



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 15 2013

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 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 (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 petition is based on an investment in [REDACTED] a business located in [REDACTED] California. According to its business plan, the “exclusive objective of this business is the export of California wines to China.” The petitioner indicated on part 2 of the petition that the business was located in a targeted employment area. The record contains inconsistent claims regarding the location of the business. Specifically, the Form I-526 and Operating Agreement list an address on [REDACTED] the bank statements, invoices and business contracts reflect counsel’s address; and the petitioner submitted a lease for yet a third address on [REDACTED] on appeal. Nevertheless, all three of the addresses are located within [REDACTED], which the petitioner has established is a targeted employment area. Thus, while the inconsistent addresses are an issue, the required amount of capital in this matter is \$500,000.

In her September 5, 2012 decision, the director denied the petition on the grounds that: (1) the petitioner failed to establish that he has placed the required amount of capital at risk for the purpose of generating a return; and (2) the petitioner failed to establish that the claimed investment has created or will create at least 10 full-time positions for qualifying employees.

On appeal, the petitioner submits a brief from counsel and additional evidence. For the reasons discussed below, the petitioner has not overcome either of the director’s grounds of denial. In addition, the petitioner has failed to document the lawful source of the required amount of capital. The appeal will therefore be dismissed.

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 13, 2012, supported by the following types of evidence: (1) documents showing that [REDACTED], California, constitutes a targeted employment area; (2) bank documents relating to a November 16, 2011 wire transfer of \$565,000 to [REDACTED] account; [REDACTED] corporate documents; (4) a copy of [REDACTED] Employment Eligibility Verification, Form I-9; (5) a September 27, 2011 Letter of Witness and Gift Letter; (6) documents relating to the petitioner's parents' assets; (7) an online printout from the Board of Governors of the Federal Reserve System relating to currency exchange rates; (8) documents relating to the petitioner's parent's income taxes between 2005 and 2010; (9) a copy of a Shanghai Certificate of Real Estate Ownership; (10) [REDACTED] business plan; and (11) a March 1, 2012 letter from the petitioner discussing his investment. While the petitioner indicated on the Form I-526 petition that [REDACTED] address was [REDACTED] in [REDACTED], California, which also appears on the company's letterhead, the petitioner did not submit a lease or deed for that location. The business bank statements, correspondence from the Internal Revenue Service (IRS), and [REDACTED] Form I-9 all list the company's address as counsel's address.

On April 11, 2012, the director issued a Request for Evidence (RFE), requesting the petitioner to provide additional information, including (1) evidence showing that the petitioner has placed the required amount of capital at risk for the purpose of generating a return; (2) evidence of the lawful source of the petitioner's funds; (3) evidence showing that the claimed investment has created or will create at least 10 full-time positions for qualifying employees; and (4) evidence showing that a new commercial enterprise has been established in a targeted employment area.

On July 2, 2012, the petitioner responded to the director's RFE with a letter from counsel, dated June 30, 2012, and a number of documents, some of which the petitioner had previously filed. The petitioner's response to the RFE includes the following types of evidence: (1) a June 27, 2012 Letter of Witness and Addendum to Gift Letter; (2) documents relating to the petitioner's mother's assets and bank transactions; (3) a February 14, 2012 [REDACTED] Operating Agreement; (4) documents relating to [REDACTED] position as the president of [REDACTED] (5) a June 18, 2012 document entitled "Letter of Intent (Revised)"; (6) documents relating to a June 7, 2012 contract between [REDACTED] doing business as [REDACTED] November 2011 bank statement; [REDACTED] Compiled Forecasted Financial Statements for a Two-Year Period Ending May 2014; (9) articles relating to the wine industry; (10) an undated letter from [REDACTED] Director of International Business Development, [REDACTED] Chamber of Commerce; and (11) an April 30, 2012 letter from the State of California, Business, Transportation and Housing Agency.

In her September 5, 2012 decision denying the petition, the director concluded that: (1) the petitioner failed to establish that he has placed the required amount of capital at risk for the purpose of generating a return; and (2) the petitioner failed to establish that the claimed investment has created or will create at least 10 full-time positions for qualifying employees.

On appeal, counsel asserts that the director erred. Counsel files a 21-page brief and the following types of evidence, some of which the petitioner had previously filed: (1) an October 3, 2012 declaration from the petitioner; (2) documents relating to a June 7, 2012 contract between [REDACTED] documents relating to [REDACTED] July 2012 shipment to [REDACTED] (4) photographs, labels, a news release, invoices and other documents relating to [REDACTED] business operation and promotional efforts; (5) an October 3, 2012 declaration from [REDACTED] bank statements; (7) a September 3, 2012 Commercial Lease; and (8) a September 11, 2012 Service Agreement.

