

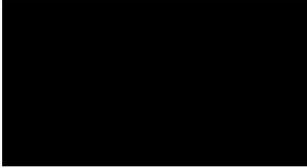
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

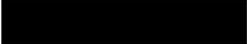


**U.S. Citizenship
and Immigration
Services**



B7.

DATE: **AUG 23 2012** Office: CALIFORNIA SERVICE CENTER 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 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 (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 business the petitioner created, Tao International Group, Inc., which is not located in a targeted employment area. Thus, the required amount of capital in this case is \$1,000,000. Tao International Group, Inc. is the new commercial enterprise (NCE) created by the petitioner. The petitioner initially claimed that the NCE would warehouse and distribute pianos. The petitioner subsequently expanded the proposed business to include importation and sale of eyeglass frames, and rental of warehouse space if the NCE did not “have sufficient purchase orders for pianos [and] optical frames and sunglasses.”

The director determined that the petitioner had failed to demonstrate that: (1) the invested capital was obtained through lawful means; (2) she had invested the required amount of capital; (3) she had placed her own capital at risk; and (4) the NCE would produce the requisite job creation.

On appeal, counsel asserts that the director applied a binding precedent decision in error. Counsel asserts that the petitioner has demonstrated the lawful source of the funds and that the petitioner was in fact excused from demonstrating the full path of the funds she claims to have invested. Counsel contends that the business plan is sufficient and that the director unilaterally imposed “novel substantive or evidentiary requirement[s]” beyond those contained in the regulation.

The AAO will affirm the director’s decision to deny the petition. The petitioner has not demonstrated that she has invested, or is actively in the process of investing capital obtained through lawful means. Further, the petitioner has not demonstrated that she has invested or is actively in the process of investing the required amount of capital at risk in the NCE in accordance with 8 C.F.R. § 204.6(j)(2). The AAO finds that the director properly applied the binding precedent decision *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm’r 1998), to the present petition. Finally, the AAO affirms the director’s determination that the petitioner has not established that her planned investment will create the required 10 or more full-time positions and that she has not complied with the regulation at 8 C.F.R. § 204.6(j)(4)(i).

I. THE LAW

Section 203(b)(5)(A) of the Act, as amended, 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 petitioner filed the petition on September 7, 2010. On February 23, 2011, the director issued a request for evidence (RFE). The director requested evidence that the invested capital was obtained through lawful means, specifically requesting an explanation of the petitioner's living expenses in China. The petitioner provided evidence indicating that her spouse earned over \$1,000,000 from 2008 through 2010, but it was not apparent whether the petitioner or her spouse utilized any of these funds for living expenses during this time period. The director also requested bank statements from both the petitioner and her spouse covering 2008 through 2010. Additionally, the director requested that the petitioner provide evidence either that she had invested the required amount of capital in the NCE as the record lacked evidence that the petitioner invested any funds into the NCE, or that she had provided the capital to the entities that invested the funds in the NCE. Because the petitioner failed to establish that she was the ultimate source of the funds invested in the NCE, the director requested evidence of the lawful source of the invested capital. Finally, the director requested evidence that the NCE will create at least 10 full-time positions for qualifying employees as the business plan the petitioner provided was not comprehensive.

In response, the petitioner submitted additional evidence identified as "survival funds" for 2008 through 2010 as evidence of her use of living expenses. Regarding the amount of invested capital, the petitioner submitted bank account statements of the NCE, and a letter from an insurance company, purportedly certifying that the petitioner has purchased property in the United States. The petitioner submitted reports on China's restrictions on exporting money from the country as the explanation of why she is unable to document the path of the funds invested in the NCE. The petitioner also submitted an amended business plan and other documents relating to the job creation of the NCE.

The director determined that the petitioner had failed to demonstrate that: (1) the invested capital was obtained through lawful means; (2) she had invested the required amount of capital; (3) she had placed her own capital at risk; and (4) the NCE would produce the requisite job creation. The director relied on *Matter of Ho*, 22 I&N Dec. at 213 in support of her findings relating to job creation.

