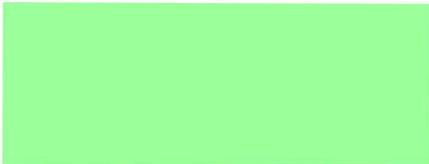


(b)(6)

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

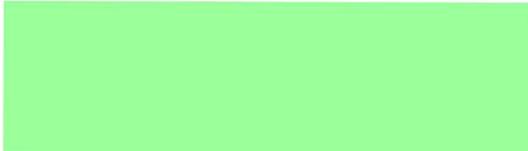


DATE: **FEB 04 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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]. The required amount of capital in this case is \$1,000,000. The Form I-526 petition states that the new commercial enterprise (NCE), [REDACTED] is a health care business. The record further reveals that the petitioner claims to be a 30-year practitioner of physiotherapy.

The director determined that the petitioner had failed to demonstrate that he has invested or is actively in the process of investing the required amount of capital, that the qualifying funds are lawfully obtained funds, and that he had created or would create 10 jobs.

On appeal, the petitioner asserts that the investment capital came from his earnings and originated from his personal accounts. Furthermore, the petitioner maintains that he plans to hire five employees upon approval of his I-526 and arrival in the United States and hire five additional employees in a two-year period after this. For the reasons discussed below, 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 July 27, 2011, supported by the following types of evidence: (1) the NCE's 2010 Florida state tax return; (2) the NCE's 2010 federal income tax returns, Internal Revenue Service (IRS) Form 1120, showing an incorporation date of August 11, 1995, no business activity, a large carry over net operating loss from prior years, \$1,179,797 in stock and additional paid-in-capital, and \$55,301 in assets; (3) a photocopy of the front and back of a December 13, 2010

check from a Greek entity purportedly made out to Ecomed for \$2,694,000; and (4) a December 7, 2010 Ecomed invoice made out to [REDACTED] listing equipment totaling \$2,694,000.

On January 12, 2012, the director issued a Request for Evidence (RFE), informing the petitioner that the Form I-526 was incomplete because the petitioner did not check an application type in Part 2 of the petition. In addition, the director stated that additional documentation was necessary to show that the petitioner had established a new commercial enterprise, that the petitioner has invested or is actively in the process of investing the required amount of capital, that the investment capital has been placed at risk, that the source of capital was lawful, and that the commercial enterprise will create not fewer than 10 full-time positions for qualifying U.S. employees.

In response to the director's RFE, the petitioner submitted a statement attempting to address the director's concerns, along with the following documents: (1) a correction to the original application indicating the petition is based in a commercial enterprise in a targeted employment area; (2) the articles of incorporation for the NCE; (3) a printout from the Florida Secretary of State's website showing the NCE's corporate name and listing it as being in active status; (4) an uncertified copy of the NCE's 2011 federal income tax return, IRS Form 1120; (5) and an uncertified copy of the NCE's 2011 Florida state income tax return. The tax returns once again show no business activity (income or expenses) and only \$55,301 in assets. Counsel asserted that the petitioner has five years to claim the \$2,694,000 in assets and would do so in 2012. Counsel further asserted that business licenses will only be available after approval of the petition and the petitioner's entry into the United States. In response to the director's specific request for a business plan, the petitioner submitted brochures for a clinic at an unspecified location and counsel asserts that the petitioner will hire the necessary employees during the conditional period.

Upon review of all the evidence, including the additional documents submitted in the RFE response, the director denied the I-526 petition on May 9, 2012. The director found there was insufficient evidence to establish that the petitioner's total investment into the NCE totaled \$3,911,738, as the petitioner claimed in part 3 of the Form I-526 petition. The director determined the petitioner failed to show that the claimed investment of \$3,911,738 ever belonged to him. The director further determined that the petitioner insufficiently documented that the requisite amount of capital was from lawfully obtained funds. Finally, the director concluded that the petitioner failed to satisfy the employment-creation requirement by providing a sufficiently detailed comprehensive business plan that substantiates the claim of job creation for 10 qualifying employees.

