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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 0 6 2014 OFFICE: IMMIGRANT INVESTOR PROGRAM 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 (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 Chief, Immigrant Investor Program Office (IPO), denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). Initially, the petitioner claimed eligibility based on an investment in the basis of the Form I-526, Petition by Alien Entrepreneur, he filed on December 27, 2012. The limited liability company was affiliated with which U.S. Citizenship and Immigration Services (USCIS) previously designated as a regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). On April 19, 2013, a federal district court judge ordered and to return all investment funds held in escrow after the U.S. Securities and Exchange Commission (SEC) filed a civil complaint alleging investment and securities fraud.[1] On August 7, 2013, the petitioner filed documents amending the petition, basing it on an investment in a limited liability company located within a USCIS designated regional center, . On September 3, 2013, USCIS terminated the designation of as a regional center.

According to its business plan, "will raise up to $14.5 million from up to 29 Investing Members" and it will "make a first mortgage loan to to fund the development of [The Foundry hotel] project." The business plan further provides that will secure an additional $7.5 million from other sources for a total estimated cost of $22 million. The petitioner is one of the Investing Members. The petitioner submitted documents indicating that the is located in a targeted employment area, for which the required amount of capital is $500,000.

The chief denied the petition on November 12, 2013, finding that the petitioner: (1) asserted eligibility under a materially different set of facts that did not exist when he initially filed the petition; (2) did not show that the petitioner had placed the required amount of capital at risk in and (3) did not show that would meet the job creation requirements. For the reasons discussed below, the petitioner has not overcome any of the chief's grounds for denial. Additionally, the petitioner has not established the lawful source of the funds he invested first in , then in the Accordingly, we will dismiss the petitioner's appeal.

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[1] *See* Securities and Exchange Commission Press Release, *Investors to Receive Their Entire Investments Back After SEC Halted Scheme Exploiting Immigration Program*, April 23, 2013, at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513998, accessed on May 7, 2014, and incorporated into the record of proceeding.

I. THE 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).

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the petition on December 27, 2012, supported by the following types of evidence: (1) documents relating to [redacted] (2) a letter from the Illinois Department of Employment Security, designating a targeted employment area; (3) bank documents relating to the petitioner's funds; and (4) documents relating to the source of the petitioner's funds.

On August 7, 2013, the petitioner amended his petition and filed the following types of evidence: (1) the SEC civil complaint against [redacted] and [redacted] (2) bank documents relating to the return and reinvestment of the petitioner's funds; (3) documents relating to the [redacted] business plan; (5) an economic impact report of developing and operating a hotel in [redacted], Arizona; (6) a letter from the [redacted] designating a targeted employment area; (7) documents relating to the petitioner's real estate properties in China; (8) documents relating to the source of the petitioner's funds; and (9) bank account documents relating to the petitioner and his wife.

On September 13, 2013, the Director, California Service Center, issued a Notice of Intent to Deny (NOID), informing the petitioner that the petition was not approvable due to material changes. Specifically, the petitioner had initially filed the petition based on an investment in [redacted] but he later amended the petition, basing it on an investment in [redacted] The petitioner filed a response to the NOID on October 11, 2013, without submitting additional evidence.

The chief denied the petition on November 12, 2013. The petitioner filed an appeal on December 12, 2013, supported by a brief, with no additional evidence.

II. ISSUES ON APPEAL

In his decision, the chief concluded that the petitioner did not establish he had placed the required amount of capital at risk in to generate a return on the capital placed at risk. *See* 8 C.F.R. § 204.6(e), (j)(2). The chief noted that a federal district court judge had ordered and Intercontinental to return all investment funds held in their escrow accounts. Similarly, the chief concluded in his decision that the petitioner did not establish that met or would meet the employment creation requirements. *See* section 203(b)(5) of the Act; 8 C.F.R. § 204.6(j). The chief noted that on September 3, 2013, USCIS terminated s participation as a regional center in the immigrant investor program. In addition, the petitioner conceded on page 1 of his NOID response that "in February 2013[,] evidence came to light indicating that project would likely not in fact satisfy the job-creation requirement . . . ."

