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

DATE: MAY 29 2014 Office: IMMIGRANT INVESTOR PROGRAM FILE:

IN RE: Petitioner:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Chief, Immigrant Investor Program Office (IPO), denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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). The record indicates that the petition is based on an investment in a new commercial enterprise (NCE), Corp., which the petitioner asserts is located in a targeted employment area (TEA) for which the required amount of capital invested has been adjusted downward. The NCE imports and distributes Filipino products throughout the United States.

The chief determined that the petitioner's contribution of $350,000 was a contribution of indebtedness, rather than cash, because it resulted from a personal bank loan. The chief then concluded that the petitioner had not demonstrated that the indebtedness was secured by the petitioner's personal assets as required under 8 C.F.R. § 204.6(e) (definition of capital).

On appeal, the petitioner asserts that the chief incorrectly applied the law. The petitioner asserts that the chief erroneously disqualified the $350,000 of cash as investment capital because the petitioner did not obtain those funds through a secured agreement. However, the petitioner asserts that he fully transferred the $350,000 cash into a business account of the NCE, and as such, the petitioner does not need to secure the loan amount with personal assets.

I. LAW

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

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

II. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the petition on September 4, 2012, supported by the following types of evidence: (1) prior E-2 nonimmigrant (Treaty Investor) approval notices; (2) personal loan and wire transfer documents; (3) the NCE's bank statements showing transactions; (4) the business plan; (5) Forms I-9, Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements for 2011, and IRS Form 941

Employer's Quarterly Federal Tax Returns for 2011; (6) various invoices; (7) a lease agreement; (8) business licenses and permits; (9) documentation that the NCE is located in a census tract the State of California designated as a targeted employment area; (10) the corporate documents for the NCE and the petitioner's prior business; and (11) the NCE's IRS Form 1120, U.S. Corporation Income Tax Returns, for 2010 and 2011.

On February 28, 2013, the Director, California Service Center, issued a Request for Evidence (RFE). The director requested the following types of evidence: (1) additional evidence showing that the area in which the NCE is located was a TEA in 2002 when the petitioner made his initial investment; (2) documentation that the petitioner invested $1,000,000 of capital; (3) documentation showing that the full amount of investment capital is subject to risk; (4) documents showing the relationship between the NCE and a similarly named entity; (5) documentation of the stock ownership of the NCE; (6) bank statements showing deposits in the NCE's U.S. business accounts; (7) documentation of assets which the petitioner purchased for use in the U.S. enterprise; (8) documentation of all property transferred from abroad for use in the NCE; (9) documentation of any loan agreement secured by the petitioner's personal assets; (10) documents regarding the status of the $350,000 bank loan from (11) documents establishing the path of funds from to the NCE's business account; (12) documents identifying any other sources of capital; (12) additional documents relating to hired employees; and (13) a copy of a comprehensive business plan showing the need for 10 employees.

The petitioner submitted a response to the RFE on May 23, 2013, supported by the following types of evidence: (1) evidence of 2002 employment statistics for the United States and for the area in which the NCE is located; (2) documents relating to the path of funds of the $350,000 loan; (3) documents regarding the terms of the $350,000 loan; (4) commercial invoices to document the use of the $350,000 of capital; (5) a reissued stock certificate reflecting the additional paid in capital of $350,000; (6) the notice of transactions filed with the California Department of Corporations for $200,000 and $350,000 worth of capital investments in 2003 and 2013; (7) the NCE's amended IRS Form 1120, U.S. Corporation Income Tax Returns, for 2010 and 2011; (8) corporate documents for Inc.; (9) a description of the NCE's business operations; (10) the NCE's organizational chart and employee job descriptions; and (11) additional documentation relating to employee taxes. On June 4, 2013, the petitioner submitted a supplement to the response to the RFE consisting of a certification from indicating an extension of the $350,000 loan until May 18, 2016.

On October 9, 2013, the chief denied the petition. The chief determined that the petitioner did not meet the requirements for investment capital outlined in 8 C.F.R. §§ 204.6(e) and (j)(2). Specifically, the chief determined that the petitioner obtained $350,000 of the investment amount through a personal loan from The chief concluded that because the personal loan from is an unsecured personal loan, the $350,000 does not qualify as part of the minimum investment of capital.

