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

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PUBLIC COPY

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[redacted]

DATE: APR 17 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mary Jenson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a formal finding of material misrepresentation.

The petitioner filed the Form I-526, Immigrant Petition by [redacted], on January 28, 2010, seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The director concluded that the petitioner's investment was not at risk and would not create the necessary jobs and denied the petition accordingly. The petitioner filed the instant appeal.

The AAO will dismiss the appeal on multiple grounds. First, the AAO agrees with the director's conclusion that the petition was not filed within a regional center, as defined at amended section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993. Second, the AAO finds that the petitioner failed to demonstrate that the investment is at risk or that each joint venture will create the requisite 10 jobs. Third, the AAO finds that the petitioner did not establish that she has invested in a targeted employment area and, thus, must establish that she has invested or is actively in the process of investing $1,000,000 rather than the reduced amount of $500,000. Fourth, the AAO finds that the petitioner has failed to submit evidence that traces the path of the money from the petitioner's personal lawfully acquired funds to the new commercial enterprise. Finally, the AAO finds that the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact.

I. THE LAW

Section 203(b)(5)(A) of the Act 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).

The regulation at 8 C.F.R. § 204.6(j) requires the petitioner to submit specific evidence in support of the petition:

> *Initial evidence to accompany petition.* A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial

> enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. In the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center designated by the Service in accordance with paragraph (m)(4) of this section.

The regulation continues to specify the required evidence that must accompany a Form I-526, Immigrant Petition by Alien Entrepreneur. *Id.* at (j)(1)-(6). The regulation also notes that the petitioner may be required to submit additional information or documentation that USCIS may deem appropriate. *Id.*

II. FACTUAL AND PROCEDURAL HISTORY

The record of proceeding contains numerous incorrect references to the multiple business entities that are involved in this petition. For example, the petitioner and the evidence refer to the new commercial enterprise as

On the Form I-526, the petitioner indicated that the petition is based on an investment of $539,000 in "," a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000. Despite the use of the abbreviation "Inc." on the Form I-526, the record contains a Joint Venture Agreement and an Operating Agreement that indicate the petitioner and organized as a limited liability company (LLC). The 2009 Internal Revenue Service (IRS) Schedules K-1 for , however, indicate that the members of the LLC are the petitioner and [1] The record contains no evidence that are one and the same although counsel and letters from other individuals use the names interchangeably. The only corporate filing in the record of proceeding for any entity is the Delaware Certificate of Incorporation for

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[1] The IRS Form 1065, U.S. Return of Partnership Income, and accompanying Schedule K-1 name "" as the other partner rather than "." As the IRS Form 1065 and Schedule K-1 list the Employer Identification number for the AAO will accept that this document relates to the petitioner's new commercial enterprise despite the recording error.

[2] The petitioner has submitted documents that use "" and "" interchangeably. As there is no evidence that exists as a separate entity, the AAO will reference only "" the name that appears on the Delaware Certificate of Incorporation.

Based on the evidence in the record, the AAO will evaluate the petitioner's initial, written claim to have created the new commercial enterprise with its managing member,

The petitioner indicated on the Form I-526 that the new commercial enterprise, , is located on the fourth floor of . According to the initial undated business plan, provides digital media equipment, mainly televisions, to medical offices to deliver customized medical content in the waiting room. The same business plan, page 2, states that the new commercial enterprise would purchase "equipments [sic] and software to enable its services to its clients."

In support of the initial petition, counsel for the petitioner claimed:

> With the support of the local government and business community, CTCI has leased an office building for its joint venturing companies. Each company subleases office space thereof, same does DTS. (See the office Rental Agreement marked as Exhibit C-11)

The submitted sublease, dated December 1, 2009, states that "is the tenant of certain premises containing a total of eleven thousand forty-four (11,044) rentable square feet . . . located [sic]" The sublease further states that has agreed to sublet a part of the leased property described in Exhibit A to The petitioner did not submit either the original lease between and its landlord or Exhibit A to the sublease.

