**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

(b)(6)

DATE: JUN 2 5 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 petitioner indicated that he invested in an existing business, , defined in the regulation as a new commercial enterprise (NCE). As the NCE is not within a targeted employment area, the required amount of capital in this case is $1 million. The NCE operates in the fast food industry selling hot dogs.

## 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 July 10, 2011, supported by evidence relating to the following issues: (1) the establishment of the NCE; (2) the lawful source of the petitioner's funds; (3) the investment of the petitioner's capital in the NCE; (4) the job creation capabilities of the NCE; (5) the NCE's business activities; (6) the petitioner's involvement in the management of the NCE; and (7) and identity documents.

On January 18, 2012, the director issued the first request for evidence (RFE). Specifically, the director requested: (1) evidence that the required amount of capital had been invested in the NCE; (2) evidence that the invested capital was at risk through actual business activity; (3) the petitioner's comprehensive business plan; and (4) employment creation within the NCE. The petitioner responded on April 4, 2012, with additional documentation.

On April 25, 2012, the director issued a second RFE. Specifically, the director requested: (1) evidence that the NCE would create at least ten full-time positions in addition to the pre-investment employment level; (2) evidence that the required amount of capital had been invested or that the petitioner was actively in the process of investing the required amount in the NCE; and (3) evidence that the petitioner would be engaged in the management of the NCE. The petitioner responded on July 17, 2012, with additional documentation.

On September 26, 2012, the director denied the petition determining that the petitioner had failed to demonstrate: (1) that the required amount of capital had been or would be made available to the entities most closely responsible for creating the employment; (2) that sufficient job creation occurred as a result of the petitioner's investment; or (3) that the NCE's business plan was sufficiently detailed to establish the requisite job creation.

On October 25, 2012, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserted: (1) the petitioner's capital was placed at risk within the NCE; (2) due to the petitioner being the only remaining investor who is seeking immigrant classification based on an investment in the NCE, USCIS should allocate all 15 full-time positions to him; and (3) the business plan is sufficiently detailed to demonstrate that the NCE has the need and the potential to meet the job creation requirements.

On June 4, 2013, the AAO issued a notice of derogatory information advising the petitioner that the petitioner's business license for its Irvine location lists four employees, that the NCE has issued more stock than the record indicated it was authorized to issue, that the blanket translation certification that did not list which translations it certified did not comply with 8 C.F.R. § 103.2(b)(3), and that there was a break in the path of funds. The notice explicitly advised that the purpose of the notice was to advise of additional derogatory information and that the bases of the director's denial and the appellate response would be discussed in the final decision. Thus, the notice did not suggest that the appeal resolved the director's concerns or that the AAO was proposing substitute reasons why the petition could not be approved.

In response, counsel objects to the AAO's notice, alleging that USCIS has a "hidden agenda to deny EB-5 cases and is fine combing through all the evidence submitted, and is going outside the records and evidence submitted in the hope of finding any derogatory information as a reason to deny the application." Relying on 8 U.S.C. §§ 1103, 1155, 1184, the instructions for the Form I-526 provide that the Department of Homeland Security, which includes USCIS, "has the right to verify any information you provide to establish eligibility for the immigration benefit you are seeking at any time." (Emphasis in original.) The instructions specifically include the review of public records and the Internet as permissible agency verification methods. The instructions advise that petitioners will be provided an opportunity to address any adverse information pursuant to 8 C.F.R. § 103.2(b)(16). The AAO's June 4, 2013, notice complied with 8 C.F.R. § 103.2(b)(16).

Counsel also responded to the specific information in the June 4, 2013, notice. The response resolves the authorization of stock and provides compliant translations and a transactional document establishing the full path of the petitioner's funds. For the reasons discussed below, while the AAO withdraws the director's conclusion that a corporation's capital should decrease where there are net losses, the AAO upholds the director's ultimate bases of denial.

## III. ISSUES PRESENTED 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. In considering the evidence, it is a relevant consideration that the petitioner is not the sole source of capital in the NCE and, in fact, invested nearly a year after the initial investment.

