

(b)(6)

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: **FEB 10 2014**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

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:
[REDACTED]

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 business, [REDACTED] located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000. According to the initial business plan, the petitioner's investment was intended to fund a food manufacturing plant to produce dim sum.

The director determined that the petitioner had not established that her invested capital was obtained through lawful means, and that the petitioner's investment in the new commercial enterprise would create at least 10 new full-time direct positions to qualifying employees. As an additional issue, the petitioner did not demonstrate that she invested the claimed \$500,000 into the new commercial enterprise.

On appeal, counsel asserts that the petitioner submitted documentary evidence demonstrating the path of the petitioner's funds into the new commercial enterprise, and that the petitioner has established that her investment would create at least 10 full-time positions. For the reasons discussed below, the petitioner has not established eligibility for the benefit sought.

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

On November 25, 2011, the petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, along with supporting documentation. On July 25, 2012, the director issued a request for evidence. On October 17, 2012, the petitioner responded to the director's notice and submitted additional documentation. On October 30, 2012, the director denied the petition. The director determined that

the petitioner did not document the lawful source of her funds, that the petitioner did not establish that her investment would create at least 10 full-time positions, and that the petitioner did not demonstrate that the new commercial enterprise was located in a targeted employment area for which the required amount of capital to invest is \$500,000. On November 30, 2012, the petitioner filed a motion to reopen and a motion to reconsider. On December 20, 2012, the director granted the motions but reaffirmed the denial of the petition. The director determined that the petitioner did not overcome her failure to demonstrate the lawful source of her funds and her failure to establish that her investment would create at least 10 positions.

On January 18, 2013, counsel filed an appeal and subsequently submitted two briefs with additional documentation. On appeal, counsel claims that the director erred in determining that the petitioner did not sufficiently document the source of her funds, and the director erred in determining that the petitioner did not establish that her investment would create at least 10 full-time positions.

III. ISSUES ON APPEAL

A. Source of Funds

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

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Id.*

The petitioner claimed that the source of her funds was a gift from her parents, [REDACTED] (father) and [REDACTED] (mother). The petitioner also claimed that her parents obtained the funds from the sale of property for RMB 2,880,000 and from a loan for RMB 800,000. In addition, the petitioner claimed that the funds were transferred by giving cash to friends and family members who either transferred the cash directly to the commercial enterprise's bank account or to the petitioner who then deposited it into her bank account and then transferred it to the commercial enterprise. For the reasons discussed below, the petitioner has not sufficiently documented the path of the funds, so as to establish that the funds not only derive from a lawful source, but are her own, especially as there are multiple investors involved in the new commercial enterprise.

i. Sale of 84 Dong Da Street Property

The petitioner submitted a civil judgment, dated November 10, 2004, from the People's Court of [REDACTED] reflecting an inheritance dispute between the petitioner's grandmother ([REDACTED] and the petitioner's mother, [REDACTED] along with two of her mother's nieces ([REDACTED] and [REDACTED]). The civil judgment indicates that [REDACTED] and [REDACTED] (the petitioner's

deceased grandfather) co-owned three properties that included [REDACTED]. The judgment awarded the [REDACTED] property to [REDACTED]. The petitioner also submitted an undated Property Ownership Certificate the [REDACTED] issued to [REDACTED] for this property.

The petitioner submitted a "Real Estate Contract for Sales" that listed the petitioner's mother, [REDACTED] as the seller and [REDACTED] as the buyer. The contract indicated that the purchase price was RMB 2,880,000.00, "[t]he buyer pays cash for two times," the due date was June 15, 2010, and the property delivery date was September 15, 2010. (Emphasis in original translation.) In addition, the petitioner submitted a "Certification" reflecting that [REDACTED] purchased the property from [REDACTED] in 2010.

As indicated above, the contract claims that [REDACTED] was to purchase [REDACTED] property for cash in the amount of RMB 2,880,000.00. In addition, although the above-mentioned "Certification" indicated that [REDACTED] purchased the property, the "Certification" did not indicate the amount of the property purchase.

At the initial filing of the petition, counsel claimed that "[i]n [REDACTED] most transactions are conducted in cash" and "[w]hen [REDACTED] sold her property, she received cash from the buyer." Furthermore, in response to the director's request for additional evidence, counsel claimed:

[REDACTED] did not deposit the money into the bank. Instead, she kept it at home. Again, there is no bank statement available.

