



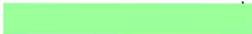
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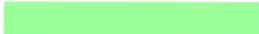
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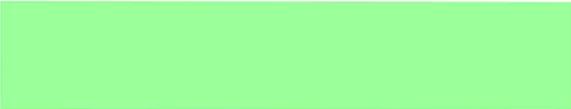
Office: CALIFORNIA SERVICE CENTER

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petition is based on an investment in [REDACTED], doing business as [REDACTED] a restaurant located in Bakersfield, California. The petitioner indicated on part 2 of the petition that the business was not located in a targeted employment area. Thus, the required amount of capital in this case is \$1,000,000.

In her June 12, 2012 decision, the director denied the petition on the basis that the petitioner failed to establish the claimed investment has created or will create at least 10 full-time positions for qualifying employees.

On appeal, the petitioner submits a three-page statement from counsel and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's basis for denial. In addition, the petitioner has failed to document (1) an investment in a "new" commercial enterprise, (2) the lawful source of the required amount of capital, and (3) that he has placed the required amount of capital at risk for the purpose of generating a return on the capital. The appeal will therefore be dismissed.

## I. THE LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

## II. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the petition on September 16, 2011, supported by the following types of evidence: (1) partial copies of the petitioner's passport and graduation certificate; (2) a translation of a document entitled "Brief Introduction of Tengfei Court, Tengfei Court, an Ideal Home"; (3) translations of documents entitled "Paid Taxes Statement" for 2007 through 2010; (4) translations of documents entitled "Enping Jinxin Certified Public Accountants' Office, Practice Report"; (5) a document entitled "Resolution of Stockholders' Conference," dated July 18, 2011; (6) an uncertified translation of a document entitled "Verification of the Alternated Items," dated August

20, 2008; (7) a translation of a document entitled [REDACTED] of Enping City, Certificate for the Company Status and the Stockholder [the Petitioner],” dated July 17, 2011; (8) two July 2011 [REDACTED] checks payable to the petitioner in the amount of 2.8 million Renminbi (RMB) and 3.2 million RMB; (9) September 2011 bank documents relating to a \$500,000 wire transfer from [REDACTED] (the petitioner’s daughter) account, with account number ending in [REDACTED] to [REDACTED] account, with account number ending in [REDACTED] (10) [REDACTED] August 2011 bank statements for accounts with account numbers ending in 1162, 4579 and 0190; (11) a partial copy of [REDACTED] passport; (12) documents relating to [REDACTED] including its May 1999 Articles of Incorporation, Common Stock Certificates, and a September 2011 Investor’s Certificate; (13) [REDACTED] unaudited financial statements for 2009 through 2011; (14) State of California Quarterly Wage and Withholding Report for the third quarter of 2010; (15) payroll documents for the pay period of June 16, 2011 through June 30, 2011; (16) an August 22, 2011 unsigned document entitled “Construction Proposal”; and (17) a 10-year lease between [REDACTED] and [REDACTED] signed in January 2009.

On February 14, 2012, the director issued a Request for Evidence (RFE), requesting the petitioner to provide additional information, including (1) evidence of the establishment of a new commercial enterprise, (2) evidence showing that the petitioner has placed the required amount of capital at risk for the purpose of generating a return, (3) evidence of the lawful source of the petitioner’s funds, (4) evidence showing that the claimed investment has created or will create at least 10 full-time positions for qualifying employees, and (5) evidence showing that the petitioner will engage in the management of the new commercial enterprise.