On November 16, 2010, the director advised the petitioner that USCIS records revealed that the address for is the same address listed on two other Form I-526 petitions filed by unrelated investors claiming to invest in separate joint ventures. The businesses identified in those petitions are and . The director further advised the petitioner of the results of a September 9, 2010 site visit. A USCIS officer visited the landlord, , and the actual office location at . The officer reported that he was unable to confirm that or any of the joint ventures occupied or leased more than 2,000 square feet, contrary to the claimed 11,044 square feet of office space. The officer also reported that most of the occupied space was unfurnished.

In response, counsel stated that the landlord was only familiar with "' and not the joint ventures and that had secured an amendment to its lease allowing it to sublease additional space up to 11,044 square feet. The petitioner submitted a downloaded copy of a June 5, 2009 lease addendum. The lease addendum permits to sublet up to 11,044 square feet, if available, to companies with common ownership. The petitioner never submitted a copy of the initial lease between and Real Estate for the director's review.

The petitioner also submitted a new business plan that states the joint ventures are now located at , but did not submit a lease for this location or evidence of the square footage such that USCIS might determine whether the space is sufficient for the business plan.

The director denied the petition after determining that the petitioner had failed to demonstrate an at-risk investment or that the new commercial enterprise, , had created or would create the necessary employment. The director entered a "finding of fraud" based on the petitioner's submission of a false sublease. The director also concluded that the petitioner had misrepresented that it employed individuals at who are in fact employed by nd noted that the Forms I-9, Employment Eligibility Verification, for appear to have been altered.

On appeal, counsel submitted a brief and two letters attempting to address the inconsistencies raised by the director. Mr. indicated in one of the letters that the lease at is "still active" but did not name any entities that are still occupying space on the fourth floor of . further asserted that he initiated a lease with with the understanding that as joint ventures were added, would pay for the actual space used. did not suggest that TC Ventures V, LLC has ever leased, used, or paid for additional space beyond the square footage specified in its initial lease.

On July 22, 2011, the AAO advised the petitioner that is, in fact, the listed business on a fourth Form I-526 petition claiming job creation on the fourth floor of . The record of proceeding for contains the original lease between and (in care of Realty), dated October 18, 2008.

Upon review, the lease was not for an "office building" with "eleven thousand forty-four (11,044) rentable square feet," but for a total of 375 square feet. The lease provides the lessee an option to expand into additional space "upon reasonable terms and conditions to be negotiated at the time of expansion or option period".

The AAO explained in its notice that the petitioner had failed to provide a negotiated contract for additional space beyond the 375 square feet in the October 18, 2008 lease. Rather, in response to the director's notification that USCIS had uncovered the existence of the other sublessees, the petitioner submitted the June 5, 2009 addendum. At best, the addendum appears to be a nonbinding option to lease additional space at an undetermined future date, if it is available. The addendum allows to acquire additional space up to 11,044 square feet "on an as available basis at the time of request, . . . the rental rate to be negotiated at the time of acquiring the additional space." The petitioner has failed to provide any evidence establishing that has expanded its initial lease agreement. Thus, remains a tenant of only 375 square feet, portions of which it is subleasing to three separate businesses:

On August 5, 2011, the petitioner submitted a response that attempts to explain the numerous inconsistencies and omissions in this matter. The petitioner failed to provide independent objective evidence to support most of the explanations in the response. Moreover, the petitioner now suggests that the new commercial enterprise will be engaged in providing services as a "call center" and not as a provider of digital media equipment and customized medical content. Thus, the petitioner proposes to provide far more limited services than originally claimed. It also appears that these limited services will be pooled with the services of other joint ventures in a single office, at a new location, and completely under the auspices of the petitioner's joint venture partner.

On appeal, then, the petitioner has radically changed the claimed nature of the new commercial enterprise. As will be discussed, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The AAO will dismiss the appeal based on multiple findings. With the exception of the first finding, all are independent grounds for denial. The AAO agrees with the director's finding regarding misrepresentation in the record, and will also enter a formal finding of material misrepresentation.

