

(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: **MAY 12 2014** Office: IMMIGRANT INVESTOR PROGRAM

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:

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 Chief, Immigrant Investor Program Office (IPO), denied the preference visa petition, which 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 new commercial enterprise (NCE), [REDACTED] Inc., doing business as [REDACTED]. The NCE is 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. The NCE manufactures automotive parts for enhancing automotive performance.

The chief determined that the petitioner had not established that he had invested or was actively in the process of investing the required amount of capital, that he obtained the investment capital through a lawful source and the investment amount is his personal capital, and that the NCE has created or will create the requisite 10 jobs.

On appeal, the petitioner asserts that the evidence shows that he is actively in the process of investing the capital. The petitioner also asserts that the banking system in Syria is unreliable, but that he substantially documented the path of his investment and met his burden of establishing the lawful source of funds. In addition, the petitioner asserts that the amended Form I-526 and other supporting documentation are internally consistent and demonstrate that the NCE will create at least 10 jobs.

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

The petitioner filed the petition on October 22, 2012, supported by the following types of evidence: (1) the NCE's corporate documents; (2) documentation establishing that the NCE is in a targeted employment area; (3) a quotation for the purchase of a BLM ELECT80 tube bending machine; (4) documents relating to personal and real property; (5) bank statements; (6) an investment agreement and (7) short term and long term business plans.

On March 2, 2013, the Director, California Service Center, issued a Request for Evidence (RFE). The director requested the following types of evidence: (1) evidence such as banking statements and asset purchase documents showing that the required amount of capital has been invested or is being invested; (2) evidence such as bank statements of the NCE's business accounts, stock purchase agreements, or promissory notes establishing that the petitioner has placed the capital at risk; (3) documentation such as foreign tax documents or other evidence identifying sources of capital to establish that the petitioner obtained the invested capital through lawful means; (4) documents such as tax records or Forms I-9 showing that the NCE has qualifying employees and a copy of a comprehensive business plan showing a need for at least 10 qualifying employees and projected hiring dates; and (5) documentation showing that the petitioner will be engaged in the management of the NCE.

The petitioner submitted a response to the RFE on May 24, 2013, supported by the following types of evidence: (1) an amended Form I-526; (2) articles of incorporation; (3) issued stock certificates and a new stock purchase agreement; (4) wire transfer documents and bank statements showing deposits into the NCE's business account; (5) the NCE's 2012 Profit and Loss Statement; (6) invoices; (7) a statement and an accounting of payment from the petitioner's employer; and (8) articles relating to the economic sanctions in Syria.

On July 9, 2013, the Director, California Service Center, issued a second RFE requesting additional evidence. Specifically, the Director requested: (1) additional evidence showing that the petitioner had committed the full amount of the required minimum investment to the NCE; (2) evidence showing the likelihood that the petitioner is in the process of selling his real property for the claimed amount; (3) evidence explaining how the petitioner will remit the additional funds to the NCE's business account in the U.S.; (4) evidence explaining whether the referenced personal loan from the petitioner on the 2012 NCE balance sheet is part of the \$500,000 claimed investment amount; (5) evidence of the source of funds for the petitioner's purchase of the real property that he will sell; (6) evidence of the source of funds and path of funds the petitioner remitted from Saudi Arabia and transferred through [REDACTED] Bank.

On October 24, 2013, the chief denied the petition. The chief determined that the initial investment amount reflected on the Form I-526 was insufficient and the petitioner's agreement to transfer the balance of the funds through a purchase of stock is insufficient because the obligation is not secured by assets the petitioner personally owns. The chief also concluded that the evidence of record was insufficient to demonstrate a lawful source and lawful path of funds. Finally, the chief determined that the petitioner submitted inconsistent evidence relating to the number of employees at the time of

the initial investment versus the time of filing and that the evidence of record does not establish that the NCE's employees are qualifying, full-time employees.

The petitioner filed the instant appeal, supported by the following types of evidence: (1) three additional articles discussing the banking conditions in Syria; (2) a copy of the amended Form I-526 submitted in response to the first RFE; and (3) the NCE's quarterly contribution return and report of wages for the quarter ending December 31, 2012. On appeal, the petitioner asserts that he invested the requisite amount of capital, as evidenced by a stock purchase agreement that, according to the petitioner, need not be secured by his personal assets. Similarly, the petitioner asserts that he has substantially documented the path and source of the investment capital and that, in light of the Syria's banking conditions, has met his burden. Lastly, the petitioner asserts that USCIS should only look to the reported and projected employment numbers in the amended I-526 and that he has established the requirement for 10 jobs because the information in the amended I-526 is internally consistent with the information in the business plan.

III. ISSUES ON APPEAL

A. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines capital and investment. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The 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).

