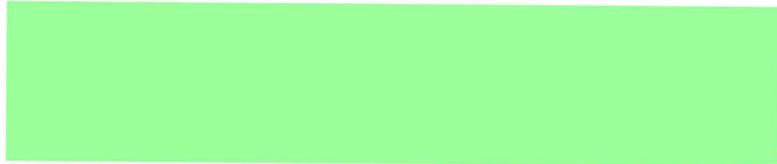




U.S. Citizenship
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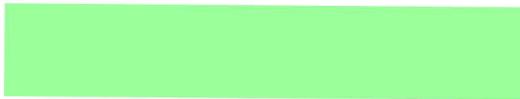
(b)(6)



DATE: **FEB 19 2014** Office: TEXAS SERVICE CENTER



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:



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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Florida corporation, states that it engages in the export and distribution of merchandise with six current employees and a gross annual income of \$951,384.00. The petitioner is seeking to employ the beneficiary as its general manager.

The director denied the petition after issuing a notice of intent to deny and reviewing the petitioner's response. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director ultimately determined that the petitioner submitted falsified evidence in support of the petition and denied the 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, counsel for the petitioner asserts that the petitioner has not presented any falsified documents in order to obtain an immigration benefit. Counsel submits a brief and additional evidence in support of the appeal. In addition, the petitioner submits a statement from the beneficiary, who requests oral argument before the AAO.

I. THE LAW

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.

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.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. QUALIFYING RELATIONSHIP

The primary issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's former foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

A. Facts

At the time of filing the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that it is an affiliate of [REDACTED] the beneficiary's former employer located in Venezuela. The petitioner stated that the beneficiary, [REDACTED], owns 55% of the shares of the foreign entity and 60% of the shares of the U.S. company.

At issue in this matter is the actual ownership of the U.S. company at the time of filing the petition. In support of the petition, the petitioner submitted the following evidence:

- A copy of its Articles of Incorporation, dated May 13, 1997, indicating that the maximum number of shares the corporation is authorized to issue is 7,500 and listing its president, secretary, treasurer, and director as [REDACTED]
- A copy of its Articles of Amendment to Articles of Incorporation, dated August 4, 2009, removing [REDACTED] of the U.S. company, signed by [REDACTED] as president.
- A copy of its share certificate number 10 issuing 4,500 shares to [REDACTED] on October 10, 2008.
- A copy of its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for 2010 indicating at Schedule K-1 that [REDACTED] owns 100% of its stock.

The petitioner identified [REDACTED] as its administration and sales assistant on the organizational chart submitted at the time of filing. [REDACTED] is listed as "president" on several supporting documents submitted with the petition, including, among others, the petitioner's occupational license, its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2010, and on its 2010 IRS Form 940, Employer's Annual Federal Unemployment Tax (FUTA) Tax Return.

On September 13, 2012, the director issued a notice of intent to deny ("NOID") informing the petitioner of derogatory evidence found within and outside the record related to the current ownership of the U.S. company. The director advised the petitioner that an investigation conducted by USCIS had uncovered evidence that [REDACTED], rather than the beneficiary, is the actual majority owner of the company. The

director provided the petitioner with a list of evidence that contradicted the petitioner's claim that the beneficiary is the majority shareholder of the U.S. company. The director also presented information gained from a telephonic interview of [REDACTED] on February 7, 2012. During that conversation, [REDACTED] stated that he owns 100% of the petitioning company and that the beneficiary does not and has never owned any shares of the company. [REDACTED] further stated that he is the president and director of the U.S. company and that the beneficiary is in charge of overseas sales, but failed to provide the beneficiary's actual title.