On appeal, counsel submits [REDACTED] savings passbook, issued on January 23, 2010, reflecting deposits in June 2010. Counsel now asserts:

Shortly after receiving the cash payment of RMB 2.88 million in June, 2010, [REDACTED] deposited most of the cash payment in her bank account. It is noted that while we had previously stated that Ms. [REDACTED] did not deposit the cash payment into a bank and she maintained the payment as cash, it was an error due to miscommunication.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 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. *Id.* If U.S. Citizenship and Immigration Services (USCIS) fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The copy of [REDACTED]'s savings book page reflects a deposit of RMB 1,500,000.00 on June 8, 2010, and a deposit of 1,100,000.00 RMB on June 14, 2010. However, the petitioner has not submitted any documentary evidence establishing that these deposits were the result of the sale of her mother's property to [REDACTED] there is no evidence reflecting the transfer of funds from [REDACTED] to the petitioner's mother or even [REDACTED] withdrawal of funds from an account in June 2010. Moreover, even if it was accepted that these deposits were from [REDACTED] which the petitioner has not established, the record contains no documentation relating to the transfer of the remaining RMB 280,000.00. 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. Moreover, as the savings book page ends on June 14, 2010, the petitioner has not established that the funds deposited in June 2010 remained available for investment in 2011.

ii. [REDACTED] Loan

1. Collateral

The petitioner submitted a "Loan Agreement" between [REDACTED] (the petitioner's father) and [REDACTED] for RMB 800,000. As collateral, the agreement indicated that [REDACTED] would use property located at [REDACTED]. The petitioner also submitted an undated "Property Ownership Certificate" for the property reflecting that Mr. [REDACTED] is the owner. In addition, the petitioner submitted a "Public Housing Property Purchase Agreement" reflecting that, according to the translation, the petitioner's father purchased the property from the Property Administration Bureau of [REDACTED] for "\$" 7,226.87 on December 28, 1993.

In counsel's cover letter at the initial filing of the petition, counsel claimed:

[REDACTED] had worked for more than 3 decades before he retired 2 years ago. . . . The mortgage on this piece of property was paid off years ago. . . . The piece of property [REDACTED] bought appreciated 160 times over almost 3 decades, and the current market value is about RMB 1,200,000 (approximately US\$187,717.05).

However, counsel did not submit any documentary evidence to support his assertions. Without documentary evidence to support the claims, counsel's assertions will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The record contains no evidence demonstrating that the petitioner's father paid off the mortgage of the property, that the petitioner's father worked for more than three decades, that the property has appreciated 160 times, and that the current market value of the property is RMB 1,200,000.00. Moreover, the petitioner did not submit any documentary evidence demonstrating the lawful source of funds that the petitioner's father used to purchase the property in 1993. Furthermore, the petitioner did not establish that the value of the property was RMB 1,200,000 in order to use it as collateral to secure a loan for RMB 800,000.

2. The Loan's Purpose

At the initial filing of the petition, counsel claimed that [REDACTED] entered into a loan agreement with [REDACTED] in order to give the funds to the petitioner to invest in the new commercial enterprise. However, according to the Loan Agreement:

1. Loan Purpose:

Party A has borrowed money from Party B for the daughter's tuition fee of studying aboard [sic]. Party A is not allowed to use this fund for other purpose. If Party A fails to follow the terms of this contract, and use the borrowing funds for other purpose [sic]. Party B has the right to revoke the contract and demand Party A to pay off the loan and interest.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. *Id.* If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d at 1220; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10; *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.

In response to the director's request for evidence, the petitioner submitted a statement from her father who claimed that due to the restrictions for remitting money out of China the loan reflected that it was for tuition purposes. Moreover, the petitioner submitted a statement from [REDACTED] who claimed she is the wife of [REDACTED] nephew and that the loan amount was identical to the amount of the petitioner's tuition in order to "avoid any hassle from making a foreign remittance." However, the petitioner did not submit any independent, objective evidence to reconcile this discrepancy. The petitioner indicated on the Form I-526 petition that she was in the United States pursuant to a student visa and did not submit any evidence demonstrating that her tuition derived from sources other than the loan proceeds.

