



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 24 2014

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:

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 ("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 Texas on [REDACTED] 3, 2007. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker (Form I-140), that it is engaged in the "hospitality" business. It seeks to employ the beneficiary as its president. 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 August 22, 2012, the director denied the petition determining that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director also entered a finding of fraud after determining that the record contains false employment records pertaining to the beneficiary's last overseas employer.

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 asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof.

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. THE ISSUES ON APPEAL

A. Qualifying Relationship

The first issue to be discussed is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's 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 below* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate," "multinational," and "subsidiary").

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

Affiliate means:

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (2) 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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.

1. Facts and Procedural History

In this matter, the petitioner claims it owns a majority interest in the beneficiary's prior foreign employer, [REDACTED] and thus claims a parent-subsidary relationship with the Indian entity.

In a letter submitted in support of the petition, the petitioner stated that the beneficiary had been a general manager employed by [REDACTED]. The petitioner provided a photocopy of a June 3, 2006 letter signed by the foreign entity's president certifying that the beneficiary worked for [REDACTED] from November 5, 2005 until February 25, 2007.² United States Citizenship and Immigration Services' (USCIS) records show that the beneficiary was admitted to the United States on March 11, 2007 as an H-1B nonimmigrant to work for an unrelated company. The petitioner was first incorporated as a limited liability company on May 3, 2007.

In the letter in support of the instant petition, the petitioner referenced a partnership deed dated July 1, 2009. The petitioner provided a copy of a signed document titled "Reconstitution of Partnership Deed" which showed that the petitioner had been added to a group of four partners who had established [REDACTED]. The July 1, 2009 partnership document set out the interest owned in [REDACTED] showing four individuals each owned 12 percent of the company and the petitioner owned 52 percent. The document noted that the petitioner had majority control of [REDACTED] based on its 52 percent interest. The document is signed by the four partners and the petitioner.

The petitioner also provided a document showing that [REDACTED] had registered as a contractor for the years 2006 to 2009 with the Office of the Executive Engineer for [REDACTED] India and again in 2008 to 2010 with the Office of the Executive Engineer for [REDACTED] (R&B) Division, in [REDACTED], India. The record included invoices showing [REDACTED] had purchased computer equipment during 2008 and in February 2009. The petitioner also provided bank statements for [REDACTED] the latest dated April 2009.

¹ Throughout the record, the foreign entity is referred to as "[REDACTED] and [REDACTED]". It is not clear whether these are the same legal entities. This decision follows the designation found on the documents as they relate to the foreign entity's name; that is when the document refers to [REDACTED] that name is used and when the document refers to [REDACTED] that name is used.

² The letter is dated 03-06-2006, and it is assumed that the author used the "day-month-year" date format that is common outside the United States. It is possible that the letter was dated March 6, 2006. The body of the letter on [REDACTED] letterhead clearly states the beneficiary was employed by the organization from November 5, 2005 to February 25, 2007. It is unclear why the date of the letter pre-dates the end date of the beneficiary's claimed employment. 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).

In response to the director's initial request for further evidence (RFE) regarding the petitioner's qualifying relationship with the beneficiary's foreign employer, the petitioner indicated that [REDACTED] had changed its name to [REDACTED]. The petitioner also provided a list of the owners of the foreign company as of October 2009, which showed that the petitioner owned a 52 percent interest in the foreign company and seven other individuals owned the remaining interest in varying amounts. The petitioner provided a list of the previous owners of the foreign company indicating four individuals had each owned 12 percent of the foreign company and the petitioner had owned 52 percent. Neither of these lists was submitted in conjunction with a partnership deed, articles of organization, stock certificates for the new entity, or other independent evidence of ownership.

The petitioner further provided a March 4, 2010 registration certificate issued by the executive engineer, [REDACTED] indicating [REDACTED] approval as a contractor until December 2012. The registration certificate noted that as per [REDACTED] application dated November 30, 2009, six individuals as employees/partners of the firm would look after the firm's work.

