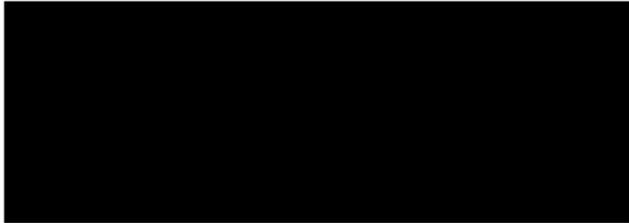


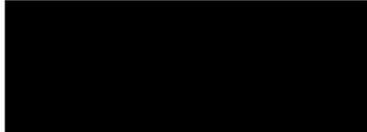
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B7

DATE: **DEC 24 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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 business, [REDACTED] located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000. The [REDACTED] is a pre-existing business entity, in which the petitioner invested to create a new commercial enterprise. The purpose of the business was initially to purchase and invest in a Motel 6 franchised facility and, with the additional investment from the petitioner, the new commercial enterprise seeks to extend the current Franchise License Agreement and re-position the motel in the local market.

The director determined that the petitioner had failed to demonstrate that she has invested or is actively in the process of investing the required amount of capital and that the need for not fewer than 10 qualifying employees will result within two years of the investment.

On appeal, counsel asserts that the petitioner has complied with the requirement to fully make available the amount of investment under existing law. In addition, counsel maintains that the director miscalculated the number of total employees that the new commercial enterprise would need and has met the requirement for the creation of 10 new jobs. For the reasons discussed below, the AAO finds that the petitioner has not overcome the director's grounds for denial.

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 petitioner filed the petition on March 21, 2012, supported by the following types of evidence: (1) a business plan for the Capital Hotels of Arkansas, Inc.; (2) copies of Internal Revenue Service (IRS) refund checks made out to the petitioner's spouse and documentation of the pathway of funds

to the business account; (3) the 2003 articles of incorporation for [REDACTED] (4) documentation of 300,000 shares of stock issued to petitioner; (5) a market analysis report of property showing current market value; (6) [REDACTED] 2010 and 2011 IRS Form 1120S U.S. Income Tax Returns for an S Corporation; (7) a March 12, 2012 renovation agreement between [REDACTED] and [REDACTED] (8) a March 14, 2012 renovation construction agreement between [REDACTED] and [REDACTED] (9) a copy of [REDACTED] check made out to [REDACTED] (10) documentation establishing the location of the Motel 6 as a targeted employment area; and (11) background information of the area.

On April 2, 2012, the director issued a Request for Evidence (RFE) seeking further documentation from the petitioner. The RFE noted that based on the initial submissions, the evidence failed to demonstrate that \$500,000 has been invested or is actively in the process of being invested and listed the type of documentation that would help establish this requirement. The director, through the RFE, also indicated that the initial submissions failed to demonstrate that the petitioner's invested capital was obtained through lawful means. The director stated in the RFE that while the petitioner had submitted evidence showing that the petitioner's capital was obtained from an alleged IRS refund check, to conform to the implementing regulatory requirement for lawful source of EB-5 investment, the petitioner needed to submit documents supporting the spouse's tax refund amount and whether the refund occurred as a result of funds obtained through lawful means. Additionally, in the RFE, the director requested documentation demonstrating that the new commercial enterprise will create at least 10 full-time positions for qualifying employees. The director further observed that a new commercial enterprise that has been established through a capital investment in a troubled business must submit evidence that the number of existing employees will be maintained at no less than the pre-investment level for a period of at least two years.

In response to the RFE, the petitioner re-submitted some of the financial documents showing the pathway of funds into the business account. In addition, the petitioner submitted: (1) copy of a check for \$150,000, made out to [REDACTED]; (2) additional evidence of a contract amount and funds already spent for contractor's renovation work; (3) copies of IRS letters addressed to the petitioner's spouse, (4) the two refund checks the IRS issued to the petitioner's spouse, and the spouse's associated tax returns; (5) [REDACTED] (6) employment history of [REDACTED]; (7) copy of Form I-9s for the employees of [REDACTED]; (8) comparison of [REDACTED] with other four hotels in which petitioner's spouse holds an ownership interest; and (9) evidence of the two new employees hired following the new investment in March, 2012.