Moreover, in the director's October 30, 2012 denial, the director stated:

The Form I-526 states that the NCE was established on August 18, 2010. The record does not show when the petitioner or her father initially became aware of the [REDACTED] business or an investment opportunity in that business. The record therefore does not demonstrate that the loan obtained in May 2010 was for the purpose of making a gift to the petitioner for an investment into the NCE.

On motion, the petitioner submitted a screenshot from [www.\[REDACTED\].com](http://www.[REDACTED].com) reflecting an airplane itinerary for the petitioner and her father from January 25, 2011 to January 27, 2011 for a trip to [REDACTED]. Counsel claimed on motion that the petitioner's father had the intention to invest in a

business and had been looking at several businesses since 2010. However, counsel did not submit any documentary evidence from 2010 to support his assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Although the petitioner's father executed a statement regarding the petitioner's investment, he never made any claims that he began searching for possible investments in 2010.

3. [REDACTED] Source of Funds

In response to the director's request for evidence, the petitioner submitted a statement from [REDACTED] who stated that she is an associate manager of a marketing department at [REDACTED] and her annual salary is about RMB 250,000 to RMB 400,000. In addition, the petitioner submitted tax payment receipts reflecting that from July 7, 2009 to July 31, 2009, [REDACTED] had RMB 320,000.00 in sales income; from April 7, 2010 to April 30, 2010, she had RMB 480,000 in sales income; from May 1, 2011 to May 31, 2011 she had RMB 137,368.91 in sales income; from July 1, 2011 to July 31, 2011, she had RMB 398,883.84 in sales income; and from May 1, 2012 to May 31, 2012, she had RMB 158,995.11 in sales income. The petitioner also submitted a tax payment receipt covering an illegible period (according to the translation) showing \$65,399.35 in sales income for Jing Li.

A review of the tax receipts does not indicate where [REDACTED] earned the sales income. The petitioner did not submit any documentary evidence to support [REDACTED]'s claim that she is employed by [REDACTED] and whether the amounts on the tax receipts were derived from [REDACTED] employment with [REDACTED]. Moreover, the petitioner has not established whether these tax receipts are her total earnings from July 2009 to May 2012 or they are examples of monthly earnings. Furthermore, the contract was executed on May 3, 2010, and the petitioner submitted a copy of [REDACTED] regular savings passbook indicating that a "borrowing" transaction of RMB 800,000 occurred on May 7, 2010. If it is assumed that this "borrowing" transaction is the loan to [REDACTED] then the tax receipts mentioned above in 2011 and 2012 cannot be used as evidence of the source of funds since this income purportedly occurred after the loan transaction took place. The two tax receipts from 2009 and 2010 indicate a total of RMB 800,000 in earnings; the exact amount of the loan. The petitioner has not demonstrated how much [REDACTED] was able to save from the RMB 800,000 sales income after any deductions for expenses and other liabilities for her living expenses. As the passbook only shows a "carry forward" of RMB 841,314.73 on March 22, 2010 prior to the May 7, 2010 withdrawal (and does not show deposits accounting for [REDACTED] RMB 320,000 sales income during April 2010), the passbook also fails to show [REDACTED] accumulation of funds over time. Therefore, the petitioner has not established that [REDACTED] loan from [REDACTED] originated from [REDACTED] salary. As such, the petitioner has not demonstrated that the loan's source of funds was obtained through lawful means.

4. The Transfer of Funds from [REDACTED] to [REDACTED]

At the initial filing of the petition, the petitioner submitted a document entitled, "Loan Receipt," dated May 7, 2010, indicating that the petitioner's father was the borrower and reflecting that "[t]oday received Loan RMB [800,000.00] from [REDACTED]. All the loan terms are based on the loan agreement." In response to the director's request for evidence, counsel claimed that [REDACTED] gave [REDACTED] cash. On motion, counsel submitted the above-mentioned savings passbook claiming that the "borrowing" transaction of RMB 800,000 demonstrated that [REDACTED] gave [REDACTED] cash on May 7, 2010. However, the petitioner has not demonstrated that the transaction from [REDACTED] passbook on May 7, 2010 relates to the loan to [REDACTED]. 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 210-11. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. Specifically, the petitioner did not submit any documentary evidence that reflected [REDACTED]'s receipt of the withdrawn funds. Instead, counsel claimed in response to the director's request for evidence that the petitioner's father "kept the cash at home for a few months without depositing it into the bank." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The petitioner has not established that [REDACTED] transferred the loan agreement funds to [REDACTED] in May 2010 or that those funds remained available for investment in 2011.