On appeal, the petitioner asserts that the capital investment came from earnings from Europe and Canada, as substantiated by two years of Canadian tax returns. The petitioner also states that the funds for the purchase of the business equipment originated from his individual bank account. As for the creation of 10 full-time positions, the petitioner states that he will hire five employees upon approval of his I-526 petition and his entry to the U.S. and plans on hiring five additional employees within two years. In support of his assertions on appeal the petitioner submits the following documents along with the Form I-290B:

- (1) a letter from the NCE's secretary;
- (2) a note from a Greek moving company, [REDACTED] accompanied by an uncertified translation;
- (3) a "Household Goods Personal Effects Inventory" prepared by [REDACTED] Forwards for an unidentified individual or business that appears to list medical equipment but includes no values;
- (4) a letter purportedly from the Commercial Bank of Greece regarding the packing transportation and home delivery of unspecified goods;
- (5) a portion of a primarily foreign language document with the English words "Foreign Exchange Savings Account Passbook" and no accompanying translation;
- (6) a copy of two documents with various numerical figures circled;
- (7) a photocopy of a series of photos numbered 1-15 with a handwritten "s#" next to each photo;
- (8) an October 16, 2000, letter from AmSouth Bank;
- (9) an October 6, 1995, letter from Nations Bank;
- (10) a May 3, 1995 wire transfer form from Scotiabank;
- (11) an October 19, 1995 First Union Deposit slip for \$150,000;
- (12) an October 19, 1995 Nations Bank check made out to First Union for \$150,000 listing the petitioner as the remitter;
- (13) a partial photocopy of a deposit slip dated July 14, 2000, for \$606,010.30;
- (14) a May 16, 2000 Bank of America certificate of deposit (CD) Deposit Receipt for \$700,000; a net asset statement with a handwritten annotation stating that the funds are transfers from a Swiss bank to Bank of America;
- (15) a partial photocopy of an April 4, 2000 document from "Banque Scotia";
- (16) the petitioner's 2009 Canadian Tax Returns; and
- (17) the petitioner's 2010 Canadian Tax Returns.

A full consideration of all the evidence of record, including all the documentation submitted on appeal, reveals that the petitioner fails to satisfy the requirements under the statute and the implementing regulations for the I-526 petition.

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. Furthermore, 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).

Finally, 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. Calif. 2001)(citing *Matter of Ho*, 22I&N Dec. 206, 210 (Assoc. Comm'r 1998)). *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.

As an initial matter, the petitioner indicated in the RFE response that his I-526 petition was based on an investment in a commercial enterprise in a targeted employment area for which the required amount of capital invested has been adjusted downward. The petitioner, however, failed to submit any evidence indicating that the location of the NCE is in a targeted employment area as defined at section 203(b)(5)(B)(ii) of the Act and 8 C.F.R. § 204.6(e). Therefore, because the NCE is ineligible for the adjustment for targeted employment, the required amount of capital in this instance is \$1,000,000. See sections 203(b)(5)(C)(i) and (ii) of the Act.

The petitioner indicates in Parts 3 and 4 of the Form I-526 that he has made an investment totaling \$3,911,738. The total is allegedly comprised of \$5,000 in a U.S. bank account, \$2,694,000 of assets purchased for use in the enterprise, and "other" funds of \$1,212,738 as shown on tax returns.

In the various tax returns that the petitioner submitted as part of the initial petition, in the RFE response, and on appeal, the only item that matches the asserted figure of \$1,212,738 is the net operating losses that the NCE claimed for tax year 2011. In the statement accompanying the RFE response, counsel asserts that the \$1,212,738 are losses that the NCE already incurred and therefore demonstrates that an amount more than \$1,000,000 must have been invested to allow for a net operating loss of \$1,212,738 to be available. Counsel's assertion is not persuasive. Documentary evidence such as business bank accounts showing the availability of the allegedly greater than \$1,000,000 investment and transactional evidence reflecting the initial transfer of those funds are necessary to establish that the petitioner ever invested the funds. Without additional documentation, especially as the NCE shows no business activity in 2010 or 2011, there is insufficient information in the record to demonstrate that the net operating losses claimed on the uncertified tax return are legitimate. USCIS will not presume the requisite amount of prior capital investment based on the amount of tax deductions that the NCE claimed to have made in a given tax year. Similarly, the petitioner failed to submit bank statements for a business account bearing the NCE's name confirming the \$5,000 in the U.S. bank account. The petitioner provides no explanation or documentation of earlier business activities for the NCE, a business that purportedly generated \$1,212,738 in net operating losses from prior years but is showing no business activity in 2010 or 2011. Consequently, the petitioner has failed to show that he made a capital investment of \$1,217,738 (\$1,212,738 plus \$5,000).

The petitioner also failed to establish that he made a \$2,694,000 investment comprising of assets purchased for use in the enterprise. The record contains the following documents relating to this portion of the investment: an invoice from Ecomed for \$2,694,000; the photocopy of the front of a check allegedly made out to Ecomed for \$2,694,000 drawn on the Commercial Bank of Greece; an illegible photocopy of what could be the back of a canceled check; a poor photocopy of a letter from the Commercial Bank of Greece seeming to confirm a withdrawal of \$2,694,000 by [REDACTED] which is not the petitioner's initials; and a poor copy of what could be a bank statement with no account number or account holder identified on which an illegible number has been circled. The Instructions for Form I-526, under the subheading "Initial Evidence Requirements" and "Copies" provides:

Unless specifically required that an original document be filed with an application or petition, an ordinary legible photocopy may be submitted. Original documents submitted when not required will remain a part of the record, even if the submission was not required.