III. ANALYSIS

A. Regional Center Issues

An alien seeking an immigrant visa under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within an approved regional center and that such investment will create jobs directly or indirectly. 8 C.F.R. §§ 204.6(m)(1), (7); 8 C.F.R. § (j)(4)(iii). Counsel represented this case as a regional center investment on page 1 of the initial brief and page 3 of the response to the director's notice of intent to deny. The director declined to consider the investment as one made within a regional center.

Initially, the petitioner submitted evidence that USCIS has designated the Pennsylvania Department of Community and Economic Development Regional Center as a regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, as amended. While [redacted] is located within a county that is included within the geographic area of the regional center, a regional center is not defined as a geographic area, but as an "economic unit." 8 C.F.R. § 204.6(e). The economic unit in the identified regional center is the Pennsylvania Department of Community and Economic Development Regional Center. As the petitioner did not invest through this economic unit, she has not invested in a regional center and must rely on direct job creation.

B. At-Risk Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines capital and investment. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. The regulation then lists the types of evidence the petitioner may submit to meet this requirement.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998). A petitioner must risk both gain and loss. *Id.* at 187. Moreover, *Matter of Ho*, 22 I&N Dec. 206, 210 (Comm'r 1998), states that the petitioner must present some evidence of the actual undertaking of business activity beyond the de minimum action of signing a lease agreement.

1. Tax Returns

The petitioner's 2009 IRS Schedule K-1, Partner's Share of Income, reflects the petitioner's 41 percent ownership of . Although the petitioner claims that she invested in as a joint venture with , the Schedule K-1 for the remaining 59 percent lists as the partner. The IRS Schedule K-1 information contradicts the petitioner's essential claim to have placed capital at risk in a joint venture with On this basis alone, the petition may not be approved.

In addition, according to Part II, section J, of the IRS Schedule K-1, the petitioner's share of s profit is 41 percent but her share of any potential loss is zero percent. lists its share of the losses as 100 percent. Although the petitioner has not claimed that she made a qualifying investment in a joint venture with to the extent that the petitioner jointly invested with ., none of that money is at risk. And even if the AAO were to deem the investment to be made jointly with , similar to the loss delegation information on the IRS Schedule K-1, section 5.3(B) of the Joint Venture Agreement confirms that any net losses of the venture would be allocated entirely to Under either scenario, the petitioner's purported capital investment is clearly not at risk.

2. Discrepancies in Expenses and Financial Statements

The petitioner's expense and financial statements are not credible because they contain conflicting information. USCIS is unable to rely on these documents as a basis for approving this petition.

To demonstrate that any transferred funds are at risk, it is incumbent on the petitioner to document how the capital will be utilized. *See Al Humaid v. Roark*, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010) (funds in a grossly overcapitalized business are not at risk). The original business plan did not include any financial projections explaining how the business would spend the capital funds. While the second business plan does contain financial projections, those projections contain irreconcilable statements. For example, the projected job creation timeline projects the purchase of 150 televisions in the first year. The petitioner claimed that each television would cost between $1,000 and $2,000. Accordingly, the petitioner should have budgeted between $150,000 and $300,000 for this projected purchase, but the financial projection only budgets $135,000. The petitioner appears to have underfunded its projected first-year television expenditures between $15,000 and $165,000.

The profit and loss statement covering January 1, 2010 through December 13, 2010 also indicates total annual rent costs of $3,950 despite the fact that the December 2009 sublease states that the annual base rent will be $12,000, increasing five percent annually. The record does not resolve this conflicting information with independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. For this additional reason, the 2010 financial statements do not appear to be valid.

The petitioner also submitted ten December 2009 receipts for "waiting room service" in the amount of $50 to various purported clients all labeled "Paid." The receipts request that the clients "make checks payable to ." While , LLC's 2009 IRS Form 1065 U.S. Return of Partnership Income does list $500 in gross receipts, the company's bank statement for November 2, 2009 through January 19, 2010, does not reflect ten $50 deposits or any $50 deposits. did transfer $650 to on January 16, 2010, but this transfer is inconsistent with the ten receipts which list payments from the clients directly to Accordingly, none of the receipts establish that any clients paid for services in December 2009.

