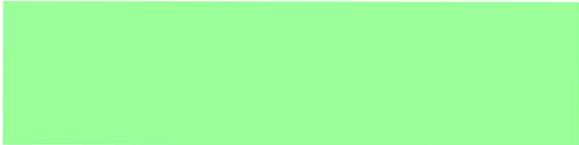


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

(b)(6)

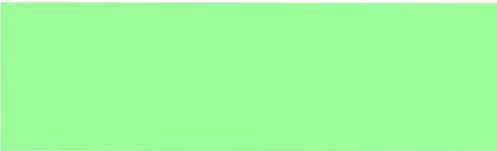


DATE: **MAY 17 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 record indicates that the petition is based on an investment in a designated regional center, the New Orleans Regional Center (NORC), pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002). The new commercial enterprise (NCE) in which the petitioner's capital is invested is the NobleRealEstateFund, LP.

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

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

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 March 16, 2010. On July 15, 2010, the director issued the first request for evidence (RFE). Specifically, the director requested: (1) evidence that the job creating enterprises are located within a TEA; (2) evidence that the invested capital is at risk and is actively

invested in a qualifying job-creating entity; (3) evidence that the commercial enterprise will create ten direct or indirect jobs per investor through a comprehensive business plan; and (4) evidence of ownership of the enterprise by multiple investors. The petitioner responded on October 6, 2010, with additional documentation. On February 28, 2011, the director issued a second RFE. Specifically, the director requested: (1) evidence that the job creating enterprises are located within a TEA; (2) evidence that the required amount of capital has been invested; and (3) evidence of employment creation through a comprehensive business plan. The petitioner responded on May 23, 2011, with additional documentation.

On June 9, 2011, the director denied the petition determining that the petitioner had failed to demonstrate: (1) that the job creating enterprise is located within a TEA for which the required investment has been adjusted downward, (2) that the petitioner has invested at least \$1,000,000 in the NCE; and (3) that the petitioner's investment will create at least ten jobs.

On July 11, 2011, the petitioner filed an appeal with USCIS. On appeal, counsel asserts: (1) the NCE is located within a TEA and that it was designated as such at the date of filing; and (2) the director incorrectly interpreted the NCE's comprehensive business plans and the applicable facts, and applied an incorrect standard of review and application of law.

III. ISSUES PRESENTED ON APPEAL

A. Targeted Employment Area

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

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

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

The record contains the following letters: (1) an August 10, 2010, letter from [REDACTED] delegating the authority to designate [REDACTED] (2) a July 29, 2010, brief cover letter from [REDACTED] Assistant Secretary at [REDACTED] asserting that the [REDACTED] “continues” the previous [REDACTED] (3) an explanatory July 2, 2010, letter from Mr. [REDACTED] (4) a March 25, 2011 letter from Mr. [REDACTED] and an August 2, 2011 letter from Mr. [REDACTED]

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

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

B. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence relating to employment creation that must accompany any petition filed pursuant to section 203(b)(5) of the Act. In general, if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.” Subparagraph (iii) allows petitioners investing through a regional center to demonstrate indirect job creation through reasonable methodologies. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm’r 1998), emphasizes that the business plan must be credible. See also *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037-38 (E.D. Cal. 2001) *aff’d*, 345 F.3d 683 (9th Cir. 2003) (finding that discrepancies between the lots to be developed as identified in the business plan and those identified in the build out plan were sufficient to raise credibility concerns about the business plan).

Within the initial filing, the petitioner submitted an “I-526 RC Business Document” listing 14 portfolio projects, one of which was the [REDACTED] Louisiana. On page 13 of counsel’s response to the first RFE, counsel referred to this list as a list of “exemplars,” a claim that is not apparent from the list itself. Rather, the introduction to the list on page 29 explains that the list includes the initial portfolio, with additional projects to be added later. The “[REDACTED]” submitted at the time of the Form I-526 filing states on pages 2-3:

The “short-term resident” does not want to pay for such things as pools, restaurants, extravagant lobbies, and meeting rooms. Therefore, in order to maintain a low rental cost, these features will not be offered at [REDACTED]. . . As mentioned above, [REDACTED] will not have any “non-rentable” space such as pools and restaurants. [REDACTED] is engineered to provide a low-cost, highly efficient, short-term lodging option.

will offer limited services, such as a bi-weekly maid service and limited front desk personnel, in order to keep costs low . . . does not have lobby dining facilities, restaurants, swimming pools, spas or fitness facilities. provides the best value for the dollar with no-frills.

The petitioner included this plan as Appendix H. Despite counsel's subsequent reference to Appendix M, this appendix was not part of the initial filing and page 3 of the I-526 RC Business Document lists only Appendices A through L as attachments.

In the first RFE, the director noted that the business plans for several of the 14 projects identified as being in the 's portfolio were scheduled to begin in 2006 or early 2007 and be completed by 2009, prior to the initial filing date in March 2010. The director requested updated information and business plans for the projects. In response, counsel stated, on page 12 of the brief: "[T]he Regional Center will 'track' [the petitioner's] funds into the new commercial enterprise and has determined that the full \$500,000 amount of [the petitioner's] funds will be placed into a specific job-creating business venture investment, referred to as that is still ongoing and that is located in the designated area." Additionally, counsel's response to the first RFE on behalf of NORC states:

The Louisiana (within) with its business plan as provided in the I-526 submission, began as only a hotel, but the 2.7-acre site and plans allow for the integration of a and conference and training rooms (these additions to the are referred to herein as the).