The director subsequently issued a Notice of Intent to Deny (NOID) the petition, advising the petitioner that the record did not include evidence that the claimed qualifying relationship existed when the beneficiary worked for the foreign entity from November 2005 until February 2007 or when the beneficiary arrived in the United States.³ The director requested evidence that the foreign organization is still doing business, including: evidence to show a regular, systematic, and continuous provision of goods and/or services; evidence of receipts, invoices, and detailed reports to show that the foreign organization traded or exchanged goods or services; or, evidence of the foreign organization's import/export license and contracts or agreements with shipping and receiving companies.

In response to the NOID, the petitioner provided a different version of the July 1, 2009 Reconstitution of Partnership Deed. This version included an untranslated stamp on the first and second page of the document showing 100 rupees had been paid. As the stamp is not translated it is not possible to identify the meaning or purpose of the documentary stamp. See 8 C.F.R. § 103.2(b)(3). This version of the Reconstitution of Partnership Deed does not include the petitioner's signature. The petitioner did not submit a partnership deed or other evidence reflecting the foreign entity's name change and the claimed current ownership of the company by the petitioner and six other partners. The petitioner re-submitted the March 4, 2010 registration certificate issued by the executive engineer, [REDACTED] which approved [REDACTED] as a contractor.

³ The beneficiary in this matter was admitted to the United States on March 11, 2007 pursuant to an approved H-1B classification petition filed by [REDACTED]. The petitioner was incorporated on May 3, 2007 and subsequently petitioned for the beneficiary to work in an H-1B classification as its computer systems analyst. The petitioner's nonimmigrant petitions on behalf of the beneficiary were approved. The beneficiary was granted H-1B status to work for the petitioner from November 13, 2007 until October 3, 2010 and his status was extended from October 4, 2010 until October 3, 2013.

Also in response to the NOID, the petitioner provided the foreign entity's tax return information for the years 2006 through 2011 as follows:

- [REDACTED] Form No. 2D, Income Tax Return Form For Non Corporate Assessee Other Than Person Claiming Exemption Under Section 11, for the April 2005 – March 2006 year which bears a joint commissioner of income tax stamp and includes [REDACTED] balance sheet and profit and loss account ending March 2006.
- The Indian Income Tax Return Acknowledgment for the 2007-2008 assessment year for [REDACTED] which includes its profit and loss account for the year ending March 31, 2007, its balance sheet at March 31, 2007, and a Schedule 1 listing the four partners' capital accounts. The partners are identified as holding 15 percent, 35 percent, 25 percent, and 25 percent of [REDACTED] as of March 31, 2007.
- The Indian Income Tax Return Verification Form for the 2008-2009 assessment year for [REDACTED] which includes its profit and loss account for the year ending March 31, 2008, its balance sheet at March 31, 2008, and a Schedule 1 listing the four partners' capital accounts. The partners are identified as holding 15 percent, 35 percent, 25 percent, and 25 percent of [REDACTED] as of March 31, 2008.
- The Indian Income Tax Return Acknowledgment for the 2009-2010 assessment year for [REDACTED] which includes its profit and loss account for the period April 1, 2009 to October 27, 2009, its balance sheet at October 27, 2009, and lists the four partners allowable remuneration and interest in the ratio of 15 percent, 35 percent, 25 percent, and 25 percent of [REDACTED]. The petitioner is not listed as one of the partners. The return filing due date is September 30, 2009. The assessment identifies the foreign entity as a partnership firm with a permanent account number as [REDACTED].
- The Indian Income Tax Return Acknowledgment for the 2010-2011 assessment year for [REDACTED] which includes its profit and loss account for the year ending March 31, 2010 and its balance sheet at March 31, 2010. The assessment does not identify the company's ownership. The assessment identifies the entity as a "private limited" company incorporated on October 27, 2009 with a permanent account number of [REDACTED].
- The Indian Income Tax Return Acknowledgment for the 2011-2012 assessment year for [REDACTED] which includes its profit and loss account for the year ending March 31, 2011 and its balance sheet at March 31, 2011. The assessment does not identify the company's ownership.