On June 14, 2011, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts that: (1) the facts in the petitioner's petition are substantially different from the facts in *Matter of Ho*, 22 I&N Dec. at 213, and that the director applied the *Ho* decision in error; (2) the petitioner has demonstrated the lawful source of the funds by providing her spouse's tax documents and evidence of her spouse's partial ownership of a company, both from China; (3) due to the Chinese government's restrictions on wire transfers, the petitioner was, *de facto*, excused from demonstrating the full path of her purportedly invested funds; (4) the "business plan contains all the necessary elements to predict the creation of 10 full time positions," and that the director arbitrarily concluded that the plan was insufficient based on the director's presumption that the petitioner did not demonstrate that she invested \$1,000,000; and (5) the director unilaterally imposed novel substantive or

evidentiary requirements beyond those contained in the regulation. Specifically, counsel asserts that the director went beyond the regulatory requirements when she required the petitioner to demonstrate the relationship between herself and the bank accounts that wired the invested capital to the NCE.

III. ISSUES PRESENTED ON APPEAL

A. Source of Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit relating to the lawful source of funds invested, 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. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner traced the path of the funds into the NCE as follows:

- May 20, 2010 – \$10,000 via deposit;
- June 1, 2010 – \$74,985 via wire transfer from QL Sunrise International Limited;
- June 1, 2010 – \$124,973 via Society for Worldwide Interbank Financial Telecommunication; (SWIFT) transfer from 1/Silver Wealth (Hong King) Limited;
- June 2, 2010 – \$149,972 via SWIFT transfer from Star View International Shipping;
- June 2, 2010 – \$89,985 via SWIFT transfer from Magmaple Minerals Co., LTD;
- June 3, 2010 – \$109,985 via SWIFT transfer from Forever Int’l Holdings LTD;
- June 4, 2010 – \$87,000 via wire transfer from CWK INV LTD;
- June 7, 2010 – \$112,985 via SWIFT transfer from Dalian Chlorate Co. Limited;
- June 9, 2010 – \$189,980 via wire transfer from Yujin INTL TDG CO., LTD;
- September 3, 2010 – \$5,000 via deposit; and
- February 4, 2011 – \$70,000 via deposit.

The petitioner’s total deposits into the NCE’s account are \$1,024,865. As evidence of the above investments, the petitioner provided the NCE’s bank statements from May 2010 through March 2011 and three wire transfer receipts for the \$189,980, \$87,000 and \$74,985 transfers. The bank statements label the May 20, 2010, September 3, 2010, and February 4, 2011 deposits without identifying the source of funds. The petitioner failed to provide evidence demonstrating her

relationship to any of the entities that transferred money to the NCE. Counsel explains that the petitioner utilized private currency exchange dealers to transfer her funds to the NCE because of China's currency exchange restrictions. Counsel further explains that these private currency exchange dealers will not provide any documentation of their transactions with the petitioner, as such transactions are illegal in China.

The petitioner submitted an article on congressional frustration with China's manipulation of the value of its currency. The article does not address Chinese laws on the transfer of money out of China. The petitioner also submitted a weblog entry indicating that it is "close to impossible to legally transfer money out of China." The record contains no evidence regarding the significance of this weblog such that the opinion of the author is authoritative on the subject.

The petitioner submitted material from the website of China's Embassy in Bangladesh providing the Chinese regulations on Foreign Exchange. Article 14 states: "Individuals may apply for the purchase of foreign currency exchange over and above the limit at the government agencies in charge of foreign exchange." The same article states that the government will approve such applications if they are for bona fide transactions. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). None of the petitioner's evidence establishes that China prohibited her from transferring money out of China. In fact, the information from the Chinese Embassy undermines this claim.

Regarding the petitioner's accumulation of capital, counsel asserts that the invested capital was obtained through lawful means. As evidence the petitioner offers numerous forms of documents relating to assets that she and her spouse possessed in China. Counsel also asserts that the petitioner provided funds derived from these assets to multiple private currency exchange dealers, who subsequently invested the funds in the NCE. The petitioner has failed to provide a connection between her own assets and the capital invested in the NCE. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner has failed to provide any correlation or nexus between assets she held jointly with her spouse and the capital invested in the NCE. Specifically, the petitioner has failed to demonstrate that the funds invested in the NCE are in any way attributable or derived from her own assets.

On appeal, the petitioner offers additional foreign bank account documents attempting to demonstrate the lawful source of the invested funds. In the RFE, the director specifically requested evidence that the petitioner sent the funds to the entities that had transferred funds to the NCE. The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established the beneficiary's eligibility for the benefit sought as of the filing date of the petition. See 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988);

Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted evidence, she should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the previously requested evidence submitted for the first time on appeal for any purpose.