The first mention of the was in response to the first RFE; not within the initial petition filing. The only initial project that counsel continues to address on appeal is the , a no frills hotel with no restaurant or meeting rooms. A petitioner must establish eligibility at the time of filing the petition; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). *See also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). At the time of filing the petition, the petitioner had not established that her invested funds were intended for the . The addition of the is a significant inconsistency because the initial filing in no way indicated that the projects on the list were "exemplars." Rather, the initial filing presented the list of portfolio projects as a diversified group of planned projects. Moreover, counsel has cited no legal authority for the proposition that a list of "exemplar" projects fulfills the business plan requirements at 8 C.F.R. § 204.6(j)(4). Ultimately, the amended business plans submitted in response to the first RFE are significantly inconsistent with the petitioner's claims at the time of filing her Form I-526 petition.

Furthermore, counsel's response on behalf of the petitioner to the first RFE contained inconsistencies regarding additional amenities within the hotel. The no-frills approach was one of the major cost-reduction elements of the plans; however, in response to the RFE, the seems to have disregarded this principal cost saving measure. It is incumbent upon the petitioner to resolve any

inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* See also *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037-38 (E.D. Cal. 2001) *aff'd*, 345 F.3d 683 (9th Cir. 2003) (upholding a finding that discrepancies in the record reduced the credibility of a business plan's employment projections). The petitioner did not provide any evidence that might sufficiently explain the [REDACTED]'s amended plans for additional amenities within the hotel; she merely provided a new plan.

The addition of the [REDACTED] results in other inconsistencies in addition to the simple addition of a new project. For example, the initial "I-526 RC Business Document" indicated, on page 9, that the [REDACTED] planned to construct six [REDACTED] at a cost of \$1,000,000 each, resulting in 20 direct jobs at each hotel. In response to the first RFE, the petitioner provided a supplemental business plan dated May 2010 that, on page 5, stated: "The simplicity of no frills, limited service, and high construction quality allow [REDACTED] to run with maximum operational efficiency, employing 4.5 full-time equivalent employees." (Emphasis added). Furthermore, the third chart in exhibit I-1 to the second RFE, which sets out the expenses and employment projections for the [REDACTED], amended the cost of the [REDACTED] from \$6,000,000 to \$9,000,000. This document also amended the number of required investors from 12 to 18. Also according to this document, the number of jobs also changed from 120 (six hotels employing 20 personnel each) to 226. 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.*

The record also includes inconsistencies regarding a second proposed project through [REDACTED]. The initial I-526 RC Business Document, page 9, lists [REDACTED] as part of the initial project portfolio. While the petitioner did not submit a business plan for this project, page 9 states that [REDACTED] falls under the following industry: "Marketing, financial, management, due diligence and business analysis, and economic forecasting and analysis entities." In response to the first RFE, the petitioner submitted a business plan for [REDACTED]. The business plan describes the company as "a financial and business services firm." Attachment I-8 to the second RFE describes [REDACTED] as falling under the following industry: "Construction, Commercial and Institutional Building Construction." The director concluded that the [REDACTED] projects, consisting of consulting services, did not fall under an industry for which the regional center has been approved. On appeal, counsel asserts that the [REDACTED] projects consist of construction of food services establishments.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* 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.* The petitioner has not resolved the inconsistencies between the characterization of [REDACTED] as a consulting firm initially and in response to the first RFE and subsequently characterizing [REDACTED] projects as construction projects.

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

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

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

Additionally, the Private Placement Memorandum stated on page six:

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

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

C. Lawful Source of Invested Funds

As an additional issue, the petitioner has not established the lawful source of the invested funds. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or

evidence of other sources of capital. A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Id.* (citing *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm'r 1998)). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner asserted that she obtained the funds to invest in the [REDACTED] through a loan from her father. The record contains a translated statement from the petitioner's father indicating that he provided her with 4,000,000 Chinese Yuan Renminbi (RMB) on December 24, 2009. The petitioner also provided bank account statements and business financial documents demonstrating the lawfulness of the funds in her father's account. The record contains evidence that the petitioner's father withdrew 8,000,000 RMB from his account on December 25, 2009, and evidence that the petitioner deposited 4,000,000 RMB in her account on this same date, which originated from her father. A break in the path of the funds, however, follows this deposit.

The petitioner provided a statement declaring that she wished to exchange her RMB currency for Hong Kong Dollars (HKD) through [REDACTED] and that the exchange would take place on February 1, 2010. The petitioner provided an application for fund transfer to Mr. [REDACTED]'s account and a banking statement for Mr. [REDACTED]'s account reflecting a deposit and withdrawal of 3,800,000 RMB on February 1, 2010. Although the petitioner indicated that Mr. [REDACTED] would transfer the funds back to the petitioner's bank account, the record lacks evidence of any such transfer of funds from Mr. [REDACTED]'s account back to the petitioner's account. This omission results in a break in the path of the petitioner's funds. The petitioner must document the full path of her funds in order to meet her burden of demonstrating that the funds are her own. *Matter of Izummi*, 22 I&N Dec. at 195.

The transactional documentation also contains an inconsistency regarding dates. The petitioner provided a document dated February 4, 2010, that indicated the petitioner transferred \$500,000 U.S. dollars from her account [REDACTED] at [REDACTED] to the [REDACTED]'s account at Citibank. The petitioner also provided a bank statement relating to her same account dated February 10, 2010, which reflected a transfer debit of \$500,000 on February 8, 2010; not on February 4, 2010, as the transfer document indicated. 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.*

Without documentation of the complete path of the funds, the petitioner has not established that the investment funds are her own. *Matter of Izummi*, 22 I&N Dec. at 195; *see also Matter of Soffici*, 22 I&N Dec. at 158. As the petitioner has failed to establish the investment funds are her own, she has failed to establish the lawful source of the funds pursuant to the regulation at 8 C.F.R. § 204.6(j)(3).

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.