On appeal, the petitioner has not specifically challenged either of the chief's findings pertaining to Rather, the petitioner's sole contention is that the chief should have considered the petitioner's subsequent, unrelated investment. Accordingly, whether the petitioner's previous investment in is currently at risk for purposes of job creation is not before us. *See Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the United States District Court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The remaining issue that the director raised is whether the petitioner has made a material change by switching his investment to a different new commercial enterprise affiliated with a new regional center, and whether the petitioner can use a new, unrelated investment to establish eligibility.

A. Material Change

The plain language of the relevant regulation states that a petitioner must demonstrate eligibility for the visa petition at the time of filing and must continue to be eligible through adjudication. The regulation at 8 C.F.R. § 103.2(b)(1) provides:

> *Demonstrating eligibility.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulation at 8 C.F.R. § 103.2(b)(12) provides:

> *Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An [sic] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed. An [sic] benefit request shall be denied where any benefit request upon which it was based was filed subsequently.

Relevant case law also states that a petitioner must show that he is eligible for a visa preference petition at the time he filed the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *cf. Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978) (requiring eligibility at the time of filing even for nonimmigrant petitions that do not involve priority dates); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Act. Reg'l Comm'r 1977) (holding that consideration of whether the petitioner has the ability to pay the proffered wage should necessarily focus on the circumstances as of the date of filing, later codified at 8 C.F.R. § 204.5(g)(2)). *See also Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 1025, 1038, n.4 (E.D. Calif. 2001), *aff'd*, 345 F.3d 583 (9th Cir. 2003) (upholding a finding that a construction management agreement with substantive changes "could not be accepted for the first time on appellate review").

The requirement that a petitioner must show eligibility at the time of filing extends to petitioners who seek classification as employment creation aliens pursuant to section 203(b)(5) of the Act. *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998). The petitioner does not contest that he must demonstrate eligibility at the time of filing. Specifically, the petitioner asserts:

. . . [T]here are two points in time at which [USCIS] must assess the evidence submitted in support of a benefit request to determine eligibility: the time at which the benefit request was filed and the time at which the decision on the request is rendered; how the facts supporting the benefit request may have changed between these two points in time is simply not relevant, provided that eligibility exists at each point.

The petitioner further asserts that the petitioner's amendment to the petition arose from circumstances beyond his control. In his August 7, 2013 amended filing, the petitioner conceded that the petition, as initially filed, could not establish his eligibility. Specifically, pages 1-2 of the cover letter provides: "The failure of the pending I-526 petition filed based on [the petitioner's] investment in [redacted] to satisfy all of [the eligibility] elements is the exclusive result of the fraud perpetrated against [the petitioner] . . . ." Similarly, in his NOID response, the petitioner stated that "the elements of eligibility that have not been satisfied in this case were [] outside the control of the petitioner . . . ." Further, the petitioner asserts that the application of the regulation and precedents requiring a petitioner to demonstrate eligibility at the time of filing results in a "miscarriage of justice" in this case.

The relevant legal authority does not support the petitioner's position that the bases for eligibility at the time of filing and at the time of adjudication do not have to be the same. The regulation at 8 C.F.R. § 103.2(b)(1) specifically requires that the petitioner establish that he or she is eligible for the requested

benefit at the time of filing the benefit request, and "continue[s] to be eligible through adjudication." The plain language of the regulation, specifically the use of the word "continue," indicates that "how the facts supporting the benefit request may have changed" is, in fact, relevant to the determination of the petitioner's eligibility. Additionally, as indicated in 8 C.F.R. § 103.2(b)(12), a request for a benefit shall be denied when the evidence submitted does not establish eligibility at the time of filing.

Moreover, *Matter of Izummi*, adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), stated:

> . . . [T]he [INS] cannot consider facts that come into being only subsequent to the filing of a petition. If counsel had wished to test the validity of the newest [business] plan, which is materially different from the original plan, he should have withdrawn the instant petition and advised the petitioner to file a new Form I-526 [petition]. The case shall be analyzed only on the basis of the original documents and the revisions that correct the original inconsistencies.

Matter of Izummi, 22 I&N Dec. at 176.