After considering the additional documents in response to the RFE, the director denied the petitioner's I-526 petition on May 9, 2012. The director identified two grounds for denial in the decision. The director determined that the evidence of record was insufficient to show that the petitioner has invested or is actively in the process of investing the required amount of capital. The director also found that the petitioner failed to establish that the new commercial enterprise will create 10 new full-time employment positions. Because the new commercial enterprise has not created the required full-time employment at the time of investment, the director observed that the

petitioner needed to submit a sufficiently detailed business plan to permit U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job creation requirements. The director further stated that the petitioner needed to show the creation of 10 additional jobs in addition to the positions that were already in existence prior to the time of investment.

On appeal, counsel asserts that the evidence shows that \$300,000 is either invested or in the process of being invested and has been subject to risk, and an additional \$200,000 investment will occur within the two years, which is sufficient to meet the requirement for amount of capital. Counsel further asserts that the director erred in noting that there were four employees, instead of two, working prior to the new investment that resulted in the new commercial enterprise, resulting in a miscalculation of total number of jobs the new commercial enterprise needed to create. Counsel maintains that the comprehensive plan projects sufficient employment to meet the requirements of the implementing regulations.

III. ISSUES ON APPEAL

A. Investment of Capital

Under the regulation, the amount of capital generally required to make a qualifying investment in the United States is \$1,000,000. 8 C.F.R. § 204.6(f)(1). However, if the investment is made in an area deemed a targeted employment area, the amount of capital necessary is \$500,000. The evidence of record indicates that Caddo Valley, Arkansas, the city in which the new commercial entity is located, is rural and, thus, a targeted employment area pursuant to 8 C.F.R. § 204.6(e). Consequently, the amount of capital that the petitioner must invest is \$500,000.

The regulation at 8 C.F.R. § 204.6(e) defines 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. Moreover, 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. 169, 179 (Assoc. Comm'r 1998).

In this instance, the petitioner submitted documentation showing that the petitioner invested \$300,000 into the new commercial entity via a transfer from the petitioner's personal bank account into the business account of [REDACTED]. Initially and in response to the director's RFE, the petitioner submitted documents showing that [REDACTED] paid \$150,000 to [REDACTED] to start the renovations on the motel property. The petitioner further stated that [REDACTED] will pay an additional \$150,000 to the construction company as various stages of the renovations are completed. The statement accompanying the initial Form I-526 petition effectively acknowledges that the required investment

amount is \$500,000 by stating that the petitioner will invest the remaining \$200,000 within two years. However, as noted above, the mere intent to invest at a later time is insufficient to demonstrate that a petitioner is actively in the process of investing. 8 C.F.R. § 204.6(j)(2). The petitioner has not documented that the remaining \$200,000 are in escrow, committed to be invested through a secured promissory note, or otherwise committed.

Counsel asserts on appeal that there is nothing in the relevant statute, implementing regulations, or the precedent decisions that the director cites requiring that the full \$500,000 investment be made prior to the filing of the petition or requiring that the investment be placed at risk prior to the filing of the petition. The plain language of 8 C.F.R. § 204.6(j)(2), which specifies that “the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk,” directly contradicts counsel’s position. In addition, *Matter of Izummi*, 22 I&N Dec. at 179, further clarified that the full amount of investment capital must be made available to the business entity that is responsible for creating employment. Thus, the petitioner’s failure to make available or otherwise commit the remaining \$200,000 to the new commercial enterprise also constitutes a failure to place the required amount of capital at risk. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm’r 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimis action of signing a lease agreement, without more, is not enough.