The record contains a five-year "Network Equipment & Service Agreement" between (the customer) and (the provider). The director found that language in the agreement undermines the petitioner's claim that used the $500,000 investment to purchase digital media equipment. The director's reasoning on this is unclear. Nevertheless, the Agreement is inconsistent with the ten December 2009 invoices purporting to document payments from clients directly to because it shows making payments to . It is also inconsistent with the bank statement that shows transferring funds to because the agreement provides that will pay the rental income to .

Finally, the Network Equipment & Service Agreement contradicts the petitioner's business plan, which states that will acquire equipment and service rights from , rather than . It is incumbent upon the

petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

While the petitioner submitted several invoices billed to '' totaling $40,100 in 2010, these invoices do not resolve the inconsistencies between the 2009 invoices and the bank statements and financial statements, discussed above. Moreover, 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. at 591. Thus, the AAO will not presume that the 2010 invoices have any more weight than the questionable 2009 invoices.

The expense projections in the record that should demonstrate how the petitioner will use the invested funds are inconsistent and, thus, not credible. In response to the AAO's July 22, 2011 notice, counsel now asserts that the petitioner is investing in a call center. The record contains no cost projections explaining how a call center requires $500,000 in capital nor did the petitioner provide a business plan for this new concept. As such, the petitioner has not established that the full $500,000 is at risk.

3. Agreement Terms

The Joint Venture Agreement and Operating Agreement also fail to establish how the petitioner's funds are at risk. For example, section 5 of the Joint Venture Agreement states that cash distributions will be "according to the schedule set forth in the 'Operating Agreement.'" Article IV, line 16, of the Operating Agreement, however, states that distributions of cash "shall be based on the terms of executed Agreement by the members." As each agreement refers to the other without additional information, there is no agreement as to when and how cash will be distributed. Additionally, as previously discussed, Section 5.3(B) of the Joint Venture Agreement states that that any net losses of the joint venture would be allocated entirely to

4. Conclusion

Based on the evidence in the 2009 IRS Schedule K-1 statements showing that the petitioner has not entered into a joint venture with , the petition may not be approved. In addition, based on the numerous inconsistencies and deficiencies in the remaining evidence, the petitioner has not put forth credible evidence of projected finances such that the AAO can conclude that the full amount of the invested funds were or are at risk.

C. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Forms I-9, or

other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise. If the new commercial enterprise has not already hired ten qualifying employees, the petitioner must submit a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees and the approximate dates, within two years, that the employees will be hired.

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. at 213. 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.*

Matter of Ho, 22 I&N Dec. at 213 makes clear that the business plan must be credible. Federal courts have upheld USCIS's authority to find business plans that are inconsistent with the record to lack credibility. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1039. In affirming that decision, the Ninth Circuit cited *Matter of Ho,* 22 I&N Dec. at 213 for the proposition that the business plan must be credible and stated that the AAO had detailed numerous findings that raised questions about the business plan, including the office from which the new commercial enterprise would operate. *Spencer Enterprises, Inc.*, 345 F. 3d at 694. The court concluded that "numerous errors and discrepancies, however – especially where [USCIS] is evaluating the credibility of a business plan – raise serious concerns about the viability of the enterprise." *Id.*

On the petition, filed January 28, 2010, the petitioner indicated [redacted] currently employed two workers and would hire an additional eight. The business plan stated that [redacted] "had been equipped with" two full-time employees, two contractors, and was "actively hiring" an administrative assistant. Initially and in response to the director's notice of intent to deny, the petitioner submitted organizational charts, payroll records, and Forms I-9.

