

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

[Redacted]

DATE: **JAN 27 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,

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. In addition, the AAO will make a finding that the petitioner has willfully misrepresented a material fact.

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 he established the [REDACTED] as a new commercial enterprise (NCE) through the creation of a new business. As the NCE is within a targeted employment area, the amount of capital the petitioner is required to invest is \$500,000. The NCE operates a Chinese restaurant in [REDACTED]

The director determined that the petitioner did not demonstrate that he had invested or was actively in the process of investing the required \$500,000 from his own lawfully obtained funds, and that the petitioner had not established that his alleged investment in the NCE had created or would create at least 10 full-time jobs for qualifying employees. On appeal, counsel asserted that the director erred. On June 20, 2013, the AAO issued a notice of intent to find willful material misrepresentation. The AAO afforded the petitioner 30 days to file a response to the derogatory evidence in the record. As of the date of this decision, neither counsel nor the petitioner has filed a response. As such, the AAO will adjudicate the appeal based on the documents and evidence in the record.

For the reasons discussed below, the petitioner, by willfully misrepresenting a material fact, sought to procure admission into the United States or other benefit provided under the Act. Moreover, the petitioner has not overcome any of the director's grounds for denial. Accordingly, the petitioner's appeal will be dismissed.

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 HISTORY

The petitioner filed the petition on June 1, 2010, supported by the following types of evidence: (1) the NCE's articles of organization, business license, business plan, and lease agreements relating to the

establishment of the NCE; (2) loan documents and wire fund transfer documents relating to the source of the petitioner's alleged investment and the path of the funds; and (3) the NCE's payroll and other documents pertaining to job creation.

On March 7, 2011, the director issued a request for evidence (RFE). Specifically, the director requested evidence: (1) that the petitioner's requisite capital had been invested in the NCE; (2) that the petitioner's claimed investment had been placed at risk within the NCE and that the funds were used to conduct business rather than remaining available for investment in the business at some point in the future; (3) that the invested capital was obtained through lawful means; and (4) of the requisite job creation.

The petitioner filed a response on May 31, 2011, with additional documentation. On July 13, 2011, the director denied the petition determining that the petitioner did not demonstrate: (1) that the full amount of his funds were placed at risk within the NCE as he had counted some of the NCE's reinvested profits as a portion of his capital investment; (2) the source and origin of the invested funds; (3) that the petitioner's loans were secured by his own assets; and (4) that the investment would result in the requisite job creation as the petitioner's business plans contained insufficient details to be considered an acceptable business plan in accordance with *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

On August 12, 2011, the petitioner filed an appeal. On appeal, counsel asserts: (1) the petitioner meets the capital investment requirement as he has invested \$538,833.23 in the NCE; (2) the invested capital was obtained through lawful means as the majority of the invested funds derived from a loan from the petitioner's sister-in-law; (3) a revised business plan shows that the NCE will create at least 10 full-time positions; and (4) the petitioner's capital has been placed at risk as the capital has been used in actual business activities.

On June 20, 2013, the AAO issued a notice of intent to find willful material misrepresentation based on derogatory information in the record. Specifically, the petitioner has filed two Form I-526s, Immigrant Petitions by Alien Entrepreneur. The AAO pointed out derogatory information in these two petitions, namely, the petitioner had made inconsistent statements on when he first invested in the NCE, the amount of his initial investment and the total amount of his investment. The petitioner had also filed a Form I-140, Immigrant Petition for Alien Worker, and a Form I-485, Application to Register Permanent Residence or Adjust Status, based on the Form I-140 petition. The AAO pointed out conflicting information in the evidence the petitioner filed in support of the Form I-140 petition and Form I-485 application, namely, the supporting evidence contradicts the petitioner's claim that he has invested in, managed, and drawn a salary from the NCE since June 2004 or that he has lived in Colorado since 2004. The AAO afforded the petitioner 30 days to file a response to the derogatory evidence. As of the date of this decision, neither the petitioner nor counsel has filed a response. As such, the AAO will adjudicate the appeal based on the documents and evidence in the record.

