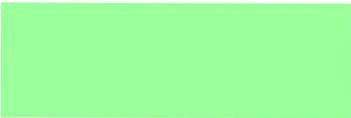


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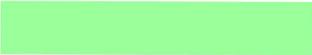
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

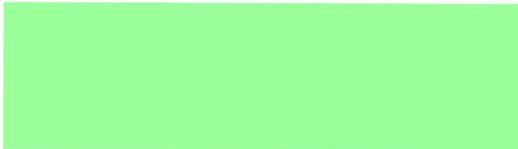


DATE: OFFICE: IMMIGRANT INVESTOR PROGRAM FILE: 
DEC 15 2014

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Chief, Immigrant Investor Program (IPO), denied the preference visa petition, which is now before the Administrative Appeals Office on appeal. We will withdraw the chief's decision based on procedural concerns; however, because the petition is not approvable, we will remand the matter to the chief for further action and consideration.

The petitioner seeks classification as an employment creation immigrant 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 new commercial enterprise (NCE), which operates three restaurants in the Texas area. The petitioner indicated in part 2 of the petition that the NCE is not located in a targeted employment area or in an upward adjustment area. Thus, the required amount of equity investment is \$1,000,000.

In his December 21, 2013 decision, the chief denied the petition because the petitioner did not demonstrate that his investment created at least 10 full-time positions to qualifying employees. On appeal, the petitioner submits a brief with additional documentation. For the reasons discussed below, we will remand the matter back to the chief for further action.

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

On Form I-526, Immigrant Petition by filed on August 20, 2012, the petitioner indicated in part 5 that there were zero full-time employees at the time of his initial investment on January 20, 2009, and that there were 55 full-time employees at the time he filed his petition. The petitioner submitted payroll records from three restaurants covering April 30, 2012 to May 13, 2012 and July 23, 2012 to August 5, 2012. In addition, the petitioner submitted a business plan indicating that "[t]he present business plan is based on the original written in late 2008, we have updated the most important values, for monies invested and in working capital, all Forecasts and Financial tables are related to the original Business Plan, our actual financial position will be shown through our financial statements." According to the business plan, "[t]he staff will include 50 full-time employees and 8 part-time employees, who will work a total of 2200 man-hours per week" Moreover, the business plan

claims 18 employees at each restaurant for fiscal years 2009 and 2010 and 19 employees at each restaurant for fiscal years 2011 – 2012; there will be no general manager positions for fiscal years 2009 and 2010. Specifically, the business plan per store claims an eventual need for: one general manager, one assistant manager, one chef, one sous chef, two part-time cashiers, six waitpersons, three busboys, two cooks, one prep cook/dishwasher, and one prep cook/dishwasher/cleaner.

On April 2, 2013, the California Service Center issued a request for evidence (RFE) indicating:

USCIS cannot determine how many “full-time positions” [have] been created. USCIS notes that some positions listed are being paid lower than the minimum wage, i.e. waitperson 1-6 are being paid \$4,430 per year each, busboy 1 and 3 are being paid \$9,120 and [\$]7,200, respectively.

The NCE’s payroll records show that the NCE paid wages to a total of 82 individuals for the period from April 30, 2012 to May 13, 2012 and 94 individuals for the period from July 23, 2012 to August 5, 2012. However, USCIS cannot determine what position each individuals are hired as or if such positions are full-time.

Therefore, with the evidence submitted, USCIS cannot determine if the NCE has created 10 full time positions or is in the process of creating 10 full time positions. Note that the NCE’s business plan is merely projecting the job creation whereas the payroll records [show] that the NCE already [has] employees.

In response to the RFE, the petitioner submitted an explanation exhibit cover page entitled, “Evidence that the NCE created at least 10 Full Time positions for qualifying employees”; a document from ADP, Inc. entitled, “2013 Fast Wage and Tax Facts”; quarterly payroll records for 2012; first quarterly payroll records for 2013; Employment Eligibility Verification (Form I-9) for 67 employees; and Internal Revenue Service (IRS) Form 1040 U.S. Individual Tax Return, Schedule C, and other tax documentation, such as franchise tax forms, from 2009 – 2012.

The chief’s December 21, 2013 decision stated:

A check of the submitted Form I-9s against USCIS’ records indicates that only eleven (11) of the employees working for the NCE are qualifying employees. The remaining fifty-six (56) employees are not qualifying employees because their provided Alien Registration Numbers (A-Numbers) do not match USCIS records

As such, the record must show that at least ten out of these eleven qualifying employees are full time employees. According to the Letter, it appears that only four (4) of the above named individuals were working an average of more than thirty-five (35) hours a week in the 4th quarter of 2012. Further, a review of the NCE’s Quarterly Wage Report for the 1st quarter of 2013 shows that only one individual was employed for more than 455 (35 hours a week x 13 weeks) hours during the quarter. Therefore, the NCE has not created at least ten full time positions for qualifying employees. Moreover, as noted above, the petitioner did not submit an updated business plan.