In the denial decision, the director noted that the petitioner's evidence "appeared to be altered and/or fraudulent, such as the employment records (Forms I-9) in which the business name has been changed . . . ." The director specifically observed "line disturbances" on the photocopied Forms I-9 in the block around the name of the company that completed the forms as evidence of employment. The director noted that the apparently altered forms indicated that certain individuals were simultaneously employed by three different new commercial enterprises: [redacted] and [redacted] Ms. [redacted] signed the Forms I-9 as the representative of [redacted]

On appeal, counsel asserts that the Forms I-9 were "filled up mostly by hand. Change of a word or handwriting is a [*sic*] common place." Upon review, the line disturbances are not changes of words or a reflection of handwriting but instead give the appearance that the name of the

company had been "whited out" with correction tape and overwritten with the name of a different company. The AAO compared the Forms I-9 that were submitted for and . Upon review, it is apparent that the original Form I-9 for a employee, had been altered and resubmitted to represent as the employee of . On both forms, the signatures of are identical, with the loops of the cursive signature crossing the same letters in both copies of the official Form I-9. While there are no line disturbances in the original Form I-9 submitted for , LLC, the Form I-9 submitted for contain the distinct line disturbances noted by the director. The line disturbances give the clear appearance that the name of the original company had been erased and substituted with the name of . In addition, the date of signature on the original Form I-9 had been left blank in the second version, representing the same notable line disturbances.

The line disturbances themselves are not conclusive evidence of fraud, but they do raise serious doubts that undermine the probative value of the evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Again, any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner has failed to resolve these inconsistencies on appeal. The Forms I-9 will not be given any evidentiary weight in this matter.

On July 22, 2011, the AAO advised that it had acquired the receipt files of nonimmigrant petitions that another company using address, filed in behalf of the petitioner's spouse, The AAO noted several discrepancies relating to overlapping staff among the joint ventures and .

With regard to overlapping staff, counsel states that the fastest way to build up the joint ventures was "to use an experienced start-up team consisting of staff members from who already possess the knowledge and skills needed to train new joint venture employees appropriately." Counsel concludes that once the joint ventures hire employees locally, they will perform "the duties of monitoring and managing the screens." The unsupported assertions of counsel do not constitute evidence. *See INS v. Phinpathya,* 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

Regarding the overlap of address and staff of the joint ventures and , counsel notes that 's address is "suite " while , address is "suite ." The petitioner submits affidavits from officers of nd onfirming the two suite numbers. Finally, Mr. , asserts that while is not a joint venture company, it requested that " provide experienced employees on a temporary basis.

A petitioner must explain projections for job creation in its business plans. The business plans for all three joint ventures identified by the director are identical. All of the plans state that each joint venture will purchase's equipment and software in order to provide television service to medical waiting rooms and deliver customized content. The types of employees contemplated by the plans include an operations manager, an author of multimedia content, a network engineer, an electronic engineer, customer service personnel, a web programmer, a database administrator, technical support staff and an administrative assistant. Thus, the joint ventures propose to provide identical services rather than complementary services. The 2010 business plan and counsel's December 13, 2010 brief indicate contemplates 20 similar joint ventures.

Both counsel and now claim on appeal that the office will be limited to a "call center." In a statement dated August 3, 2011, the petitioner appears to suggest that the ten full-time permanent jobs that the joint venture will create will be customer service and technical support representatives. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The director never had an opportunity to review the claim that would be limited to opening a call center. The record contains no business plan providing staffing projections for a call center.

Given the new description on appeal of the office in Johnstown as a "call center" and assertion that "" not will be supplying content to the joint ventures, the record does not explain why the proposed job creation would include sales consultants and digital content authors as claimed in the only business plan contained in the record.

In addition, assertion that the "" employees worked part-time for the joint ventures and during overlapping periods lacks credibility and the record undermines these claims. For example, Ms. appears on the August 2010 payroll for in and yet appears on staffing plan in Maryland during the same month.[3] Similarly, appears on both the August 2010 and June 2, 2011 staffing plans of in Maryland. also appears on all but one of payroll records in Pennsylvania from January 2010 through November 2010. Neither the petitioner nor explain how these individuals worked in both locations

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[3] s letterhead lists its website. The AAO notes that is also represented by the website as the President of *See* (Accessed March 12, 2012 and incorporated into the record of proceeding).

during the same period. Moreover, according to the submitted payroll records, purportedly worked 86 hours during a two-week period for *both* and during pay periods in March 2010. The payroll records also indicate that each overlapping employee has been paid separate salaries by each company.