Furthermore, the USCIS May 30, 2013 Policy Memorandum on adjudication of immigrant investor petitions, reiterates that "in visa petition proceedings, a petitioner must establish eligibility at the time of filing and that a petition cannot be approved if, after filing, the petitioner becomes eligible under a new set of facts or circumstances." *EB-5 Adjudications Policy*, PM-602-0083, 24 (May 30, 2013) (citing *Matter of Izummi*, 22 I&N Dec. at 176). Significantly, the policy memorandum further provides, in pertinent part:

> [I]f there are material changes to a Form I-526 [petition] at any time after filing, the petition cannot be approved. Under these circumstances, if, at the time of adjudication, the petitioner is asserting eligibility under a materially different set of facts that did not exist when the petition was filed, he or she must file a new Form I-526 petition.

Id. at 24.

Accordingly, the relevant regulation, binding precedent decision, and USCIS policy memorandum provide that the petitioner must establish his eligibility for the visa petition at the time of filing and continue to be eligible through the time of adjudication under the same set of material facts. *See* 8 C.F.R. § 103.2(b)(1). Ultimately, the petitioner may not secure a priority date based on facts materially different from those that existed at the time he initially filed the petition. *Id.*

In this case, the petitioner has not shown that he remained eligible for classification as an employment creation alien under section 203(b)(5) of the Act from the time he filed the petition on December 27, 2012 until the time that the chief adjudicated the petition.

Furthermore, the petitioner has provided insufficient legal support demonstrating that USCIS may make an exception to the regulations and binding precedent in any case, even one where the petitioner might

have been a victim of fraud. Accordingly, USCIS cannot consider the amended petition based on an investment in The petitioner may request a consideration of a petition based on an investment in by filing a new petition.

B. Lawful Source of Funds

As an additional issue, the petitioner has not sufficiently established the lawful source of funds he invested first in We may deny an application or petition that does not comply with the technical requirements of the law, even if the chief does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. Dep't of Justice*, 381 F.3d 143, 145-46 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

To establish the lawful source of funds, the regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital. 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. 206, 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. at 195. In addition, without documentation of the complete path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own or they derive from lawful sources. *Matter of Izummi*, 22 I&N Dec. at 195.

First, to establish the source of the petitioner's funds, the petitioner submitted numerous foreign language documents, in support of his initial filing and subsequent filings. The petitioner, however, has not provided English translations for these documents that comply with the regulatory requirements. The regulation at 8 C.F.R. § 103.2(b)(3) provides:

> Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As part of his August 7, 2013 filing, the petitioner submitted a declaration from The declaration does not specifically identify the individual who completed the translation, and it does not include a certification that the translator is competent to translate the documents from the foreign language into English or a certification that the translations are complete.

Second, the petitioner asserts that the funds he invested first in are proceeds from a 4.4 million loan he secured with his real estate properties. The petitioner documented his loan from and submitted a receipt for the transfer of the loan proceeds to his account ending in 0770 on June 8, 2012. The petitioner's bank statement for that account reflects that he withdrew those funds on that date. In the initial cover letter, the petitioner asserts that the bank wired the funds from his loan directly to

Factory in order to comply with the terms of the loan, which were for the purpose of "product purchase." The only document reflecting a transfer to s account ending in 1889, however, reflects an originating account number ending in 0001. Thus, rather than showing that the bank transferred funds directly to the factory as the disbursement of the petitioner's loan, the documents in the record show that the bank transferred funds to both the petitioner and

then transferred the funds to s account ending in 7462 from a separate account ending in 0390 as the petitioner's loan to then transferred those funds to the petitioner's account ending in 7249 from an account ending in 969. In order to convert the funds to Hong Kong dollars, the petitioner transferred funds from his account ending in 7249 to s account ending in 7014. then transferred funds from an account ending in 882 to the petitioner's account ending in 5403, from which the petitioner transferred funds to . Accordingly, first, the petitioner has not documented that the funds ransferred from an account ending in 0001 to represent the loan to the petitioner, which the bank transferred directly to his account ending in 0770. Second, the petitioner has not documented the path of funds (1) from s account ending in 1889 to its account ending in 0390, (2) from s account ending in 7462 to his account ending in 969 or (3) from s account ending in 7014 to his account ending in 882.

Accordingly, the petitioner has not established the path of the lawful source of the funds he invested first in

III. SUMMARY

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In a visa petition proceeding, 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.