III. WILLFUL MATERIAL MISREPRESENTATION

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term “willfully” means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which “tends to shut off a line of inquiry which is relevant to the alien’s eligibility, and which might well have resulted in a proper determination that he be excluded.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in a visa petition proceeding, he or she must determine: (1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; (2) that the misrepresentation was willfully made; and (3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

As discussed in the AAO’s June 20, 2013 notice of intent to find willful material misrepresentation, the record contains derogatory evidence. First, the petitioner has made inconsistent statements on when he initially invested in the NCE, the amount of his initial investment, and the total amount of his investment. In part 3 of the June 1, 2010 petition, the petitioner stated that he initially invested \$3,000 in the NCE on June 8, 2004 and that he had invested \$660,027 as of June 1, 2010. In part 3 of the January 9, 2012 petition, the petitioner’s second Form I-526 petition, the petitioner stated that he initially invested \$10,000 in the NCE on June 4, 2004 and that he had invested \$538,833.23 as of January 9, 2012. This contradicts the assertions the petitioner made in his June 1, 2010 petition as relating to his investment in the NCE.

Second, the petitioner has made inconsistent statements relating to his employment for the NCE. In part 5 of the June 1, 2010 petition, the petitioner claimed to be the “Owner, General Manager” of the NCE, receiving a salary of \$21,600. In his May 26, 2010 letter, initially filed in support of the June 1, 2010 petition, the petitioner asserted that he is “the owner and general manager of [redacted] and that “[i]n the middle of 2004, [he] became the proprietor of [redacted]. The petitioner’s 2004-2010 Internal Revenue Service (IRS) Form 1040s, U.S. Individual Income Tax Returns, and the accompanying IRS Schedules C, Profit or Loss from Business, similarly indicate that the petitioner has resided in Colorado and worked as a restaurateur for [redacted].

since 2004. The business plans that the petitioner filed with the director and filed on appeal indicate that he began operating located in in June 2004.

Other claims and evidence that the petitioner filed with the United States Citizenship and Immigration Services (USCIS), however, contradict the petitioner's assertions made in the June 1, 2010 petition and its supporting evidence. Specifically, a Form G-325A, Biographic Information, that the petitioner filed in support of a Form I-485 application indicates that the petitioner worked as the Vice President of in Taiwan until May 2003, and that he was unemployed from May 2003 through September 26, 2006, the date the petitioner signed the Form G-325A. This claim contradicts the assertions the petitioner made in his June 1, 2010 petition and its supporting evidence that he has invested in, personally managed and drawn a salary from the NCE since June 2004.

Finally, the petitioner has made inconsistent statements relating to his involvement in the NCE located in In support of the June 1, 2010 petition and his claim that he has personally operated and managed the NCE since 2004, the petitioner submitted IRS Form 1040s for 2004 through 2010, showing that he lived in during this period. The petitioner signed the June 1, 2010 petition, certifying under penalty of perjury that the petition and the submitted evidence are all true and correct. According to the Form G-325A, however, the petitioner lived in between July 2003 and September 26, 2006, the date the petitioner signed the Form G-325A. The petitioner also signed the I-485 application certifying under penalty of perjury that the application and the submitted evidence, including the Form G-325A, are all true and correct. The conflicting information listed on the June 1, 2010 petition and the I-485 application cannot both be true.

With regard to this derogatory information, 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.* at 591. Because the petitioner submitted false documents misrepresenting his investment in and management and operation of the NCE, the AAO does not accord any of the petitioner's other claims any weight.

As of the date of this decision, neither the petitioner nor counsel has filed a response or any evidence to overcome, fully and persuasively, the abovementioned derogatory evidence. Thus, the petitioner has not resolved the inconsistencies between the various filings with USCIS such that he has established that the information submitted in support of the Form I-526 petition is true. An immigration officer will deny a visa petition if the petitioner submits evidence that contains false information. See section 204(b) of the Act. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or a petitioner seeking immigration benefits. See *Spencer Enterprises Inc. v. United States*, 345 F.3d 683, 694 (9th Cir. 2003) (upholding the AAO's adverse credibility finding). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides him or her an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. See *Matter of Ho*, 19 I&N Dec. at 591. 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.*

As the petitioner has not filed a response to the notice of intent to find willful material misrepresentation or provided evidence to overcome the derogatory information noted in the notice, the AAO finds that the petitioner has not resolved the inconsistencies among his various filings with USCIS. Therefore, he has not established that the information listed on the June 1, 2010 petition and supporting evidence relating to his claim that he has been personally managing and operating the NCE located in [REDACTED] since June 2004 are true.

