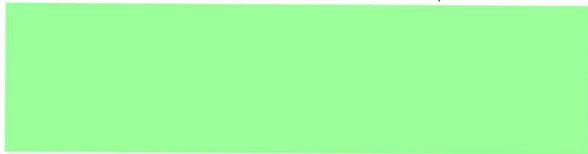


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)

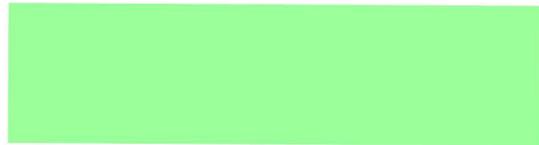


DATE: **SEP 05 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 she created [REDACTED] as a new commercial enterprise (NCE) through the creation of a new business. As the NCE is within a targeted employment area (TEA), the required amount of capital in this case is \$500,000. Initially, the NCE was to take part in the sale of vehicles to China, but also had an ancillary plan related to wine and cosmetics. The petitioner subsequently amended the plan to change the focus from wine and cosmetics to distributing used machinery; then, on appeal, further amended the business plan to also include a restaurant.

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 June 27, 2011, supported by the following types of evidence: (1) documents related to the establishment of the NCE; (2) documents related to the lawful source of the petitioner's funds; (3) documents establishing the NCE was located within a TEA; (4) and identity documents.

On January 18, 2012, the director issued a request for evidence (RFE). Specifically, the director requested: (1) evidence that the required amount of capital had been invested; (2) evidence that the invested capital was at risk through actual business activity; (3) evidence the capital was obtained through lawful means; (4) and evidence of sufficient job creation within the NCE to include a comprehensive business plan. The petitioner responded on April 10, 2012, with additional documentation.

On June 13, 2012, the director denied the petition determining (1) that the petitioner had failed to demonstrate that the invested capital was at risk within the NCE, and (2) that the business plan was

insufficient to establish that the petitioner's investment would result in the creation of the required amount of jobs.

On July 13, 2012, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts the petitioner had established that the capital was at risk within the NCE, and that the NCE would create the required number of jobs for qualifying employees through a revised business plan.

On June 24, 2013 the AAO served the petitioner with a Notice of Adverse Information and Intent to Dismiss Appeal that provided the petitioner with the opportunity to address several adverse elements related to the petition. Specifically, the AAO advised that it was unable to verify that [REDACTED], the landlord on the NCE's lease, actually owned the property. In addition, the AAO was unable to verify that the purported vehicle invoices include all of the information mandated by the State of California, such as odometer disclosure. Finally, the AAO was unable to verify that the entities from whom the NCE purportedly purchased vehicles are licensed vehicle dealers. The petitioner failed to respond to the AAO's notice. The regulation at 8 C.F.R. § 103.2(b)(13) states:

If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons. If other requested material necessary to the processing and approval of a case, such as photographs, are not submitted by the required date, the application may be summarily denied as abandoned.

The AAO may dismiss the appeal based on the petitioner's failure to respond to the AAO's notice. In addition, because the petitioner did not respond to the petitioner's notice, her claims remain unverifiable. Section 204(b) of the Act, 8 U.S.C. § 1154(b), provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true. *See Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

III. ISSUES PRESENTED ON APPEAL

A. Translated Evidence

The regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

While not addressed by the director in her decision, the petitioner submitted translations that do not comport with the regulation. Instead the translations are accompanied by photocopies of a single blanket certification that does not identify any specific document. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value. Even if the translations satisfied the regulation, the director correctly concluded that the petitioner's evidence does not establish eligibility.

B. 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 petitioner contributed in excess of \$500,000 to the NCE's bank account prior to the petition's priority date. She also claimed the following expenditures of capital by purportedly purchasing vehicles on behalf the NCE:

- \$257,700 on May 9, 2011;
- \$71,980 on May 18, 2011;
- \$74,655 on May 24, 2011;
- \$71,325 on June 8, 2011;
- \$56,825 on June 10, 2011; and
- \$108,000 on June 27, 2011.

