

(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: JUN 18 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 petitioner indicated that he formed [REDACTED] as a new commercial enterprise (NCE) through the creation of a new business. As the NCE is not within a targeted employment area, the required amount of capital in this case is \$1 million. According to the unaudited income statements, the NCE is operating as “a sushi sales company with 25 sales locations in New York Among its locations are two restaurants.”

I. 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 HISTORY

The petitioner filed the petition on September 27, 2011, supported by the following types of evidence: (1) company profile information from [REDACTED] (2) the NCE’s tax returns; and (3) several photographs.

On January 23, 2012, the director issued a request for evidence (RFE). Specifically, the director requested: (1) evidence relating to the petitioner’s removal order in 2002; (2) a list of the capital that the petitioner had invested in the NCE, supported by and cross indexed with documentary evidence of the investments; (3) evidence the invested capital is at risk within the NCE; (4) evidence of the lawful source of the invested capital; (5) evidence that the NCE either employs the requisite number of employees, or a comprehensive business plan to establish the need for not fewer than ten qualifying employees. The petitioner responded with additional documentation, but did not include the requested list of each investment cross-indexed with the new evidence.

On June 14, 2012, the director denied the petition, determining that the petitioner had failed to demonstrate : (1) the petitioner’s current immigration status; (2) an investment of the requisite capital in the NCE; (3) the lawful source of the invested capital; (4) the employment of at least ten full-time

qualifying employees or a comprehensive business plan establishing the need for not fewer than ten qualifying employees.

On July 16, 2012, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts: (1) the director erred by including information relating to other applications and petitions filed by or on behalf of the petitioner; (2) the director did not consider the Forms 1099-MISC relating to the employment of ten full-time employees; (3) the director disregarded the “developing plan for petitioner’s [REDACTED] and the tax returns submitted by petitioner”; and (4) the director disregarded the actual expenses reflected in the tax returns as evidence of the petitioner’s investment in the NCE. The petitioner submitted additional evidence, including tax returns and bank statements.

III. ISSUES PRESENTED ON APPEAL

A. The Petitioner’s Immigration Status

While the director discussed the petitioner’s immigration status as relevant to the adjudication of this petition, admissibility issues are properly considered in the context of an Application to Register Permanent Residence or Adjust Status or when applying for entry into the United States. Thus, the AAO will not address this issue.

B. New Commercial Enterprise

The regulation at 8 C.F.R. § 204.6(j) requires, as initial evidence, that “[a] petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise” (Emphasis added.) Thus, consistent with the requirement that a petitioner make the full amount of the investment available to the employment creating entity, a petitioner must establish eligibility based on an investment in a single new commercial enterprise. *See Matter of Izummi*, 24 I&N Dec. 169, 179 (Assoc. Comm’r 1998) (the full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based). The regulation at 8 C.F.R. § 204.6(e) defines the term commercial enterprise to include a holding company and its wholly-owned subsidiaries.

On November 29, 2006, the petitioner incorporated the NCE. On November 5, 2009, the petitioner registered [REDACTED] as the NCE’s assumed name. On November 30, 2009, the petitioner registered [REDACTED] as the NCE’s assumed name. On January 27, 2010, the petitioner amended the NCE’s assumed name from [REDACTED] to [REDACTED].

On May 24, 2005, the petitioner incorporated [REDACTED]. On January 19, 2007, [REDACTED] incorporated [REDACTED]. The petitioner has not demonstrated that he and [REDACTED] are the same person. The record contains claims of the petitioner’s capital investment in an entity named [REDACTED] however, the record lacks evidence linking this entity to the NCE or the petitioner. As the

record lacks evidence that these entities are wholly-owned subsidiaries of the NCE, the petitioner has not established that any investment in these entities is part of his investment in the NCE.

C. 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 definition of “investment” at 8 C.F.R. § 204.6(e) specifically states that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of “invest” does not include the reinvestment of proceeds. In addition, the list of types of evidence required to demonstrate the necessary investment at 8 C.F.R. § 204.6(j)(2) does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi*, 22 I&N Dec. at 195, for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

On appeal counsel asserts that the director disregarded the actual expenses on the tax returns that, according to counsel, show the petitioner’s personal investment of capital in the NCE. While tax returns are useful evidence in establishing the nature of any funds the petitioner has transferred to the NCE, they are not one of the types of evidence listed at 8 C.F.R. § 204.6(j)(2) to demonstrate the requisite amount of capital in the NCE. Moreover, given that a business can pay its expenses with money obtained in ways other than through a capital investment, such as business loans or proceeds, demonstrating expenses is insufficient evidence of the petitioner’s investment.

