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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**

[REDACTED]

B7

DATE:

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

APR 17 2012

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition by Alien Entrepreneur (Form I-526). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security “may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for “good and sufficient cause” where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director’s realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The petitioner filed the Form I-526, Immigrant Petition by Alien Entrepreneur, on October 5, 2009, 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 revoked the approval of 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. 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

On the Form I-526, the petitioner indicated that the petition is based on an investment of \$519,920 in [REDACTED] a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. The record contains a Joint Venture Agreement and an Operating Agreement that indicate the petitioner and [REDACTED] organized [REDACTED]

as a limited liability company (LLC). The 2009 Internal Revenue Service (IRS) Schedules K-1 for [REDACTED] however, indicate that the members of the LLC are the petitioner and [REDACTED] not [REDACTED]. The record contains no evidence that [REDACTED] 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 [REDACTED] entity is the [REDACTED]

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

The petitioner indicated on the Form I-526 that the new commercial enterprise, [REDACTED] is located in [REDACTED] in Pennsylvania. According to the initial undated business plan, [REDACTED] 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 [REDACTED] "equipments [sic] and software to enable its services to its clients." The stated purposes of the new commercial enterprise is also described at section 3 of the Joint Venture Agreement: "Engaging in the business of building, supporting, renting and maintaining multimedia advertising networks utilizing the latest communication technology."

The submitted sublease, dated June 15, 2009, states that [REDACTED] "is the tenant of certain premises containing a total of eleven thousand forty-four (11,044) rentable square feet . . . located [sic] [REDACTED] PA." The sublease further states that [REDACTED] has agreed to sublet a part of the leased property described in Exhibit A to [REDACTED]. The petitioner did not submit either the original lease between [REDACTED] and its landlord or Exhibit A to the sublease.

The director approved the petition on February 11, 2010. On November 16, 2010, the director issued the NOIR, advising the petitioner that USCIS records revealed that the address for [REDACTED] 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 [REDACTED] and [REDACTED]. The director further advised the petitioner of the results of a September 9, 2010 site visit. A USCIS officer visited the landlord, [REDACTED] and the actual office location at [REDACTED]. The officer reported that he was unable to confirm that [REDACTED] or any of the joint ventures occupied or leased more than 2,000

¹ The petitioner has submitted documents that use [REDACTED] and [REDACTED] interchangeably. As there is no evidence that [REDACTED] exists as a separate entity, the AAO will reference only [REDACTED] the name that appears on the [REDACTED]

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 [REDACTED]" and not the joint ventures and that [REDACTED] 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 [REDACTED] 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 [REDACTED] and [REDACTED] for the director's review.

The petitioner also submitted a new business plan that states the joint ventures are now located at [REDACTED] Pennsylvania, 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 revoked the approval of the petition after determining that the petitioner had failed to demonstrate an at-risk investment or that the new commercial enterprise, [REDACTED] 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 [REDACTED] who are in fact employed by [REDACTED] and noted that the Forms I-9, Employment Eligibility Verification, for [REDACTED] appear to have been altered.

On appeal, counsel submitted a brief and two letters attempting to address the inconsistencies raised by the director. [REDACTED] indicated in one of the letters that the lease at [REDACTED] "still active" but did not name any entities that are still occupying space on the fourth floor of [REDACTED]. [REDACTED] further asserted that he initiated a lease with [REDACTED] with the understanding that as joint ventures were added, [REDACTED] would pay for the actual space used. [REDACTED] did not suggest that [REDACTED] 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 [REDACTED] is, in fact, the listed business on a fourth Form I-526 petition claiming job creation on the fourth floor of [REDACTED]. The record of proceeding for [REDACTED] contains the original lease between [REDACTED] and [REDACTED], 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 [REDACTED] 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 [REDACTED] has expanded its initial lease agreement. Thus, [REDACTED] remains a tenant of only 375 square feet, portions of which it is subleasing to three separate businesses: [REDACTED]

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.

jointly with [REDACTED] 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 [REDACTED]. 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 projected that during the first year, [REDACTED] would engage in "new screen deployment" of 570, incurring "screen" costs of \$558,000. At between \$1,000 and \$2,000 per television, the cost for 570 televisions would be between \$570,000 and \$1,140,000. The second business plan contains new financial projections that are irreconcilably inconsistent. For example, the projected job creation timeline projects the purchase of 150 televisions in the first year. Once again, with projected costs per television of between \$1,000 and \$2,000, 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. These numbers are also inconsistent with the initial projections.

The profit and loss statement covering January 1, 2010 through December 13, 2010 also indicates total annual rent costs of \$3,350 despite the fact that the June 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 19 receipts dated in August 2009 for waiting room services in the amount of \$50 to various purported clients, 10 of which are labeled "Paid." The receipts, which total \$950, request that the clients "make checks payable to [REDACTED]." While [REDACTED] 2009 IRS Form 1065 U.S. Return of Partnership Income does list more than \$950 (\$2,500) in gross receipts, the company's bank statement for June 1, 2009 through September 29, 2009, does not reflect 19 \$50 deposits or any \$50 deposits. [REDACTED] did transfer \$500 to [REDACTED] on September 11, 2009, but this transfer is inconsistent with the 19 receipts which list payments from the clients directly to [REDACTED]. Accordingly, none of the receipts establish that any clients paid [REDACTED] for services in August 2009.

The record contains a five-year "Network Equipment & Service Agreement" between [REDACTED] (the customer) and [REDACTED] (the provider). The director found that language in the agreement undermines the petitioner's claim that [REDACTED] used the \$500,000 investment to purchase digital media equipment. The director's reasoning on this is unclear. Nevertheless, the Network Equipment & Service Agreement is inconsistent with the 19 December 2009 invoices purporting to document payments from clients directly to [REDACTED] because it shows [REDACTED] making payments to [REDACTED].

Finally, the Network Equipment & Service Agreement contradicts the petitioner's business plan, which states that [REDACTED] will acquire equipment and service rights from [REDACTED] rather than [REDACTED]. 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 [REDACTED] totaling \$66,370 in June and July 2009 and \$41,600 in 2010, these invoices do not resolve the inconsistencies between the other 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 June and July 2009 or 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 Joint Venture 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 [REDACTED].

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, [REDACTED] 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.