In light of the above unresolved discrepancies, the petitioner has not credibly documented sufficient job creation and has not presented a credible business plan for the creation of at least 10 new jobs in the next two years.

D. Minimum Investment Amount

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that a targeted employment area is one which, "at the time of filing" is an area that has experienced unemployment of at least 150 percent of the national average rate. The regulation at 8 C.F.R. § 204.6(j)(6)(ii) provides that a petitioner must document a targeted unemployment area through the submission of data regarding the county or a letter from an authorized body of the government of the relevant state. *See also* 8 C.F.R. § 204.6(i).

As stated above, the petitioner indicated on the petition that she was investing in a targeted employment area, specifically within Cambria County, Pennsylvania. The petitioner began investing on December 21, 2009. The petitioner submitted a March 26, 2008 letter from the office of of the Center for Workforce Information and Analysis, Pennsylvania Department of Labor and Industry. letter, predating the investment by 21 months and relying on data for 2007, designates 23 contiguous census tracts which he asserts encompass in its entirety. The fact that an area was once an area of high unemployment does not mean that it still is. *See Matter of Soffici,* 22 I&N Dec. 158, 159 (Comm'r 1998). The petitioner failed to provide an updated letter from or, in the alternative, recent unemployment data for Cambria County as a whole.[4]

In light of the above, the minimum investment amount is $1,000,000. As the petitioner does not claim to have invested or to be actively in the process of investing that amount, the petition must be denied.

[4] In December 2009, the unemployment rate for Cambria was 9.4 percent, less than the national rate of 9.9 percent. *See* http://www.tradingeconomics.com/united-states/unemployment-rate-in-cambria-county-pa-percent-m-nsa-fed-data.html; http://data.bls.gov/cgi-bin/surveymost. (Accessed June 2, 2011 and incorporated into the record of proceeding.)

E. Source of Funds

To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied by specific evidence to show the source of the invested funds. 8 C.F.R. § 204.6(j)(3). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Matter of Izummi,* 22 I&N Dec. at 195.

The petitioner documented that she withdrew $584,975 from her Chinese Citibank debit account on December 9, 2009. On December 11, 2009, 10 individuals identified by counsel as "close friends" began transferring money to the petitioner's account at Far East National Bank. One of the transfers is notated as an "education fee" and others are notated as "for travel less." The petitioner's name appears on only three of the transfers. DTS Woodsboro Bank Notices of Wire Transfer reflect that the petitioner wired $49,000 and $490,000 to Digital Tech Solutions, LLC on December 21, 2009 and January 15, 2010. The record does not trace the funds transferred by the petitioner's "close friends" back to her Chinese Citibank debit account. Moreover, the notations for some of the transfers raise concerns about whether these funds were intended for the petitioner's investment.

In light of the above, the petitioner has not sufficiently documented the path, and thus, the lawful source, of her invested funds.

F. Material Misrepresentation

In support of the initial petition, the petitioner claimed that its managing member, [redacted], had leased an "office building" for the joint venture and that the premises contained "a total of eleven thousand forty-four (11,044) rentable square feet."

In the denial, the director entered a "finding of fraud" based on the petitioner's submission of the sublease representing a total of 11,044 square feet when the new commercial enterprise had not, in fact, subleased a space that size. The director's decision was based in part on a site visit. Specifically, on September 9, 2010, a USCIS officer visited [redacted] Realty, the landlord for the location specified on the lease, the fourth floor of [redacted]. The receptionist advised that "[redacted]" had leased approximately 2,000 square feet on the fourth floor of [redacted] in early 2010. She was not familiar with any sublease agreement. The USCIS officer then visited the actual location at [redacted], to find most of the fourth floor vacant with "[redacted]" occupying a small furnished office with approximately 400 square feet and an additional unfurnished 1,600 square feet. A smaller sign next to "[redacted]" sign listed three joint ventures, including [redacted]. As previously discussed, the sub-lessor only had 375 square feet available to sublease to the new commercial enterprise.