iii. The Transfer of Funds from the Petitioner's Parents

At the initial filing of the petition, counsel claimed the petitioner sought assistance from friends and family to wire funds into the United States because of foreign exchange policy restrictions imposed by China. Counsel also claimed that family and friends transferred \$150,000.00 into the new commercial enterprise's bank, and \$350,000.00 to the petitioner who then in return deposited the money into the new commercial enterprise's bank account. The petitioner did document her transfer of \$350,000 to the new commercial enterprise's [REDACTED] account [REDACTED] from the following personal accounts: [REDACTED] Fargo account [REDACTED] [REDACTED] account [REDACTED] and [REDACTED] account [REDACTED] between March 30, 2011 and August 15, 2011.

1. The Transfer of \$149,955.00 (after fees) from Friends to the New Commercial Enterprise

The petitioner submitted documentary evidence reflecting that [REDACTED] and [REDACTED] initiated wire transfers from or through the [REDACTED] to the new commercial enterprise's [REDACTED] account [REDACTED]. Although the wire transfers were for \$50,000.00 each for a total of \$150,000.00, the [REDACTED] charged a \$15.00 commission fee for each transaction; thus the total amount available to the new commercial enterprise was \$149,955.

On motion, the petitioner submitted a copy of [REDACTED] savings passbook reflecting a deposit of RMB 315,200.00 on July 11, 2011, and a withdrawal of RMB 315,001.00 on July 15, 2011; a copy of [REDACTED] savings passbook reflecting a deposit of RMB 318,800.13 on July 26, 2011, and a

withdrawal of RMB 315,179.00 on July 29, 2011; and a copy of [REDACTED] savings passbook reflecting a deposit of RMB 315,000.00 on July 26, 2011, and a withdrawal of RMB 315,000.00 on July 29, 2011. However, the savings passbooks do not reflect the transfer of funds from the petitioner's parents to [REDACTED]. 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. The record contains no evidence demonstrating that the deposits originated from the petitioner's parents and trace back to the proceeds from the 2010 sale of property and 2010 loan.

On appeal, the petitioner submitted letters from [REDACTED] claiming that they received cash from the petitioner's parents to make wire transfers to the new commercial enterprise's bank accounts. However, the petitioner did not submit any documentary evidence to support the claims. The letters are not sufficient to establish that the funds used to make the wire transfers from or through [REDACTED] originated from cash transactions between the petitioner's parents and them. Although the petitioner has demonstrated the transfer of \$149,955.00 by the petitioner's friends to the new commercial enterprise, the petitioner has not established the transfer of \$150,000 from the petitioner's parents to the petitioner's friends.

2. The Transfer of \$284,980.00 from Friends to the Petitioner

At the initial filing of the petition, the petitioner submitted documentary evidence reflecting the following wire transfers into the petitioner's personal [REDACTED] bank account [REDACTED]

- March 30, 2011 from the [REDACTED] (the petitioner's mother) for \$49,980.00
- April 1, 2011 from [REDACTED] for \$50,000.00
- June 9, 2011 from [REDACTED] \$50,000.00
- June 14, 2011 from [REDACTED] for \$50,000.00
- June 14, 2011 from [REDACTED] for \$50,000.00
- August 12, 2011 from [REDACTED] for \$35,000.00

Regarding the March 30, 2011 transaction, although the wire transfer application indicated \$50,000, the [REDACTED] bank statement indicates that \$49,980.00 was deposited into the account. Moreover, regarding the August 12, 2011 transaction, the petitioner did not submit a wire transfer application; however the [REDACTED] bank statement reflected the transaction.

Similar to the claims above, counsel claimed the petitioner's parents gave the above-mentioned individuals cash who then in return wired money to the petitioner's bank account. On motion, the petitioner submitted copies of the savings passbooks for [REDACTED]. However, the petitioner did not submit any documentary evidence regarding the transactions for [REDACTED]. Moreover, the savings passbooks do not reflect the transfer of funds from the petitioner's parents to [REDACTED] and [REDACTED] or that those funds trace back to the 2010 property sale and loan. 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. There was no evidence demonstrating that the deposits originated from the petitioner's parents.