The petitioner stated in rebuttal to the NOID that it was unable to find any language in the Act or in the Adjudicator's Field Manual (AFM) that "requires that a qualifying relationship *existed* between the two companies at the time the employee was employed by the foreign entity." The petitioner referenced an informal memorandum between legacy Immigration and Naturalization Services (INS)

and cable guidance from U.S. Department of State dating back to the 1990s in support of the assertion that just the opposite is acceptable.⁴

Upon review of the record, the director denied the petition, determining that in the employment-based immigrant context the petitioner must establish that the beneficiary's foreign employer and the U.S. employer had a qualifying relationship when the beneficiary was working for the foreign employer.

On appeal, counsel for the petitioner agrees with the director's finding that there was no qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner when the beneficiary worked for the foreign employer. Counsel, however, contends that although the petitioner must establish a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed, the petitioner is not required to establish that the qualifying relationship existed when the beneficiary was employed by the foreign entity. Rather, counsel avers that a qualifying relationship that is established subsequent to the beneficiary's employment with the foreign entity suffices to satisfy this requirement. Counsel asserts that the director fails to cite to any statute, regulation, or other legal standard to support his conclusion that the petitioner must establish that it had a qualifying relationship with the foreign employer during the beneficiary's relevant period of employment abroad.

The petitioner submits a number of invoices, affidavits, and payroll documentation in support of its assertion that the beneficiary worked for the foreign entity, [REDACTED] from November 5, 2005 until February 25, 2007.

2. Analysis

A multinational executive or manager is one 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." See section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it 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. See 8 C.F.R. § 204.5(j)(3)(i)(C).

⁴ In support of this reference, the petitioner provided a one-page excerpt from an article in *Business Immigration Law Strategies for Employing Foreign Nationals*. The cover sheet identifies the article as originally published in 2000 and re-published in 2002 by the Law Journal Press in New York, New York. On the page provided, the writers noted: "[t]he year of employment outside the U.S. may occur any time during the three years prior to the filing of the petition for L status" and "the foreign employer need not have been related to the U.S. entity when the foreign national was so employed." The writers footnoted a letter of the chief, nonimmigrant branch, INS adjudications that was reprinted in 70 Interpreter Rel. 410-411 (Mar. 22, 1992) and a United States cable discussed in 73 Interpreter Rel., 963-964 (July 22, 1996) in support of these two notes.

Upon review, the petitioner has not provided sufficient evidence to establish that the petitioner ever owned a majority interest in the foreign entity that employed the beneficiary from November 2005 until February 2007, nor has the petitioner established that meets the definition of "multinational" at 8 C.F.R. § 204.5(j)(2). The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

First, the record is deficient in establishing the foreign entity's claimed change in ownership in July 2009, the month in which the petitioner claims it became the foreign entity's majority and controlling owner. The tax return filed for the 2009-2010 assessment year lists the four partners' allowable remuneration and interest from the beginning of [REDACTED] tax year, April 1, 2009 to October 27, 2009. There is no indication on the tax return that the petitioner held a partnership interest during this time or that the petitioner's claimed 52 percent interest in the foreign entity was approved by the proper Indian authorities as a business with a foreign partner. Even if we considered the untranslated documentary stamp on the Reconstitution of Partnership Deed dated July 1, 2009 submitted in response to the NOID, as evidence of registering the partnership, this document does not include the petitioner's signature. Upon review, the record lacks sufficient probative evidence establishing the petitioner's claimed purchase and ownership of a majority interest in [REDACTED].

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)).

In addition, the record does not include probative evidence that [REDACTED] continued to do business as a partnership between July 1, 2009, the date of the petitioner's purported purchase of a majority interest, and October 27, 2009, the date [REDACTED] is claimed to have changed its name and corporate form from a partnership to a private limited company.

