



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

JUN 11 2013

Office: CALIFORNIA SERVICE CENTER

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 (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 designated regional center, the New Orleans Regional Center (NORC), pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000), section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); section 144 of Pub. L. No. 110-329, 122 Stat. 6574 (2008); section 101 of Pub. L. 111-8, 123 Stat. 524 (2009); and section 548 of Pub. L. No. 111-83, 123 Stat. 2142 (2009). The new commercial enterprise (NCE) in which the petitioner's capital is invested is the [REDACTED]

The director determined that the petitioner had failed to demonstrate that the job creating enterprise is located within a targeted employment area (TEA) for which the required investment has been adjusted downward, that the requisite amount of capital has been invested in the NCE; and that the required number of jobs will be created by the petitioner's investment.

On appeal, counsel asserts that the NCE is located within a TEA and that the director incorrectly interpreted the NCE's business plans. While U.S. Citizenship and Immigration Services (USCIS) no longer contests the TEA designation, the petitioner has not overcome the director's concerns about the credibility of the petitioner's business plan. Additionally, the petitioner has not demonstrated the lawful source of all of the invested funds.

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 April 21, 2010. On December 21, 2010, the director issued a request for evidence (RFE). Specifically, the director requested: (1) evidence of ownership of the

enterprise by multiple investors; (2) evidence that the job creating enterprises are located within a TEA; (3) evidence that the invested capital is at risk and is actively invested in a qualifying job-creating entity; and (4) evidence that the commercial enterprise will create ten direct or indirect jobs per investor through a comprehensive business plan. The petitioner responded on January 27, 2011, with additional documentation.

On May 3, 2011, the director denied the petition determining that the petitioner had failed to demonstrate: (1) that the job creating enterprise is located within a TEA for which the required investment has been adjusted downward, (2) that the petitioner has invested at least \$1,000,000 in the NCE; and (3) that the petitioner's investment will create at least ten jobs.

On June 3, 2011, the petitioner filed an appeal with USCIS. On appeal, counsel asserts: (1) the NCE is located within a TEA and that it was designated as such at the date of filing; and (2) the director incorrectly interpreted the NCE's comprehensive business plans and the applicable facts, and applied an incorrect standard of review and application of law.

III. ISSUES PRESENTED ON APPEAL

A. Targeted Employment Area

Pursuant to section 203(b)(5)(C)(ii) of the Act and the regulation at 8 C.F.R. § 204.6(f)(2), the petitioner asserts that she is eligible for a reduced investment amount of \$500,000 based on her investment in a targeted employment area (TEA). Section 203(b)(5)(B)(ii) of the Act defines a non-rural targeted employment area as an area, at the time of the investment, which has experienced high unemployment (of at least 150 percent of the national average rate). This definition also appears at 8 C.F.R. § 204.6(e). The regulation at 8 C.F.R. § 204.6(j)(6) provides that the initial required evidence to demonstrate that the NCE will create employment in a high unemployment area includes either (1) evidence documenting that the county in which the NCE will primarily be doing business has a qualifying unemployment area or (2) a letter from an authorized state body. In this matter, the petitioner relies on letters from an authorized state body.

In pertinent part, the regulation at 8 C.F.R. § 204.6(i) provides the following requirements for a state letter:

State designation of a high unemployment area. The state government of any state of the United States may designate a particular geographic or political subdivision . . . as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526.

The record contains the following letters: (1) an August 10, 2010, letter from [REDACTED] delegating the authority to designate TEAs to the Secretary for Louisiana Economic Development (LED); (2) a July 29, 2010, brief cover letter from [REDACTED] Assistant Secretary at LED asserting that the LED "continues" the previous TEA designation; (3) an explanatory July 2, 2010,

letter from [REDACTED]; (4) a March 25, 2011 letter from [REDACTED] and an August 2, 2011 letter from [REDACTED]

The director concluded that the letters in the record at the time of the denial were insufficient. On appeal, counsel asserts that the director failed to give proper deference to the state designation. The state's authority is to merely describe the boundaries of the areas that meet USCIS' regulatory requirements; a state may not utilize its own criteria to determine that an area qualifies as a TEA.

The director correctly determined that the letters in the record before her did not use the statutory definition of a TEA to make the designation. Rather, they were based on factors other than the relevant unemployment rates. The August 2, 2011 letter, however, resolves the issue. Thus, the minimum investment amount in this matter is \$500,000.

B. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence relating to employment creation that must accompany any petition filed pursuant to section 203(b)(5) of the Act. In general, 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." Subparagraph (iii) allows petitioners investing through a regional center to demonstrate indirect job creation through reasonable methodologies. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), emphasizes that the business plan must be credible. *See also Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037-38 (E.D. Cal. 2001) *aff'd*, 345 F.3d 683 (9th Cir. 2003) (finding that discrepancies between the lots to be developed as identified in the business plan and those identified in the build out plan were sufficient to raise credibility concerns about the business plan).