On appeal, the petitioner submitted letters from [REDACTED] claiming that they received cash from the petitioner's parents to make wire transfers to the petitioner's bank account; the petitioner did not submit a letter from [REDACTED]. However, the petitioner did not submit any documentary evidence to support the claims. The letters are not sufficient to establish that the funds used to make the wire transfers originated from cash transactions between the petitioner's parents and them. The petitioner has not documented the transfer of funds from the petitioner's parents to the petitioner's friends.

3. The Transfer of Funds from the Petitioner's Parents to the Petitioner

At the initial filing of the petition, counsel claimed that when the petitioner returned to China for vacation every year her parents would give her approximately \$9,000.00 to bring back to the United States. Counsel claimed that whenever family or friends visited the petitioner in the United States they would bring her "several thousand dollars each time." At that time, the petitioner submitted her [REDACTED] bank statements reflecting a wire credit of \$35,000 on August 12, 2011 by order of [REDACTED] into her [REDACTED] savings account [REDACTED] and a transfer from that account to her [REDACTED] account [REDACTED] of \$10,000.00 on August, 18, 2011; her [REDACTED] statement for account [REDACTED] reflecting two fund transfer credits from an unidentified source of \$20,000.00 and \$28,000.00 on November 8, 2007, and her [REDACTED] statement for account [REDACTED] reflecting a wire transfer of \$10,000.00 from [REDACTED] on September 11, 2007. However, the petitioner did not submit any documentary evidence reflecting the transfer of funds from the petitioner's parents to the petitioner while she was in China on vacation or from the petitioner's parents to family or friends who visited the petitioner while in the United States and then from family or friends to the petitioner. 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195.

In response to the director's request for evidence, the petitioner submitted a letter from her father who stated that every time the petitioner visited China on vacation he would give her cash and when his relatives travelled between the United States and China they would give her cash. The petitioner submitted additional [REDACTED] bank statements from August 2007 to October 2009 highlighting various deposits in the amount of \$74,285 into the petitioner's accounts [REDACTED] and [REDACTED]. 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. The petitioner has not demonstrated whether these deposits were for her tuition, for her use in an investment, or for any other expenses.

Significantly, the final balance for account [REDACTED] as of November 12, 2008, after all of the documented deposits during this period into that account, was \$1,003.52. The final balance for account [REDACTED] on October 31, 2009 was \$2,402. Thus, these statements do not demonstrate that the full \$74,285 deposited prior to October 31, 2009 remained available for investment in 2011.

On motion, the petitioner submitted additional bank statements reflecting various deposits. Counsel claimed that “[t]he fact that these are cash and the fact that the only person who would give cash to her is her father proves that cash was the common means of money transferred to [the petitioner].” 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. Again, the petitioner has not demonstrated that these bank deposits were a result of the transfer of funds from the petitioner’s parents to the petitioner or from the petitioner’s parents to the family or friends and from family or friends to the petitioner.

On appeal, counsel reiterates his prior claims that the bank statements reflecting various deposits “represent cash given to the petitioner by her parents when she visited China and cash given to the petitioner by her parents through her parents’ friends and relatives who visited the U.S.” 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. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Matter of Izummi*, 22 I&N Dec. at 195. The bank statements do not reflect the lawful transfer of funds from the petitioner’s parents to either the petitioner or to family or friends who in return transferred the funds to the petitioner.

For the reasons stated above, the petitioner failed to establish that she invested her own capital obtained through lawful means pursuant to the regulation at 8 C.F.R. § 204.6(j)(3).

B. Employment Creation

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, Forms I-9, or other similar documents for ten (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).

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.

The regulation at 8 C.F.R. § 204.6(g)(1) states that the establishment of a new commercial enterprise may be used as a basis of a petition for classification as an alien entrepreneur by more than one investor provided that each investor has invested or is actively investing the required amount of capital, and each individual investment will create at least 10 full-time positions. The regulation at 8 C.F.R. § 204.6(g)(2) states that USCIS shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of qualifying positions.

