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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

B7

[redacted]

DATE: APR 17 2012 Office: CALIFORNIA SERVICE CENTER 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 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, 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 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 limited liability company, Pau Holdings, LLC, which is not located in a targeted employment area. Thus, the required amount of capital in this case is $1,000,000. The petitioner asserts that [redacted] will operate medical diagnostic imaging facilities.

The director determined that the petitioner had failed to demonstrate that she is investing through a wholly-owned subsidiary of [redacted] the new commercial enterprise. The director also determined that the petitioner had failed to demonstrate that she has invested or that she is actively in the process of investing the required amount of capital in the wholly-owned subsidiaries of [redacted].

On appeal, counsel asserts that the petitioner has invested the required amount of capital, and that she is in the process of investing additional capital in [redacted]. Counsel also asserts that the petitioner did not create layer upon layer of holding companies, with each taking a cut of the investment. Counsel correctly asserts that [redacted] conducts business under two fictitious names rather through two subsidiaries. Counsel further asserts that the petitioner invested her capital in [redacted] which "purchased income-generating assets, directly leading to the creation of employment."

The AAO concurs with the director that a partially-owned subsidiary is not part of a new commercial enterprise as defined at 8 C.F.R. § 204.6(e). The AAO further finds that the petitioner may not resolve this deficiency with new facts that postdate the filing of the petition. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) *citing Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981); 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The AAO finds that the petitioner has not demonstrated that she has invested or is actively in the process of investing the required amount of capital in [redacted] as defined at 8 C.F.R. § 204.6(j)(2). As an additional issue, the AAO finds that even if the AAO considered the investment in and jobs at [redacted], the petitioner has not documented that [redacted] constitutes the creation of a new business rather than the purchase of an existing business. Thus, the record does not establish that the petitioner has created or will create any new jobs at [redacted]. As a second additional issue, the AAO finds that the record lacks evidence of the lawful source of [redacted] $60,000 investment.

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).

II. PROCEDURAL AND FACTUAL BACKGROUND

The director issued a request for additional evidence on December 14, 2010. The petitioner responded on February 15, 2011. In a final decision dated March 21, 2011, the director determined that the petitioner had failed to demonstrate that [redacted] (Subsidiary), is a wholly-owned subsidiary of [redacted]. The director also determined that the petitioner had failed to demonstrate that she has invested or that she is actively in the process of investing the required amount of capital in the wholly-owned subsidiaries of [redacted]. The director provides an outline of the business structure of [redacted], and its subsidiary, [redacted], and implies that [redacted] is itself a holding company for two subsidiaries: [redacted].

On appeal, the petitioner, through counsel, asserts that: (1) the petitioner has invested $1,015,200, and is in the process of investing additional capital in [redacted]; (2) [redacted] performs business under two fictitious names rather than through two subsidiaries; and (3) the petitioner invested her capital in [redacted], which then "purchased income-generating assets, directly leading to the creation of employment."

Counsel confirms that [redacted] only owned a 75 percent membership of [redacted] at the time of filing. However, counsel implies that failure to establish 100 percent ownership is not relevant because [redacted] "retained control over [the Subsidiary], including control over the investment and the creation of the employment opportunities." Counsel finally indicates that the petitioner's failure to establish 100 percent ownership is no longer an issue because [redacted] purchased the 25 percent membership interest in [redacted] and that [redacted] now owns 100 percent of [redacted].

III. ISSUES PRESENTED ON APPEAL

A. Inclusion of Subsidiaries in the New Commercial Enterprise

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

> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

The petitioner's June 17, 2010, statement accompanying her initial petition, states:

> The initial business purpose of the [New Commercial Enterprise] is to operate Medical Diagnostic Imaging facilities. Over the next two years, and beyond, [the New Commercial Enterprise] will expand to provide other medically related services. It will do this by creating subsidiary limited liability companies. Each individual subsidiary will operate its own medical service office.

The petitioner indicated in her initial filing statement that on March 25, 2010, [redacted] "was established," that [redacted] owned 75 percent of [redacted], and that [redacted] owned the remaining 25 percent. The petitioner further indicated that on March 18, 2010, the petitioner and [redacted] made an offer to purchase the assets of [redacted], and the record reflects that [redacted] registered that name as a fictitious name under which it does business. According to the petitioner, the parties finalized this purchase on April 15, 2010.

Counsel and the petitioner indicated that both Pau Holdings, LLC and Pearl Imaging, LLC will be involved in the job creation activities. A commercial enterprise is defined to include, "[A] commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries. . ..*" *See* 8 C.F.R. § 204.6(e) (emphasis added). On June 21, 2010, the date the petitioner filed the Form I-526, the petitioner owned 75 percent of Pearl Imaging, LLC. The petitioner subsequently purchased the remaining 25 percent on April 8, 2011, more than 9 months after she filed the petition.