Within the initial filing, the petitioner submitted an "I-526 RC Business Document Summary" listing 18 portfolio projects, one of which was the [REDACTED] project in [REDACTED] Louisiana. On page 11 of counsel's response to the RFE, counsel referred to this list as a list of "exemplars," a claim that is not apparent from the list itself. Rather, the introduction to the list explains that the list includes the initial portfolio, with additional projects to be added later. The [REDACTED] submitted as Appendix H at the time of the Form I-526 filing states on pages 11-12:

The "short-term resident" does not want to pay for such things as pools, restaurants, extravagant lobbies, and meeting rooms. Therefore, in order to maintain a low rental cost, these features will not be offered at [REDACTED] has no "non-rentable" space such as pools and restaurants. . . . [REDACTED] does not have lobby dining facilities, restaurants, swimming pools, spas or fitness facilities. [REDACTED] provides the best value for the dollar with no-frills.

Section 2.2 of initial Exhibit M explains that the [REDACTED] will be adjacent to the [REDACTED]

In the RFE, the director noted that the business plans for several of the projects identified as being in the NCE's portfolio were scheduled to begin in 2006 or early 2007 and be completed by 2009, prior to the initial filing date in April 2010. The director requested updated information and business plans for the projects. In response, counsel stated, on page 13 of the statement: "[T]he Regional Center will 'track' [the petitioner's] funds into the new commercial enterprise [redacted] and has determined that the full \$500,000 amount of [the petitioner's] funds will be placed into a specific job-creating business venture investment, referred to as [redacted] that is still ongoing and that is located in the designated TEA area."

The initial filing presented the list of portfolio projects as a diversified group of planned projects and counsel has cited no legal authority for the proposition that a list of "exemplar" projects fulfills the business plan requirements at 8 C.F.R. § 204.6(j)(4). Furthermore, counsel's response to the RFE on behalf of the petitioner contained inconsistencies regarding additional amenities within the hotel. The no-frills approach was one of the major cost-reduction elements of the [redacted] plans; however, in response to the RFE, the NCE seems to have disregarded this principal cost saving measure with the inclusion of the [redacted] as part of the [redacted] rather than adjacent to the [redacted]. Specifically, the blueprints for [redacted] submitted as RFE exhibit 7-F appear to include the [redacted] as they cover the entire structure bordering [redacted]; the location of the [redacted]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* See also *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1037-38, *aff'd*, 345 F.3d at 683 (upholding a finding that discrepancies in the record reduced the credibility of a business plan's employment projections). The petitioner did not provide any evidence that might sufficiently explain the NCE's amended plans for additional amenities within the hotel; she merely provided a new plan.

The regulation at 8 C.F.R. § 204.6(g)(2) permits investors who pool their investment to allocate job creation among themselves. The Partnership Agreement dated December 2007, under section 5.6(d) stated:

In the event that the Partnership's investments generate a greater number of Jobs than may be required by the Immigrant Investors, the General Partner shall determine in its sole discretion how any surplus Jobs should be allocated, all in accordance with applicable law, including USCIS rules, regulations, and precedent decisions. Without limiting the generality of the foregoing sentence, the General Partner may (i) accept and allow investments by other individuals or funds into the Partnership to take advantage of surplus Jobs or (ii) take other actions or refrain from taking any action with respect to surplus Jobs.

Additionally, the Private Placement Memorandum stated on page six:

In the event that excess Jobs are available after the Jobs requirements of each of the Fund's EB-5 Immigrant Investors have been satisfied, the General Partner shall determine in its sole discretion how any remaining Jobs should be allocated. The General Partner, in its sole discretion, may decide to accept and allow Investments by

other funds into the Fund and/or accept and allow additional investors to invest in the Fund.

The above quotes from the Partnership Agreement and the Private Placement Memorandum suggest that [redacted] reserves the right to allocate existing jobs to new alien investors in the NCE. The statute and the regulation require that the alien's investment result in the required job creation; there is no provision to allocate jobs already in existence to a subsequent alien investor absent evidence that the existing business is a troubled business. 8 C.F.R. § 204.6(j)(4)(ii).

On appeal, counsel states:

The Completed Projects which were identified amongst the several investment projects within the investment portfolio are part of the Overall Fund and [c]an be attributed to [the petitioner's] investment, and moreover, even if not attributed to [the petitioner], would still qualify as job creating projects for previous/earlier investors.

The AAO does not contest the principle that earlier investors who invested prior to the completion of the completed projects may be credited with the jobs created by those projects. At issue in this matter are the jobs that this petitioner will create.