The evidence in the record, as analyzed under the BIA's framework, shows that the petitioner has made a material misrepresentation. *See Matter of M-*, 6 I&N Dec. at 149; *Matter of L-L-*, 9 I&N Dec. at 324; *Matter of Kai Hing Hui*, 15 I&N Dec. at 288. First, the petitioner has not rebutted the AAO's finding that he submitted false documentation in support of his June 1, 2010 petition, namely, his May 26, 2010 letter, his IRS Form 1040s and [REDACTED] business plans. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the petitioner's submission of the abovementioned documents in support of the June 1, 2010 petition constitutes a false representation to a government official.

Second, the petitioner willfully made the misrepresentation. The petitioner signed the June 1, 2010 petition, certifying under penalty of perjury that the petition and the submitted evidence are all true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). More specifically, the signature portion of the petition, at part 7, requires the petitioner to make the following affirmation: "I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct." The petitioner's signed May 26, 2010 letter and his signed Form I-526 petition affirmation, made under penalty of perjury, establish that the petitioner willfully and knowingly made the misrepresentation.

Third, the evidence is material to the petitioner's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. United States*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

In this case, the information the petitioner submitted in support of the Form I-526 (which contradicts the information contained in his other filings with USCIS) constitutes material facts because it relates to the petitioner's claimed capital investment in and the management of the NCE. These are elements the petitioner must establish to meet his visa petition eligibility. *See* 8 C.F.R. §§ 204.6(j)(2), (5). The petitioner has not provided competent independent and objective evidence to overcome, fully and persuasively, the AAO's June 20, 2013 finding that he submitted falsified documentation by establishing which, if any, facts are true. Thus, the AAO affirms its finding that the petitioner has

willfully misrepresented a material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

Regarding the instant June 1, 2010 petition, the petitioner's failure to submit independent and objective evidence to overcome the derogatory information discussed above compromises the credibility of the petitioner and the remaining documentation. As previously discussed, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591. Nevertheless, the AAO will address the insufficiency of the petitioner's evidence to demonstrate his eligibility for the classification sought.

IV. TRANSLATED EVIDENCE

While not addressed by the director in her decision, the record of proceeding reflects that the petitioner submitted numerous deficient or summary translations of foreign language documents. Although each translation states, "the above is a true and correct translation," it is apparent from viewing the foreign language documents that the translations are missing information and contain only a portion of the original document's contents. 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." Incomplete, summary translations that contain only the information that another party determined to be relevant do not meet the requirements of the regulation. Initially the petitioner provided summary translations of the following documents, which [REDACTED] certified:

- Professional certification dated January 25, 1995;
- Tax return package (undated document; translation dated May 4, 2010);
- Graduation certificate dated September 2002;
- Graduation certificate dated December 2002; and
- "Loan acknowledge" dated May 30, 2010.

In response to the director's RFE the petitioner provided additional summary translations of the following documents, which [REDACTED] certified:

- Multiple summary translations of loan agreements;
- Multiple summary translations of deposit passbooks;
- Multiple summary translations of wire transfer certificates;
- Multiple summary translations of insurance loan records;
- A summary translation of a wire transfer certificate, of which the date was altered from its original without notation from the translator (the new date reflects January 14, 2008);
- Multiple summary translations of insurance loan agreements;
- A summary translation of the deposit passbook and application for remittance dated March 31, 2010;
- A summary translation of a closing statement for seller dated June 30, 2010;

- A summary translation of a domestic remittance receipt dated March 24, 2011; and
- A summary translation of a credit card loan application dated March 28, 2011.

Although loan document translations submitted in response to the RFE contain more information on the same transactions (e.g., identifying the borrower and the loan guarantor by including each person's address), they remain summary translations of the actual transaction. On appeal, the petitioner has provided photocopies of the same foreign language documents and summary translations he submitted in response to the director's RFE. The translations certified by [REDACTED] do not meet the regulatory requirements under 8 C.F.R. § 103.2(b)(3). As such, they are insufficient to serve as evidence.

Furthermore, the translations of some of the loan documents bear conflicting information. For example, both of the initially submitted loan acknowledgement translations relating to the [REDACTED] indicate that the loan provided to the petitioner was in the amount of "NT \$ 550,000," whereas the translation submitted in response to the RFE indicates that the loan provided was "NT\$ 5,500,000." 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.* 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.* at 591. In this case, all translations that [REDACTED] certified have diminished probative value.

