubtedly valuable to the company, is not synonymous with an individual managing an essential function.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the remuneration and presence of other employees to relieve the beneficiary from performing operational duties, and the nature of the petitioner's business, the petitioner has not established that the beneficiary's actual duties incorporate primarily executive or managerial functions. Although the petitioner may have plans to expand its business, the record before the director failed to establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Again an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

D. Previously Approved Nonimmigrant Petition

The AAO acknowledges that USCIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. It must be noted, however, that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava, supra*. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary would be employed in a primarily managerial or executive position. In both the request for evidence and the final denial, the director articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous nonimmigrant petition(s) was approved based on the same evidence as submitted in this matter, the previous approval(s) would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. § 13611361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary, as the corporate officer who signed the petition under penalty of perjury, knowingly submitted documents containing false statements in an effort to mislead USCIS on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.