The petitioner subsequently filed an appeal supported by evidence of a new loan application secured by real property. On appeal, the petitioner asserts that USCIS misinterpreted the regulation relating

to capital investment in determining that the petitioner's personal loan from needed to be secured by the petitioner's personal assets. The petitioner asserts that he used the personal loan from to obtain $350,000 of cash and invested the entirety of the cash proceeds into the NCE. The petitioner further asserts that regulations and precedent establish that direct loans to the NCE must be secured by a petitioner's personal assets, rather than NCE assets, to qualify as investment capital. In this instance, the petitioner asserts that the circumstances are distinguishable from a prohibited transaction because he invested cash in the NCE, the source of which was a personal loan from a third party lending institution.

III. ISSUES ON APPEAL

A. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines "capital" and "investment" and states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The definition of capital expressly excludes unsecured indebtedness. The petitioner here, however, asserts that USCIS should treat as cash the proceeds that he obtained from an unsecured third-party loan, instead of indebtedness. The petitioner notes that the Adjudicator's Field Manual provides that in cases where the source of funds is a third-party loan, USCIS should request evidence of how the entity advancing the funds obtained those funds. The petitioner further notes that the chief did not question that the bank was anything other than a recognized international bank. At issue, however, is not whether these funds were lawfully obtained, but whether they constitute cash or indebtedness.

The petitioner then differentiates the facts in this case from *Matter of Soffici,* 22 I&N Dec. 158, 162-63 (Assoc. Comm'r 1998) and *Matter of Hsiung,* 22 I&N Dec. 201, 203-04 (Assoc. Comm'r 1998), which involved a loan by the NCE, personally guarantied by the petitioner, and a promissory note by the petitioner to pay the NCE. The petitioner additionally asserts that he complied with the regulation at 8 C.F.R. § 204.6(j)(2)(i), which provides that evidence of an investment may include bank statements showing deposits with the NCE.

The investment of cash obtained as a loan from a third party is not simply an investment of cash that need not be examined further. As noted by the petitioner on appeal, in *Matter of Soffici*, 22 I&N Dec. at 162, the new commercial enterprise itself was the borrower, not the petitioner. That decision, however, states:

> Even if it were assumed, arguendo, that the petitioner and [the new commercial enterprise] were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital."

Id. Thus, the precedent contemplated examining third party loans as contributions of indebtedness, not cash.

It is petitioner's assertion that whether (and by logical extension how) the loan was secured is irrelevant because the proceeds of third-party loans are contributions of cash, and not indebtedness. That reasoning, however, would also allow third party loans that are secured by the assets of the NCE. The regulations and precedent decisions, however, preclude such financing.

In addition, the definition of indebtedness is not limited to promises by the petitioner to pay the NCE. The regulatory definition of "capital" precludes any indebtedness secured in whole or in part by the assets of the NCE. As the NCE would be unlikely to accept the assets it already owns as security for a promise to pay itself, the definition must include third party loans as indebtedness. Therefore, the requirements for promissory notes set forth in *Matter of Izummi*, 22 I&N Dec. 169, 193 (Assoc. Comm'r), and *Matter of Hsuing*, 22 I&N Dec. at 203-204, must be met.

The loan from is other evidence of borrowing; thus, the petitioner must also document that it is secured by his own assets. The record reflects that the third-party loan was not secured by assets of the petitioner. Therefore, the petitioner has not established that the financing complies with requirements set forth in the regulations at 8 C.F.R. § 204.6(e) (definition of capital), 8 C.F.R. § 204.6(j)(2)(v), *Matter of Izummi* and *Matter of Hsuing*.

Additionally, *Matter of Ho* states, among other things, the following:

> The petitioner must establish that he has placed his own capital at risk, that is to say, he must show that he was the legal owner of the invested capital. Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital.

