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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 3 2015 Office: IMMIGRANT INVESTOR PROGRAM FILE:

IN RE: Petitioner:

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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, California Service Center, denied the preference visa petition and subsequently dismissed a motion to reopen and motion to reconsider, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. We will also enter a separate administrative finding of material misrepresentation.

The petitioner seeks classification as an immigrant investor pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in a business, , located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $500,000. intends to trade antique watches.

The director determined that the petitioner had not established that her investment had created or would create the requisite 10 jobs. Specifically, the director concluded that the petitioner's business plan was not credible. The director subsequently dismissed the petitioner's motions for not meeting the filing requirements for a motion. On appeal, the petitioner states that her investment would create at least 10 jobs in the next two years, and that the director erroneously dismissed the motions. For the reasons discussed below, the petitioner has not established eligibility for the benefit sought.

I. LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. INFORMATION FROM OUR SEPTEMBER 8, 2014 NOTICE

On September 8, 2014, we issued a notice of intent to dismiss (NOID) the appeal, advising the petitioner that the evidence in the record, considered with information available in public records, raised serious questions regarding the credibility of the evidence submitted to establish the petitioner's eligibility. Specifically, the petitioner indicated on Form I-526, Immigrant Petition by Alien Entrepreneur, and submitted supporting documentation reflecting that address is located at The petitioner also submitted bank statements and employer quarterly reports that listed address on As noted in our NOID, however, the location is the address of registered agent,

IncParadise, which operates a service whereby it will forward mail addressed to at the address, allowing to maintain a physical presence in without conducting business at the address.[1]

Further, we also advised the petitioner that, according to the Nevada Secretary of State, is in "default" status; the business license expired on February 28, 2014, and the most recent corporate activity occurred on August 5, 2013, which was an update to the corporate officers. We included information from the Secretary's website as enclosures with our NOID. In addition, we advised that web site (was no longer accessible. Moreover, we informed the petitioner that we contacted a representative of , the lessor to lease, who indicated that representatives of showed up every three months or so and did not appear to be conducting business out of the suite. We also contacted , who purchased the building from , and a representative from stated that: no individuals were ever seen in suite; never occupied the suite; did not collect mail or correspondence; and a person in Oregon was the only known contact for

Finally, the petitioner stated on appeal that waited until August 2012 to hire a head appraiser who had five years of experience, and under his management, sold 11 watches, with a profit margin ranging from 17% to 83% per watch. The record, however, contained no evidence of the head appraiser's five years of experience other than his curriculum vitae. Given the petitioner's attestations as to the importance of the head appraiser's experience to the success of plan and ability to begin business operations, the petitioner was asked to provide documentary evidence of the head appraiser's experience in Hong Kong and Shanghai from 2004 through 2010 as listed on his curriculum vitae.

In accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), we afforded the petitioner 33 days to rebut the derogatory information and document the head appraiser's experience. The petitioner did not respond to the notice. Therefore, we may dismiss the petitioner's appeal without further discussion. *See* 8 C.F.R. § 103.2(b)(14).

III. ANALYSIS

First, the regulation at 8 C.F.R. § 204.6(e) provides:

> Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing

[1] *See* We accessed the website September 5, 2014 and incorporated into the record of proceeding. We also provided a copy as an enclosure with our September 8, 2014 notice.

> conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

As is in default status, it is no longer authorized to conduct lawful business in Nevada and does not meet the definition of commercial enterprise as "any for-profit activity formed for the ongoing conduct of lawful business . . . ." *See* 8 C.F.R. § 204.6(e).

Second, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Forms I-9 (Employment Eligibility Verification), or other similar documents for ten (10) qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite 10 jobs, the petitioner must submit a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(B). The petitioner has submitted an initial and a revised business plan.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.* The director concluded that the petitioner's business plans contained inconsistencies and that the projections were not reasonable. Specifically, the director determined that the petitioner's business plans grossly underestimated how many antique watches an appraiser could research in a month, and the business plans grossly overestimated how many antique watches could purchase and sell in an attempt to show that could pay the wages for the 10 appraisers. The director found that the business plans that proposed to purchase approximately 10 watches for inventory were not credible because the petitioner could not justify the need for 10 appraisers to work full-time to buy and sell 10 watches for two years. Further, because of the cost of the antique watches, the $500,000 investment was insufficient to purchase 10 watches.

The petitioner asserts on appeal that a reputable head appraiser is key to the new commercial enterprise's success. Accordingly, without evidence of the head appraiser's past experience, the petitioner has not overcome the director's concerns regarding the credibility of the business plan. Moreover, as there is no evidence that is conducting business, the petitioner has not demonstrated that will create at least 10 jobs to qualifying employees.

IV. MATERIAL MISREPRESENTATION

Furthermore, the petitioner has not resolved the inconsistencies with independent and objective evidence. An immigration officer will deny a visa petition if the petitioner submits evidence that contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an individual 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 errors lead us to conclude that the evidence of TII's location and actual business operation, which is material to the petitioner's investment in the new commercial enterprise, is neither true nor credible.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts.[2] 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 inadmissible to the United States, and criminal prosecution. As immigration officers, United States Citizenship and Immigration Services (USCIS) may enter a finding of fraud or willful misrepresentation of a material fact whenever it is discovered in the course of their duties. Immigration officers process the full scope of authority accorded to them by the relevant statutes and regulations. *See* sections 101(a)(18), 103(a) and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, and to make recommendations for prosecution or other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I) (effective March 1, 2003).

As an issue of fact that is material to an individual's eligibility for the requested immigration benefit, or that individual's subsequent admissibility to the United States, the administrative decision in an immigration proceeding must include specific findings of fraud or material misrepresentation. Outside of the basic adjudication of visa eligibility, there are many critical DHS functions that hinge on a finding of fraud or material misrepresentation. Most critical, the Act provides that an individual is inadmissible to the United States if that individual seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act. For this provision to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[3]

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.

[2] 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. at 288. A finding of fraud requires a determination that the individual 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).

[3] Although it may present the opportunity to enter an administrative finding of fraud or material misrepresentation, the immigrant visa petition proceeding is not the appropriate forum for finding an individual inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the individual may be found inadmissible at a later date when he or she subsequently applies for admission into the United States.

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 Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *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. at 288.

First, the petitioner misrepresented business operations at the address. The petitioner submitted documentation indicating that was operating a business from the address when there was no such activity. 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 petitioner's submission of Form I-526 listing address at , a lease for two business plans indicating address at photographs to establish the operating office space for the address, and other supporting documentation listing the address constitutes false representations to a government official.

Second, the petitioner willfully made the misrepresentations. The petitioner signed the immigrant investor petition (Form I-526), certifying under penalty of perjury that the 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). More specifically, the signature portion of the Form I-526, at part 7, 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 are all true and correct." On the basis of this affirmation, made under penalty of perjury, it must be concluded that the petitioner willfully and knowingly made the misrepresentations.

Third, the evidence is material to the petitioner'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 actual existence and viability of conducting business in a target employment area in and the petitioner's misrepresentations were accordingly material to her eligibility.

By filing the instant petition and making false representations regarding business conduct, the petitioner has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

IV. SUMMARY

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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 petitioner knowingly submitted documents containing false statements in an effort to mislead USCIS relating to an element material to their eligibility for a benefit sought under the immigration laws of the United States.