On May 8, 2012, the petitioner responded to the director’s RFE with a letter from counsel, dated May 1, 2012, and a number of documents, some of which the petitioner previously filed. The documents include the following types of evidence: (1) [REDACTED] September 2011 and March 2012 bank statements for an account with account number ending in [REDACTED] (2) payroll documents for the pay period of April 16, 2012 through April 30, 2012; (3) [REDACTED] Employer’s Quarterly Federal Tax Returns, Internal Revenue Service (IRS) Forms 941, for the first quarter of 2012 and all four quarters of 2011; (4) [REDACTED] 2011 Transmittal of Wage and Tax Statements, IRS Form W-3; (5) [REDACTED] employees’ 2011 Wage and Tax Statements, IRS Forms W-2; (6) [REDACTED] unaudited financial statements for 2011; (7) [REDACTED] 2010 and 2011 U.S. Income Tax Returns for an S Corporation, IRS Forms 1120S; (8) a copy of an Environmental Health Permit; (9) a copy of the City of Bakersfield, California, Business Tax Certificate; (10) a document entitled “Promissory Note Secured by Stock Certificate,” signed on July 18, 2011; (11) documents relating to [REDACTED] of Enping City and the petitioner’s investment in the company; (12) identification documents relating to the petitioner and his family members; (13) [REDACTED] August 2011 bank statements for accounts with account numbers ending in [REDACTED] and [REDACTED] (14) an article entitled “Dish: Iconic Restaurant Gets a Whole New Look”; (15) an August 18, 2011 [REDACTED] document entitled “Design Proposal”; (16) documents from September 2011 through February 2012 showing [REDACTED] renovation related expenditures; (17) documents relating to [REDACTED]

employees; (18) [REDACTED] menu; and (19) documents relating to an October 5, 2011 special meeting of the board of [REDACTED]

In her June 12, 2012 decision denying the petition, the director concluded that the petitioner failed to show his claimed investment has created or will create at least 10 full-time positions for qualifying employees.

On appeal, counsel asserts that the director erred. Counsel files a three-page letter and the following types of evidence: (1) a document entitled "List of [REDACTED] Employees October 2011"; (2) payroll documents for the pay period of October 1, 2011 through October 15, 2011; (3) a document entitled "List of [REDACTED] Employees June 2012; (4) payroll documents for the pay period of June 1, 2012 through June 15, 2012; and (5) documents relating to [REDACTED] employees.

### III. ISSUES ON APPEAL

#### A. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9, or other similar documents for 10 qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees. If the petitioner invests in a pre-existing, ongoing business, then the petitioner must create no fewer than 10 qualifying positions, and he "cannot directly cause a net loss of employment." *Matter of Hsiung*, 22 I&N Dec. 201, 204-05 (Assoc. Comm'r 1998). Moreover, "it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created," or if the business is a pre-existing, ongoing business. *Matter of Soffici*, 22 I&N Dec. 158, 166 (BIA 1998).

If the evidence does not show that the petitioner's equity investment has resulted in the creation of at least 10 qualifying, full-time positions, the regulation at 8 C.F.R. § 204.6(j)(4)(i) requires the petitioner to provide a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Id.* Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

The regulation at 8 C.F.R. § 204.6(e) defines "employee" as an individual who provides services directly to the new commercial enterprise and excludes independent contractors. The same regulation defines "qualifying employee" as "a United States citizen, a lawfully admitted permanent

resident, or other immigrant lawfully authorized to be employed in the United States.” The definition excludes the petitioner, the petitioner’s spouse, sons, or daughters, or any nonimmigrant alien. Section 203(b)(5)(D) of the Act, as amended, now defines “full-time employment” as “employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.” Full-time employment also means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Ca. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

#### 1. Investment in a Troubled Business

The petitioner indicated on part 4 of the petition that the new commercial enterprise resulted from a capital investment in an existing business. According to counsel’s September 7, 2011 letter, initially filed in support of the petition:

[The business] has been in existence since 1948 and was purchased by its present owner in May 1999. During the early 1970s, this was one of the premier Chinese restaurants in the City of Bakersfield. [On May 3, 1999, t]he restaurant [was] incorporated in California as [redacted] doing business as [redacted]

According to the Common Stock Certificates, issued in May 1999, [redacted] had three shareholders: [redacted] and [redacted]. According to the petition, since September 2011, [redacted] has had only two shareholders: [redacted] and the petitioner. The petitioner claimed that [redacted], was a troubled business. The regulation at 8 C.F.R. § 204.6(j)(4)(ii) does permit an alien to include preserved jobs where the investment is made in a troubled business.