V. ISSUES PRESENTED ON APPEAL

A. Operation of a Business

On the Form I-290B, counsel asserts generally that the director did not consider probative evidence on record. This decision will discuss the evidence below. At the outset, however, counsel asserts generally that the director did not take into account that "a legitimate business was established and has been in operation for many years above and beyond the statutory requirement of two years." This assertion is not persuasive. The statutory requirement for the petitioner to sustain an investment for two years relates to the removal of the conditions on his permanent resident status two years after receiving such status. Section 216A of the Act; 8 U.S.C. § 1186b. The operation of a legitimate business prior to filing a Form I-526 petition does not mandate a finding that the petitioner meets the specific Form I-526 requirements that the petitioner demonstrate an investment of lawful funds and submit a credible business plan.

B. 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 his burden of establishing that the funds are his own funds. *Id.*

In the final decision, the director noted inconsistencies in the petitioner's claims. Specifically, within the initial filing, the petitioner claimed that the funds came from his personal savings earned over several years. However, in response to the RFE, the petitioner claimed that the majority of the funds derived from a loan from the petitioner's sister-in-law. On appeal, counsel acknowledges that the director identified specific inconsistencies, but asserts that the director did not sufficiently explain why the documents submitted in response to the director's RFE were insufficient.

Within the initial filing, the petitioner provided a May 26, 2010 letter, indicating that the source of the invested funds derived from "my personal savings in Taiwan, bank loans, and income earned." The petitioner also provided tax records from his Taiwanese business; loan documents from [REDACTED] totaling \$343,750; loan documents from the [REDACTED] located in [REDACTED] totaling \$165,000; and his United States tax returns from 2004 through 2009. The petitioner made no claim of funds obtained from any other source within the initial filing. However, in response to the RFE, the petitioner amended his claim of the source of the invested funds to include:

- Wire transfers from his account in Taiwan executed by his sister-in-law;
- Numerous personal loans, most of which are from the petitioner's sister-in-law;
- Loans that the petitioner's sister-in-law took out against insurance policies;
- Multiple investments;
- A gift from the petitioner's mother; and
- The transfer of a vehicle to the NCE.

The evidence in the record shows that the petitioner's sister-in-law has loaned funds to the petitioner. The funds from these loans, however, are separate from other funds that she also purportedly transferred from the petitioner's account in Taiwan. These funds originating from the petitioner's account but transferred by his sister-in-law are not loans as the funds were the petitioner's own. The petitioner has not explained why he revised his initial claim that his investment derived from his own funds and two loans from the [REDACTED] to subsequently claim that a large portion of his investment derived from loans from his sister-in-law. It is the petitioner's responsibility 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.*

In pages 4 and 5 of the appellate brief, counsel claims that the petitioner has invested a total of \$538,833.23 in the NCE. Counsel asserts that some of the funds came from the petitioner's own assets or loans purportedly secured by his assets. Counsel asserts that these funds include:

- The June 4, 2004 loan utilizing the petitioner's Taiwanese property as collateral resulting in a \$10,000 investment in the NCE;

- The August 11, 2004 investment with [REDACTED] resulting in a \$4,000 investment in the NCE;
- The April 2, 2010 loan utilizing the petitioner's Taiwanese property as collateral resulting in a \$130,000 investment in the NCE;
- The April 13, 2011 investment with [REDACTED] relating to the sale of the petitioner's Taiwanese property resulting in a \$40,000 investment in the NCE; and
- The transfer of ownership of a vehicle to the NCE on May 3, 2011, with a value of \$12,698.

As discussed, the petitioner has relied on foreign language documents that are not accompanied by the required certified full translations pursuant to 8 C.F.R. § 103.2(b)(3). As such, the loan documents and all banking documents, including the wire transfers to the petitioner's accounts in the United States, are documents of no evidentiary value.

Notwithstanding this deficiency, even if the translations met the regulatory requirements under 8 C.F.R. § 103.2(b)(3), the petitioner has not shown the lawful source of the funds he claimed to have invested in the NCE. First, there is a break in the path of the \$10,000 he claimed to have invested in the NCE on June 4, 2004. In the appellate brief, counsel explains:

- The petitioner obtained a NT\$ 5,500,000 loan from [REDACTED] in 2004 using his property in Taiwan as collateral for the loan;
- The funds from the loan were deposited into the petitioner's [REDACTED] account ending in 2020 on June 1, 2004;
- The petitioner delegated the authority for his sister-in-law to withdraw money from his account ending in 2020, who on June 2, 2004 transferred \$10,000 from his account ending in 2020 to another of the petitioner's [REDACTED] accounts ending in 8545; and
- The petitioner wrote a \$10,000 check, dated June 4, 2004, from his account ending in 8545 to the NCE as his initial investment in the NCE.