In response to the NOID, former counsel for the petitioner provided the following clarification as to the ownership of the U.S. company:

[O]n May 13th, 1997 [REDACTED] formed a corporation named [the petitioner]. On or about March of 2005 [REDACTED] met [the beneficiary]. . . . At that time [REDACTED] was a distributor of the brand [REDACTED]. . . which [the beneficiary] was interested in distributing in Venezuela through his company, [the foreign entity]. On or about October 1, 2008, [REDACTED] (the Accountant for [the petitioner], since 1997) drafted an "Agreement to Sell Business", which [REDACTED] and [the beneficiary] signed at the offices of [the petitioner], on October 7, 2008, in the presence of two witnesses, [REDACTED]

As set forth in the "Agreement to Sell Business", [REDACTED] sold to [the beneficiary] 60% of the stock of [the petitioner], for an initial installment of \$70,000.00. On September 22, 2008, [REDACTED] received a transfer of funds corresponding to the purchase of 60% of the Stock of [the petitioner], which was transferred from the account of [the foreign entity], to the account of [the petitioner]. The transfer was for the amount of \$68,582.80, due to the fact that the amount of \$1,417.20, was discounted. . . .

. . . In the "Agreement to Sell Business" [the beneficiary] and [REDACTED] agreed that [the beneficiary] would be responsible for paying the balance of \$30,000.00 owed by [the petitioner], in a [REDACTED] had verbally agreed that upon full payment of the aforementioned balance, an additional 35% of the Stock of [the petitioner], would be transferred to [the beneficiary], and that [REDACTED] would retain 5% of the Stock of [the petitioner], for an indefinite amount of time. However, on or about April of 2012, [REDACTED] decided to transfer the remaining 40% of the stock to [REDACTED]. . . Additionally . . . find bank statements evidencing that the Bank of America credit line referenced in the "Agreement to Sell Business", was paid in full on or about April of 2012.

Counsel further stated that the beneficiary and [REDACTED] verbally agreed in October 2008 that [REDACTED] would maintain the title of President of the petitioning company for a period of five years and that the beneficiary would replace him at the end of the period. Counsel also stated that the parties agreed that Mr. [REDACTED] would work for the petitioner as an administrative and sales assistant. Counsel stated that [REDACTED] resigned as President in March 2012.

The petitioner submitted the following evidence in support of its claim that the beneficiary is the majority owner of the company:

- An affidavit from [REDACTED] accountant for the petitioner, stating that she made a clerical error on the petitioner's 2010 IRS Form 1120S by indicating that [REDACTED] owned 100% of the shares of the U.S. company when he actually owned 40% and the beneficiary owned 60% of said shares. She further states that she made an error on the petitioner's 2011 IRS Form 1120S by stating that the beneficiary owned 70% of the shares of the U.S. company when he actually owned 60%. [REDACTED] states that she filed an amended U.S. Income Tax Return to correct the errors.
- A copy of an IRS Form 1120S for 2010, stamped on the first page with "amended return," indicating at Schedule K-1 that [REDACTED] owns 40% of stock of the U.S. company and the beneficiary owns 60%.
- A copy of an IRS Form 1120S for 2011, stamped on the first page with "amended return," indicating at Schedule K-1 that [REDACTED] owns 40% of stock of the U.S. company and the beneficiary owns 60%.
- A copy of an "Agreement to Sell Business," dated October 1, 2008 in which [REDACTED] agreed to sell the beneficiary 60% of the shares of the U.S. company for \$70,000.00. The agreement also states that the beneficiary agrees to pay the balance of \$30,000.00 owed by the petitioner to a Bank of America credit line and the beneficiary will be responsible for any and all debts incurred after October 1, 2008. The agreement further states: "this agreements [sic] will be held open until such time as [the beneficiary] gets his Immigration papers in order at such time [REDACTED] will transfer to [the beneficiary] 35% of the stocks[.]" The agreement is signed by [REDACTED] the beneficiary, and two witnesses; none of the signatures are dated.
- An affidavit from [REDACTED] in which he outlines the same sequence of events described by counsel. [REDACTED] further stated that he did not believe the phone call he received on February 7, 2012 was official in nature and purposefully stated that he owned 100% of the shares of the U.S. company. He explains that he believed that the phone call was from someone trying to extract private information regarding the beneficiary's interests in the United States.
- A copy of share certificate number 12 issuing 3,000 shares to [REDACTED] on April 6, 2012, signed by [REDACTED]
- An affidavit from the beneficiary outlining the same sequence of events described by counsel. The beneficiary further stated that he was interviewed while applying for admission to the United States on July 12, 2012 and mistakenly stated that he owns 70% of the shares of the U.S. company when he actually owns 60% since October 2008.
- Bank statements demonstrating that the foreign entity transferred funds to the U.S. company on September 22, 2008, along with other bank statements and invoices, submitted as evidence of payments made for the beneficiary's shares.
- Bank statements demonstrating that the \$30,000.00 credit was paid to Bank of America in April 2012.