Furthermore, USCIS notes that ten individuals above claims [sic] to be a citizen of the United States; however, no additional evidence, such as a birth certificate, naturalization certificate, or passport, was submitted to support such claims.

On appeal, the petitioner claims that he was not afforded an opportunity to rebut the derogatory information in the chief's decision regarding the Form I-9s containing incorrect information. Further, the petitioner claims that the chief was not permitted to request specific documents regarding the U.S. citizenship of ten of the employees. Moreover, the petitioner claims that the NCE has created at least ten full-time positions for qualifying employees and, in the alternative, the petitioner has submitted an updated business plan on appeal that demonstrates the need for at least 10 full-time positions in the next two years.

III. ANALYSIS

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9s, or other similar documents for 10 qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite 10 jobs, the petitioner must submit a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(B).

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 a 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.

Section 203(b)(5)(D) of the Act, as amended, 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." The regulation at 8 C.F.R. § 204.6(e) defines full-time employment as employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week. Full-time employment also 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).

A. Derogatory Information

As indicated above, the petitioner submitted 67 Form I-9s in response to the RFE. The chief determined that the A-Numbers supplied by 56 of the employees did not match USCIS' records. On the Form I-9, the employee is required to complete and sign section one (Employee Information and Verification), certifying that the employee is aware that federal law provides for imprisonment and/or fines for false statements or use of false documents with completion of the form. While the employer must complete and certify section two (Employer Review and Verification), attesting under penalty of

perjury that it has examined the documents and that they appear to be genuine.. The 56 employees indicated in section one that they were lawful permanent residents and/or provided their A-Numbers, and the authorized representative of the NCE indicated in section two that the employees presented their lawful permanent resident cards and recorded their cards' A-Numbers and expiration dates. When the chief attempted to verify the information on the Form I-9s with USCIS' records, the A-Numbers belonged to different individuals or did not belong to anybody.

Therefore, in the chief's December 21, 2013 decision, he determined that 56 of the 57 individuals who claimed that they were lawful permanent residents were not, in fact, lawful permanent residents. 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, 591-92 (BIA 1988). Moreover, the chief determined that out of the remaining 11 Form I-9s, 10 of the employees claimed to be U.S. citizens and one employee stated that he was a lawful permanent resident (LPR). The LPR's status was confirmed by USCIS records; however, the chief stated that the petitioner did not submit any additional evidence, such as copies of a birth certificate, naturalization certificate, or passport to support the employees' claims of U.S. citizenship.

Instead of affording the petitioner with an opportunity to rebut the above information, the chief denied the petition. The regulation at 8 C.F.R. § 103.2(b)(16)(i) states:

If the decision will be adverse to the applicant or petitioner and is based on the derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered

Pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), the chief was required to advise the petitioner of the derogatory information and offer the petitioner an opportunity to rebut the information and present information before denying the petition. Accordingly, we remand the matter to the chief on procedural grounds to afford the petitioner an opportunity to rebut the information and present any additional documentation as required by the regulation at 8 C.F.R. § 103.2(b)(16)(i).

Furthermore, on appeal, the petitioner claims:

Requiring that specific documents be provided to an employer (i[.]e. the NCE) is contrary to the legal restrictions of employment in the United States. As referenced in the Instructions to Form I-9 and the USCIS procedural guidance, an [sic] U.S.-based employer may not request specific documents from its employees. {<http://www.uscis.gov/i-9-central/employee-rights-discrimination/employee-rights>}.

The chief's decision did not request specific documents of the employees' U.S. citizenship status as claimed by the petitioner. Rather, the chief indicated that the petitioner did not submit any "additional evidence, such as a birth certificate, naturalization certificate, or passport." The chief provided examples of additional evidence that the petitioner could have submitted to support the U.S. citizenship claims. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the

Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) allows for the submission of the Form I-9 as evidence of job creation, the petitioner has not established that these 10 employees are qualifying based on the submission of other documentation that was verified to have falsified information. Notably, the Form I-9s the petitioner submitted reveal that the NCE reviewed the employees' drivers' licenses and Social Security cards. The petitioner, however, has not provided independent, objective evidence to establish qualifying documents in support of the instant petition. 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. at 591-92.