The Summary Translation of the Deposit Passbook shows a June 1, 2004 NT\$ 7000,000 cash withdrawal from the petitioner's [REDACTED] account ending in 2020. The translation does not indicate the recipient of these funds; however, the petitioner claimed to have authorized his sister-in-law access to his account. The record lacks documents from the banking authority demonstrating that it was the sister-in-law who withdrew the NT\$ 700,000, as the petitioner claimed. As such, the evidence does not establish how his sister-in-law came into possession of the \$10,000 she wired to the petitioner from a [REDACTED] account on June 2, 2004. The fact that the translations do not identify the recipient of the funds constitutes a break in the path of funds.

Were the AAO to accept the translations, additional questions remain unanswered, such as the account holder of the [REDACTED] account. The later wires from the petitioner's sister-in-law originated from a [REDACTED] account. Page 3 of the petitioner's appellate brief indicates that the petitioner executed the wire from [REDACTED] on June 2, 2004. However, the deficient Summary Translation of the Wire Transfer Certificate reflects that it was the petitioner's sister-in-law, not the petitioner, who performed the transfer. It is the petitioner's responsibility to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N at 591-92. If

the record 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 lawful source. *See Matter of Izummi*, 22 I&N Dec. at 195 (citing *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm'r 1998).) "A petitioner must also establish, pursuant to 8 C.F.R. 204.6(e), that funds invested are his own." *Matter of Soffici*, 22 I&N Dec. at 165 n.3.

Second, the evidence of the sister-in-law's loans to the petitioner is insufficient to establish lawful source of funds. As evidence of the loan agreement between the petitioner and his sister-in-law, the petitioner has provided a Certificate of Creditor's Right. The translation lists several personal loans from the sister-in-law to the petitioner. The parties signed the document on May 25, 2011, after all of the loans occurred. Like a delayed birth certificate, an agreement that the parties signed after the claimed transaction, raises serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Moreover, counsel indicated on page 13 of his appellate brief that in 2010, the petitioner obtained a second NT\$ 5,500,000 loan in Taiwan, using his property located at [REDACTED] as collateral. Counsel also asserts on page 2 of his appellate brief that the petitioner "acquired the funds for [the 2010] investment from a home loan he received using his home in Taiwan as collateral." The Loan Agreement shows that the petitioner's address is [REDACTED] and that the petitioner's sister-in-law's address is [REDACTED]. The Loan Agreement also lists the petitioner's sister-in-law as the loan guarantor. The petitioner has provided no evidence showing that he owned the property located at [REDACTED] when he obtained the loan in 2010.

Third, regarding the August 11, 2004 transaction involving [REDACTED] the petitioner has provided evidence of the value of the investment in his spouse's name through the submission of a November 25, 2003 facsimile on the bank's letterhead. The petitioner, however, has provided insufficient evidence to document the transfer of the investment into his account. The petitioner's banking statement for his account ending in 8545 shows a July 27, 2004 wire deposit of \$24,540.36, without any indication of the origin of the wired funds. Moreover, the petitioner has not provided bank documents showing that he transferred part of the \$24,540.36 from his [REDACTED] account ending in 8545 to his [REDACTED] account ending in 9701 before August 11, 2004, when he allegedly issued a \$4,000 check payable to the NCE from his account ending in 9701. Notably, the July 30, 2004 \$10,000 deposit into the account ending in 9701 predates the two August 2, 2004 checks for \$5,000 each issued on the account ending in 8545.

Fourth, regarding the April 13, 2011 transaction involving [REDACTED] the petitioner has provided a July 29, 2010 memorandum on [REDACTED] letterhead, indicating that the petitioner received a \$40,000 promissory note in connection with his investment in [REDACTED]. The evidence shows that the petitioner and his wife received a \$45,400 check, dated April 7, 2011, from [REDACTED] for the sale of unidentified property. The bank statement for the petitioner's account ending in 9701 shows that on April 13, 2011, the petitioner deposited \$45,400 into the account, and issued a \$40,000 check payable to the NCE from the

account. The petitioner, however, has not documented the connection, if any, among [REDACTED] and [REDACTED]