On December 12, 2012, the director denied the petition with a finding of fraud, concluding that the petitioner had clearly submitted falsified evidence to establish the beneficiary's claimed ownership of the company and had therefore misrepresented a material fact. The director found that there is no evidence that the submitted

"Agreement to Sell Business" is a legally sufficient document that reflects a true sale of the business. The director observed that the record reveals multiple monetary transactions between the U.S. company and the foreign entity for goods sold and there is no evidence that the money transfer on September 22, 2008 was for stock and not for goods sold. The director further observed that the U.S. company has elected to be an S Corporation and filed its IRS tax forms as such, therefore, a discrepancy exists in share certificate numbers 10 and 12 issued to the beneficiary and [REDACTED], respectively, in that the specific language required by the Articles of Incorporation does not appear on said share certificates.

Additionally, the director observed that share certificate number 10, issued to the beneficiary, is dated October 10, 2008, which records reveal is the beneficiary's departure date from the United States; therefore, the director found that the stock certificates reflect a legitimate transfer of company stock. The director found that the stock certificates and Agreement of Business Sale appear to have been manufactured to support the petitioner's claimed ownership structure and do not reflect the true structure of the U.S. company's ownership. The director concluded that the evidence submitted does not support the petitioner's claim that, at the time of filing, the beneficiary owned 60% of the company.

On appeal, counsel for the petitioner contends that the director has not shown by clear and convincing evidence that the beneficiary had the intent to deceive USCIS. Counsel states:

Even with the discrepancies that USCIS had claimed, in a best case scenario, the Petitioner had submitted sufficient documentation to show that it is more probable than not the Beneficiary's claim of majority ownership of the Petitioner's stock and in a worst case scenario, there was still some doubt as to whether or not the Beneficiary was the majority owner of the Petitioner's shares of stock and therefore there can be no basis that under the above law that the Beneficiary had committed fraud.

The petitioner submits duplicate copies of previously submitted evidence and affidavits, along with new affidavits from the beneficiary, [REDACTED]. The petitioner also submits a letter from a new accountant and copies of the petitioner's amended IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2008, 2009, 2010, and 2011.

B. Analysis

Upon review, the AAO finds that counsel's assertions are not persuasive in overcoming the grounds for denial. The petitioner has not established that it has a qualifying relationship with the beneficiary's former foreign employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or

indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

While the petitioner claims to have an affiliate relationship with the foreign entity based on the beneficiary's majority ownership interests in each company, the petitioner has failed to submit probative documentary evidence of the ownership or control of the U.S. company.

The petitioner claims that [REDACTED] had owned the U.S. company since 1997. The petitioner further claims that the beneficiary purchased 60% of the shares of the U.S. company in October 2008 and later paid off the U.S. company's remaining debt to acquire the remaining 40% of the shares of the U.S. company in his wife's name, [REDACTED]. In support of these claims, the petitioner has submitted documents containing contradictory information, such as the originally filed IRS Form 1120S for 2010 showing [REDACTED] as 100% owner of the U.S. company. Although the petitioner's former accountant states that she completed and filed amended tax returns for 2010 and 2011 reflecting the correct ownership of the U.S. company, the petitioner has not submitted any evidence that such amendments were in fact filed with the IRS. Additionally, the petitioner's new accountant, on appeal, also states that he has filed amended tax returns for 2008, 2009, 2010, and 2011 reflecting the correct ownership of the U.S. company and changing the company's status from an S corporation to a C corporation. Again, no evidence was submitted to show that those amendments were actually filed with the IRS. 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)).