On appeal, counsel confirms that Pearl Imaging, LLC was not wholly-owned on the date the petitioner filed the petition, suggesting that this should not preclude approval of the petition because [redacted] "retained control over [the Subsidiary], including control over the investment and the creation of the employment opportunities." This assertion is not persuasive. Counsel fails to cite to any statute or regulations in support of this suggestion. Section 7.4 of [redacted]'s March 25, 2010 Operating Agreement states that the managers of the company include both the petitioner and

Manhar Maisuria. Section 7.6.4 of the same agreement states that each manager shall have one vote on each matter.

Regardless of the petitioner's control of [redacted] the regulation requires, as initial evidence, that "[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..." *See* 8 C.F.R. § 204.6(j). A subsidiary which is not wholly-owned by the new commercial enterprise at the time of filing cannot qualify as a part of the new commercial enterprise under the plain language of the regulation at 8 C.F.R. § 204.6(e) (definition of commercial enterprise). Accordingly, the petitioner may not invest her capital in, and rely upon full-time positions created by a partially-owned subsidiary to count toward both the investment and the job creation requirements.

Regarding counsel's assertion that the petitioner remedied this issue by purchasing the remaining 25 percent of [redacted], a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. at 49. Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* At 176. The agreement whereby [redacted] purchased [redacted] interest in [redacted] is dated April 8, 2011, nearly ten months after the petitioner filed the instant petition.

The AAO concurs with the director that a partially-owned subsidiary is not part of a new commercial enterprise as defined at 8 C.F.R. § 204.6(e). As such, USCIS may not credit the petitioner with any investment in or employment creation at [redacted] The AAO further finds that the petitioner may not resolve this deficiency with new facts that postdate the filing of the petition. *See Matter of Izummi*, 22 I&N Dec. at 175 (*citing Matter of Bardouille*, 18 I&N Dec. at 114); 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49.

B. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) 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.

* * *

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

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner 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. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > (v) 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.

On the Form I-526 petition, the petitioner indicated a total investment of $270,200 as of June 21, 2010, the date of filing. In the petitioner's June 17, 2010 statement, she identifies the following as capital available to be invested in Pau Holdings, LLC: (1) her property in Canada,

which, according to a Land Title Certificate in the record, held a value of $532,500, on October 24, 2006; and (2) a $50,000 line of credit from The Royal Bank of Canada. The petitioner must show actual commitment of both the property and the line of credit to demonstrate the required amount of capital is at risk. 8 C.F.R. § 204.6(j)(2). The "mere intent to invest...will not suffice to show that the petitioner is actively in the process of investing." *Id.* The petitioner has not documented that either of these forms of assets were committed or secured for the investment in [redacted] as of the date of filing. Thus, USCIS may not consider these assets as evidence that the petitioner has invested or was actively in the process of investing as of the date of filing.

The petitioner has executed the following transactions related to the bank account of [redacted]:

- April 1, 2010 – transfer in of $200 from the petitioner's personal joint bank account;
- April 12, 2010 – deposit of $270,000 from the petitioner's joint personal bank account;
- April 13, 2010 – withdrawal of $250,000 from [redacted] account, deposited in [redacted] account; and
- April 15, 2010 – withdrawal of $225,000 from [redacted] account made payable to one of the fictitious names for the "purchase of MRI centers";
- September 13, 2010 – deposit of $500,000 from an unidentified account at the "Banking Ctr Edwardsville Crossing."

The petitioner failed to provide evidence identifying the account holder from whom the $500,000 was transferred on September 13, 2010. Instead, the petitioner documented her spouse's withdrawal of $433,993 from his credit line on August 30, 2010; a deposit of $435,243 from an unknown source into the petitioner's joint account with her spouse at the Royal Bank of Canada; a $507,000 withdrawal from that joint account also on August 30, 2010; and a $492,482 transfer from the spouse's account at the Royal Bank of Canada to his personal account at Bank of America on September 10, 2010. These transfers, however, do not document a complete path from personal accounts of the petitioner or her spouse to [redacted]. Thus, the petitioner has not documented that this amount constitutes her personal investment. Further, the September 13, 2010, transfer postdates the filing of the petition and the petitioner has not submitted evidence that these funds were committed to [redacted] as of the date of filing.

According to the Form I-526 petition and the petitioner's June 17, 2010 statement, the petitioner invested $270,000 in [redacted]. However, because [redacted] was not a wholly-owned subsidiary of [redacted] at the time of filing, the $250,000 capital investment withdrawn from [redacted] account on April 13, 2010, and transferred to [redacted], [redacted] may not be considered a qualifying investment in the job creating enterprise. Therefore, as of the filing date of the Form I-526 petition, the petitioner's qualifying investment in [redacted] was $20,200.

In response to the request for additional evidence, the petitioner asserted that she had invested $267,600 through the purchase of assets for one of [redacted]'s businesses, that she had irrevocably committed to an investment of $492,689 in rent over five years under the terms of two

leases, had recently purchased property for $503,751, and that she planned to invest an additional $441,909 for equipment and construction.