Fifth, regarding the transfer of ownership of a vehicle to the NCE on May 3, 2011, the petitioner has not documented that he was the owner of the vehicle and that he purchased the vehicle with his own funds. The petitioner's evidence, specifically, a Certificate of Title and registration, demonstrates that the NCE is the owner of the vehicle. The date of acceptance is May 3, 2011, and the date of purchase is May 31, 2010. The record contains no sales documentation regarding the purchase or transactional evidence establishing the funds the purchaser used to buy the vehicle. As such, the petitioner has not shown that he, rather than someone else, transferred ownership of the vehicle to the NCE. Moreover, the petitioner has not provided evidence showing the source of the funds he used to purchase the vehicle, or the date on which he transferred the ownership of the vehicle to the NCE.

Finally, the record includes evidence that the NCE purchased a real estate property located at [REDACTED] on April 1, 2010. At closing, the NCE issued a \$48,191.16 check from its [REDACTED] account ending in 1706. In response to the director's RFE, the petitioner provided the bank statements for the NCE's account ending in 1706 that show the account was opened with a \$56,000 deposit on March 11, 2010. The bank statements further show that the funds the NCE used at closing came from the March 11, 2010 deposit. An additional bank statement the petitioner filed in response to the director's RFE shows that the \$56,000 March 11, 2010 deposit originated from a check issued from the NCE's [REDACTED] account ending in 5501. The bank statements for the NCE's account ending in 5501 show a March 9, 2010 deposit of \$44,537.61 that became part of the \$56,000 deposited into the NCE's account ending in 1706 on March 11, 2010. The petitioner, however, has not shown the source, or more importantly, the lawful source, of the \$44,537.61 March 9, 2010 deposit.

In light of the above, the petitioner has not demonstrated the lawful source of his alleged investment in the NCE. *See* 8 C.F.R. § 204.6(j)(3).

C. Capital Investment

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.

On the June 1, 2010 Form I-526 petition, the petitioner indicated that he made an initial investment of \$3,000 on June 8, 2004 and had invested \$660,072 total as of the date of filing. The petitioner also indicated that he had purchased \$160,000 in assets for use in the enterprise. The record reflects that the NCE purchased a real estate property located at [REDACTED]

for \$165,000 on April 1, 2010, with a \$115,263.50 mortgage from [REDACTED]. On page 2 of the appellate brief, counsel concedes that the funds relating to the purchase of the real property, including the [REDACTED] loan, do not constitute the petitioner's capital investment in the NCE. Accordingly, the petitioner has abandoned that claim from the Form I-526 petition. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

The record contains evidence of the following transfers from the petitioner's accounts to the NCE's [REDACTED] accounts ending in 5501 and 8901:

1. \$10,000 on June 4, 2004 from the petitioner's [REDACTED] account ending in 8545;
2. \$2,000 on June 16, 2004 from the petitioner's account ending in 8545;
3. \$6,000 on June 29, 2004 from the petitioner's [REDACTED] account ending in 9701;
4. \$30,000 on January 29, 2008 from the petitioner's account ending in 9701;
5. \$25,000 on November 15, 2009 from the petitioner's account ending in 8545;
6. \$25,000 on November 18, 2009 from the petitioner's account ending in 8545;
7. \$130,000 on April 2, 2010 from the petitioner's account ending in 9701;
8. \$41,700 on March 29, 2011 from the petitioner's account ending in 9701;
9. \$40,000 on April 13, 2011 from the petitioner's account ending in 9701; and
10. \$212,435.23 on May 2, 2011 from the petitioner's account ending in 9701.

The initial business plan, however, lists only \$19,869 in paid-in-capital for 2010 through 2012. Thus, the business plan is contrary to any claim that the petitioner has made an equity investment of at least \$500,000. Similarly, a compiled balance sheet as of December 31, 2009, reflects a membership investment of \$75,992 and a member drawing of \$78,006. Thus, the petitioner had withdrawn more than he had invested as of that date.

Moreover, the petitioner claims to have made investments in the NCE after the petition filing date of June 1, 2010. In order for these investments to be permissible, the petitioner must demonstrate that any capital invested after the priority date was committed to the NCE as of that date. The petitioner must show actual commitment of both the funds and the asset, i.e., the 2010 vehicle, to demonstrate the required amount of capital is at risk. See 8 C.F.R. § 204.6(j)(2). The "mere intent to invest . . . will not suffice to show that the petitioner is actively in the process of investing." *Id.* An actual commitment does not exist if the petitioner's assets are not at risk. See 8 C.F.R. § 204.6(j)(2); *Matter of Hsiung*, 22 I&N Dec. 201, 204 n.5 (Assoc. Comm'r 1998). The petitioner has not documented that either of these forms of capital was committed to or secured for the investment in the NCE as of the date of filing. Thus, USCIS may not consider these assets as evidence that the petitioner invested or was actively in the process of investing as of the date of filing. The sum of these post-filing investments is \$294,135.23.