Further, in a telephonic interview with a USCIS officer on February 7, 2012, [REDACTED] stated that he owned 100% of the shares of the U.S. company, that the beneficiary has never owned any shares of the U.S. company, and that he remained as president of the U.S. company at that time. [REDACTED] states in his affidavit that he did not believe the interview was official in nature and purposefully provided false information in order to protect the beneficiary's privacy. However, it is unclear why he did not simply decline to answer the questions regarding the ownership of the company if he believed that the questions came from an individual who was not entitled to such information. [REDACTED] affidavit does not fully explain the responses he provided.

Moreover, the petitioner has submitted only two out of its 12 or more issued share certificates. Specifically, the petitioner submitted certificates numbers 10 and 12 reflecting the beneficiary's ownership of 4,500 shares

and [REDACTED] ownership of the remaining 3,000 authorized shares. The petitioner has not submitted a stock ledger or copies of the other 10 share certificates issued by the U.S. company prior to the alleged final one issued to [REDACTED] on April 6, 2012. Although the other 10 share certificates may not relate directly to the beneficiary and his spouse, they can provide a clearer picture of the ownership pattern and status of the petitioning company. Further, given [REDACTED] claim that he formed the petitioning company in 1997, and his claim that he maintained ownership of the company until 2008, it is unclear why the beneficiary would be issued stock certificate number 10, as opposed to stock certificate number 2 or some lower number. There is no documentary evidence establishing that [REDACTED] was actually the sole owner of the company in 2008 when the claimed stock transfer occurred. Absent evidence that he owned 100 percent of the company at that time, the "Agreement to Sell Business" has limited probative value.

Additionally, it must be noted that the petitioner has submitted two versions of its stock certificate number 10 which reflect slight differences in the beneficiary's signature, thus suggesting they were signed at different times. In addition, although the petitioner stated that [REDACTED] finally resigned as president in March 2012, his signature appears on stock certificate number 12, which was issued in April 2012. The lack of evidence presented to corroborate the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is an affiliate of the foreign entity.

On appeal, the petitioner contends that the beneficiary clearly purchased 60% of its shares by way of a wire transfer from the foreign entity on September 22, 2008, in the amount of \$68,582.80. The petitioner states that the foreign entity made payments for goods sold prior to the purchase of the shares, as evidenced by invoices, and bank statements. The petitioner further states that the wire transfer on September 22, 2008 was clearly for the purchase of 60% of its shares, minus \$1,417.20, which was the difference for overpayment of a previous invoice. The petitioner submitted a "pre-invoice" number 89-093, dated August 11, 2008, in the amount of \$27,569.84, and a "pre-invoice" number 89-094, dated August 11, 2008, in the amount of \$58,150.40, totaling \$85,720.24. The petitioner submitted its bank statement reflecting a credit of \$85,720.24 from [REDACTED], the foreign entity, on August 14, 2008. The petitioner also submitted an "invoice" number 80-993, dated September 9, 2008, in the amount of \$56,733.20 and an "invoice" number 80-994, dated September 9, 2008, in the amount of \$27,569.84. On "pre-invoice" number 89-094, the petitioner highlighted an ocean freight charge of \$4,717.20, which the foreign entity paid on August 14, 2008; however, "invoice" number 80-994 reflects a lower ocean freight cost of \$3,300.00, which is a difference of \$1,417.20. The petitioner then provided its bank statement reflecting a credit of \$68,582.80 (\$70,000.00 minus \$1,417.20) from [REDACTED] on September 22, 2008.