As evidence of the above investments, the petitioner provided the NCE's bank statements and simplistic invoices that do not reflect that the sellers were authorized car dealers and contain no odometer disclosures or other information as required under California law.¹ While the new commercial enterprise is located in California, one of the sellers is located in Arlington, Virginia, and another is located in Allentown, Pennsylvania. The petitioner submitted no evidence that any of the sellers are licensed automobile dealers such that these invoices represent legal car sales. As noted in the AAO's June 23, 2013 notice, the AAO was unable to verify that any of the sellers listed on the invoices are licensed dealers. The petitioner failed to respond to this notice. After allegedly purchasing these vehicles, the NCE purportedly sold each of these vehicles to an overseas entity in the conduct of business. The petitioner has not demonstrated her investment was at risk as she has failed to document the actual vehicle purchases in response to the director's specific request for such information in the RFE or the AAO's notice advising of adverse information relating to the alleged vehicle purchases.

¹ The AAO advised the petitioner of the California vehicle sale requirements in its June 24, 2013 notice, to which the petitioner failed to respond.

Moreover, as the petitioner has not contested the AAO's adverse information that [REDACTED], [REDACTED] is not the owner of the leased property at [REDACTED], California, the petitioner has also failed to document that any alleged security deposit or rent payments for this property are part of an at-risk investment in the NCE.

Accordingly, the petitioner has not demonstrated that she has invested the required amount of capital in the NCE and that her capital was placed at risk within the NCE. As such, she has not complied with the regulation at 8 C.F.R. § 204.6(j)(2).

C. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence that must accompany a petition for the petitioner to demonstrate that the 10 qualifying employees have already been hired following the establishment of the NCE, or, if the employment-creation requirement has not been satisfied prior to filing the petition, requires 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 with regard to who is 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, the petitioner indicated that there were no employees at the time of the initial investment in May 5, 2011, and two employees as of the date she filed the petition, June 27, 2011. The petitioner indicated that "8 or more" additional jobs would be created by her additional investment in the NCE. The petitioner submitted three Forms I-9, Employment Eligibility Verification with accompanying evidence that the named individuals were authorized to work in the United States. The NCE's 2011 Form 941, Employer's Quarterly Federal Tax Returns, show one employee in the third quarter and zero employees in the fourth quarter. The 2011 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, reflects \$6,000 as compensation to the NCE's officers and does not reflect any money paid in salaries and wages. The 2011 Form 1125-E, Compensation of Officers reflected that the \$6,000 payment to the NCE's officers was

attributed to Xiaoqi Song, whose Form I-9 and Form I-551, Permanent Resident Card the petitioner submitted within the initial proceedings.

The NCE's 2011 Form 100, California Corporation Franchise or Income Tax Return, also did not reflect any salaries or wages paid. Finally, the Forms W-3, W-2, 941 and 940 for 2011 are all consistent with a single employee, [REDACTED]. Thus, these documents do not support the claim of two employees as of June 27, 2011, supported by the Forms I-9. 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 business plan the petitioner submitted with the petition reflected the NCE employed two individuals and the business plan the petitioner submitted in response to the RFE reflected that the NCE employed three individuals. From the evidence submitted within the proceedings before the director, the petitioner has not submitted sufficient corroborating evidence to demonstrate the number of employees the NCE employed at the time she filed the petition or at the time she responded to the director's RFE.