It is acknowledged that, unlike the petitioner in *Matter of Ho*, this petitioner has an operating business. Regardless, the case stands for the proposition that all the funds must be at risk. *Matter of Ho* states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

Id. at 210. While the petitioner has explained how [REDACTED] will spend the additional \$150,000 already transferred to the company, the business plan merely states: “The balance of the \$200,000.00 (Two Hundred Thousand Dollars) Investment will be made within Two years period.” The business plan does not include any financial projections or other explanations as to how the company will spend that money and the petitioner has not documented that she has an additional \$200,000 available to invest let alone fully committed to invest through, for example, placement in an escrow account or an obligation set forth in a secured promissory note. *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Assoc. Comm’r 1998) (providing the requirements for a promissory note to document a commitment of funds).

Accordingly, the petition cannot be approved because the petitioner failed to invest the requisite amount of capital.

B. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9, or other similar documents for 10 qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees.

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. *Matter of Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

The regulation at 8 C.F.R. § 204.6(e) defines employee as an individual who provides services directly to the commercial enterprise and excludes independent contractors. The same regulation defines qualifying employee as a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States. The definition excludes the petitioner, the petitioner's spouse, sons, or daughters, or any nonimmigrant alien.

The petitioner initially attempted to identify the prior business as a troubled business, but there is insufficient evidence in the record to support such a finding. Following a review of the initially submitted evidence, the director determined that the record failed to persuasively demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees and requested the petitioner to submit a comprehensive business plan, as outlined in 8 C.F.R. § 204.6(j)(4)(i)(B) and *Matter of Ho*, to allow USCIS to reasonably conclude the enterprise has the potential to meet the job creation requirements. In response to the director's request, the petitioner submitted a document titled "Future Staffing Plan," which provided a schedule for hiring and the expected staffing requirements for the new commercial enterprise indicating that a total of 12 employees would be employed by October 2014. In his decision, the director ultimately determined that the record did not include a comprehensive business plan, based on which USCIS could reasonably conclude that the required job creation numbers would be met. The director also observed that a minimum of 14 employees would be required to meet the requirements of the new entity.

On appeal, counsel maintains that the director erred in noting that there were four employees working prior to the new investment, instead of two, resulting in the director's miscalculation that the new commercial enterprise must have a total of 14 full-time employees within a two year time frame instead of 12 employees. Counsel further asserts that the correct number of jobs has been supported by a comprehensive plan to meet the requirements of the implementing regulations.

As an initial matter, the record reveals that \$300,000 was deposited into the business account of the new commercial enterprise on March 16, 2012. Temporarily setting aside the issue of a \$300,000 investment being an alternate basis of denial as discussed in the preceding section, the record includes quarterly wage reports to state and federal tax authorities and internal business records, including pay stubs, which sufficiently demonstrate that two employees were working prior to March 16, 2012, and that two additional employees were hired following the investment creating the new commercial enterprise. Therefore, the new commercial enterprise must hire a total of 12 employees (two pre-existing employees plus 10 new employees) within a two year time frame.

Nevertheless, even assuming that 12 is the correct number of total jobs, the director properly determined that the record does not include a comprehensive plan upon which USCIS could reasonably base the conclusion that the required job creation numbers would be met. The petitioner's projected employment requirements are based on a 50% occupancy rate, but failed to support the claimed occupancy rate for the area where the new commercial enterprise is located. Moreover, the "Future Staffing Plan" indicates that based on the unsubstantiated occupancy rate, the new commercial enterprise could employ three full-time maids. However, the "Future Staffing Plan" projects employing five full-time maids by October 2012, to result in the total of 12 employees. The plan does not account for any potential growth within the two year time frame and therefore fails to demonstrate that five full-time maid positions could be supported. Along with these two examples of unsupported assumptions that undermine the plan's credibility, the director properly determined that because the plan lacks critical corroborating data and fails to substantiate its employment projections, it otherwise fails to constitute a comprehensive business plan upon which USCIS can determine whether or not the new commercial enterprise could meet the job creation requirements.

Accordingly, the petition cannot be approved because the new commercial enterprise fails to meet the job creation requirements.

IV. SUMMARY

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.