III. ISSUES ON APPEAL

A. Investment of Capital

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. 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). Significantly, a mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, does not qualify as an active, at-risk investment. *Matter of Ho*, 22 I&N Dec. 206, 209 (Assoc. Comm’r 1998). Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Cal. 2001) (citing *Matter of Ho*).

In this case, the petitioner has failed to show that he has placed the required amount of capital at risk for the purpose of generating a return. First, the petitioner has not shown that the required amount of capital had been placed at risk as of March 13, 2012, the date he filed the petition. It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing the petition. See 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l. Comm’r 1971); *Matter of Izummi*, 22 I&N Dec. at 175. At the time of the filing of the petition, the petitioner provided the following relevant evidence: (1) bank documents showing that the petitioner’s mother wired \$565,000 to [REDACTED] (2) documents relating to the formation of [REDACTED] business plan, including a Letter of Intent to Purchase Wine from [REDACTED] and a Memorandum of Understanding between [REDACTED] (CICC); (4) a March 1, 2012 letter from the petitioner discussing his investment; (5) a copy of [REDACTED] Employment Eligibility Verification, Form I-9; and (6) a February 14, 2012 letter from the [REDACTED]

petitioner to [REDACTED] relating to the hiring of [REDACTED] as the president of [REDACTED]

None of these documents, however, show that the petitioner had placed the \$565,000 at risk. *Matter of Ho*, 22 I&N Dec. at 210, 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.

Matter of Ho concludes: "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.*

The petitioner did not initially submit a lease for the address that appears on the Form I-526, within the Operating Agreement, and on the company letterhead. The petitioner submits a lease for the first time on appeal. That lease, for a 1,170 square foot portion of a suite at [REDACTED] in [REDACTED] California, is dated September 3, 2012 and, thus, postdates the filing of the petition by almost six months. Moreover, the record contains invoices dated September 18, 2012 through September 25, 2012 that continue to list counsel's address as the address of [REDACTED]. As the location of the new commercial enterprise was undecided as of the date of filing, the petitioner had not even engaged in this *de minimis* action as of that date.

Moreover, the petitioner had not otherwise undertaken any business activity that placed his funds at risk as of the date of filing the petition. The Letter of Intent to Purchase Wine from [REDACTED] does not contractually require [REDACTED] to commit any funds in the proposed business transaction. Rather, as the document's name suggests, it memorializes [REDACTED] intent to engage in business transactions with [REDACTED]. Similarly, the Memorandum of Understanding between [REDACTED] does not place any of the petitioner's claimed investment at risk. The Memorandum of Understanding states that [REDACTED] "will initiate a strategic partnership project of mutual benefit to both parties." It fails, however, to specify the amount of funds or the level of resources [REDACTED] had committed or was required to commit to the "strategic partnership project." Indeed, in his March 1, 2012 letter, the petitioner failed to establish or even allege that any of the \$565,000 claimed investment had been committed or placed at risk.

Although the documents relating to the hiring of [REDACTED] as the president of [REDACTED] entitled [REDACTED] to receive an annual salary of \$60,000, the hiring amounts to a *de minimis* action, similar to the signing a lease agreement in *Matter of Ho*. [REDACTED] will incur some financial responsibilities if it fires [REDACTED] without cause, 50 percent of his salary in addition to a three percent interest in the company. Nevertheless, similar to the single

commitment in *Matter of Ho*, 22 I&N Dec. at 210, this single act of hiring [REDACTED] the company's only commitment prior to the date of filing the petition, cannot demonstrate that the petitioner's claimed investment had been placed at risk. In short, a review of the record reveals that the petitioner did not initially support the petition with any documentation of business activity other than the hiring of [REDACTED] which constitutes a *de minimis* action. See *Matter of Ho*, 22 I&N Dec. at 210. As such, the documents initially filed in support of the petition fail to establish that the petitioner had placed the claimed investment at risk for the purpose of generating a return on the capital.