The petitioner initially submitted a Form I-526, which showed that the initial investment amount was \$105,000, for a 33% ownership of the NCE. Along with the Form I-526, the petitioner submitted supplemental evidence including an investment agreement the petitioner executed on October 16, 2012. The agreement states that as an investor, the petitioner will contribute \$500,000 in exchange for stocks or shares of the company. Furthermore, the agreement states that the profits of the NCE will be split on a 70/30 basis, consistent with a 33% ownership of the NCE. The submitted documentation, however, does not indicate that the petitioner's personal assets secure the promise of future investment such that the petitioner had placed the full investment amount at risk. Similarly, the May 17, 2013 stock purchase agreement lists no security for the petitioner's promise to purchase additional stock by July 1, 2014. Furthermore, the NCE did not enter into a contract to purchase machinery, the claimed use of the petitioner's investment, until December 2, 2012. Even this contract does not bind the petitioner, demonstrating risk, as it states that the NCE was responsible for \$54,750 at the time of the invoice and that [REDACTED] was responsible for the remaining \$348,344.50

prior to shipment.¹ The petitioner acknowledges on appeal that the petitioner's personal assets did not secure the stock purchase agreements, but asserts that this omission is irrelevant because the petitioner liquidated the real estate that would have otherwise secured the balance of the investment amount. The record reveals that the petitioner did not contract to sell the referenced real property until July 23, 2013.

Regardless, the petitioner needed to demonstrate that he committed to investing \$500,000 with some form of agreement or promissory note, secured by his personal assets, as of October 22, 2012, the filing date of the visa petition. Specifically, the regulation at 8 C.F.R. § 204.6(e) defines capital as including indebtedness secured by the investor's assets. *See also Matter of Hsiung*, 22 I&N Dec. 201, 202-04 (Assoc. Comm'r 1998) (providing that a promissory note can document an at-risk commitment of funds only if (1) the petitioner secures his promise with his own specifically identified assets, (2) the promisee has a perfected interest in those assets, (3) the assets are amenable to seizure by a U.S. note holder and (4) the note itself has a fair market value of the required investment amount.) Moreover, there is nothing in the regulations or the precedent decisions that allows the petitioner, in the alternative, to meet the at-risk requirements by liquidating an asset he could have used to secure the note. Therefore, the issue of whether the petitioner's assets secured his promise to make the remainder of his investment is relevant. At the time of filing, and even on appeal, the record does not establish that the petitioner has invested or is actively in the process of investing the required minimum capital as documented by a secured promissory note.

On appeal, the petitioner asserts that the amended Form I-526, which he submitted to USCIS on May 24, 2013, includes the correct information. The petitioner disavows the information in the initial Form I-526 by stating: "[I]n response to the first RFE, the [p]etitioner submitted an amended Form I-526 stating that the initial investment amount was \$267,840.25 and that by the time the balance of the investment was made, he would own 50% of the NCE."

Regardless of the information presented in the amended Form I-526, the filing date for the visa petition remains October 22, 2012, the date the petitioner submitted the original Form I-526 to USCIS. The record reveals that the amended claim of a \$267,840 initial investment includes a series of six wire deposits into the NCE's business account. The record reveals that four of the deposits, totaling \$162,893, occurred after the filing date. The stock purchase agreement, which outlines the methodology for the investment of the balance of the minimum capital amount, and the Board resolution authorizing the additional numbers of stock issuance to allow for the 50% ownership, are dated May 17, 2013. It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); 72 Fed. Reg. 19100 (Apr. 17, 2007) (adopting 8 C.F.R. § 103.2(b)(1), originally proposed at 69 Fed. Reg. 69549 (Nov. 30, 2004); 59 Fed. Reg. 1455, 1458 (Jan. 11, 1994) (explaining in the commentary to 8 C.F.R. § 103.2(b)(12) that supplemental evidence must establish that the petitioner was eligible for the benefit when the petition was filed); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (holding that a beneficiary may not demonstrate eligibility as a member of the professions based on coursework that postdates the filing of the petition). Ultimately, the petitioner cannot secure a priority date based on

¹ [REDACTED] is a technical loan company. *See* [http://\[REDACTED\]](http://[REDACTED]) accessed May 9, 2014 and incorporated into the record of proceedings.

future events. *Matter of Izummi*, 22 I&N Dec. at 175-76 (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that the United States Citizenship and Immigration Services (USCIS) cannot “consider facts that come into being only subsequent to the filing of a petition.”) *See also EB-5 Adjudications Policy*, PM-602-0083, p. 24 (May 30, 2013) (citing *Matter of Izummi*, 22 I&N Dec. at 176 and 8 C.F.R. § 103.2(b)(1) for the proposition that a petitioner cannot establish eligibility under a new set of facts during the pendency of the Form I-526 petition). Thus, at the time of filing, he had invested only \$105,000 and had not, at that time, properly committed the balance of the required investment with a secured note or agreement.

For all of the foregoing reasons, the petitioner did not establish that he had invested or was in the process of investing the requisite amount of capital.