Moreover, the record does not include probative evidence of the change in ownership from a partnership with five claimed partners to a private limited company with seven shareholders in October 2009. The record does not include documentary evidence that the purported five-entity partnership was dissolved prior to or contemporaneously with the incorporation of the private limited company, [REDACTED] such that it could be described as a successor company. Other than the registration of [REDACTED] which identifies six partner/employees, not including the petitioner, the record does not include evidence of the ownership of [REDACTED].

In addition, the tax returns filed by [REDACTED] for the 2010-2011 year and the 2011-2012 year indicate the company has a different permanent account number than the previously identified partnership.

In the NOID, the director requested that the petitioner file an IRS Form 4506, Request for Copy of Tax Return, to obtain official and complete copies of its IRS Forms 1065 for 2010 and 2011 with all supporting schedules, exhibits and statements. Instead of submitting complete copies of its tax returns for the requested years, the petitioner submitted Tax Return Transcripts for 2010 and 2011 and attached a Form 5472, Information Return of U.S. Persons with Respect to Certain Foreign

Corporations, to each transcript. The Forms 5472 indicate that the petitioner owns 520 shares out of 1,000 shares of common stock issued by [REDACTED]. However, there is no evidence that the petitioner actually filed the Forms 5472. The tax return transcripts do not list this document as part of the petitioner's filing, and the petitioner did not comply with the director's request to submit complete official copies of its tax returns.

Moreover, the tax returns alone would be insufficient to establish the petitioner's claimed majority ownership of [REDACTED]. The petitioner has not submitted the foreign company's articles of incorporation, stock certificates or stock certificate ledger. The stock certificates, corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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. In addition, 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.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership. Here, there is no independent or objective evidence establishing the petitioner has any ownership interest in [REDACTED] and therefore the petitioner has not established by a preponderance of the evidence that it is a multinational company with a foreign affiliate, parent or subsidiary.

In sum, there is no evidence that the beneficiary was employed by [REDACTED] as this company was formed more than two years after his admission to the United States. Nor is there sufficient evidence to support a finding that this is the same employer as [REDACTED] or [REDACTED]. As observed above, the record does not establish that [REDACTED] is a successor company to [REDACTED] that the beneficiary was ever employed by [REDACTED] that the petitioner ever owned a majority interest in [REDACTED] or that the petitioner presently owns a majority interest in [REDACTED].

Again, 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)).

As there is insufficient evidence that the petitioner is a multinational company or that it has a qualifying relationship with the beneficiary's claimed foreign employer, the appeal will be dismissed.

B. Finding of Fraud

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

1. Facts and Procedural History

The director advised the petitioner in the NOID that a review of the beneficiary's claimed employment history revealed that the beneficiary had submitted false documentation to verify his work experience. The director noted that USCIS records reflect that the beneficiary was admitted to the United States to work for [REDACTED] pursuant to an H-1B nonimmigrant visa. The director further noted that a telephonic interview with the manager of [REDACTED] revealed that the beneficiary had worked in India for [REDACTED] a software engineering firm, from July 2005 until February 2007. The director notified the petitioner that this information contradicted the beneficiary's claim that he worked for [REDACTED] the petitioner's claimed foreign subsidiary, from November 2005 until February 2007. The director provided the petitioner an opportunity to rebut the derogatory information and notified the petitioner that failure to overcome this information in the record could result in a finding of fraud or misrepresentation.

In response to the NOID, the beneficiary provided a signed affidavit in which he affirmed that he held two jobs concurrently in India in the 2005 to 2007 time period. The beneficiary explained that upon graduation in May 2005, he was able to obtain only a part-time job as a software consultant in July 2005. Accordingly, the beneficiary indicated he continued to look for full-time work and in November 2005 was hired to work as a general manager at [REDACTED]. The beneficiary noted that he worked for [REDACTED] until February 2007. The beneficiary further stated that he continued to work part-time for [REDACTED] in the evenings several days a week, while also working full time for [REDACTED] as its general manager.