In light of the above, the petitioner has not demonstrated that he has invested or is actively in the process of investing the required amount of capital in the NCE. See 8 C.F.R. § 204.6(j)(2).

D. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9s, or other similar documents for 10 qualifying employees, if such employees have already been hired following the establishment of the NCE; or a copy of a comprehensive business plan showing the need for no fewer than 10 qualifying employees. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). 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. *Id.* 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.*

Section 203(b)(5)(D) of the Act 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." If the petitioner invests in a pre-existing, ongoing business, then the petitioner must create no fewer than 10 additional qualifying positions, and he "cannot directly cause a net loss of employment." *Matter of Hsiung*, 22 I&N Dec. at 204-05. Moreover, "it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created," or if the business is a pre-existing, ongoing business. *Matter of Soffici*, 22 I&N Dec. at 166.¹

In part 5 of the June 1, 2010 Form I-526 petition, the petitioner indicated that there were no employees at the time of the initial investment in June 2004 and five employees as of the date of filing. The petitioner indicated that he would create six additional jobs through his additional investment in the NCE. The petitioner indicated in part 4 of the petition that the NCE was the result of the creation of a new business. The evidence in the record, however, does not support the petitioner's assertion. Rather, the evidence shows that the NCE resulted from the petitioner's purchase of an existing business. Specifically, the business purchase agreement, dated June 9, 2004, reflects that the petitioner purchased the business from [REDACTED]. In addition, the business purchase agreement identifies the business name as [REDACTED] and transfers "all furniture, fixtures, supplies, inventory and equipment" and the business' telephone number and customer lists and customer files to the petitioner at the time of purchase. Moreover, according to page 2 of the petitioner's May 26, 2010 letter, initially filed in support of the petition, at the time of purchase, [REDACTED] was operated by [REDACTED] [the business's] current landlord, with only part time workers and [independent] contractors." On page 3 of the same letter, the petitioner stated that when he purchased the business, "[t]he venue was already a restaurant, albeit failing." Similarly, page 6 of the business plan the petitioner filed on appeal provides that the petitioner began to operate [REDACTED] in June 2004 and that "[t]he business was

¹ A petitioner may rely on job preservation in addition to job creation for an investment in a troubled business. *See* 8 C.F.R. §§ 204.6(j)(4)(i), (ii); *Matter of Hsiung*, 22 I&N Dec. 204. In this case, however, neither the petitioner nor counsel has shown, or alleged, that the [REDACTED] constituted a troubled business, as defined under the regulation at 8 C.F.R. § 204.6(e).

procured from [REDACTED], which “had been averaging \$188,000 in sales for the five (5) years prior (200[0]-2004).” Approximately three years after the purchase of the business, the petitioner electronically filed the NCE’s articles of organization on July 11, 2007, creating the [REDACTED]. While [REDACTED] may be new, it is the job-creating business that must be examined in determining whether the petitioner has created a new commercial enterprise. *Matter of Soffici*, 22 I&N Dec. at 166. As such, the evidence in the record shows that the petitioner has invested in a pre-existing, ongoing business. *See Matter of Soffici*, 22 I&N Dec. at 166.

As the petitioner has invested in a pre-existing, ongoing business, he must establish that he has created or will create no fewer than 10 additional full-time positions for qualifying employees, and he “cannot directly cause a net loss of employment.” *Matter of Hsiung*, 22 I&N Dec. at 204-05. The petitioner has not made such a showing. According to the [REDACTED] payroll ledger, in 2004, [REDACTED] had 25 employees. The document does not specify if the employees worked full time or part time or shared positions.

The evidence in the record does not establish that the petitioner’s alleged investment has created or will create no fewer than 10 additional full-time positions for qualifying employees, or that the petitioner has not “directly cause[d] a net loss of employment.” *See Matter of Hsiung*, 22 I&N Dec. at 204-05. In his statement accompanying the June 1, 2010 petition, the petitioner claimed that at the time he purchased the business, it only employed part-time workers. However, the petitioner has not provided evidence to corroborate this assertion. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165.