22 I&N Dec. 206 (Assoc. Comm'r 1998).

Matter of Ho is relevant to an evaluation of loan proceeds as a source of EB-5 investment capital for two reasons. First, as stated in the first sentence of the language quoted above, it confirms that a petitioner must establish that he has placed his own capital at risk (i.e., that he is the legal owner of the invested capital being placed at risk). When an individual receives loan proceeds, he is also

obligated to repay a corresponding amount to the lender of such proceeds at a defined time, along with interest payments. Consistent with the general principle that loans do not increase net worth, the schedules L in the record include loan obligations such as mortgages and shareholder loans as liabilities.[2] Within the context of tax law, the IRS does not consider loan proceeds as income of the borrower. *Cf.* 26 C.F.R. § 1.61-12(a) (stating that loan proceeds become realized income if the loan is forgiven). Within the immigration context, *Matter of Soffici* referenced the receipt of a portion of investment funds as a loan from the investor's father. In a footnote to the source of funds discussion, the decision states the following: "A petitioner must also establish, pursuant to 8 CFR § 204.6(e), that funds invested are his own. The petitioner has already conceded that the funds lent to Ames are not his; the funds belong to his father and must be repaid." 22 I&N Dec. at 165 n.3. Thus, this decision found that the proceeds of a third party loan represent indebtedness.

This approach is also consistent with USCIS's approach with regard to non-cash "capital" contributions as well. For example, it is insufficient for a petitioner to show that they have contributed "capital" in the form of an asset (e.g., machinery, equipment, real property, etc.) unless the investor is also able to establish his ownership of the asset. If the investor provides evidence a third party only loaned him a capital asset, that capital is therefore borrowed. In that case, the contribution of that asset would not be qualifying capital as it is a contribution of an asset owned by another. Likewise, if the petitioner provides evidence that the source of the cash is a loan, then the contribution of that cash would also not be qualifying capital as it is a contribution of cash capital owned by another.

Second, as set forth in the second sentence of the language quoted above, *Matter of Ho* confirms that USCIS must scrutinize the investment of loan proceeds, from an evidentiary standpoint, differently than an investment of cash capital actually owned by the investor. The evidentiary standard set forth at 8 C.F.R. § 204.6(j)(2)(i) and (iv) provides that when a petitioner is the actual owner of the cash investment capital (from a lawful source), he may provide bank statements and other financial documents as evidence of the investment. While the petitioner correctly notes that the initial required evidence of investment may include evidence that the petitioner has deposited cash with the NCE, the regulation at 8 C.F.R. § 204.6(j)(2)(v) requires the following evidence of investment:

> Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

As ascertained from the above, a borrower of cash loan proceeds has merely been granted temporary use of the cash loan proceeds and, for purposes of *Matter of Ho*, would therefore not be the "legal owner." *Matter of Ho* states that "[b]ank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital." 22 I&N Dec. at 206. Accordingly, 8 C.F.R. § 204.6(j)(2)(v) is the only other evidentiary avenue expressly

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[2] The NCE does not list any mortgages or shareholder loans on schedule L; we mention the inclusion of these items under liabilities on the schedule L as corroboration of the principle that while loan proceeds increase cash, they create a corresponding liability.

contemplated by the regulations to establish an investment of cash loan proceeds (i.e., evidence of borrowing secured by assets of the petitioner).

For all the reasons stated above, and particularly given the repayment obligations imposed by a loan, loan proceeds must be characterized as the proceeds of "indebtedness" in order to constitute "capital" under 8 C.F.R. § 204.6(e). Consequently, and also pursuant to 8 C.F.R. § 204.6(e), loan proceeds must also then be "secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness" and subject to the evidentiary requirements described in *Matter of Ho* and 8 C.F.R. § 204.6(j)(2)(v) and other precedential cases. The unsecured loan from does not meet the requirements of indebtedness as capital.

On appeal, the petitioner submits the loan application for a secured loan to contribute additional capital to substitute for the proceeds of the unsecured loan and states that he will provide additional documentation on the new, secured loan if necessary. However, the secured loan application reflects a date of December 4, 2013. The petitioner filed the Form I-526 petition on September 4, 2012. A petitioner must establish the elements for the approval at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Ultimately, the petitioner cannot secure a priority date based on future events. *Matter of Izummi*, 22 I&N Dec. at 175-76 (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that the United States Citizenship and Immigration Services (USCIS) cannot "consider facts that come into being only subsequent to the filing of a petition.") *See also EB-5 Adjudications Policy*, PM-602-0083, p. 24 (May 30, 2013) (citing *Matter of Izummi*, 22 I&N Dec. at 176 and 8 C.F.R. § 103.2(b)(1) for the proposition that a petitioner cannot establish eligibility under a new set of facts during the pendency of the Form I-526 petition); *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").