In response to the director's RFE and in support of the petitioner's appeal, counsel has provided documents including: (1) a June 18, 2012 Letter of Intent (Revised); (2) a June 7, 2012 contract between [REDACTED] (3) documents relating to [REDACTED]; July 2012 shipment to [REDACTED] (4) a September 3, 2012 Commercial Lease; and (5) a September 11, 2012 Service Agreement. These documents, however, postdate the filing of the petition. As noted, the petitioner must establish eligibility at the time of filing the petition. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49; see *Matter of Izummi*, 22 I&N Dec. at 175. At the time of filing the petition, the petitioner had not established sufficient business activity such that his claimed invested funds were at risk.

Second, [REDACTED] appears to be grossly overcapitalized. Specifically, [REDACTED] bank statements for an account ending in [REDACTED] 2023 show that the entire \$565,000 claimed investment remained in the account unused until June 2012, seven months after the wire transfer and three months after the petitioner filed the petition. According to the most recent bank statement provided for the account, as of July 11, 2012, \$469,429.15, or 83 percent, of the \$565,000 remained in the account.

While there is no requirement that the new commercial enterprise had already spent the petitioner's investment as of the filing date, those funds must be at-risk. According to [REDACTED] Compiled Forecasted Financial Statements for a Two-Year Period Ending May 2014, submitted in response to the director's RFE, [REDACTED] is forecasted to have a net income of \$701,507 during its first 12 months of operation, and a net income of \$3,473,339 during its second 12 months of operation. Thus, it appears that [REDACTED] can pay its expenses from its proceeds, rather than from the petitioner's claimed investment. Similarly, according to the more conservative Profit and Loss Forecast Overview, on pages 72 and 73 of [REDACTED] business plan, the company is forecasted to have a net loss of only \$99,160 during its first 12 months of operation, and a net income of \$299,520 during its second 12 months of operation. Even the more conservative forecast fails to identify start-up costs or other capital expenses of \$565,000.

The Operating Agreement and [REDACTED] employment terms reveal that there are limits on the petitioner's ability to remove his funds. Nevertheless, based on the large sum of money remaining as cash in [REDACTED] account and the petitioner's failure to provide projected capital expenditures for his claimed investment, [REDACTED] appears grossly

overcapitalized such that all of the petitioner's claimed investment is not at risk for purposes of employment creation. *See Matter of Izummi*, 22 I&N Dec. at 179; *see also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010).

In light of the above, the petitioner has not demonstrated that he has placed at least \$500,000 of capital at risk for the purpose of generating a return on the 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. If the evidence does not show that the petitioner's equity investment has resulted in the creation of at least 10 full-time positions for qualifying employees, the regulation at 8 C.F.R. § 204.6(j)(4)(i) requires the petitioner to provide a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees. *See Matter of Ho*, 22 I&N Dec. at 213. 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. *Id.* 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 new 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. Section 203(b)(5)(D) of the Act, as amended, now defines "full-time employment" as "employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position." Full-time employment also means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Ca. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

In this case, the evidence fails to show that [REDACTED] has hired any qualifying employees. First, although the record contains documents relating to the hiring of [REDACTED] as the president of [REDACTED] in February 2012, the petitioner has provide insufficient evidence, such as bank documents, tax withholding documents or payroll documents, showing that [REDACTED] has worked at least 35 hours a week or has received any wages. Specifically, [REDACTED] November 2011 through July 2012 bank statements for an account with account number ending in 2023 fail to show that [REDACTED] has made any payment to [REDACTED] since his alleged hiring. The record also lacks any tax withholding related documents or payroll documents showing the number of hours [REDACTED] has worked per week or that he has ever

received wages or compensations from [REDACTED]. As such, the petitioner has failed to establish that his claimed investment in [REDACTED] has resulted in the hiring of any qualifying full-time employees.

As the evidence does not demonstrate that the petitioner's claimed investment has resulted in the creation of at least 10 full-time positions, the petitioner must provide a copy of a comprehensive business plan showing the need for not fewer than 10 full-time, qualifying employees. See 8 C.F.R. § 204.6(j)(4)(i); *Matter of Ho*, 22 I&N Dec. at 213. The petitioner has failed to do so. The petitioner did initially submit a business plan. According to pages 43 and 44 of the business plan, the petitioner and [REDACTED] will initiate operations for [REDACTED] and will hire nine additional employees within two years. One of the nine positions is a marketing manager. The petitioner, however, has not provided a job description for this position. Instead, page 64 of the business plan provides a job description for the position of marketing representative. The petitioner has not shown that these positions share the same job description. As such, the business plan does not constitute a comprehensive business plan, as it fails to include job descriptions for all positions. See *Matter of Ho*, 22 I&N Dec. at 213.