The director concluded that the petitioner's business plan was insufficient based on the following shortcomings: (1) the evidence submitted in response to the RFE did not comply with the director's request for copies of the bids and contracts prepared by [REDACTED] as discussed on page 13 of the initial business plan; (2) the record lacked evidence regarding the exportation of wine and of health and beauty products, even though the business plan discussed such activities; (3) although the RFE requested the experience and qualifications of its current employees to include [REDACTED] the revised plan submitted in response did not comply with the director's request; (4) the director interpreted the phrase "independent sales representatives" within the business plan to be independent contractors, who do not meet the regulatory requirements for qualifying employees; (5) the record lacked evidence of any exclusive relationships with distribution channels and since the company is a new company, it is not clear how it has formed its claimed long-term relationships with suppliers; (6) the NCE's business transactions revealed a diminutive profit of one percent and the business plan did not outline a plan to increase the NCE's profit margins; (7) the Pro Forma statement submitted with the April 2012 business plan did not account for rent paid in 2011, which conflicted with evidence on record asserting the NCE's rent was \$1,500 per month in 2011; (8) insufficient evidence demonstrating the NCE is located at and doing business at the claimed address, which the director noted is also occupied by a business named [REDACTED]; (9) the business plan did not substantiate the need to hire several of the identified positions within the NCE; and (10) the petitioner failed to provide evidence of a leased warehouse, or of the need for such a warehouse to store its products.

On appeal, the petitioner provides a third business plan dated June 2012. Counsel's appellate brief asserts that the NCE has hired three full-time employees and will hire two additional employees prior to the end of the 2012 calendar year. Counsel also claims that the NCE is negotiating to buy a restaurant in Upland, and "according to the normal size of the fast food (fast-casual style), it can be easily [sic] to reach the goal to make a reasonable profit and to hire 5-6 full-time employees." On appeal, the petitioner also submits the lease agreement and copies of processed checks relating to the NCE's new location in Ontario, California.

Within the appellate brief, counsel addressed items one and two within the above list; however he failed to address the remaining eight items. The petitioner also failed to submit evidence that the newly planned restaurant is situated within an area that is considered a TEA. More importantly, the new business plan, by including a restaurant, is inconsistent with prior plans. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Finally, as discussed above, the AAO was unable to confirm any of the petitioner's alleged business activities to date. Thus, the original business plan is not credible.

The petitioner has not established that her planned investment will create the required ten or more full-time positions based on the business plan submitted within the proceedings before the director. Accordingly, she cannot comply with the regulation at 8 C.F.R. § 204.6(j)(4)(i).

D. 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.

As an additional issue, the petitioner has not established the lawful source of her 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 at 1043, *aff'd*, 345 F.3d at 683; 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 petitioner claimed that she and her spouse obtained the funds to invest in the NCE through real estate transactions of foreign properties. As evidence within the initial proceedings, the petitioner provided audited personal financial statements, a family asset report, real estate agreements, and foreign business registration records, all accompanied by deficient translations. The petitioner also submitted foreign bank account statements, property ownership documents, and personal statements from both the petitioner and her spouse. Within the RFE, the director noted the lack of sufficient evidence and requested additional evidence to establish the lawful source of the petitioner's invested funds, to include "evidence of taxes paid by or on behalf of the petitioner." In response to the RFE, the petitioner submitted personal statements from both herself and her spouse, and evidence related to the ownership of foreign property that was not accompanied by individual certified translations as required by 8 C.F.R. § 103.2(b)(3). The petitioner did not provide five years of foreign tax returns as required by the regulation at 8 C.F.R. § 204.6(j)(3), which the director noted within the RFE. Thus, the petitioner has failed to demonstrate that the funds utilized to purchase the foreign properties were obtained through lawful means.

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. at 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 at 1040, *aff'd* 345 F.3d at 683 (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).

As the petitioner failed to establish the lawful source of the funds utilized to purchase the properties that provided the means for the petitioner to invest in the NCE, she cannot sufficiently demonstrate all of the funds invested in the NCE were obtained through lawful means. Furthermore, as she relied on foreign language documents that are not accompanied by regulatory required certified translations to demonstrate the lawful source of her invested funds, she is unable to demonstrate that she has invested, or is actively in the process of investing, capital obtained through lawful means in accordance with 8 C.F.R. § 204.6(j)(3).

IV. SUMMARY

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.