U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 1 5 2010**
WAC 08 099 51768

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

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 on appeal. The appeal will be dismissed.

The petitioner seeks 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 determined that the petitioner had failed to demonstrate that she would create the necessary employment.

On appeal, the petitioner submits a personal statement. For the reasons discussed below, without additional information about the type of construction workers required for the projects and whether some construction positions would be intermittent, we concur with the director that the record does not establish that the petitioner has created the necessary employment. We further note that the Forms I-9 submitted are incomplete and, thus, cannot establish that any of the employees are qualifying employees. Beyond the decision of the director, we further find that the petitioner has not sufficiently traced the invested funds back to her personal, lawfully obtained assets.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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).

The record indicates that the petition is based on an investment in a business, [redacted], not 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 $1,000,000.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form 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; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
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> * * *
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, the regulation at 8 C.F.R. § 204.6(g)(1) states that multiple investors may invest in a new commercial enterprise "provided each individual investment results in the creation of at least ten full-time positions for qualifying employees." The regulation at 8 C.F.R. § 204.6(g)(2) further states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall

> recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

According to the record, the new commercial enterprise involves three investors who will be seeking benefits pursuant to section 203(b)(5) of the Act. Thus, for all three investors to qualify, the new commercial enterprise must create at least 30 new positions for qualifying employees.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Most significantly for this decision, full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

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 the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job

> descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

Initially, the petitioner submitted a business plan indicating that CIMC would begin hiring in 45 days and within the next two years would hire a Chief Executive Officer (CEO) and President, a Vice President of Marketing, a Vice President of Operation, a Vice President of Business Development/Corporate Secretary, four clerks, one receptionist, two foremen and 22 construction crew workers. The petitioner is the Vice President for Marketing, the two other investors who are seeking or will seek benefits pursuant to section 203(b)(5) of the Act fill the other two vice president positions. Another investor who owns 85 percent of the company but who is not seeking benefits pursuant to section 203(b)(5) of the Act is the CEO. The plan does not include a specific time table for hiring the clerks, receptionist, foremen and construction crew workers and does not break down the type of construction workers, which can include carpenters, plumbers and electricians.

In response to the director's request for additional evidence, the petitioner submitted CIMC's quarterly returns for all four quarters of 2008 reflecting employment increasing from 14 employees to 33 employees. While two of the 33 employees in the fourth quarter of 2008 do not show wages that can account for full-time employment at minimum wage for the full quarter, we acknowledge that two employees were added in December 2008 and, thus, cannot be expected to show wages for the full quarter.

The petitioner also submitted Forms I-9 for 37 employees. All of the Forms I-9 are incomplete. Specifically, section two is blank, including the certification by the employer. Thus, these forms cannot establish that the employees are qualifying.

On February 3, 2009, the director issued a notice of intent to deny advising that transitory or temporary jobs cannot serve to meet this criterion. In response, the petitioner references the memorandum from William Yates, Acting Associate Director of Operations, *Amendments Affecting Adjudication of Petitions for Alien Entrepreneurs (EB5)*, HQ40/6.1.3 (June 10, 2003). The petitioner notes that the 2003 memorandum states that the jobs need not be retained until a reasonable time after conditional visa issuance. The petitioner submits evidence that the construction project should begin in 2009 and be completed in 2011. The petitioner concludes that CIMC will employ the necessary employees for more than 24 months on this single project alone and will roll these positions over to new projects.

The director concluded that constructions workers utilized for a limited duration construction phase of less than three years could not serve to satisfy the employment creation requirement. The director also expressed concern that the Internal Revenue Service (IRS) Form SS-4 completed for CIMC lists the principal activity for the business as real estate rather than construction.

On appeal, the petitioner asserts that there is no authority that requires the jobs to last three years and that real estate, a broad term, includes construction among other activities.