The petitioner claimed the following investments of capital in the NCE:

- The NCE’s unaudited income statements indicating the NCE was doing business as Aqua House;
- The NCE’s tax returns for 2007, 2009, and 2010;
- The NCE’s banking statements covering the period between January 2007 through March 2012; and
- Invoices, sales receipts, and purchase contracts submitted in response to the RFE.

Unaudited income statements are not sufficient to demonstrate that [REDACTED] is associated with or is a wholly-owned subsidiary of the NCE. Therefore, these unaudited statements are not sufficiently probative of the petitioner’s capital investment in the NCE.

The petitioner submitted copies of the NCE's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Tax Returns from 2007, 2009, and 2010 as evidence of his capital investment in the NCE. The petitioner provided copies of these tax returns three separate times, but each time he failed to provide USCIS with copies of the NCE's 2008 tax returns and he failed to provide an explanation for this omission. The returns reflect little capital investment in the NCE. Specifically, the 2007 Form 1120 schedule L is blank even though according to the petitioner's response to the question from schedule K line 13, the petitioner should have provided financial information on the schedule L. The question contained on line 13 states:

Are the corporation's total receipts (line 1a plus lines 4 through 10 on page 1) for the tax year and its total assets at the end of the tax year less than \$250,000?

If 'Yes,' the corporation is not required to complete Schedules L, M-1, and M-2 on page 4. Instead, enter the total amount of cash distributions and the book value of property distributions (other than cash) made during the tax year.

The petitioner responded in the negative to the above question and the return, lines 1a plus lines 4 through 10, were more than \$250,000 in 2007, meaning he should have completed schedule L for the 2007 tax year. The petitioner has not provided an explanation regarding why the NCE's 2007 schedule L does not contain any information. In 2009 and 2010, schedule L is complete, reflecting no capital stock and paid-in-capital increasing from \$0 to \$15,000 in 2009 and from \$15,000 to \$53,771 in 2010. While the reinvestment of proceeds is not a capital contribution by the petitioner as explained above, both the 2009 and 2010 schedules L reflect negative retained earnings.

The petition's priority date is September 27, 2011. Therefore, any of the petitioner's funds invested in the NCE must have occurred or must have been committed to the NCE on or before this date. In response to the director's RFE the petitioner failed to provide a cross-indexed list of claimed investments and the NCE's bank account statements provided with that submission do not reflect any amounts transferred or deposited by the petitioner. Instead of providing the cross-indexed list of investments, the petitioner submitted his own statement asserting that he invested approximately \$250,000 in (b)(6) which is not the NCE or a wholly-owned subsidiary of the NCE. The director's RFE requested bank statements showing amounts deposited in the NCE's business accounts and the petitioner responded to this request with bank statements that reflect balances, but no deposits. On appeal, the petitioner provides additional banking statements related to the NCE, but still fails to provide a cross-indexed list of each investment claim.

The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the filing date of the petition. *See* 8 C.F.R. § 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted

evidence, he should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted on appeal. Even if the AAO were to accept this evidence on appeal, it does not reflect any deposits that can be attributed to the petitioner. The petitioner has not provided evidence relating to the banking accounts from which the funds originated, processed checks or wire transfer receipts to demonstrate that the funds were his own as required by *Matter of Izummi*, 22 I&N Dec. at 195 (the petitioner must demonstrate the path of the invested funds); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm'r 1998).

The petitioner also provided bank statements relating to [REDACTED] within the RFE response, but as noted, the petitioner has not demonstrated that he is associated with this entity or that it is a wholly-owned subsidiary of the NCE. As such none of the evidence relating to [REDACTED] is relevant to the petitioner's investment in the NCE.

Regarding the invoices, sales receipts, and purchase contracts submitted in response to the director's RFE, much of the evidence names [REDACTED] or [REDACTED] which the petitioner has not established are wholly-owned subsidiaries of the NCE. Furthermore, regarding the documents that are related to the NCE, such as the [REDACTED] the checks paying for the service are in the name of the NCE. The petitioner did not document that he personally paid this bill and he has not documented that he infused any capital into the NCE's bank account. As companies can accrue money through means other than the owner's investment, such as a business loan or business income, not every payment by a business can be credited as an investment by the owner. As discussed above, any reinvestment of proceeds is not a contribution of capital by the petitioner. The petitioner also provided purchase receipts in which various credit cards were used to pay for the purchase. He did not, however, establish the account holders of any of the credit cards. Consequently, none of the credit card purchases can be attributed to the petitioner.