Counsel took issue with the fact that the director stated the only two eligible investments were the [redacted]. Counsel asserts that because the NORC engages in multiple ongoing projects, and because USCIS approved the NORC model, that job creation from previously completed projects can be allocated to petitioners that have not yet invested in the NCE. Counsel acknowledges that the [redacted]-Management project is complete. The record also reflects that

[redacted] projects were completed prior to the petitioner's investment and the job creation from these projects may not be attributed to the petitioner. 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). The petitioner has not demonstrated that any of her funds were or will be made available to these completed projects. While the regulation expressly allows for consideration of preexisting jobs, such jobs can only be considered in the context of job preservation at a troubled business. 8 C.F.R. § 204.6(j)(4)(ii). Counsel does not assert that these completed projects are troubled businesses.

Regarding the new projects, [redacted] and the three new [redacted] and [redacted] locations, the director concluded that she was unable to determine the job creation capabilities of these projects as the business plans did not contain a project and an employment timeline. On appeal, counsel contests the director's determination of the insufficient business plan relating to each of these projects. As these projects were not presented with the petition at the time of filing, whether or not each project's business plan was sufficient is moot. A petitioner must establish eligibility at the time of filing the petition; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). *See also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Moreover, the addition of these new projects is inconsistent with the RFE response. Within the RFE response on page 13, counsel stated that the petitioner's "funds will be placed into a specific

job-creating business venture investment, referred to as [REDACTED]. Counsel also stated on page 15 of this same response that: “The Regional Center has submitted additional information and documents about the [REDACTED], a job-creating business venture that is set to receive [the petitioner’s] capital investment into [REDACTED].” It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Counsel also claims on appeal that even if the petitioner were limited to the job creation resulting from the [REDACTED], that the number of jobs these two projects would create is sufficient to support the 31 petitions already approved, in addition to the petitioner’s job creation requirements. This decision has already addressed the inconsistencies relating to each of these projects’ business plans.

Additional inconsistencies are also present within the record. For example, the initial “I-526 RC Business Document Summary” indicated, in Exhibits 1-2 through 1-4 starting on page 11, that the NCE planned to construct six [REDACTED] at a cost of \$1 million each, resulting in 20 direct jobs at each hotel. The same information appears on page 35. Exhibit H of the initial filing, however, contains a business plan dated December 2009 that, on page 5, stated: “The simplicity of no frills, limited service, and high construction quality allow [REDACTED] hotels to run with maximum operational efficiency, employing 4.5 full-time equivalent employees.” (Emphasis added). Exhibit 7-Q of the RFE response contains this same contradictory information. Moreover, the individual business plans for [REDACTED] all list a total investment requirement of over \$7 million. The record does not resolve these inconsistencies with independent objective evidence as required. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner has presented multiple inconsistent claims relating to her investment and has therefore not established that her planned investment will create the required ten or more full-time positions. Accordingly, she has not complied with the regulation at 8 C.F.R. § 204.6(j)(4)(i). See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1037-38.

C. Lawful Source of Invested Funds

As an additional issue, the petitioner has not established the lawful source of the invested 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.*, 229 F. Supp. 2d at 1043, *aff’d*, 345 F.3d at 683; 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).

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. at 195. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Id.*

(citing *Matter of Soffici*, 22 I&N Dec. at 158). 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1040 *aff'd* 345 F.3d at 683 (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 asserted that she obtained the funds to invest in the NCE through a gift of \$100,100 from her husband and a gift of \$460,300 from her brother-in-law. The petitioner submitted evidence of bank accounts in both her spouse's and her brother-in-law's name.

The petitioner claims the following cash investments of capital in the NCE:

- March 27, 2010 – \$100,100 transferred from her spouse;
- March 28, 2010 – \$300,100 transferred from her brother-in-law;
- April 3, 2010 – \$60,100 transferred from her brother-in-law;
- April 5, 2010 – \$100,100 transferred from her brother-in-law.

According to the transactional documentation, the total amount of the actual transfers is \$560,400. As evidence of the above investments, the petitioner provides wire transfer documents, a statement from both her spouse and her brother-in-law, and a confirmation letter that the NCE received a similar amount of funds on or around the corresponding dates.

The petitioner asserted that her spouse transferred funds into the NCE's escrow account. The evidence relating to her spouse's account covered the period between January 2009 and February 2010. As the alleged transaction between her spouse's account and the escrow account occurred in March 2010, the record lacks evidence that establishes by a preponderance of the evidence that the funds transferred into escrow originated from her spouse's account. Significantly, the monthly statement immediately preceding the transfer only reflected an account balance of \$12,856.96. Therefore, the petitioner has not demonstrated that her spouse's account contained the amount of money transferred into the escrow account. Without documentation of the complete path of the funds, the petitioner has not established that the investment funds are her own. *Matter of Izummi*, 22 I&N Dec. at 195; *see also Matter of Soffici*, 22 I&N Dec. at 158.

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; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). The petitioner has not met that burden.

ORDER: The appeal is dismissed.