The regulation at 8 C.F.R. § 204.6(e) provides in relevant part:

*Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur’s Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business’s net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

The priority date in this matter is September 16, 2011. Thus, the relevant 12- and 24-month periods prior to that date begin in September 2010 and September 2009. During the 24-month period, according to the 2010 IRS Form 1120S, the business began 2010 with a net worth of \$132,434 and suffered a net loss of \$39,218, which is more than 20 percent of the net worth prior to that loss.<sup>1</sup>

<sup>1</sup> Net worth equals total assets less total liabilities. Barron’s Dictionary of Accounting Terms (5<sup>th</sup> ed. 2010).

While the petitioner did not invest until September 2011, the business continued to lose money, \$3,471 during that year, and there is no indication it had a sufficient net income prior to September 2011 to counter the more than 20 percent of net worth the company lost as a net loss in 2010. Thus, the petitioner has satisfactorily demonstrated that his investment qualifies as an investment in a troubled business.

## 2. Investment in an Pre-existing, Ongoing Business

As [REDACTED] did constitute a troubled business when the petitioner made his claimed investment, to meet the statutory employment creation requirement, the petitioner must show that his investment has preserved or created, or will preserve or create at least 10 full-time positions, and must show that he has not directly caused a net loss of employment. See 8 C.F.R. §§ 204.6(j)(4)(i), (ii); *Matter of Hsiung*, 22 I&N Dec. 204.

At part 3 of the Form I-526 petition, the petitioner asserted that the date of his initial investment was September 7, 2011, that the amount of his initial investment was \$1 million, and that his "total capital investment in the enterprise to date" was \$500,000. At part 5, he asserted that [REDACTED] had seven full-time employees when he made the initial investment, and that the enterprise had 15 full-time employees at the time he filed the Form I-526 petition because his investment had created eight full-time new jobs. The petitioner signed the Form I-526 petition on September 6, 2011, declaring under penalty of perjury that the petition and the evidence submitted with it are true and correct. Given that he signed the petition on September 6, 2011, it is unclear how his assertions that he made his full and initial investment one day later on September 7, 2011, and thus already created eight jobs could be true. Accordingly, the claims on the Form I-526 petition are internally inconsistent.

In addition, the information provided in the petition is inconsistent with information provided in counsel's supporting letter, dated September 7, 2011. According to counsel, when the petitioner filed the petition, [REDACTED] employed "a total of 15 employees but 7 of these [were] part[-]time [employees]." This contradicts the petitioner's claim at part 5 of the petition that [REDACTED] had 15 full-time employees at the time he filed the petition. The petitioner has provided inconsistent information relating to the number of full-time employees at the time he filed the petition. "[I]t is incumbent upon [him] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or evidence], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner has provided no such evidence to explain or reconcile the inconsistent claims.

As supporting evidence that [REDACTED] had seven full-time employees when the petitioner made his claimed initial investment in September 2011, the petitioner has provided: (1) [REDACTED] State of California Quarterly Wage and Withholding Report for the third quarter of 2010; (2) payroll documents for the pay period of June 16, 2011 through June 30, 2011; and (3) [REDACTED] Employer's Quarterly Federal Tax Return, IRS Form 941, for the third quarter of 2011. Neither the State of California Quarterly Wage and Withholding

Report nor the payroll documents establish the number of full-time employees [REDACTED] had when the petitioner made his claimed initial investment. Specifically, the State of California Quarterly Wage and Withholding Report relates to the period between July 2010 and September 2010, approximately one year before the petitioner's claimed initial investment in September 2011. The payroll documents relate to a two-week period in 2011, approximately three months before the petitioner's claimed initial investment in September 2011.