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

D. Source of Funds

The director's decision indicated that the petitioner had not submitted sufficient evidence to satisfy the regulatory requirements at 8 C.F.R. § 204.6(j)(3). The petitioner failed to raise this as an issue within the present appellate proceedings or to contest the director's determination within her decision. Therefore, the AAO views this as a scenario whereby the petitioner has abandoned his claims under this regulatory requirement. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not submitted qualifying evidence under this regulatory provision. Regardless, as the petitioner has not established his personal contribution of capital, there is no capital for which he could establish the lawful source.

E. 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, if not, a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. To be considered comprehensive, a business plan must be sufficiently detailed to permit USCIS to reasonably conclude that the enterprise has the potential to meet the job-creation requirements. Additionally, *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998) lists the elements that constitute a comprehensive business plan and states that, "a comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." The regulation at 8 C.F.R. § 204.6(e) defines the terms employee and qualifying employee for purposes of job creation. Section 203(b)(5)(D) of the Act defines full-time employment as a position that requires at least 35 hours of service per work week. Full-time employment means continuous, permanent employment. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

On the Form I-526 petition, despite claiming that the NCE resulted from the creation of a new business, the petitioner indicated that there were 45 employees at the time of the initial investment in November 2006 and 65 employees as of the date of filing. The petitioner indicated that 25 additional jobs would be created by his additional investment in the NCE. The petitioner initially submitted no documentation of these employees. In response to the RFE, the petitioner submitted 28 IRS Forms 1099-MISC, Miscellaneous Income listing nonemployee compensation. One of the Forms 1099 is for the petitioner.

Within the Form I-290B, counsel asserted that the director failed to consider the Forms 1099-MISC in her decision, and that these forms show the compensation paid to the petitioner's employees. The director's decision acknowledged that the petitioner provided Forms 1099-MISC for its claimed employees in response to the RFE, but concluded that such evidence was not sufficient to demonstrate that the employees listed on the forms were full-time, qualifying employees as required by 8 C.F.R. § 204.6(j)(4)(i)(A). As stated above, the title of Box 7 on the Form 1099-MISC, where the petitioner indicated the amount paid to each individual, states "Nonemployee compensation." The IRS's webpage titled, "Form 1099-MISC & Independent Contractors" provides that the Form W-2 is used by employers to: "Report wages, tips and other compensation paid to an employee." This same webpage also provides that a Form 1099-MISC should be used "generally to report payments made in the course of a trade or business to a person who is not an employee."¹ The definition of "employee" at 8 C.F.R. § 204.6(e) states: "This definition shall not include independent contractors." As the Forms 1099-MISC do not represent wages or salaries paid to the NCE's employees as anticipated by the regulation, they are not relevant, probative evidence of employment generated by the NCE.

¹ See <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099-MISC-&-Independent-Contractors/Form-1099-MISC-&-Independent-Contractors>, accessed on June 4, 2013, a copy of which is incorporated into the record of proceeding.

Counsel's response to the RFE also asserted the Forms 1099-MISC showed each employee's social security number. Certain nonimmigrants who are authorized to work in the United States are assigned social security numbers, and the regulatory definition of a qualifying employee at 8 C.F.R. § 204.6(e) precludes the inclusion of "any nonimmigrant alien." Consequently, the Forms 1099 do not establish that the listed individuals are qualifying employees. The petitioner failed to submit any Forms I-9.

In the absence of such evidence as paystubs and payroll records showing the number of hours worked, and evidence establishing that the NCE employs at least ten qualifying employees, the petitioner has not met his burden of establishing that he has created full-time employment within the United States. *Matter of Ho*, 22 I&N Dec. at 212.

Counsel also asserts on appeal that the director disregarded the petitioner's "developing plan." The petitioner initially submitted two one-page documents entitled "Company Profile & Development Plan." One version says the NCE operates 17 sales locations while the other states the NCE operates 25 sales locations. Neither document constitutes a comprehensive business plan as they are missing most of the elements of such a plan as enumerated in *Matter of Ho*, 22 I&N Dec. at 213, including staffing requirements, job descriptions and a timetable for hiring employees.

The petitioner has not established that his investment has created the required ten or more full-time positions for qualifying employees. Additionally, the petitioner failed to provide a comprehensive business plan in compliance with the regulation at 8 C.F.R. § 204.6(j)(4)(i)(B). Thus, the petitioner has not established that the NCE has created or will create the requisite ten full-time positions for qualifying employees.

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

ORDER: The appeal is dismissed.