The director's first RFE requested proof that the petitioner's capital was placed at risk through actual business activity. The petitioner responded with evidence that the NCE had executed two leases (one for each store location), evidence that the NCE submitted the payment of sales and use tax, licensing fees, and the NCE's 2011 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return listing the following amounts: $133,904 in operating losses and $219,087 in buildings and other depreciable assets (restaurant renovations according to counsel). Counsel asserted that the $452,991 in operating losses and money spent on renovations are evidence that the company is spending the petitioner's capital.

i. Capital on Tax Returns

The director's decision indicated that the petitioner's investment was not at risk because the NCE showed a loss on its 2011 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. Thus, according to the director, the capital invested in stock should have also decreased. The director then concluded that because capital invested in stock did not experience a decrease, the petitioner's investment was not at risk. As noted by counsel on appeal, however, the NCE is a corporation, not a partnership, and reports a reduction in equity due to a net loss by listing that amount on schedule L as negative retained earnings rather than as a reduction in stock. The NCE's 2011 schedule L does, in fact, reflect negative retained earnings as part of the company's equity amount. An equal reduction in stock would double count the decrease in equity. In light of the above, the AAO withdraws this portion of the director's determination as a basis for the denial.

ii. Business Activity

Regarding the claim that the petitioner's capital was placed at risk within the NCE, the petitioner provided evidence of actual business activity. Such evidence is an indicator that a portion of the petitioner's invested funds are at work within the NCE, and are therefore at risk. Other evidence discussed below, however, reveals that the business activity does not indicate that the full amount of the petitioner's investment is at risk.

iii. Restaurant Improvements

Improvements are a capital expense. The petitioner, however, failed to provide invoices, billing information, or the NCE's banking statements to establish that the improvements actually occurred, the amount of funds expended on the improvements, and when the NCE paid for the improvements to demonstrate the expenditures occurred after the petitioner infused his capital in the NCE. As stated above, the petitioner invested nearly a year after the initial investment in the NCE. Therefore, it is not possible to determine what portion of the approximate $101,158 listed on the NCE's 2011 Schedule L

line 10a may be identified as the petitioner's investment. The petitioner also failed to document any licensing fees or the date upon which the NCE paid for such fees.

iv. Operating Expenses

Not all operating expenses are capital expenditures paid for through capital. The sales and use taxes, utilities and salaries are, at least in part, paid for from the proceeds of the business. The reinvestment of proceeds is not a qualifying investment. *See generally Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003); *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997). The $133,904 operating loss, however, does represent operating costs that the business could not have paid from its proceeds. This amount, however, is far less than the petitioner's investment of $1 million.

v. At-Risk Nature of Unused Funds

According to statement four attached to the 2011 Form 1120, schedule L, line six, the NCE began 2011 with $837,976 in investments with and ended the year with $1,401,045. The petitioner has not established how the NCE used or will use the petitioner's $1 million in capital for capital expenses or to cover net losses. As an excess of the petitioner's capital investment rests in an investment fund that is not being utilized by the NCE, it would appear that the NCE is overcapitalized. The initial business plan calls for the NCE to open three stores during the two years that would be the petitioner's conditional residency period at a cost of $452,616. Two of those stores are already operational. Although the initial business plan projects an additional store, the petitioner did not provide cost projections for each of the planned locations to justify the need for the NCE to maintain such large cash reserves in an investment account. As the petitioner has not justified the need for such large cash reserves, the petitioner has not demonstrated that his full investment is being utilized for job creation. *Cf. Al Humaid v. Roark*, 2010 WL 308750 (N.D. Tex. Jan. 26, 2010) concluding that funds invested in a grossly overcapitalized company with no capital expenditures forecasted are not at risk.

The petitioner has not submitted sufficient evidence to demonstrate that he has placed the required amount of capital at risk. Evidence that $384,224 is at risk is not sufficient to meet the petitioner's burden of proof. The petitioner must show his full investment is at risk within the NCE, rather than lying dormant in the NCE's account with no probability of being utilized for job creation. As such, the petitioner has not complied with the regulation at 8 C.F.R. § 204.6(j)(2).

B. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence that must accompany a petition to demonstrate that the 10 qualifying employees have already been hired following the establishment of the NCE. If the employment-creation requirement has not been satisfied prior to filing the petition, the same regulation provides that 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." 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)

provides greater specifics related to 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 who are eligible to be counted toward employment creation under the present classification sought by the petitioner. 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, the petitioner indicated that there were five employees at the time of the initial investment in May 2011, and 12 employees as of the date of filing the petition. The petitioner indicated that ten additional jobs would be created by his additional investment.

