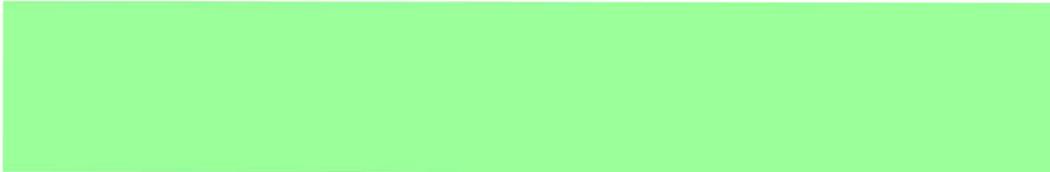
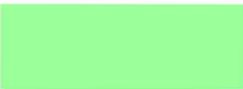


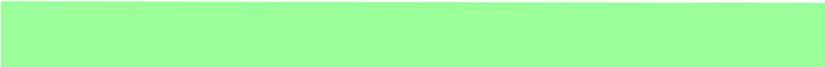
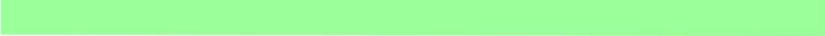


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 28 2013** Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and withdraw the director's decision.

The petitioner is a United States corporation that is engaged in the dairy industry. According to the petition, the company employs 242 persons and produces a gross annual income of approximately \$148,000,000. The petitioner sought to transfer the beneficiary from a related company in Mexico and employ him as its Senior Engineer Specialist. Accordingly, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

After issuing a notice of derogatory information, the director ultimately denied the petition with a “finding of fraud.” The petitioner filed a timely appeal seeking to reverse the finding of fraud.

I. The Law

Section 203(b) of the Act states in pertinent part:

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

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary. *See* 8 C.F.R. § 204.5(j)(2) (defining the terms “affiliate” and “subsidiary”).

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.

II. Issues on Appeal

This matter has a complicated procedural history, involving a complex multinational business structure and multiple mergers. While the record fully represents the history, the AAO will summarize the essential facts for purposes of this decision.

According to the company's representations, the petitioner is a wholly-owned subsidiary of [REDACTED] a major producer of dairy products in Mexico. [REDACTED] maintains over 20 dairy plants in Mexico and the United States and employs more than 27,000 persons. Through the complex organization of [REDACTED] the petitioner has been or is currently associated with the following entities: [REDACTED]

On May 9, 2011, to create a single corporate identity for the company, the petitioning organization adopted the name [REDACTED] after acquiring the rights to that brand.

On August 24, 2009, [REDACTED] filed a Form I-140 visa petition ([REDACTED]) on behalf of the beneficiary. USCIS denied this petition on April 16, 2010. On August 25, 2010, the current petitioner, [REDACTED] filed the present Form I-140 visa petition ([REDACTED]) on behalf of the beneficiary. On August 11, 2011, the director issued a Notice of Intent to Deny (NOID) to inform the petitioner of derogatory information and to provide an opportunity to rebut the information. In the NOID, the director detailed the petitioner's corporate structure, name changes, and history, referring to websites as the source for much of the information. The petitioner responded on September 12, 2011, providing a detailed and comprehensive rebuttal. On March 13, 2012, after six months with no decision forthcoming, the petitioner withdrew the visa petition stating that the beneficiary was no longer employed by the company.

On August 7, 2012, the director denied the petition, concluding that the petitioner failed to provide sufficient reliable evidence to: (1) establish that it has a qualifying relationship with the beneficiary's employer abroad; (2) establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; (3) establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (4) establish that the petitioner and the foreign entity had been and continue to do business; and (5) establish that it had the ability to pay the beneficiary's proffered wage at the time the petition was filed. The director denied the visa petition based on these five merits determinations.

Additionally, the director determined that the petitioner failed to submit independent and objective evidence to overcome the finding that the petitioner submitted "falsified evidence" and therefore issued the denial with a "finding of fraud."

On September 7, 2012, the petitioner, through counsel, filed an appeal. Counsel did not address any of the five adverse findings regarding the petitioner's eligibility and, in fact, expressly stated that it was not the petitioner's intention to seek approval of the original Form I-140 in light of the beneficiary's departure from his employment with the petitioner. Instead, the petitioner seeks to challenge the director's finding of fraud.

III. Analysis

A. Withdrawal

As an initial matter, in view of the petitioner's request that the petition be withdrawn, the director issued the August 7, 2012 decision on the merits in error. The AAO will withdraw the director's decision relating to the five determinations on the merits. The record will reflect that the petition was withdrawn by the petitioner. *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976).