The beneficiary noted that the Form G-325A, Biographical Information sheet, submitted with his concurrently filed Form I-485 Application to Adjust Status, asks only that the alien list employment for the last five years. The beneficiary explained that he did not consider himself an employee at [REDACTED] because he worked there only part-time on a project by project basis, thus he did not list this work on the G-325A. Specifically, the beneficiary indicated that he worked for [REDACTED] on average, approximately 5 to 10 hours per week. The petitioner's response to the NOID included a letter from [REDACTED] confirming the beneficiary's employment as a software consultant from July 2005 until February 2007. The letter does not refer to the beneficiary as a part-time employee.

The director in his denial decision stated that fraud had been confirmed. The director stated that the petitioner had submitted fraudulent employment records for the beneficiary indicating that he had worked at [REDACTED]. The director again noted that the beneficiary had confirmed during his previous H-1B visa application that he worked for [REDACTED] but had not disclosed this information in the documents in support of the Form I-140 petition. The director emphasized that the beneficiary had corrected his employment history in response to the NOID but found that the correction of the employment history resulted in a material change to the Form I-140 petition.

On appeal, the petitioner submits three identical affidavits from alleged former co-workers of the beneficiary, signed in September 2012, each attesting that the beneficiary worked as General Manager for [REDACTED] from November 2005 to February 2007. Each affiant claims to

be a current employee of [REDACTED] notwithstanding the petitioner's claims elsewhere in the record that the company name changed to [REDACTED] in 2009.

The petitioner also provides [REDACTED] monthly wage registers listing its employees for this 16-month time period. The wage registers reflect that two of the affiants - [REDACTED] an administrative officer, and [REDACTED] an accountant - worked for [REDACTED] from November 2005 until June 2006 only. The wage registers reflect that the third affiant, [REDACTED] a site manager, worked for [REDACTED] from July 2006 to November 2006 only.

In support of the appeal, the petitioner submits copies of the beneficiary's monthly pay statements from [REDACTED] for the period July 2005 through February 2007. The statements reflect that the beneficiary earned a monthly salary of Rs. 5,000 during the first four months, Rs. 6,500 for the next eight months, and Rs. 8,200 for his last five months with the company and appears to have been paid as a regular payroll employee. The beneficiary's claimed monthly earnings from [REDACTED] were Rs. 7,000 to 7,500 per month.

2. Analysis

Upon review, we will affirm the director's determination that the facts support a finding of willful misrepresentation of a material fact.

The director properly gave notice of derogatory information found regarding the beneficiary's employment history. The beneficiary's employment history is a material element in the Form I-140 petition. The beneficiary's employment history must establish that in the three years preceding the time of the alien's application for classification and admission into the United States for a Form I-140 managerial or executive position, the beneficiary has been employed for at least one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof in a managerial or executive capacity. Accordingly, the beneficiary's employment with a software consulting firm in a software engineer position during the time period he was allegedly employed as the foreign entity's general manager casts doubt on the credibility of the petitioner's claims regarding his eligibility as a multinational manager or executive.

Although the beneficiary claims that he did not consider himself to be an "employee" of [REDACTED] because he worked for the company part-time on average of 5 to 10 hours per week, he has not adequately explained why informed his previous H-1B employer, [REDACTED] that his last foreign employer was [REDACTED] or why he identified this company as his employer in connection with a previous nonimmigrant visa application. Further, the beneficiary's pay statements from [REDACTED] do not support the beneficiary's claim that he was a part-time employee of that company, given that his salary in some months was actually higher than what he is claimed to have received as a full-time manager with [REDACTED]

There is a further discrepancy in the evidence offered to demonstrate that the beneficiary was employed by [REDACTED]. As footnoted above, the petitioner provided a letter certifying that

the beneficiary was employed by [REDACTED] from November 5, 2005 to February 25, 2007. However, the letter is dated June 3, 2006, prior to the end of the beneficiary's claimed employment as designated in the letter. As the beneficiary's proposed managerial or executive employment for the petitioner is predicated on his prior employment in such a capacity for a qualifying foreign entity, these discrepancies are material.