As stated above, the U.S. District Court for the Eastern District of California stated that the AAO had not abused its discretion "in construing full-time employment to mean continuous, permanent employment." *Spencer,* 229 F. Supp. 2d at 1039. The alien in that case had not documented that the construction positions, while full-time for a given week, would be continuous rather than intermittent as the workers' skills were needed. *Id.* For example, the plan in that case indicated that the number of framers required would fluctuate month to month. *Id.* The court concluded that the jobs "do not appear to qualify as permanent, full-time positions, but rather arise when building trade skills are needed during a phase of construction." *Id.* While only a district court decision, this decision was affirmed by the Ninth Circuit. 345 F.3d at 683.

The phrase "construction crew workers" is extremely vague. It is not known whether these employees include workers in concrete, framing, finish carpentry, masonry and roofing trades as in *Spencer,* 229 F. Supp. 2d at 1039. Solely for purposes of employment creation in the context of section 203(b)(5) of the Act, while the individual filling the position need not remain in the position, the position itself cannot be intermittent. Without a more detailed plan of which type of construction workers would be required in each phase, we cannot determine which of those positions, if any, are continuous rather than intermittent.

In light of the above, the business plan is insufficient to establish that the petitioner has created or will create the necessary continuous positions. Moreover, as the Forms I-9 are incomplete, they cannot establish that any of the hired employees are qualifying.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) 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, as applicable, by:
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> > (i) Foreign business registration records;
> >
> > (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
> >
> > (iii) Evidence identifying any other source(s) of capital; or
> >
> > (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise)

> involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998). Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose 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'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *See Spencer*, 229 F. Supp. at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted Hong Kong investment accounts for 2007 showing ending balances as of December 1, 2007 of over $700,000.[1] The petitioner also submitted a personal tax return that reflects her income for February and March 2007 as ¥558,984.62 ($72,221)[2] and the employer's return for reflecting the director's wages issued to the petitioner's husband, Mr. director compensation for this company was HK$200,000 ($25,605) in 2006 and HK$300,000 (approximately $38,656) each year in the previous five years. The petitioner also submitted investment account statements for The petitioner additionally submitted promotional materials for listing as the Deputy Chairman and Executive Director. The registration for this company reveals that it was created on March 20, 2007. The petitioner also submitted evidence that has been a shareholder in in the British Virgin Islands as of April 12, 2004. Finally, the petitioner submitted evidence that Mr. ordered the transfer of $999,983 from an account at JP Morgan Chase to CIMC on December 6, 2007, 2007 and another $9,985 from Wachovia NY International to CIMC on December 10, 2007. While ordered these transfers, the record does not contain any statements for these accounts indicating whether he owns these accounts personally or whether they are corporate accounts. The record also lacks evidence explaining how the petitioner and who reside and own businesses in China, accumulated funds in the U.S. bank accounts from which funds were transferred to CIMC.

On December 16, 2008, the director requested the petitioner's personal tax returns and noted that had only existed for a few months prior to the petitioner's investment. In response, the petitioner submitted evidence that is the sole shareholder of , also in the British Virgin Islands. The record reflects that made large withdrawals from Hong Kong investment accounts in 2005 and 2006. The record, however, contains no evidence that actually conducts business such that it creates profits for its shareholder.

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[1] U.S. dollar approximation calculated at www.oanda.com as of December 1, 2007 on February 25, 2010.
[2] U.S. dollar amount calculated at www.oanda.com as of March 31, 2007 on February 25, 2010.

The director did not raise this issue in the notice of intent to deny or the final denial notice. The record, however, does not establish how the petitioner and accumulated the large sums in their investment accounts and account. The petitioner has not traced the invested funds from China to the U.S. banks that ultimately transferred money to CIMC. Thus, the petitioner has not adequately traced the invested funds back to her personal, lawfully acquired assets.

Finally, the regulation at 8 C.F.R. § 204.6(g) provides that, in the case of multiple investors, all capital must be identified and derived from lawful means. While the two other investors seeking benefits pursuant to section 203(b)(5) will have to demonstrate the lawful source of their investments, CIMC has another investor who is not seeking benefits pursuant to section 203(b)(5) of the Act. The record contains no information about the amount of this investor's investment or its source.

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.