The AAO has already considered the funds transferred to [redacted] as of the date of filing. The leases do not establish that the $492,689 over five years was at risk as of the date of filing. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998) (the de minimis action of signing a lease does not demonstrate that funds already transferred to the new commercial enterprise are at risk). While the petitioner has engaged in additional business activities other than signing a lease, she had not transferred the $492,689 to [redacted] as of the date of filing. In addition, she has not demonstrated that the full five years of rent must be paid from capital rather than proceeds of the operational business such that she was committed to subsequently transfer such funds.

On August 23, 2010, [redacted] entered into an agreement to purchase property at [redacted] According to the September 16, 2010 Settlement Statement, the final sale price was $470,000. The petitioner indicated in her February 10, 2011 statement that the September 13, 2010 deposit into [redacted] account was intended for the purchase of 1345 Triad Center. The $500,000 that the petitioner deposited on September 13, 2010, is not capital that was committed to the investment on the date the petitioner filed the petition. The regulation requires that at the time the petition is filed, "the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." *See* 8 C.F.R. § 204.6(j)(2). Consequently, these funds do not qualify as capital that the petitioner had invested or was actively in the process of investing as of the date of filing. Therefore, the petitioner's qualifying investment in the new commerical enterprise, [redacted], is $20,200.

Regarding the remaining $441,909 in projected investments, evidence of a mere intent to invest is insufficient. 8 C.F.R. § 204.6(j)(2). The record does not establish that the petitioner had committed these funds to [redacted] as of the date of filing through an escrow agreement, promissory note or other means of creating a commitment.

Counsel asserts on appeal that on March 3, 2011, the petitioner invested $245,000 for the purchase of one "16 slice CT system." While the record contains a March 3, 2011 quote for this equipment listing one of [redacted] ctitious names as the customer, the record lacks a record of sale or of a bank statement indicating a withdrawal of the quoted funds on or around the quote date. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The March 3, 2011 quote is signed by the petitioner; however, the seller failed to sign in the designated space. The agreement includes the following language: "This agreement shall not bind [the seller] until it has been countersigned by an authorized representative in its corporate offices in Twinsburg, Ohio." Accordingly, this document alone does not establish that the petitioner purchased $245,000 in

equipment. The petitioner also provides what appears to be a printout of an email reflecting the delivery of the 16 slice CT system. However, without a bill of sale or bank records reflecting the purchase, the AAO cannot determine that [redacted] made the purchase or the amount of the purchase. Finally, [redacted] is not part of [redacted] as defined at 8 C.F.R. § 204.6(e) and the transaction postdates the filing of the petition. Therefore, the total qualifying amount the petitioner has invested in [redacted] remains $20,200 as of the date of filing.

Counsel also asserts that the petitioner has invested $300,000 to maintain the above 16 slice CT system. However, the evidence the petitioner provides to support this assertion is in the form of an agreement and suffers the same shortcoming as the quote for the 16 slice CT system. Specifically, the record fails to demonstrate that the petitioner has invested this capital. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N at 165. More importantly, even if the AAO were to determine that the investment occurred as counsel asserts, as noted above, the investment is would be in [redacted] which is not a qualifying investment.

Counsel also asserts that the petitioner has invested $490,000 for "leasing the space to operate the business." The petitioner failed to provide evidence to corroborate this assertion, and as previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N at 165. The petitioner provides a lease agreement for [redacted] for a period of at least five years for a total of $219,935. However, as previously noted, investments in [redacted] are not qualifying investments under the regulation. *See* the definition of commercial enterprise at 8 C.F.R. § 204.6(e).

The petitioner has failed to demonstrate that she has invested or is actively in the process of investing the required amount of capital in [redacted] As such, she has failed to satisfy the regulatory requirements at 8 C.F.R. § 204.6(j)(2).

C. Creation of New Jobs

As an additional issue, the petitioner originally submitted an April 15, 2010, Bill of Sale whereby [redacted] purchased goods and chattel from [redacted] The asset schedule attached to this agreement reveals that [redacted] purchased [redacted] goodwill, trade name, logos, phone numbers, website, patient records, referring physician database, managed care contracts, certain accreditation, a noncompetition agreement and, most significantly, the current employees.

It is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici,* 22 I&N Dec. at 166. When purchasing an existing business, the petitioner must demonstrate the addition of 10 new, full-time positions or, in the case of a troubled business, maintenance of the previous level of employment. *See id.* at 167; 8 C.F.R. § 204.6(j)(4). In a similar fact-pattern involving the purchase of existing clinics, the Associate Commissioner held that while the company purchasing the clinics is arguably the new commercial enterprise, the clinics were "pre-existing, ongoing businesses" and the petitioner could not "directly

cause a net loss of employment." Without evidence of the preexisting employment at [redacted] the AAO cannot determine if the petitioner has created any new jobs.

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).

D. Lawful Source of Co-Investor's Funds

According to the March 25, 2010, Operating Agreement for [redacted] invested $60,000 capital into [redacted] The petitioner has not documented the lawful source of these funds as required under 8 C.F.R. § 204.6(g)(1).

IV. CONCLUSION

The AAO upholds the director's ultimate determination that the petitioner has not established her eligibility for the classification sought. 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.