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 24 2013 Office: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in a business, located in a targeted employment area (TEA) for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $500,000. the new commercial enterprise (NCE), engages in the business of wholesale beauty supply, to be developed through long-term business relations with retailers.

The director determined that the petitioner had failed to demonstrate that the petitioner had invested or was in the process of investing the required minimum amount of capital into the NCE. The director also found that the petitioner failed to show that she had created or would create 10 full-time positions for qualifying employees.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) confused legal issues, ignored and misinterpreted evidence and misapplied the standard of proof. Specifically, counsel maintains that USCIS abused its discretion by ignoring extensive business transaction documents to conclude that the investment funds were not at risk. Counsel also maintains that the petitioner has established that she would create 10 full time jobs, as supported by a credible comprehensive business plan. For the reasons discussed below, while the AAO withdraws the director's finding that the invested funds were not at risk as of the date of filing the petition, the petitioner has failed to overcome the director's concerns regarding employment creation. Finally, the AAO also finds that the petitioner has failed to document the complete path of funds from a lawful source.

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 BACKGROUND

The petitioner filed the petition on June 8, 2011, supported by the following types of evidence:

(1) The NCE's corporate documents;
(2) The stock certificate, transaction ledger and Notice of Transaction reflecting the petitioner's $520,000 investment for 52,000 shares;
(3) The wire transfer form and confirmation for a $529,500 transfer from to an NCE account held at
(4) A letter and January 2011 bank statement from verifying the NCE's January 28, 2011 checking account balance as $529,365;
(5) The January 14, 2011 lease agreement for the NCE's principal executive office;
(6) The NCE's Seller's Permit and Business License;
(7) Documentation of insurance, sales orders and invoices pertaining to the NCE;
(8) A letter from the petitioner's parents attesting to a $500,000 gift to the petitioner;
(9) Evidence relating to a gift from the petitioner's parents and their business interests;
(10) Form I-9s and identification for the two original employees;
(11) The NCE's Financial Statement prepared and audited by ; and
(12) Documentation establishing the location of the NCE as a TEA.

On December 22, 2011, the director issued a Request for Evidence (RFE) seeking further documentation from the petitioner. The RFE concluded that based on the initial submissions, the evidence failed to demonstrate that the petitioner had fully invested and placed at risk the claimed amount of capital investment. In addition, the director requested documentation showing that the invested capital was obtained through lawful means and the clear path of the funds. The director also found that the evidence of record failed to demonstrate that the NCE will create not fewer than 10 full-time positions for qualifying employees and determined that the petitioner's employment projections were not supported by a sufficiently detailed comprehensive business plan. On February 27, 2012, the petitioner responded to the director's RFE and submitted the following documents:

(1) Monthly bank statements from the accounts.
(2) Monthly bank statements from accounts for the period covering September 2011 through January 2012;
(3) Monthly credit card statements from for the period covering February 2011 through February 2012;
(4) The financial statements for the period covering October 2010 through October 2011 and October 2011 through January 2012;
(5) The NCE's 2010 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return;

(6) The loan agreement between . and the NCE reflecting a business purpose;
(7) A copy of the processed check evidencing the loan between and the NCE;
(8) A statement regarding a $700.84 personal loan to the petitioner;
(9) The stock transfer ledger and stock certificate for outstanding shares of the NCE;
(10) Documentation relating to the NCE's employees;
(11) The NCE's business license, seller's permit, utility bills and invoices;
(12) A price list and a nail product brochure;
(13) A declaration from the petitioner attesting to exclusive oral contracts;
(14) The NCE's client list;
(15) A Revised Business Plan;
(16) Documentation regarding the source of the petitioner's funds, including documentation of her parents' lease of a welding facility.

After reviewing the entirety of the record, including the documents provided with the RFE response, the director denied the visa petition on March 13, 2012. Counsel filed a timely appeal on April 11, 2012, and submits the following documents along with the appeal brief before the AAO: (1) a vehicle registration showing the registered owner of the car as the NCE and the petitioner; (2) a printout detailing the auto loan and payments; (3) a declaration from the petitioner attesting to the need for a company vehicle; (4) information from the webpages of ; (5) two examples of shipping rates; (6) a declaration from the petitioner attesting to why the RFE response did not include copies of exclusive contracts with suppliers, as requested by the director; and (7) the California State Quarterly Wage Reports for the 1st quarter of 2012.