Here, while it is apparent that a wire transfer took place from the foreign entity to the petitioner, the claimed payment is not distinguishable from other regular business transactions between the two entities. The petitioner has not provided sufficient evidence to establish that the payment of \$68,582.80 was for the purchase of 60% of its shares and not for goods sold or services rendered. The sales agreement presented by the petitioner specifically states, "60% of the [s]tocks of [the petitioner] for the sum of \$70000.00 payable on this day"- it does not make any reference to the wire transfer on September 22, 2008, and does not acknowledge that any payment had already been received. In fact, the sales agreement implies that the \$70,000 was due on the date of the agreement. 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 also submitted a letter from [REDACTED] stating that he has prepared amended returns for the petitioner and for [REDACTED] further states that, based on his review of the documentation provided, the beneficiary did acquire 60% of the petitioner's stock. However, [REDACTED] does not reveal what documentation he reviewed in order to reach this determination. The petitioner has not provided all of the stock certificates issued by the company, a stock ledger, or other vital documentation. Therefore, [REDACTED] statement has limited probative value.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Due to the deficiencies and inconsistencies detailed above, the petitioner has not met its burden to establish that it has a qualifying relationship with the beneficiary's foreign employer. Accordingly, the appeal will be dismissed.

III. FINDING OF FRAUD/MATERIAL 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 claimed qualifying relationship with the beneficiary's foreign employer. As discussed above, the petitioner's response to the NOID failed to adequately rebut the director's initial findings that the petitioner did not have a qualifying relationship with the beneficiary's former foreign employer, and the director had sufficient grounds to deny the petition on that basis alone. The director also denied the petition based on a finding of fraud.

Upon review of the director's decision, the AAO finds that the director erred when entering a finding of fraud, rather than a finding of material misrepresentation. 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).

In this case, the discrepancies and inconsistencies discussed in the preceding section lead the AAO to conclude that the evidence of the beneficiary's claimed ownership of Sunshine Overseas, which is material to the regulatory criteria at 8 C.F.R. § 204.5(j)(3)(i)(C) is neither true nor credible. When given an opportunity to rebut these findings, the petitioner failed to adequately explain the reasons for the discrepancies or provide additional evidence to sufficiently overcome the inconsistencies. The AAO concludes that the petitioner submitted stock certificates and other evidence containing information which is more likely than not false.

First, as previously discussed, the petitioner submitted stock certificates, corporate documents, and other evidence to USCIS, in support of a visa petition, which contained information that is 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 corporate documents containing false information in support of an immigrant visa petition constitutes a false representation to a government official.

Second, the AAO finds that the petitioner willfully made the misrepresentation. The petitioner asserts that the beneficiary is the majority shareholder of the U.S. company; however, [REDACTED] asserted in a telephonic interview that he is and has always been the only shareholder of the U.S. company. When presented with the inconsistent information, the petitioner explained that [REDACTED] purposefully provided false information in the telephonic interview and the documentation presented to USCIS shows the accurate ownership of the U.S. company. However, all of the evidence presented relating to the U.S. company's ownership is either incomplete or contradictory. The petitioner presented only two of its 12 or more issued stock certificates to show ownership of the company, and the petitioner's IRS returns show contradicting ownership information. Although the petitioner's accountant states that she made an error when completing the IRS Forms, the inconsistent stock certificates and the contradictory testimony provided by [REDACTED], show that the petitioner more likely than not intentionally made the misrepresentation in order to establish eligibility for the benefit sought.

Furthermore, 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). Accompanying the signed petition, the petitioner submitted an undated letter, stock certificates, and other corporate documents, claiming in each document that the beneficiary is the majority shareholder of the U.S. company. 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.

Third, the evidence is material to the petitioner's and 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 cut 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 cut off a potential line of inquiry regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. The petitioner submitted evidence indicating that the beneficiary is the majority shareholder of the foreign entity and sought to establish that, through the beneficiary's majority ownership of the U.S. company, the petitioner had an affiliate qualifying relationship with the U.S. entity. These facts are directly material to the beneficiary's eligibility under the statutory definition of "qualifying relationship" at section 203(b)(1)(C) of the Act and to the regulatory requirement at 8 C.F.R. § 204.5(j)(2). As the beneficiary did not actually own the petitioning company, the immigration officer would have likely denied the petition based on the true facts. The AAO concludes that the petitioner's misrepresentations were material to the beneficiary's eligibility.