Moreover, the business plan also does not appear to be credible. The business plan provides that within one to twelve months, [REDACTED] will hire three full-time employees to fill the positions of president, vice-president and officer manager. The profit and loss forecast overview by month reflects monthly wages of \$8,000 beginning in the first month, increasing to \$10,500 in the tenth month. [REDACTED] did not even lease a location until September 3, 2012, six months after the petitioner filed the petition supported by the business plan. According to page 8 of counsel's appellate brief, as of the date of the brief, October 4, 2012, 14 months after the August 2011 formation of the company, [REDACTED] has hired only one employee, [REDACTED] as the president of the company. The record contains no evidence that the positions of vice-president and officer manager have been filled, as provided in the business plan. As discussed, [REDACTED] bank statements fail to show that the company has made any payment to [REDACTED] the company's president and the first and only employee.

Moreover, the business plan acknowledges that anyone purchasing alcohol for resale domestically or in foreign commerce requires a federal Wholesaler's Basic Permit, which the plan indicates the company will acquire. While the petitioner submitted purported evidence of exports on appeal, the petitioner did not submit a Wholesaler's Basic Permit. The business plan also fails to address whether the company requires a license from the California Department of Alcoholic Beverage Control.

In light of the above, the petitioner has not demonstrated that his claimed investment has created or will create at least 10 full-time positions for qualifying employees.

C. Source of Funds

As an additional issue, the petitioner has not established the lawful source of his funds. 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).

In order to establish the lawful source of funds, the regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital. A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. 195. An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Matter of Izummi*, 22 I&N Dec. at 195.

In this case, the bank documents show that the petitioner's claimed investment of \$565,000 came from a November 16, 2011 wire transfer from the petitioner's mother's account ending in [REDACTED]. The petitioner, however, has not established the path of the funds into that account. The petitioner's mother's bank documents show that on November 11, 2011, she wired the following amounts from her [REDACTED] account ending in [REDACTED] (1) 3,500,000 RMB to [REDACTED] account ending in [REDACTED] and (2) 184,600 RMB to [REDACTED] account ending in [REDACTED]. According to the petitioner's parents' Addendum to Gift Letter, [REDACTED] are "brokers at the [REDACTED] [REDACTED] and converted the funds to Hong Kong Dollars (HKD), and deposited the funds into the petitioner's mother's [REDACTED] account. Although the statement of the petitioner's mother's brokerage account ending in [REDACTED] shows a 4.45 million HKD deposit on November 11, 2011, the petitioner has failed to show that the deposit came from [REDACTED]. The note associated with the deposit reads "TRF Deposit – BOC." The petitioner has not explained the meaning of the note. The petitioner has also failed to provide bank documents relating to [REDACTED] account with account number ending in [REDACTED] and [REDACTED] account ending in [REDACTED] showing that they made the 4.45 million HKD deposit into the petitioner's mother's account ending in [REDACTED], on November 11, 2011. As such, the petitioner has not documented the complete path of funds from the petitioner's mother's RMB account to her HKD account.

Moreover, while the Addendum to Gift Letter states that the petitioner's mother received 4.45 million HKD in her brokerage account on September 11, 2011, that transfer actually took place on November 11, 2011. The petitioner has provided inconsistent documents and "it is incumbent upon [him] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or evidence], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has provided no such evidence to explain or reconcile the inconsistent documents.

Furthermore, the petitioner has provided insufficient evidence showing the source of the funds in his mother's account with account number ending in [REDACTED]. According to a September 9, 2011 [REDACTED]

(b)(6)

Page 10

██████████ Certificate of Deposit, the petitioner's mother had 630,000 RMB in the account. The November 2011 bank statement reflects deposits in the following amounts between November 8, 2011 and November 11, 2011: (1) 300,000 RMB, (2) 597,000 RMB, (3) 922,000 RMB, (4) 1.52 million RMB, (5) 8,000 RMB, and (6) \$450,000 RMB. The petitioner has provided insufficient evidence showing the source of any of these deposits. Although the record contains evidence relating to the petitioner's parents' assets, property ownership and income tax information, the record lacks evidence showing the source of funds associated with the November 8, 2011 through November 11, 2011 deposits, which total 3.797 million RMB. The petitioner has not established that the funds came from the petitioner's parents' accounts or money they have lawfully accumulated.

In light of the above, the petitioner has not documented the complete path of the funds to show the lawful source of the funds he claimed to have invested in ██████████

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.