[REDACTED] IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2011 (July 2011 through September 2011) similarly fails to show the number of [REDACTED] full-time employees when the petitioner made his claimed initial investment. Specifically, the tax return shows that between July 2011 and September 2011, [REDACTED] had 32 employees. Neither this document nor any other evidence in the record indicates how many of these 32 employees were full-time employees, part-time employees, or employees sharing full-time positions. As the petitioner has not shown the number of full-time positions [REDACTED] had in September 2011, when he made his claimed initial investment, he has failed to show that he "[has] not directly cause[d] a net loss of employment." *Matter of Hsiung*, 22 I&N Dec. at 204-05.

In addition, the Employer's Quarterly Federal Tax Returns, IRS Forms 941, for periods after the petitioner's claimed initial investment show a net loss of employment. Specifically, according to the Employer's Quarterly Federal Tax Return, IRS Form 941, for the fourth quarter of 2011 (October 2011 through December 2011), [REDACTED], had 31 employees, a net loss of one employee from the third quarter of 2011. According to the Employer's Quarterly Federal Tax Return, IRS Form 941, for the first quarter of 2012 (January 2012 through March 2012), [REDACTED] had 30 employees, a net loss of two employees from the third quarter of 2011. Evidence submitted on appeal suggests that the total number of employees has increased to 37 as of June 2012. The evidence, however, does not establish if these are full-time or part-time employees, or employees sharing full-time positions. Indeed, based on the payroll documents for the two-week pay period between June 1, 2012 and June 15, 2012, all but two of the 37 employees worked at least 70 hours, or 35 hours per week. The evidence fails to show that the petitioner "[has] not directly cause[d] a net loss of employment." *Matter of Hsiung*, 22 I&N Dec. at 204-05.

In addition, the evidence fails to show that the petitioner's claimed investment has preserved or created at least 10 full-time positions. Indeed, on appeal, counsel does not claim that the petitioner's claimed investment has already created 10 new, full-time positions. Instead, counsel asserts that as of June 2012, [REDACTED] has had "6 full-time employees" and "31 part-time employees work[ing] in six different positions, and based upon the hours worked by these 31 part-time employees, the full-time equivalent is 16 full-time positions." The evidence in the record, however, does not support counsel's assertion. First, counsel raised the issue of shared full-time positions for the first time on appeal. Counsel's definition for full-time positions, however, is not the definition provided under the plain language of the regulation at 8 C.F.R. § 204.6(e). The regulation provides in pertinent part, "[a] job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions

even if, when combined, such positions meet the hourly requirement per week.” On appeal, counsel asserts, “upon the hours worked by these 31 part-time employees, the full-time equivalent is 16 full-time positions.” Counsel has improperly relied solely upon the number of hours worked to assert that the 31 part-time employees shared 16 full-time positions.

Furthermore, irrespective of counsel’s assertion on shared full-time positions, he has stated on appeal that as of June 2012, there has only been “a net increase of 4 new full-time employees from October 2011.” Counsel further asserts that an additional new full-time cook was hired on July 1, 2012. 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). While there are several handwritten notes on the payroll records, of the employees whose hours are preprinted on the payroll records, only three show more than 70 hours over the two-week pay period. As the evidence does not support an assertion that the petitioner’s claimed investment has resulted in the preservation or creation of at least 10 full-time positions, the petitioner must provide a copy of a comprehensive business plan showing the need for not fewer than 10 new, qualifying employees. See 8 C.F.R. § 204.6(j)(4)(i); *Matter of Ho*, 22 I&N Dec. at 213. The petitioner has failed to do so.

In response to the director’s RFE, counsel provided a May 1, 2012 letter that includes an “Exhibit E: Comprehensive Business Plans” heading and two paragraphs under the heading. Neither this document nor any other evidence in the record constitutes a comprehensive business plan. Although the business plan discusses the hiring of additional employees, it fails to specify if any of the new hires will be full-time or part-time employees, or employees who will share full-time positions. In his letter dated July 5, 2012 filed on appeal, counsel also discusses [REDACTED] plan to hire additional full-time and part-time employees. The petitioner fails to provide evidence to show that they will share full-time positions. In addition, the petitioner’s business plan lacks sufficient information relating to personnel’s experience, staffing requirements, job descriptions, and projections of sales, costs, and income. In short, the petitioner has failed to provide a comprehensive business plan showing the need for not fewer than 10 new, full-time positions. See *Matter of Ho*, 22 I&N Dec. at 213.