The record before the director lacked evidence that would support the petitioner's contention that she utilized private currency exchange dealers to circumvent China's restrictions on foreign exchange remittances. The petitioner has failed to provide evidence documenting the route through which her funds allegedly travelled after leaving her possession. There is a break in the path of the funds first between the petitioner and the private currency exchange dealers, and then between these currency dealers and the NCE. Even on appeal, the petitioner provides evidence of withdrawals of only 910,000 Chinese Renminbi (\$133,255) as of April 26, 2010 and an additional 3,276,530 Chinese Renminbi as of June 9, 2010.¹ As of June 9, 2010, however, the exchange deals had transferred \$949,865 to the NCE as of that date. Regardless, the statements showing the withdrawals do not reflect the beneficiary of the transfers.

Without the documentation of the full path of the funds, the record establishes only that the private currency exchange dealers are infusing the NCE with the capital. As the petitioner has not documented the path of the funds, she has failed to meet her burden of establishing that the invested funds are her own. *See Matter of Izummi*, 22 I&N Dec. at 195 (citing *Matter of Soffici*, 22 I&N Dec. at 158.) As a result, she has not demonstrated that she has invested, or is actively in the process of investing capital obtained through lawful means in accordance with 8 C.F.R. § 204.6(j)(3).

B. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines the terms "capital" and "investment." 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.

On appeal, counsel asserts that USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulations. *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010), *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). When regulations are not drawn in broad terms, USCIS may not develop additional requirements in implementing the regulations. *Love Korean Church*, 549 F.3d at 757-758. Counsel concludes that as the petitioner submitted bank statements showing deposits of cash pursuant to 8 C.F.R. § 204.6(j)(2)(i), she has met her burden of documenting her investment.

¹ Dollar amounts calculated using the exchange rate provided at www.oanda.com/currency/converter on April 26, 2010 and June 9, 2010 respectively. Website accessed February 21, 2012, and calculations conducted on that website have been incorporated into the record of proceeding.

Counsel's position fails to take into account a controlling precedent on the topic. To meet her burden to document that the funds are her own, the petitioner must document the path of the funds. See *Matter of Izummi*, 22 I&N Dec. at 195. Precedent decisions are binding on all USCIS employees. 8 C.F.R. § 103.3(c).

As discussed above, the petitioner has failed to demonstrate a transfer of her money to any private currency exchange dealer as counsel asserts. 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. at 165. Additionally, she has failed to identify the entities or individuals responsible for the three listed deposits in the NCE's account. There is a break in the path of the funds in two fundamental stages of the purported money transfer process: (1) between the petitioner and the private currency exchange dealers; and (2) between these dealers and the NCE. As such, the petitioner has not demonstrated that the capital invested in the NCE from the private currency exchange dealers derives from her own assets.

The required amount of amount of capital that the petitioner must invest in the NCE is \$1,000,000. The petitioner must demonstrate that, as of the petition filing date, she has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. The regulations repeatedly make it clear that the alien or the petitioner must demonstrate that he or she has invested or is actively in the process of investing the requisite amount of capital. See 8 C.F.R. §§ 204.6(e), (j), (j)(2), (j)(3). Additionally, the petitioner must demonstrate that she has placed her own assets at risk and that she is the actual owner of the invested capital. *Matter of Soffici*, 22 I&N Dec. at 165, n.3 (misabeled as n.5 in the footnote); *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Assoc. Comm'r 1998); *Matter of Ho*, 22 I&N Dec. at 210-211.

The petitioner has failed to demonstrate that she has invested or is actively in the process of investing the required amount of capital in the NCE or that she is the owner of the invested capital. As such, she has not complied with the regulation at 8 C.F.R. § 204.6(j)(2).

C. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence that a petitioner must provide in order to establish that: (1) 10 qualifying employees were hired following the establishment of the NCE, or (2) if the employment creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit USCIS to reasonably conclude that the enterprise has the potential to meet the job creation requirements. Additionally, *Matter of Ho*, 22 I&N Dec. at 213 provides that "a comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." The regulation at 8 C.F.R. § 204.6(e) defines the terms "employee" and "qualifying employee" as those who are eligible to be counted toward employment creation under the present classification. Section 203(b)(5)(D) of the Act defines

“full-time employment” as a position that requires at least 35 hours of service per work week. Full-time employment means continuous, permanent employment. *See Spencer Enterprises*, 229 F. Supp. 2d at 1039.