On the petition, the petitioner indicated that the new commercial enterprise resulted from the creation of a new business but did not complete part 5 regarding how many jobs existed at the time of her investment or currently and did not list how many jobs the petitioner's investment would create. The petitioner, however, submitted a 2006 lease for the premises between the landlord and

The April 28, 2011 business plan references [REDACTED]. The director's RFE noted that the new commercial enterprise documented eight employees prior to the petitioner's investment. In response, counsel asserted that the new commercial enterprise had five employees as of the date of the petitioner's investment and 17 currently. It is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998). Thus, the petitioner must document how many employees were involved in dim sum manufacture and sales at the leased location prior to the petitioner's investment in order to demonstrate the total number of jobs required to document the creation of 10 new jobs.

At the initial filing of the petition, counsel claimed in his cover letter that the new commercial enterprise was planning to solicit a \$2,000,000.00 investment and that it had two investors including the petitioner. Moreover, the petitioner submitted a business plan, dated April 28, 2011, reflecting general job descriptions. The petitioner subsequently submitted updated business plans dated November 8, 2012 and February 12, 2013. In the director's request for evidence, the denial and the reaffirmation of the denial on motion, the director raised various concerns regarding the business plans submitted throughout the proceedings.

On appeal, the petitioner submitted four memoranda of understanding, dated February 11, 2013 and February 12, 2013, for the four investors, including the petitioner, reflecting that the first investor will be allocated the first 10 jobs, the petitioner (the second investor) will be allocated the 11th – 20th positions, the third investor will be allocated the 21st – 30th positions, and the fourth investor will be allocated the 31st – 40th positions. Moreover, the petitioner submitted another business plan, dated February 2, 2013.

A review of USCIS records reflects that the director denied the first investor's petition on October 18, 2012, and on December 21, 2012, the director reaffirmed the denial on motion. On January 24, 2013, that petitioner filed an appeal of the director's decision, and, as noted by counsel in a subsequent appellant brief in this matter, the director treated the first investor's appeal as a motion and approved the petition on March 19, 2013.

On May 30, 2013, USCIS issued a policy memorandum entitled *EB-5 Adjudication Policy* (PM-602-0083) reflecting:

Where USCIS has previously concluded that an economic methodology satisfies the requirement of being a "reasonable methodology" to project future job creation as applied to the facts of a particular project, USCIS will continue to afford deference to this determination for all related adjudications, so long as the related adjudication is directly linked to the specific project for which the economic methodology was previously approved.

The director did not issue a new written decision in this matter after treating the related appeal as a motion and approving the other Form I-526. Thus, the director has not articulated to the petitioner in this matter why the business plan for the first investor was sufficient and the same business plan for the petitioner was insufficient or why deference was not applied to the petitioner's business plan.

If this was the only issue, then the AAO would remand the matter to the director to determine whether or not deference should be applied in this case and, if not, to articulate, in a written decision from which the petitioner could file a meaningful appeal, why deference is not applicable. However, as the director correctly concluded that the petitioner has not demonstrated that she invested capital obtained through lawful means pursuant to the regulation at 8 C.F.R. § 204.6(j)(3), the appeal will be dismissed.

C. Investment of Capital

Beyond the decision of the director, the petitioner has not established an investment of the minimum amount. 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(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 petitioner must

show actual commitment of the required amount of capital. The regulation then lists the types of evidence the petitioner may submit to meet this requirement.

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

On Form I-526, the petitioner indicated in Part 3 that her total capital investment in the commercial enterprise was \$500,000.00. In addition, the petitioner has claimed throughout the record of proceeding that she has invested \$500,000.00 into the commercial enterprise. However, based on a review of the documentation discussed above, because of commission fees for three transfers from China to the new commercial enterprise, the record reflects that the petitioner has only invested \$499,955.00.

The regulation at 8 C.F.R. 204.6(f)(2) defines a targeted employment area and explains that the amount of capital necessary to make a qualifying investment is \$500,000.00. Moreover, the regulation at 8 C.F.R. 204.6(j) explains that the petitioner must submit evidence that she has invested or is actively in the process of investing lawfully obtained capital. As indicated above, the petitioner claimed that she has already fully invested in the new commercial enterprise, which she has not, and the petitioner has not claimed that she intends to invest any further capital into the new commercial enterprise.

Accordingly, the petitioner has not established that she has invested or is actively in the process of investing the required amount of capital pursuant to the regulation at 8 C.F.R. § 204.6(j)(2).

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.