Accordingly, as the chief will be affording the petitioner an opportunity to rebut the derogatory information regarding the 56 Form I-9s containing incorrect information, the chief may wish to clarify that copies of whatever documentation the NCE reviewed, as acceptable for Form I-9 purposes, would be acceptable evidence that these additional 10 employees are qualifying pursuant to the regulation at 8 C.F.R. § 204.6(e). The petitioner may also submit any other evidence to establish the job creation requirement and to overcome any of the inconsistencies discussed by the director.

B. Comprehensive Business Plan

On appeal, the petitioner claims:

[W]here the adjudicator questions whether [the petitioner] has actually and lawfully employed the required ten (10) full-time, qualifying employees, but evidence in the record could be liberally construed to establish actual employment or prospective employment within two (2) years, the USCIS should consider the collective record in a favorable manner that is consistent with the legislative intent.

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists evidence to submit if the employees have already been hired following the establishment of the NCE. The regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) states that the petitioner may submit a comprehensive business plan to show the petitioner's investment will result in the need for at least 10 qualifying employees in the next two years.

At the time the petitioner filed his petition, he claimed that his investment had already created 55 full-time positions. On appeal, the petitioner claims that he incorrectly defined full-time employment as the collective earnings of the NCE's 112 employees and it would be unreasonable for him to completely rely on part-time employment for his business. Furthermore, the petitioner claims that he has hired at least 10 full-time positions. Thus, the petitioner is required to submit evidence to establish that he has created or will create at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(A).

As indicated in the chief's December 21, 2013 decision, the petitioner has only demonstrated that he has hired one qualifying employee, [REDACTED], who was confirmed to be a lawful permanent resident, and according to the payroll records submitted on appeal, is working full-time. As the petitioner has only established the full-time employment of one qualifying employee, the petitioner has not demonstrated that he has created at least 10 full-time positions to qualifying employees. 8 C.F.R. § 204.6(j)(4)(i).

Even though the petitioner claims that he has already created at least 10 full-time positions to qualifying employees, the petitioner also submits an updated business plan on appeal. 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. 206, 213 (Assoc. Comm'r 1998). 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.*

According to the updated business plan, there are 11 employees specifically mentioned who are currently employed (as of February 2014) in management positions in the NCE including one district manager, three general managers, two assistant managers (with one vacancy), one district chef, and four chefs. The business plan specifically indicates that these positions are full-time positions. According to the payroll records, out of the 11 management positions, there are only 10 positions that confirm employment as of December 2013. Specifically, [REDACTED], who was supposed to be occupying the chef position at the [REDACTED] restaurant location, was terminated on June 10, 2013. Moreover, [REDACTED], who is supposed to be occupying the assistant manager position at the [REDACTED] restaurant location, only earned \$8,300 as of December 25, 2013 (hire date is listed as of October 30, 2012), which is not reflective of full-time employment wages. In addition, according to the Form I-9s, three of the employees are U.S. citizens [REDACTED] and seven employees are LPRs. The petitioner did not submit independent, objective evidence establishing the U.S. citizenship for the three employees and according to USCIS's records, the A-Numbers supplied by the employees belong to other individuals or do not exist and do not confirm LPR status. The petitioner also did not submit the Form I-9 for [REDACTED]. 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. at 591-92.

In addition, the petitioner's business plan claims actual salaries for fiscal year 2012 – 2013 and projected salaries for fiscal year 2014 – 2016. According to the 2013 payroll records submitted on appeal, there are inconsistencies in the claims for the actual salaries for fiscal year 2013. For instance, the business plan claims that each general manager earned \$39,000 for fiscal year 2013. According to the payroll records, [REDACTED] only earned \$26,779. The business plan claims that each assistant manager earned \$33,800. As indicated above, [REDACTED] only earned \$8,300. The business plan claims that the district chef earned \$36,400. According to the payroll records, [REDACTED] only earned \$32,692. The business plan claims that each chef earned \$33,800. According to the payroll records, [REDACTED] only earned \$9,328, [REDACTED] only earned \$21,990, and [REDACTED] only earned \$12,690. Although [REDACTED] was hired in May 2013, her projected earnings would have only been around \$20,000 if she was employed full-time for the entire year. The petitioner's claims in his business plan are inconsistent with the actual payroll records. 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. at 591-92.

The business plan also indicates that each restaurant location will have a sous chef, cooks, prep cooks/dishwashers, servers, and busboys. There is no indication if these positions are full-time or part-time, and the business plan does not identify the employees who are currently occupying the positions even though the petitioner also submitted payroll records reflecting employment of other workers. Again, the director's decision indicated that the petitioner has only demonstrated that he has hired one qualifying employee, [REDACTED], who was confirmed to be an LPR, and according to the payroll records submitted on appeal, is working full-time. The petitioner has not identified the position that [REDACTED] is occupying within the NCE.