In the instant case, the account number on the front and back of the check, as well as the account number and withdrawn funds from the corresponding bank statement need to match in order for the petitioner to establish that he purchased \$2,694,000 of assets for the NCE. However, the account number is illegible in every document. Similarly, the document that appears to be a bank statement must legibly show the bank account number and the amount that has been withdrawn, but both critical numbers are illegible. The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for generating a return on the capital placed at risk. Moreover, the petitioner must establish that he has placed his own capital at risk. *See Matter of Ho*, 22 I&N Dec. at 209-210. Without legible documents showing that the petitioner owned the \$2,694,000 which ultimately allegedly funded the purchase of assets for the NCE, the petitioner cannot establish that he placed his own capital at risk and made the required investment under the regulations.

Accordingly, because the documentation of record does not substantiate the claim of a \$1,217,738 investment or the purchase of \$2,694,000 of assets, the petitioner has failed to establish that he invested the requisite amount of capital.

Finally, the record lacks evidence that any money used to purchase assets in 2010 has been placed at risk for purposes of generating a return on those funds. The petitioner has not listed those assets on the NCE's tax returns and both the returns for 2010 and 2011 show no business activity. Simply formulating an idea for future business activity, without taking meaningful concrete action, is insufficient for a petitioner to meet the at-risk requirement. *Matter of Ho*, 22 I&N Dec. at 210. While that decision states that even a lease is insufficient evidence of business activity, *id.*, the record lacks even this most basic evidence. Significantly, counsel's most recent address is the address of the NCE; this address does not appear to be a viable business address for the NCE.

B. 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. 206, 210-211 (Assoc. Comm'r 1998); *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 his burden of establishing that the funds are his own funds. *Id.*

The petitioner in this instance has not documented the path of the funds that he allegedly invested into the NCE. The petitioner has submitted two letters from U.S. banks stating that the petitioner and [REDACTED] have accounts with those banks. The accounts from those banks appear to be titled either in the petitioner's or his spouse's name. And while one of the letters, dated 1995, provide the account number and the balance, the other letter only attests to the fact that the petitioner has accounts in good standing but does not provide any account numbers or account balances. The petitioner also provided a CD deposit receipt from the Bank of America showing a purchase of a CD in 2000. Critically, the petitioner has failed to provide the origins of those funds that are reflected in his U.S. accounts. The petitioner did not provide statements from banks outside the U.S. that sent the funds into his U.S. accounts. The record does contain various deposit slips, but as the petitioner has only partially photocopied the original document, the account numbers on the deposit slips cannot be matched up to the known bank accounts of the petitioner, or are illegible. Furthermore, many of the deposits have a handwritten annotation stating that they are funds transferred from abroad and "deposited as [REDACTED]". However, the record, as noted earlier, does not include any bank statements or business accounts in the name of the [REDACTED]. Therefore, the financial documents that the petitioner submitted in support of his petition do not adequately document the path of the funds.

Consequently, the petitioner cannot establish that the capital he invested or is in the process of investing originated from a lawful source.

C. 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 ten (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 ten 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 petitioner in this instance failed to submit a business plan. In addition, he essentially concedes that he has no employees currently and does not otherwise indicate that he ever hired employees for the NCE even though the record reflects that the business has been in existence since 1995, although it had no income or expenses in 2010 or 2011. Counsel, in the statement accompanying the RFE response, makes reference to the brochures in the record and asserts that under section 204(b)(5), employees need only be employed during the two-year conditional period after the green card is issued. Counsel states that employment records will be provided after the removal of the conditions.

While the regulations do not require that the petitioner have already hired the requisite number of qualifying employees when filing the Form I-526, the regulation at 8 C.F.R. § 204.6(j)(4)(i) does require evidence documenting any employees already hired or, if sufficient job creation has not yet occurred "a comprehensive business plan showing 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." The brochures that the petitioner submitted do not constitute a comprehensive business plan and fail to even minimally comport to the requirements outlined in *Matter of Ho*, 22 I&N Dec. at 213. Thus, the petitioner's failure to either provide documentation of already hired employees or to submit a comprehensive business plan means that he has not submitted the required initial evidence and has thus failed to meet the job creation requirement necessary for the visa classification he seeks. USCIS must deny the petition on that basis.

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.