On the Form I-526 petition, the petitioner indicated that there were no employees at the time of the initial investment in June 2010 and no employees as of the date of petition filing. The petitioner indicated that 10 additional jobs would be created as a result of her additional investment. The petitioner initially indicated that the new commercial enterprise would engage in the importing, selling, and leasing of pianos. The original business plan indicated the petitioner would utilize approximately \$750,000 on the purchase of a warehouse in Ontario, California, while the remaining \$250,000 would be utilized to operate the business.

The director’s RFE cited the business plan requirements identified in *Matter of Ho*, 22 I&N Dec. at 213, and noted several shortcomings in the petitioner’s business plan. Specifically, the director found that: (1) the petitioner had not included a market analysis with the names of competitors, comparing the NCE’s products with these competitors; (2) the plan contained no descriptions of the NCE’s target market or customers; (3) the plan lacked a discussion of the NCE’s suppliers or details about any executed contracts; and (4) the plan did not contain an explanation of any staffing requirements and job descriptions for the NCE’s anticipated employees.

In response to the RFE, the petitioner submitted an amended business plan. In the amended business plan, the petitioner expanded the NCE’s business plan to include importing and selling eyeglass frames, or simply renting empty warehouse space. Neither the petitioner nor counsel provides an explanation of expanding the business into the eyeglass frame market or warehouse rental. In addition to the amended business plan, the petitioner claimed that she hired three employees and provided Forms I-9, Employment Eligibility Verification, and documents demonstrating each employee’s eligibility to work in the United States. At the time of the RFE response, counsel indicated that payroll records would not be available until the end of the quarter.

The director concluded that the amended business plan still lacked cost projections, salaries and an analysis of competitors. The director further concluded that the marketing strategy was vague.

On appeal, the petitioner reiterates information included in the earlier business plans. Counsel asserts that the director erroneously applied *Matter of Ho*, 22 I&N Dec. 206 to the present petition. He offers the following differing elements: (1) the alien in the *Ho* decision was in the United States at the time of submitting his petition, while the petitioner in the present case was outside of the country; (2) the alien in the *Ho* decision invested \$500,000, while the petitioner in the present case purportedly invested \$1,000,000; (3) the alien in the *Ho* decision failed to document that he earned the invested funds, while the petitioner in the present case demonstrated that she and her spouse had earned the funds that she claims to have invested; (4) the alien in the *Ho* decision kept his \$500,000 in a bank account, while the petitioner in the present case spent additional funds in the exercise of

business for the NCE; (5) the alien in the *Ho* decision hired no employees, while the petitioner in the present case hired three employees within five months of filing her petition.

None of the differences counsel cites are relevant to the requirements for a comprehensive business plan. 8 C.F.R. § 204.6(j)(4)(B). The language in *Matter of Ho*, 22 I&N Dec. at 213 does not exempt a petitioner from providing a comprehensive business plan where, as here, the petitioner has created only some of the required jobs; rather, it applies in all cases where a petitioner has not already created all of the 10 requisite jobs. As such, counsel's assertion that *Matter of Ho* does not apply to the petitioner's case is not persuasive. In addition to the regulation at 8 C.F.R. § 204.6(j)(4)(B), *Matter of Ho* is binding on all USCIS officers in their adjudication of Form I-526 petitions. 8 C.F.R. § 103.3(c).

Finally, counsel asserts that the director's conclusion that the business plan did not show the NCE will create 10 full-time positions for qualifying employees is arbitrarily based on the presumption that the petitioner did not invest \$1,000,000. To support this assertion, counsel presents two points: (1) the amended business plan contains all the necessary elements to predict the NCE will create 10 full-time positions, and (2) the business plan is being carried out and three positions have already been created within the NCE. As numerous necessary elements delineated in *Matter of Ho* are absent from the amended business plan, the petitioner's unsubstantiated prediction that the NCE will fill at least seven additional full-time positions is not sufficient to show that the NCE will create not fewer than 10 full-time positions for qualifying employees.

The petitioner has not established that her planned investment will create the required ten full-time positions. Accordingly, she has not complied with the regulation at 8 C.F.R. § 204.6(j)(4)(i).

IV. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought 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.