By filing the instant petition and falsely claiming ownership of the U.S. company by the beneficiary, when he is not in fact the majority shareholder, 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.

IV. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the record is not persuasive in demonstrating that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

On the Form I-140, the petitioner indicated that the beneficiary would be its general manager overseeing five direct employees and two outsourced service contracts. The petitioner provided a lengthy list of job duties for

the beneficiary indicating the number of hours he devotes to each duty, along with a list of job duties for each of his subordinates, which includes [REDACTED] as "administration and sales assistant," reporting to the "administrative supervisor," who reports to the "operations manager," who reports to the beneficiary as general manager. The director issued an RFE instructing the petitioner to submit additional evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity. In response to the RFE, the petitioner submitted another lengthy list of job duties and attached percentages of time the beneficiary devotes to each duty. The petitioner also provided a list of job duties for each of his subordinates (same as above), along with IRS Forms 941 showing the number of employees working at the U.S. company.

The director issued a NOID and referenced a telephonic interview with [REDACTED] where he clearly stated that he was the president of the U.S. company and that the beneficiary was in charge of overseas sales. In response to the NOID, the petitioner did not address [REDACTED] statements in regards to the beneficiary's position at the U.S. company, but merely stated that [REDACTED] and the beneficiary agreed that [REDACTED] would remain the U.S. company's president for five years. Counsel for the petitioner states:

On or about October 7th, 2008, [the beneficiary] and [REDACTED] verbally agreed that [REDACTED] would maintain the title of President of [the petitioner], for a period of 5 years, with the purpose of being able to give continuity as an officer of [the petitioner], in front of providers, public services, and third companies, and that [the beneficiary] would eventually replace [REDACTED] was also given employment in [the petitioner], as the Administrative and Sales Assistant. It is important to point out that acting in a director position (President, Vice President, Treasurer, etc) does not impede a person from also being employed by a Company as a direct employee with a separate job title.

As of March 2012 [REDACTED] resigned as President of [the petitioner], and continues to be employed as Administrative and Sales Assistant.

In the instant matter, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Although the petitioner has provided lengthy job descriptions and duties for the beneficiary and his subordinates, the contradictory statements made by [REDACTED] as president of the U.S. company, raise doubts as to the beneficiary's actual role. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In response to the NOID, the petitioner attempts to explain that [REDACTED] and the beneficiary agreed for [REDACTED] to remain as president of the U.S. company, but it failed to indicate how that decision affects the beneficiary's position at the U.S. company. The petitioner also failed to address [REDACTED] statement in regards to the beneficiary's role in overseas sales at the U.S. company. As such, the record remains unclear as to the beneficiary's actual role at the U.S. company and his employment in a managerial or executive capacity. 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).

Due to the inconsistencies and deficiencies detailed above, it cannot be determined that the beneficiary will be employed in a managerial or executive capacity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

V. PREVIOUSLY APPROVED NONIMMIGRANT PETITIONS

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 a qualifying relationship with the beneficiary's foreign employer. 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*.

VI. REQUEST FOR ORAL ARGUMENT

On appeal, the beneficiary submits a letter addressing the issues presented by the director in this case and requests an "opportunity to appear before an immigration official or immigration judge to state [his] case." The regulations provide that the affected party must explain in writing why oral argument is necessary. 8 C.F.R. § 103.3(b). USCIS has the sole authority to grant or deny a request for oral argument and will grant

argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b)(2). In this instance, neither counsel nor the petitioner has identified unique factors or issues of law to be resolved. In fact, the beneficiary, making this request on behalf of the petitioner, set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

VII. 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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.