#### B. New Commercial Enterprise

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: “Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise.” (Emphasis added.) The regulation at 8 C.F.R. § 204.6(e) defines “new” as established after November 29, 1990. The regulation at 8 C.F.R. § 204.6(h) further states that the establishment of a new commercial enterprise may consist of the following: (1) the creation of an original business, (2) the restructuring or reorganization of an existing business such that a new commercial enterprise results, or (3) an expansion of an existing business through the requisite investment, defined as a 40 percent increase in either net worth or number of employees.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien

Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. This amendment did not, however, eliminate the requirement that the commercial enterprise be “new.” Thus, the regulation at 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

Moreover, “[i]t is the job-creating business that must be examined in determining whether a new commercial enterprise has been created.” *Matter of Soffici*, 22 I&N Dec. at 166. *Matter of Soffici* held that a Howard Johnson’s Motor Lodge did not constitute a new commercial enterprise, because although the motor lodge was purchased by Ames Management, which was incorporated in 1997, the motor lodge “had been in operation for approximately 24 years and was an ongoing business at the time of purchase; Ames Management, doing business as Howard Johnson Hotel, has merely replaced the former owner.”

Similarly, in this case, counsel has repeatedly made representations that [redacted] owned by [redacted] has been in existence before November 29, 1990. Specifically, according to counsel’s September 7, 2011 letter, the “business has been in existence since 1948.” According to counsel’s May 1, 2012 response to the director’s RFE, “[the] restaurant . . . has been in existence since the 1960s.” According to counsel’s July 5, 2012 letter, filed on appeal, the restaurant is “a 60 year old iconic gathering place in the City of Bakersfield.” As such, [redacted] doing business as [redacted] does not constitute a “new” commercial enterprise through the creation of a new business after November 29, 1990.

In response to the RFE, counsel asserted that the petitioner had established a “new” commercial enterprise by expanding [redacted]. Counsel notes that the 2011 IRS Form 1120S shows an increase in *total assets*. The regulations do permit the petitioner to invest in an existing business created prior to November 29, 1990, provided the petitioner expands the existing business through the investment of the required amount, so that a substantial change (40 percent) in the *net worth* or number of employees results from the investment of capital. See 8 C.F.R. § 204.6(h). Net worth is not equal to total assets as counsel implies. Rather, net worth is total assets less total liabilities. Barron’s Dictionary of Accounting Terms (5th ed. 2010).

Although the record contains evidence relating to the restaurant undergoing a remodeling and renovation, the record lacks evidence relating to an expansion as defined at 8 C.F.R. § 204.6(h)(3). In addition, although the record contains unaudited financial statements as of January 31, 2009, December 31, 2010, March 31, 2011, and December 31, 2011, the record lacks financial statements or other evidence relating to [redacted] net worth as of September 2011, before the petitioner made his claimed initial investment. Significantly, the 2011 IRS Form 1120S reflects that [redacted] began the year with a net worth of \$89,729 (\$70,000 in stock + \$1,000 paid-in-capital + \$18,729 in retained earnings) and ended the year with a net worth of only \$64,166 (\$70,000 in stock + \$12,451 in paid-in-capital - \$18,285 in negative retained earnings). The petitioner’s \$500,000 contribution is listed on the tax return, schedule L and accompanying statement 7, as a liability payable to [redacted]. As the net worth decreased with the petitioner’s investment, the petitioner has not shown that his claimed investment has resulted in an

expansion or a substantial change of at least 40 percent in [REDACTED] net worth. See 8 C.F.R. § 204.6(h). Accordingly, the petitioner has not shown that he has invested in a new commercial enterprise.

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

### C. Source of Funds

In order to establish the lawful source of funds, the regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital. A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Matter of Izummi*, 22 I&N Dec. at 195.