The NCE existed and employed personnel prior to the petitioner's investment. Therefore, to meet the regulatory requirement related to job creation, he must document the number of the NCE's full-time employees that existed at the time of his investment. When a petitioner invests in a pre-existing, ongoing business, he must establish the business' pre-investment employment level to establish he is maintaining the previous employment level, adding 10 new positions, and is not causing an actual loss of employment within the NCE. *Cf. Matter of Hsiung*, 22 I&N Dec. 201, 204 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I&N Dec. 158, 167 (Assoc. Comm'r 1998). As the petitioner failed to provide any evidence relating to individual employee hours worked per week or individual employee wages, the petitioner has not established the number of full-time or part-time employees that the NCE employed prior to the date of the petitioner's investment.

Within the second RFE response, counsel claimed that five employees working at the Brea location were full-time and that the Irvine location employed ten full-time individuals. Counsel reiterates the figure of 15 full-time employees within the appellate brief. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Consequently, counsel's assertion of the number of full-time employees will not be accorded any evidentiary weight.

Exhibit 70 in response to the director's first RFE is the NCE's City of Irvine Business License. The license stated that the number of personnel is eight. As stated in the AAO's June 4, 2013 notice, the AAO reviewed the publicly available current version of the business license, which lists the number of personnel as four. In response, counsel asserts that USCIS would not accept a business license listing 10 employees as evidence of those employees and concludes that the business license "has no probative value in determining the number of employees." Counsel notes that the regulation at 8 C.F.R. § 204.6(j)(4) provides the documentation required to establish job creation and that the petitioner has submitted that documentation. Finally, counsel notes the salaries listed for the Irvine and Brea locations contained on the NCE's 2011 and 2012 tax returns.

While the business license is not determinative, counsel provides no explanation of where the City of Irvine obtains its number of personnel such that the number listed on the business license has "no"

probative value as counsel claims. It remains that the business license is inconsistent with the petitioner's claims. 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.* Counsel's assertion that the business license has no probative value, by itself, does not resolve the inconsistency.

The petitioner provided several Forms I-9, Employment Eligibility Verification documents. "Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as paystubs and payroll records showing the number of hours worked, 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. As a result, these documents are insufficient to establish that any of the NCE's employees work full-time.

In addition, the quarterly wage reports are also inadequate to establish a specific number of full-time or part-time employees. Unlike wage statements or paystubs, the quarterly wage reports do not reflect each employee's wages earned per hour, salary, or hours worked per week. While employees earning less than $3,640 in a quarter could not have worked full-time at minimum wage, it does not follow that employees earning at least that amount or more did work full-time.[1] Without evidence of their wages per hour or actual hours, the petitioner cannot establish that the positions are full-time.

As the petitioner has not demonstrated that his investment created 10 new full-time jobs, he must submit a qualifying business plan. 8 C.F.R. § 204.6(j)(4). Pursuant to *Matter of Ho,* 22 I&N Dec. at 212-213, to be "comprehensive," a business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable USCIS to determine whether the job-creation projections are any more reliable than hopeful speculation. *Matter of Ho* also provides a list of the elements that, at a minimum, should be included in a comprehensive business plan as contemplated by the regulations:

1. A description of the business, its products and/or services, and its objectives;
2. A market analysis, including the names of competing businesses and their relative strengths and weaknesses;
3. A comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise;
4. The required permits and licenses obtained;
5. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources;
6. Any contracts executed for the supply of materials and/or the distribution of products;

[1] Minimum wage per quarter calculated at $8/hour × 35 hours/week × 13 weeks = $3,640. Information relating to California's minimum wage rate since January 2008 obtained from http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm, accessed on March 19, 2013, and incorporated into the record of proceeding.

7. A discussion of the marketing strategy of the business, including pricing, advertising, and servicing;
8. The business's staffing requirements and a timetable for hiring, as well as job descriptions for all positions;
9. The business's organizational structure and its personnel's experience; and
10. Sales, cost, and income projections and detail the bases therefor.

Most importantly, the business plan must be credible.