On appeal, the petitioner submits three affidavits from employees who claim that they worked with the beneficiary from November 2005 to February 2007. However, the submitted payroll records show that [REDACTED] worked for [REDACTED] only from November 2005 until June 2006. Thus, these two affiants could not attest that the beneficiary worked for [REDACTED] subsequent to June 2006. Similarly, [REDACTED] who worked for [REDACTED] from July 2006 to November 2006 attests that he worked the beneficiary from November 2005 to February 2007 but Mr. [REDACTED] was not employed by [REDACTED] until July 2006, thus, he could not attest to the beneficiary's employment prior to that date. Further, as noted, all three of these affiants claim to be current employees of [REDACTED] while the petitioner otherwise states in the record that [REDACTED] is no longer known by this name. Due to these deficiencies, the affidavits are not credible, as the affiants have not established that they have direct knowledge of the beneficiary's dates of employment or that they are current employees of [REDACTED] a company that is claimed to no longer exist under that name. The information in the affidavits must be considered false.

However, as a preliminary matter we find that the director erred by relying on the omission of material information as forming the basis 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 an 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). A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of material fact may lead to serious consequences, including but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

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).

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. at 288.

First, 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). In this matter, the petitioner's failure to disclose the beneficiary's claimed part-time employment with a software consulting firm in a software engineer position during the time period he was also allegedly employed as the foreign entity's general manager raised concerns regarding the facts surrounding the beneficiary's actual foreign employment. For the reasons discussed above, the beneficiary's assertion that he did not consider himself to be an "employee" of [REDACTED] is not supported by the evidence or by his assertions in previous immigration proceedings, which the director brought to light in the NOID. Similarly, the evidence submitted on appeal does not support the beneficiary's claim that his employment with [REDACTED] was part-time or that he was not an employee of [REDACTED]. If the beneficiary did in fact have a different full-time employer during the period of time in which he is claimed to have worked for the petitioner's claimed foreign subsidiary, this information is material to his eligibility for this classification. The petitioner has not submitted sufficient credible evidence to overcome these material inconsistencies.

In addition, the petitioner's submission of a letter dated June 3, 2006, signed by the foreign entity on a date prior to the conclusion of the beneficiary's claimed employment as designated in the letter, suggests that the letter was produced after the fact to remedy the deficiency in the record noted by the director. The petitioner also submitted, without any explanation, an unsigned, un-dated version of this same letter.

Finally, the petitioner submitted affidavits containing false information in support of the Form I-140 visa petition which constitute a false representation to a government official.

We must conclude finds that the petitioner willfully made the misrepresentation. The petitioner submits these three affidavits on appeal in an effort to establish that the beneficiary had worked for a qualifying foreign entity for one year in the three years prior to his application for classification and admission into the United States under section 203(b)(1)(C) of the Act. The beneficiary also submitted an affidavit attesting that he was a part-time consultant for [REDACTED] and worked only 5 to 10 hours per week. There is no evidence to corroborate this statement. Moreover, the evidence submitted tends to indicate that he was in fact a regular, full-time employee of [REDACTED] given his regular monthly salary of up to Rs. 8,200, which was higher than the salary he allegedly received for his full-time managerial position with [REDACTED]

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 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 petitioner's misrepresentation in order to establish the beneficiary's one-year of claimed foreign employment in a managerial or executive capacity cuts off a potential line of inquiry regarding the beneficiary's claimed managerial or executive employment. As the petitioner submitted inconsistent and false evidence related to the beneficiary's foreign employment, 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 that the affiants had worked with the beneficiary from November 2005 until February 2007, the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. Moreover, the record supports a finding that the beneficiary misrepresented a material fact when he submitted an affidavit in which he claimed that he was a part-time consultant for [REDACTED] working only 5 to 10 hours per week during the relevant time period. The AAO will enter a finding that the petitioner and beneficiary made willful material misrepresentations. 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).

III. 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 knowingly submitted documents containing false statements in an effort to mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.