According to counsel's September 7, 2011 letter, the funds the petitioner invested in [REDACTED] came from a loan from [REDACTED] of Enping City, of which the petitioner is a shareholder. A July 18, 2011 document entitled "Resolution of Stockholders' Conference" indicates that [REDACTED] of Enping City agreed "to pay in advance 6 million RMB [approximately \$927,542] to [the petitioner], which will be deducted from the dividends of the company later."<sup>2</sup> The documents from [REDACTED] show that [REDACTED] of Enping City issued two checks payable to the petitioner: one was dated July 28, 2011, in the amount of 2.8 million RMB, or approximately \$434,791; and the other was dated July 23, 2011, in the amount of 3.2 million RMB, or approximately \$495,011.<sup>3</sup> The record, however, lacks evidence showing that the funds were actually deposited into one of the petitioner's accounts. Specifically, the petitioner has failed to provide any bank related documents showing that in July 2011, six million RMB were actually deposited into one of his accounts.

Moreover, although the record contains evidence of the petitioner wire transferring funds to [REDACTED] who then wire transferred \$500,000 to [REDACTED], on September 7, 2011, the record lacks sufficient evidence showing the source of the petitioner's funds. Specifically, [REDACTED] bank statements, for accounts with account numbers ending in [REDACTED] and [REDACTED] show that between August 19, 2011 and August 31, 2011, the petitioner made nine wire transfers to [REDACTED]

<sup>2</sup> U.S. dollar amount calculated using the exchange rate for July 18, 2011 at [www.oanda.com/currency/converter/](http://www.oanda.com/currency/converter/), accessed on January 29, 2013 and incorporated into the record of proceeding.

<sup>3</sup> U.S. dollar amount calculated using the exchange rate for July 28, 2011 and July 23, 2011 at [www.oanda.com/currency/converter/](http://www.oanda.com/currency/converter/), accessed on January 29, 2013 and incorporated into the record of proceeding.

Feng, each in the amount of \$49,985, totaling \$449,865. The petitioner, however, has failed to show that the funds came from a loan from [REDACTED] of Enping City, or any other lawful source. As discussed, the record lacks evidence showing that the petitioner actually received any funds from [REDACTED] of Enping City in July 2011 or August 2011.

Furthermore, [REDACTED] bank statement, for an account with account number ending in [REDACTED], shows that on March 29, 2012, after the director issued the RFE noting that the record lacked evidence of an investment of the full \$1,000,000, [REDACTED] received a \$499,980 wire transfer from the petitioner. The record, however, lacks evidence showing that the funds came from [REDACTED]'s July 2011 loan to the petitioner.

Finally, although in response to the director's RFE, the petitioner provided documents showing that he is a shareholder of [REDACTED], the petitioner has provided no document showing that he has actually received any funds from [REDACTED] for investment in [REDACTED].

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

#### D. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines "capital" and "investment." The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. The regulation then lists the types of evidence the petitioner may submit to meet this requirement. The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. at 179.

[REDACTED] bank statements show that on September 7, 2011, [REDACTED] received a \$500,000 wire transfer from [REDACTED], and on March 29, 2012, [REDACTED] received a \$499,980 wire transfer from the petitioner. The petitioner, however, has failed to show that [REDACTED] entire \$500,000 wire transfer came from the petitioner. Specifically, [REDACTED] bank statements, for accounts with account numbers ending in [REDACTED] and [REDACTED] show that between August 19, 2011 and August 31, 2011 the petitioner made nine wire transfers to [REDACTED], each in the amount of \$49,985, totaling \$449,865. The petitioner's \$449,865 to [REDACTED] in August 2011 is \$50,135 short of [REDACTED] \$500,000 to [REDACTED] in September 2011. In short, even if the petitioner had demonstrated the lawful

source of his funds, the evidence at best shows that he has placed \$949,865, not \$1,000,000 at risk for the purpose of generating a return on the capital.<sup>4</sup>