At the time the petitioner filed the petition, a second alien investor had already filed another Form I-526 based on the same business plan. The only amendment or change to the petitioner's business plan is an organizational chart submitted in response to the second RFE, which the previous business plan did not contain. While the initial business plan contains some elements listed above, it does not contain a job description for each of the positions within the NCE. Potential job creation components are essential elements of a comprehensive business plan, as a plan does not only have to establish that the business plan is credible, but it is also intended to lay out all the necessary elements relating to possible jobs that will be created within the NCE. The petitioner's initial business plan listed an overall general manager and bookkeeper/accountant as well as the following positions for each store:

1. Two Store Managers;
2. Two Cashiers;
3. Four Grillers; and
4. Two Kitchen Workers.

The initial business plans calls for a total of 10 personnel at each store location for a total of 32 jobs at three stores, including the general manager and bookkeeper/accountant, all within two years.

The organizational chart submitted in response to the second RFE listed the following positions:

1. CFO and CEO presently occupied by the same individual;
2. Corporate Secretary (counsel);
3. President;
4. Two Store Managers (one for each existing store);
5. Nine Grillers (three at one store, five at the second store; and
6. Fourteen Servers/Cashiers (five at one store, nine at the second store).

Thus, the organizational chart listed 28 employees for only two stores whereas the initial business plan projected 32 employees for three stores. The organizational chart contained corporate positions not previously listed, but it also eliminated the original Kitchen Worker and added the new position of Server/Cashier. Within the initial business plan, the Cashier was a distinct, stand-alone position and the plan projected only one for each store, yet the organizational chart reflected nine at one store. As the petitioner's initial business plan failed to provide a job description for any of the positions, the petitioner has not established the similarities of any job duties between the original plan and the new positions listed within the organizational chart submitted in response to the second RFE.

The inconsistencies discussed above bear direct relevance to the job creation requirements. 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. See also Spencer Enterprises, Inc. v. U.S.*, 229 F. Supp. 2d at1037-38 (upholding a finding that discrepancies in the record reduced the credibility of a business plan's employment projections).

The business plan contained several additional discrepancies regarding the number and the location of future NCE locations. Page 5 of the plan noted the two current locations and indicated that, "Future expansion of will be into Los Angeles County." Page six of the initial business plan indicated that one of the NCE's goals and objectives was to "open 3 outlets in Orange County within the next year and 5 outlets in Los Angeles and San Diego areas within 5 years." Page eight of the initial business plan stated: "The initial three locations will be Counsel's response to the second RFE stated:

> Please take note that the store in is not owned by, operated by, or related to the NCE. The is operated by a different licensee. The [Form] I-526 petition filed by this NCE made no reference to the store. The Comprehensive Business Plan refers only to the Brea store . . . and the store.

The unsupported and erroneous assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6. Moreover, counsel's statement conflicts with the actual wording in the initial business plan. 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.*

Based on the evidence accompanying the Form I-9 documents, the director notified the petitioner that eight of the NCE's employees appeared to be utilizing alien registration numbers that neither USCIS nor legacy Immigration and Naturalization Service properly assigned to them. The director concluded that these individuals could not meet the definition of qualifying employees pursuant to the regulation at 8 C.F.R. § 204.6(e). On appeal, counsel asserts that the petitioner cannot reply to this allegation because the director did not identify which employees are using unrelated alien registration numbers. A review of the record reveals that nine of the NCE's employees were claiming lawful permanent resident status either on the Form I-9 or by submitting a Form I-551, Permanent Resident Card, and eight of these appear to be improperly using alien registration numbers assigned to other actual lawful permanent residents.

An employer is subject to civil money penalties under sections 274A(e)(4) and (5) of the Act for knowingly hiring employees who lack authorization to work in the United States and for paperwork violations. This proceeding, however, is not an enforcement proceeding and regardless of whether the NCE hired individuals knowing that they lacked authorization to work, it remains that the investment

has not created the claimed number of direct jobs for qualifying employees as defined at 8 C.F.R. § 204.6(e). The petitioner requested that the director identify the NCE employees who did not meet the definition of a qualifying employee under the regulation, but the director did not do so. As the petitioner has failed to demonstrate that any of the NCE's employees meet the definition of full-time, it is not necessary for the AAO to address whether the director committed an error by not providing more specific information.

The petitioner has not established that the NCE employs the required number of full-time qualifying employees. Additionally, the petitioner has not resolved the inconsistencies between the initial business plan and subsequent evidence such that he has demonstrated that his planned investment will create the required number of full-time positions. Accordingly, the petitioner has not established that his investment in the NCE has created or will create the necessary jobs.

## 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.