A petitioner may withdraw a petition at any time up to the point that a decision is rendered by USCIS or, if the petition is approved, until the beneficiary is admitted, adjusts status, or changes status based on the approved petition. 8 C.F.R. § 103.2(b)(6). A withdrawal may not be retracted. *Id.* Once a petition is withdrawn, USCIS may not refuse the withdrawal and may not deny the petition on the merits, but the facts and circumstances surrounding the withdrawn petition shall be considered material to any new petition. *See Cintron*, 16 I&N at 9; 8 C.F.R. § 103.2(b)(15).

However, only a timely and voluntary retraction of a misrepresentation can serve as a defense to inadmissibility; the simple withdrawal of a visa petition will not absolve a petitioner or beneficiary from the attempted misrepresentation. A withdrawal will not preclude USCIS from entering a finding on the record, separate and apart from a decision on the merits, based on an attempt to procure a visa, other documentation, admission, any other immigration benefit by fraud or the willful misrepresentation of a material fact.

B. Timely Retraction

Accordingly, the second issue in this matter is whether the withdrawal constitutes a timely retraction of the alleged "falsified evidence." A timely retraction of a misrepresentation can serve as a defense to inadmissibility under section 212(a)(6)(C)(i) of the Act. *See Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949); *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). For the retraction to be effective, it must be done "voluntarily and without prior exposure of [the] false testimony." *Matter of R-R-*, 3 I&N Dec. at 827; *see also Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that recantation of false testimony one year after the event, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was not voluntary or timely).

Here, the director issued the NOID prior to the withdrawal but the petitioner denied any wrongdoing and submitted a comprehensive rebuttal to the notice of derogatory evidence. Assuming arguendo that the petitioner submitted the purported "falsified evidence," there would be no timely and voluntary correction of misrepresentation as the NOID placed the petitioner on notice that the director was prepared to expose the false testimony. *See Matter of M-*, 9 I&N Dec. at 119. The petitioner's request to withdraw the petition, after the director confronted the petitioner with the purported misrepresentation, did not have the effect of a timely retraction.

C. Material Misrepresentation

Finally, turning to the vital issue in this appeal, the AAO concludes that the director did not establish the necessary elements to find a material misrepresentation, or a “finding of fraud” as the director inaccurately phrased the matter.¹

A misrepresentation is an assertion or manifestation that is not in accord with the true facts of the case. 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. *See* INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). The law provides for a wide range of potential consequences for material misrepresentation, including the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, or criminal prosecution. *See* 18 U.S.C. §§ 1001, 1546; *see also*, *U.S. v. O'Connor*, 158 F.Supp.2d 697 (E.D. Va. 2001).

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

Beyond the adjudication of the visa petition, a misrepresentation may also lead USCIS to enter an administrative finding that a petitioner or individual sought to procure a visa or other documentation by willful misrepresentation of a material fact. *See* sec. 212(a)(6)(C) of the Act.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires someone to 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 knowingly 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).

¹ 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).

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.

In the present matter, the director's decision is defective at the most basic level – the director did not identify any specific assertion or manifestation that might constitute a material misrepresentation.

In the original NOID, the director independently researched and recited in great detail the merger history, name changes, and the complex corporate structure of the petitioning organization. In response to the NOID, as noted by the director in the ultimate decision, the petitioner “confirm[ed] the different name changes and filing dates mentioned in the NOID. . . . although the different filings and name changes may have caused some confusion, [the petitioner stated] that its business relationship with [REDACTED] has been maintained.” The petitioner submitted extensive evidence to rebut the director's conclusions.

The director rejected the rebuttal, however, citing to the fact that the [REDACTED] website does not reflect any association with the U.S. petitioner or corroborate any of the claimed activities in the United States. The director also referenced research from an outside business information resource that indicated that [REDACTED] had not engaged in business activities outside of Mexico. After careful review, the AAO cannot locate copies of the website or the report in the record of proceeding. As such, the director did not document the conflicting information.

In conclusion, the director has recited a string of complex and possibly conflicting facts, but failed to identify any specific assertions that might rise to the level of a material misrepresentation. Vague references to “derogatory information” are not sufficient. At best, the director's conclusions are based on inferences or conclusions that are not supported by the record. Observations that are conclusory, speculative, equivocal, or irrelevant will not provide a proper basis for a finding of material misrepresentation. *Cf. Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

In response to the NOID and on appeal, the petitioner has submitted sufficient evidence to overcome the director's conclusions. Accordingly, the director's “finding of fraud” or misrepresentation will be withdrawn.²

² Both the director's decision and the petitioner's subsequent appeal make reference to a Form I-90, Application to Replace Permanent Resident Card, which the beneficiary filed independently. In the final decision, the director did not provide the receipt number for this application so that it might be specifically identified. Regardless, as a separate record of proceeding, the decision on that application is not before the AAO for review and furthermore does not fall within the AAO's appellate jurisdiction.

IV. Conclusion

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. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained; the petition is withdrawn.

FURTHER ORDER: The director's finding of fraud or misrepresentation is withdrawn.