Moreover, the evidence in the record does not establish how many full-time employees the NCE has hired, as the evidence in the record does not indicate how many hours each employee works per week. The petitioner has submitted quarterly wage reports; quarterly federal tax returns; IRS Form W-2s, Wage and Tax Statements; IRS Form W-3s, Transmittal of Wage and Tax Statements; Form I-9s, Employment Eligibility Verifications; and a 2009 [REDACTED] Payroll Ledger. The most recent IRS Form 941, Employer’s Quarterly Federal Tax Return, reflects that the NCE had 13 employees who received wages, tips or other compensation in the third quarter of 2011. The IRS Form 941 for the second quarter of 2011 shows that the NCE paid wages, tips or other compensation to 15 employees. The evidence in the record, however, does not establish if any of the employees were full-time employees working at least 35 hours a week. On page 19 of the appellate brief, counsel asserts that the NCE currently employs seven full-time employees. As the evidence in the record does not establish the number of full-time employees [REDACTED] had before selling the [REDACTED] in 2004, or the number of full-time employees the NCE has hired, the petitioner has not shown that his alleged investment has created or will create at least 10 additional full-time positions for qualifying employees, or that the petitioner has not “directly cause[d] a net loss of employment.” *See Matter of Hsiung*, 22 I&N Dec. at 204-05.

As the petitioner did not submit sufficient evidence to establish that he had already created the requisite full-time employment, the petitioner must submit a qualifying business plan. The business

plans the petitioner filed with the director do not demonstrate that due to the nature and projected size of the NCE, it will create not fewer than 10 full-time positions for qualifying employees, or provide the approximate dates, within the next two years, when the NCE will fill such positions. The director determined that the business plan submitted with the initial filing and dated May 5, 2010, was not sufficiently detailed to allow the director to reasonably conclude that the NCE had the potential to meet the job creation requirements. The director requested a revised plan in the RFE, and in response, the petitioner submitted a revised business plan, although it bears the same date as the initial plan. A review of the revised business plan the petitioner submitted with the RFE response reveals that the NCE employed seven full-time and two part-time employees. The business plan states the following related to anticipated employment expansion:

Due to the fact that [REDACTED] is projected to show gains in growth in the next two years, it is expected that the restaurant will convert the two current part-time positions into full-time positions during the summer of 2011. It is expected that the two part-time positions will become full-time positions during the summer of 2011 because summer is usually a very busy time for the restaurant. The fact that kids are out of school and the fact that more families tend to go out to eat during the summer weekends means that the restaurant usually experiences a growth in sales during this time and thus needs additional full-time employees in the kitchen it is projected that an additional full-time employee for the kitchen will be necessary during the summer of 2012.

Regarding the business plan submitted initially and in response to the RFE, the director's decision states:

The business plan submitted did not explain the business strategy and marketing plans of the commercial enterprise. Further, it lacked a description of plans for hiring of additionally employees within the 2 year conditional period. In addition, it did not indicate plans to add additional jobs.

The business plan submitted by the petitioner does not contain a specific timetable for hiring nor does it contain job descriptions for all positions. Therefore, this business plan was not found to be a credible document on which to base the commercial enterprise's ability or intention of creating 10 positions for qualifying employees with the next two years.

The business plans the petitioner filed with the director are insufficient to show that the NCE will create at least 10 full-time positions for qualifying employees. Regarding job creation, the petitioner's projection for an expanded number of employees is flawed. 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). The petitioner identified a need for increased employment during the summer months without articulating the need for these additional employees during the remaining three seasons or nine months of the year. These jobs do not represent

continuous, permanent employment as anticipated by the regulation. As such the petitioner's business plans that he filed with the director do not meet the employment creation requirements.

On appeal the petitioner has provided a revised business plan that bears a 2011 copyright notation. The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the filing date of the petition. See 8 C.F.R. §§ 103.2(b)(8) and (12). Where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted on appeal.

In light of the above, the petitioner has not established that his alleged investment has created or will create at least 10 full-time positions for qualifying employees. See 8 C.F.R. § 204.6(j)(4)(i)(B).

VI. SUMMARY

By filing the instant petition and submitting demonstrably false evidence, the petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

In addition, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In a visa petition proceeding, 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The petitioner knowingly submitted false documents in an effort to mislead USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.