Accordingly, the petitioner did not establish that the $350,000 obtained from a third-party loan qualifies as part of the minimum investment capital.

B. Capital Subject to Risk

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.*, 229 F. Supp. 2d at 1043 (E.D. Cal. 2001); *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).

As an additional issue, 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. at 179. Funds invested in an overcapitalized company with no capital expenditures forecasted are not at risk. *See Al Humaid v. Roark*, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010).

The record contains bank statements reflecting the varied amounts of capital investment deposited into the NCE's U.S. business account on various dates. In the RFE, the director requested documentation showing that the full amount of the investment amount is subject to risk including evidence of all assets which have been purchased for use in the U.S. enterprise, including: invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity. The RFE also requested evidence of all property transferred from abroad for use in the U.S. enterprise, including: U.S. Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information to identify the property and to indicate the fair market valuation of such property. As part of the response to the RFE, the petitioner submitted copies of "some of the commercial invoices showing application of additional paid in capital of $350,000. These funds were used for payment for the NCE's imported goods from Asia." These imported goods, however, constitute inventory purchases in the regular course of business for a business in operation since 2003, rather than capital expenses.

The evidence of record indicates that the NCE is a high-volume business with numerous high dollar deposits and payments that occur in the regular course of business. For instance, the business bank statement for July 2012 showed frequent deposits, usually multiple deposits in a day, with the dollar value ranging from hundreds of dollars to tens of thousands per transaction. Similarly, the itemized paid checks and list of debits show transactions ranging from several hundreds of dollars to hundreds of thousands of dollars. Some of the debits for over $100,000 are notated as [redacted].[3] None of the invoices are for amounts this large. As such, the petitioner has not demonstrated that all of these amounts are business expenses. The single complete monthly bank statement in the record for July 2012 displays a wide range in the number and value of transactions that the NCE conducts. As part of the business plan, the petitioner included a projected statement of annual cash flow for 2012 through 2015 which shows annual gross incomes ranging from $5.6 million to $6.1 million and annual inventory purchases ranging from $4.8 million to $5.3 million. The projected statements include no capital as a source of cash and no expenses for the purchase of furniture and fixtures, the purchase of equipment, or leasehold improvements. The business plan does not explain how the NCE will use the $350,000 for other capital expenses, such as by expanding the business.

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[3] [redacted] businesses are remittance subsidiaries of [redacted] in the Philippines. *See* https [redacted] accessed May 233, 2014 and incorporated into the record of proceedings.

As an initial matter, some of the invoices reflect a date that predates the $350,000 contribution of capital, which occurred on July 23, 2012. Accordingly, they do not help establish that the petitioner made available the full amount of the investment capital. Also, in light of the high volume of inventory that the NCE purchases as a regular course of business and the limited subset of invoices that the petitioner made available as part of the evidence of record, the petitioner has not demonstrated that he actually placed the $350,000 at risk for the purpose of generating a return on the capital. The record does not include documentation of any purchases or commitments beyond inventory that could be used for generating a return on the capital, such as equipment or warehouse space.

Given (1) that the petitioner is the sole shareholder of a business that had been in operation for nine years at the time of the 2012 investment, (2) that the business was operating at a profit in 2012 whereby its income covered its inventory costs, (3) the transfer of large amounts of cash to an unknown recipient in July 2012, and (4) that the business plan projects no capital expenses to expand the business or otherwise capitalize the company, the petitioner has not demonstrated that the $350,000 deposit is at risk. *See Al Humaid*, 2010 WL 308750, at *4.

C. Source of Funds

As a final additional issue to the findings in the chief's denial, 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, 210-211 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.*

The record establishes that the source of $350,000 of the investment amount was a loan from to the petitioner. Regarding the remaining approximate $205,000 of the investment, the petitioner has established the path of funds from gifts of $142,000 and $60,000 from his grandmother and his mother, respectively. While the petitioner has established the path of funds as being from his mother and grandmother, the petitioner has not submitted evidence of the lawful source of those gifted funds. For instance, the petitioner needs to demonstrate the source that generated the funds that comprised the $142,000 cash gift, such as inheritance, salary, investment proceeds, or other source of income. Thus, the petitioner has not fully established the source of funds for the amount of funds that he placed with the NCE.

IV. SUMMARY

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to

establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.