Counsel asserts generally on appeal that the director failed to evaluate the evidence under the proper standard of proof. With regard to the capital investment, counsel maintains that the documents evidencing the transfer of $529,000 into the NCE's bank accounts in exchange for shares of stock sufficiently demonstrates the requisite capital investment at the time of the Form I-526 filing date. Counsel also maintains that the petitioner provided documentation showing that the capital was placed at risk and the director applied the erroneous standard of proof by ignoring the evidence. Furthermore, counsel asserts that the director erred by discounting the loan to and the company car purchased as part of the invested capital. Finally, counsel states that the petitioner's job creation projections are supported by a credible, comprehensive business plan and that the updated business plan (Business Plan #2) submitted with the RFE builds on the initial business plan (Business Plan #1).

A full consideration of all the evidence of record, including all the documentation submitted on appeal, reveals that the petitioner fails to satisfy the requirements under the statute and the implementing regulations for the Form I-526 petition. Specifically, while the AAO withdraws the director's concern that the invested funds were not at risk, the AAO affirms the director's concerns

regarding employment creation. As an additional issue, the AAO finds that the petitioner has not satisfactorily documented the lawful source of her funds.

III. ISSUES 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. Furthermore, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

As stated above, given that the NCE primarily does business in a targeted employment area, the required amount of capital in this instance is $500,000. *See* section 203(b)(5)(C)(i) and (ii) of the Act; 8 C.F.R. § 204.6(f)(2). The petitioner submitted bank statements and wire transfer receipts confirming that she transferred $529,465 from her [redacted] to one of the NCE's business accounts on January 25, 2011, which predates the filing of the Form I-526 petition on June 8, 2011.

The director, in her March 13, 2012 decision, found that the petitioner failed to present sufficient evidence to establish that the required minimum amount of capital has been invested or was actively being invested into the NCE and placed at risk. In the appeal brief, counsel maintains that the NCE in this instance has actually undertaken meaningful concrete business activity and is distinguishable from the *de minimis* activity of the enterprise in *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998). The record reveals that the NCE had hired employees, purchased inventory, entered into a lease, and started shipping supplies to overseas buyers by the filing date and continued business activities that required further depletion of the investment capital deposited in the business bank accounts after the petitioner filed the visa petition. Thus, unlike the enterprise in *Matter of Ho*, 22 I&N Dec. at 209, the funds placed in the NCE's business accounts qualify as an active, at-risk investment.

Accordingly, the AAO withdraws the director's findings in this regard and concludes that the petitioner in this instance sufficiently demonstrated that she placed the requisite amount of capital at risk pursuant to the regulatory requirements of 8 C.F.R. § 204.6(j)(4)(i).

B. 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, Forms I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the NCE; or a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees.

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. *Matter of Ho,* 22 I&N Dec. at 213. 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 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.

The NCE, at the time of filing, had hired only two full-time employees. Therefore, the petitioner needed to demonstrate the need for not fewer than ten qualifying employees total through the submission of a credible, comprehensive business plan, as outlined in *Matter of Ho,* 22 I&N Dec. at 213. The petitioner submitted Business Plan #1 as part of the original package and presented the NCE as a wholesale beauty supply business with a goal and mission to The petitioner submitted Business Plan #2 as part of the RFE response and explained that the NCE provided supplies to buyers internationally as a result of the development of a clientele in Asia. In Business Plan #2, the NCE's "goal and mission is to set the cornerstone and establish long-term business relations with retailers in Hong Kong and China."

The director found that Business Plan #2 is not sufficiently comprehensive and credible to demonstrate that the NCE is reasonably likely to meet the job creation requirements. On appeal, counsel asserts that the director failed to apply the correct evidentiary standard in concluding that Business Plan #2 is not credible and sufficiently detailed to constitute a comprehensive business plan.