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. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.*

The petitioner acknowledges that his cash transfer to his broker is undocumented. The record reveals that the broker then subsequently wire transferred the funds to the NCE’s business account in the United States. On appeal, the petitioner asserts that given the difficulties of transferring money from Syria due to economic sanctions and problems in the Syrian banking system, by supplying all available documents, the petitioner has met his burden of documenting the path and source of funds.

The chief determined that the evidence in the record of proceeding, including the agreements with the petitioner’s broker to transfer funds, did not establish that the broker received U.S. currency in cash or that any received cash actually belonged to the petitioner. Furthermore, the chief determined that at least one of the wire transfers came from an account of [REDACTED]

On appeal, the petitioner has not provided any information about his relationship to [REDACTED]. Instead, the petitioner has submitted additional articles on appeal regarding the banking conditions in Syria.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. While the petitioner has submitted articles regarding the disrupted banking conditions in Syria, the record contains two online statements of the

petitioner's bank account at [REDACTED]. The submitted online statements reflect banking activities in 2012. The submitted bank statements undermine the petitioner's claim that primary evidence relating to the path of funds is unavailable due to Syrian banking conditions. Even if the petitioner had demonstrated that primary evidence does not exist or is unavailable, he then must submit secondary evidence establishing the path of his investment funds. If the secondary evidence is unavailable, then the petitioner must submit two or more affidavits that comply with the requirements for a legal affidavit. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not submitted secondary evidence nor established that secondary evidence of the source of funds is unavailable. Therefore, the petitioner has not complied with the requirement to document the path of funds.

Accordingly, because the petitioner did not document the path of the capital transferred to his broker, he did not establish that the capital he invested or is in the process of investing originated from a lawful source.

C. 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.

Section 203(b)(5)(D) of the Act, as amended, defines full-time employment as "employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position." Full-time employment also means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

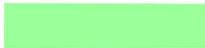
Like the information relating to the initial investment amount, the initial Form I-526 submitted on October 22, 2012 and the amended Form I-526 include different information relating to the number of employees that were present at the time of the petitioner's initial investment. The initial Form I-526 indicates that the NCE had seven employees at the time of investment and seven employees currently. The petitioner further indicated on the initial form that his investment would create an additional five new jobs. The amended Form I-526 indicates that the NCE had five employees at the time of the petitioner's investment, nine employees as of May 24, 2013, and indicates that an additional six new jobs will be created by the investment. At the time of the petitioner's investment, [REDACTED] was a pre-existing business entity. The regulation at 8 C.F.R. § 204.6(j)(4) relating to job creation contemplates 10 new jobs and if a pre-existing business had employees, the NCE must create 10 additional jobs. The regulation at 8 C.F.R. § 204.6(j)(4)(ii) allows an exception to the requirement for 10 new jobs for investments in a troubled business, as defined at 8 C.F.R. § 204.6(e). However, the petitioner in this instance has neither claimed nor demonstrated that the NCE is a troubled business. *See Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998) (absent evidence that the pre-existing business meets the definition of a troubled business, the investment must result in the addition of 10 new, full-time positions); *Matter of Hsiung*, 22 I&N Dec. at 204-05 (a petitioner may not cause a net loss of employment). In fact, the NCE's 2011 tax return and 2012 profit and loss statement both reflect a net income. Because the NCE does not qualify as a troubled business, if [REDACTED] had seven employees at the time of investment, the NCE must prove that it will employ a total of 17 qualifying employees to meet the requirements of the statute and regulation and if it had five employees at the time of investment, the NCE must prove that it will provide a total of 15 jobs.

Accepting the employee information in the amended Form I-526 as the petitioner requests, he still has not meet the requirements of 8 C.F.R. § 204.6(j)(4)(i)(A). The record includes payroll documents for the pay period covering September 26, 2011 to October 2, 2011 (Pay Period 1) and for the pay period covering April 29, 2013 to May 5, 2013 (Pay Period 2). The record does not include documentary evidence, such as Forms I-9, showing that all employees for both periods are lawfully authorized to work in the United States. Such evidence is required initial evidence. 8 C.F.R. § 204.6(j)(4)(i)(A). Furthermore, the payroll documents for both pay periods list [REDACTED] as an employee for the NCE. Mr. [REDACTED] however, is listed as receiving "1099" earnings, suggesting he is an independent contractor. [REDACTED] an employee listed on the Pay Period 2 documents, also is listed as receiving "1099" earnings. The definition of employee at 8 C.F.R. § 204.6(e) explicitly excludes independent contractors. Thus, in May 2013, the NCE employed only seven potentially qualifying employees, two more than it had prior to the petitioner's investment. The business plan projects only an additional six employees beyond those currently employed.

Accordingly, the petitioner did not establish that the NCE has created or will create 10 new jobs as a result of the petitioner's investment.

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.