Based on the inconsistencies between the business plan and the NCE's payroll records, the petitioner's business plan is not credible. 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. at 591-92. Moreover, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) does not require the petitioner to only show that his investment will result in the need for at least 10 employees in the next two years; rather, the regulation requires that his investment will result in the need for at least 10 "qualifying" employees in the next two years. The petitioner is not claiming on his petition or in his business plan that he intends to create any additional positions that have not already been created by his investment. In addition, the petitioner is not claiming that he intends to hire qualifying employees to replace any non-qualifying employees. The petitioner has offered no evidence on appeal regarding how he intends to rectify his hiring of non-qualifying employees. For these reasons, the petitioner has not established that he has created or will create at least 10 full-time positions to qualifying employees consistent with the regulation at 8 C.F.R. § 204.6(j)(4)(i).

Accordingly, as the chief will be affording the petitioner an opportunity to rebut the derogatory information regarding the Form I-9s with incorrect information, the petitioner may also submit any additional documentation to demonstrate that he has created or will create at least 10 full-time positions to qualifying employees pursuant to the regulation at 8 C.F.R. § 204.6(a)(j)(4)(i).

IV. ADDITIONAL ISSUE

As an additional issue, the chief should consider if the petitioner has provided sufficient evidence showing the lawful source of his \$1,000,000 claimed capital investment. If the evidence does not document the complete path of the petitioner's funds, the petitioner has not met his burden of establishing that the invested funds were his own or of the lawful source of those funds. See *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998) (citing *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm'r 1998).)

At the time of the initial filing of the petition, the petitioner submitted a January 16, 2007 statement from [REDACTED] indicating that the petitioner had a money market fund reflecting a total account value of \$251,390.91. The petitioner also submitted a July 4, [REDACTED] letter indicating that the petitioner had two checking accounts with a current balance of \$1,004.76 and \$899.52 with 12-month deposits of \$2,172,157.53 and \$1,419,126.43. In addition, the petitioner submitted [REDACTED] wire transfer transactions totaling approximately \$862,374 from various sources to the petitioner along with foreign language documents without English language translations. The regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language

document that a petitioner submits to USCIS must be accompanied by a full and certified English language translation.

In the April 2, 2013 RFE, the chief advised that “merely submitting wire transfers does not establish how the petitioner accumulated the funds.” In response to the RFE, the petitioner claimed that the sources of his investment funds were from the following:

- Savings and mutual funds in the United States - \$291,000
- Residential Real Estate Properties - \$450,000
- Commercial Real Estate - \$65,000
- Business Disinvestment - \$559,000
- Vehicles - \$50,000

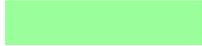
Regarding the savings and mutual funds, the petitioner claimed that they were his life savings since 2000. Regarding one residential real estate property, the petitioner claimed that he bought his primary residence in [REDACTED], paying in full in 2003, and liquidated that property in [REDACTED]. The petitioner further asserts that he purchased land in [REDACTED] in 1995, built a cabin in 1998, and sold that property to his parents in 2010. Regarding commercial real estate, the petitioner claimed that his wife acquired the premises of a business in [REDACTED] and liquidated it in [REDACTED]. Regarding the business disinvestment, the petitioner claimed that he sold two businesses in [REDACTED] and partially liquidated a business interest in South America. Finally, the petitioner claimed that he sold three vehicles in 2007.

In support of the petitioner’s claims, he submitted a [REDACTED] portfolio statement from 2008 – 2010. The petitioner also submitted numerous foreign language documents without English language translations as required under 8 C.F.R. § 103.2(b)(3). The petitioner did submit several bank statements reflecting numerous transfers from the petitioner to the NCE for several thousand dollars each. The statements also, however, reflect transfers from the NCE to the petitioner. For example, the NCE transferred \$36,918.83 to the petitioner on November 26, 2010. In addition, not all of the deposits reflect the source of the deposited funds. For example, the statements for March and June 2012 reflect counter deposits of \$100,000 on March 6, 2012 and \$196,608 on June 7, 2012 without documenting the source of those deposits.

For these reasons, the chief should consider if the evidence in the record is sufficient to document the complete path of the funds from all of his claimed sources.

V. SUMMARY

Based on the reasons stated above, this matter will be remanded for further action in accordance with this decision. The chief must issue a notice of derogatory information and afford the petitioner the opportunity to present a meaningful response if the chief intends to rely on that information. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. The petitioner has not met that burden.



ORDER: The chief's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore we may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the chief for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to us for review.