In addition, the petitioner transferred the \$499,980 to [REDACTED] on March 29, 2012. While the September 6, 2011 Minutes of Special Meeting of Directors indicate the petitioner would make the second payment within two years, counsel stated in September 7, 2011 letter accompanying the petition that the petitioner would make the next payment within 60 days. Instead, the petitioner made the payment after the director issued the RFE noting the lack of evidence of an investment of the full amount. Regardless, the petitioner has not established that these funds are at risk. While the petitioner submitted the unsigned August 22, 2011 construction contract for \$378,680 toward which the initial \$500,000 would allegedly be applied, the record does not identify the capital expenses for which [REDACTED] will spend the \$499,980. It is acknowledged that, unlike the petitioner in *Matter of Ho*, 22 I&N Dec. at 209, this petitioner has an operating business. Regardless, the case stands for the proposition that all the funds must be at risk. *Matter of Ho* states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

*Id.* at 210; *see also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010). Without explaining how the March 29, 2012 funds will go towards capital expenses, the petitioner cannot demonstrate that the funds are sufficiently at risk.

Moreover, the record contains contradictory evidence relating to the petitioner's interest in [REDACTED]. According to part 3 of the petition, filed on September 16, 2011, the petitioner owns 51.9 percent of [REDACTED]. According to a document attached to the petition, the petitioner's 51.9 percent ownership interest means that he owns 27,000 shares of [REDACTED] common stock, and the other shareholder, [REDACTED] owns 48.1 percent of the ownership interest and 25,000 shares of the common stock. In support of this assertion, the petitioner has provided a copy of Common Stock Certificate Number 8, showing that he owns 27,000 shares of common stock. The certificate, however, is not dated. As such, it is unclear when [REDACTED] issued the certificate. Further, the petitioner provided an Investor's Certificate dated September 6, 2011, in which he asserted that he would purchase 51,000 shares. This figure contradicts the 27,000 shares listed on Common Stock Certificate Number 8.

In addition, the petitioner's claim to own 51.9 percent of [REDACTED] is contradicted by [REDACTED] 2011 IRS Form 1120S, Schedules K, Shareholder's Share of Income, Deductions, Credits, etc. The 2011 Schedules K show that [REDACTED] "shareholder's percent of stock ownership for tax year" 2011 was 50 percent, and [REDACTED] "shareholder's percent of stock ownership of tax year" 2011 was the remaining 50 percent. [REDACTED] signed the 2011 IRS Form 1120S on March 12, 2012, declaring under penalty of perjury that he had examined the return and accompanying schedules and statements, and that all

<sup>4</sup> \$449,865 + \$500,000 = \$949,865

information was true, correct, and complete. The petitioner has provided inconsistent documents and “it is incumbent upon [him] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or evidence], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner has provided no such evidence to explain or reconcile the inconsistent documents.

Furthermore, [REDACTED] 2011 U.S. Income Tax Return for an S Corporation, IRS Form 1120S, Schedule L, Item 21, lists \$500,000 as “other liabilities,” which is explained in statement 7 as payable to [REDACTED]. Item 23 then indicates that at the beginning of 2011, “additional paid-in capital” was \$1,000, and at the end of 2011, “additional paid-in capital” was \$12,451. The petitioner has not provided any explanation as to why his claimed investment does not qualify as stock or “additional paid-in capital” instead of “other liabilities.” The definition of “invest” under the regulation at 8 C.F.R. § 204.6(e) excludes contributions of capital in exchange for a note or other indebtedness. According to [REDACTED] Balance Sheet, as of December 31, 2011, while other shareholders’ investments were listed as “Cap. Invest,” presumably representing “Capital Investment,” the petitioner’s \$500,000 claimed investment was listed as “[REDACTED] Deposit.” The record does not resolve these inconsistent characterizations of the petitioner’s contribution of \$500,000.

In light of the above, the petitioner has not demonstrated that he has placed the \$1,000,000 required amount of capital at risk for the purpose of generating a return on the capital.

#### 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.