Despite repeated USCIS requests, the petitioner has failed to provide any evidence establishing that [redacted] has ever formally expanded its initial lease agreement. Counsel has never

explained why USCIS should accept affirmations about informal understandings rather than the plain language of the leases itself. Thus, based on the lease agreement in the record, remains a tenant of only 375 square feet, portions of which it is subleasing to three separate businesses.

The AAO will address whether the submission of a sublease stating that "is the tenant of certain premises containing a total of eleven thousand forty-four (11,044) rentable square feet area ('Leased Premises')" rises to the level of a misrepresentation. A misrepresentation is an assertion or manifestation that is not in accord with the true facts.[5] 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.

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 at 694. 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. at 591. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. *See* section 204(b) of the Act.

In this case, the discrepancies and errors lead the AAO to conclude that the evidence of the petitioner's claimed ability to lease up to 11,044 square feet is neither true nor credible. The new commercial enterprise's ability to utilize up to 11,044 square feet is material to the credibility of the business plan regulatory mandated under 8 C.F.R. § 204.6(j)(4)(i)(B) and to whether the funds are credibly at risk pursuant to 8 C.F.R. § 204.6(j)(2). *See Matter of Ho*, 22 I&N Dec. at 210.

When given multiple opportunities to rebut these findings, the petitioner failed to sufficiently explain the inconsistencies and support those explanations with independent and objective evidence, such as through the submission of a credible lease addendum with negotiated space and rent terms. *Id.* The AAO concludes that the petitioner submitted a sublease and other evidence containing information which is patently false.

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[5] 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 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).

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 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, as previously discussed, the petitioner submitted the sublease and other evidence to USCIS, in support of a visa petition, which contained information that is patently false. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the submission of a sublease containing false information in support of a Form I-140 visa petition constitutes a false representation to a government official.

Second, the AAO finds that the petitioner willfully made the misrepresentation. For all of the reasons discussed above, the petitioner's assertion that there was no intent to mislead through the submission of the sublease is not credible.

Furthermore, the petitioner signed the visa petition, 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 a business plan, the sublease and other evidence such as organization charts and payroll records. The signature portion of the Form I-526 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 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 credibility of the petitioner's business plan and whether or not the petitioner's joint venture was operating in the claimed location. The size of the location, and whether or not the petitioner had invested or was actively in the process of investing in office space at the location, is directly material to the petitioner's eligibility under section 203(b)(5) of the Act and the regulatory requirements at 8 C.F.R. § 204.6(j). Had the petitioner revealed that it had only 375 square feet available for its business plan, rather than the claim of 11,044 square feet, the director would have reasonably inquired into the credibility of the petitioner's business plan and whether the funds were credibly at risk for purposes of job creation. Ultimately, the site visit and request for evidence revealed that four businesses were operating out of a single location with only 375 square feet available, that they all shared the same business plan, and that they shared at least some employees. If the petitioner had revealed these facts in the initial petition, the director would have reasonably determined the location was insufficient to support the required 40 jobs that would be necessary to satisfy the job creation requirement for all four businesses. The AAO concludes that the petitioner's misrepresentations were material to the petitioner's eligibility.

By filing the instant petition and falsely claiming an ability to sublease up to 11,044 square feet, 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 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.

The AAO conducts appellate review on a *de novo* basis. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *Soltane v. DOJ*, 381 F.3d at 145. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal.

2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed with a separate finding of willful misrepresentation of a material fact on the part of the petitioner, .

FURTHER ORDER: The AAO finds that the petitioner, , knowingly misrepresented evidence submitted in an effort to mislead USCIS and the AAO on an element material to her eligibility for a benefit sought under the immigration laws of the United States.