Counsel maintains that the director, in stating that the petitioner failed to sufficiently explain the change in financial projections, failed to examine Business Plan #2 within the context of the totality of the evidence as mandated by *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). For the reasons discussed below, the petitioner has not established her eligibility by a preponderance of the evidence

through the submission of relevant, probative, and credible evidence. *Id.* at 376. The discrepancies between the sales projections in the two business plans are as follows:

	Business Plan #1	*Business Plan #2*
2011	$1,520,000	$970,950.18
2012	$2,100,000	$1,400,000
2013	$2,650,000	$2,000,000
2014	$3,050,000	$2,200,000
2015	$3,350,000	$2,650,000

Despite the differences in financial projections, the employment projections are very similar, anticipating four employees by the end of 2011, an additional three employees in 2012 and an additional three employees in 2013, with the initial plan also projecting a fourth employee in 2013. The job titles, however, are significantly different. In both plans, the petitioner projected a president (the petitioner), a general manager, a sales manager, an accountant and a warehouse manager. In Business Plan #1, however, the petitioner indicated the position of sales manager was filled, while Business Plan #2 projects that position to remain unfilled until July 2013. In addition, while Business Plan #1 projects four regional sales representatives, Business Plan #2 projects only a single marketing position with a similar job description to the sales representatives. Business Plan #2 also adds a purchase manager and an extra warehouse worker.

In the appeal brief, counsel states that within the context of the totality of the evidence, and in light of the actual financial data, the NCE's adjustment of financial estimates in Business Plan #2 was inevitable because the projections would be more accurate, reliable and realistic. The petitioner further maintains that she has substantially complied with the business plan. The difference, however, in financial projections from Business Plan #1 and Business Plan #2 for year one alone is substantial. The projected difference for subsequent years continues between the two financial plans. 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.* The petitioner has not resolved the inconsistencies between the two plans.

The financial projections reflect the future growth of the business, which in turn would substantiate the employment projections. In this instance, however, while the petitioner claims a downward adjustment in the future financial growth of the NCE, the petitioner in Business Plan #2 has not reflected a corresponding downward adjustment, in terms of percentage, in the employment projections. Given the significant downward adjustment in the financial growth, the petitioner must provide an explanation as to why the employment projections remain unchanged and substantiate the explanation with credible supplemental evidence. For example, the record provides no explanation for why the NCE would require additional warehouse workers when projecting far lower sales volume and far fewer sales representatives. Furthermore, Business Plan #2's credibility is further undermined by the fact that the evidence of record indicates that the NCE had only three employees in the first quarter of 2012, despite the plan's statement that for that time period the NCE had four employees. Counsel stated that one of the employees was on leave and was scheduled to return, but failed to substantiate this claim with

independent documentation. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In light of the above, USCIS concludes that the petitioner did not resolve the discrepancies between its business plans in accordance with *Matter of Ho*, 19 I&N Dec. 591-92 . *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). Thus, the petitioner has failed to satisfy the job creation requirements because she did not provide a credible, comprehensive business plan showing the need for not less than 10 jobs.

C. Source of 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).

As an additional issue, 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. 206, 210-211 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.*

The petitioner submitted a gift letter, bank statements, business and property records and rental receipts to demonstrate the lawful source of funds for the required investment capital, rental payments to the petitioner's parents by a welding company. The foreign language savings bank statements, the business and tax registrations and the property ownership certificate are accompanied only by uncertified translations. These translations do not meet the requirements for translations set forth at 8 C.F.R. § 103.2(b)(3) and, thus, have no probative value.

The director's RFE requested additional documentation about the lawful source of funds, specifically documents that establish a clear path of funds from the rental income for a welding facility that the petitioner's parents own, to the petitioner, which the petitioner subsequently deposited into the NCE's business account. In response, the petitioner submitted documentation relating to her mother's assets and certified translations pursuant to 8 C.F.R. § 103.2(b)(3). Consequently, each of these documents qualifies as probative evidence.

While the petitioner provided transactional evidence documenting her transfer of $529,500 to the evidence submitted fails to document the path of funds from the lessee of the parents'

property to the petitioner's parents or from the parents to the petitioner. Accordingly, the petitioner has failed to document the path of funds for the investment and therefore, cannot establish that the capital she invested or is in the process of investing originated from a lawful source.

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.