(b)(6)

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-G-

DATE: OCT. 2, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) § 203(b)(5), 8 U.S.C. § 1153(b)(5). The Director, California Service Center denied the immigrant visa petition. The matter is now before us on appeal. We will dismiss the appeal.

The Petitioner indicated that he and others invested in the new commercial enterprise (NCE). The Petitioner further asserted the NCE is within a targeted employment area (TEA) because the NCE is located in a rural area, and, accordingly, the required amount of capital in this case is $500,000. The NCE proposes to provide home and inpatient care to terminally ill patients. The Director determined that the Petitioner had not established that the NCE will create the required number of jobs, nor had he demonstrated that he obtained the invested funds through lawful means.

The Petitioner previously explained that the job creation would occur at and now, within the appeal brief, he asserts for the first time that the job creation will occur at the NCE. The Petitioner also provides additional evidence relating to the joint savings between himself and his spouse to demonstrate the lawful source of his invested funds. 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 HISTORY

The Petitioner filed the petition on May 17, 2010, with supporting documentation. On January 31, 2011, the Director issued a request for evidence (RFE). The Petitioner responded on April 25, 2011, with additional documentation. On May 9, 2011,[1] the Director denied the petition determining that the Petitioner had not demonstrated the lawful source of his invested funds, and that he did not establish his investment would create at least ten full-time positions. On June 10, 2011, the Petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS) explaining a change in the entity that will serve as the employer and supported by additional material relating to his spouse's earnings. On July 27, 2015, we issued a notice of intent to dismiss (NOID) the appeal and afforded the Petitioner 30 days to respond. The NOID notified the Petitioner of two discrepancies in the record. First, a USCIS officer visited the Georgia Secretary of State, Corporate Division's website, but was unable to verify that the NCE has ever existed. Instead, the USCIS officer found that not the NCE, was registered in Georgia in May 2009, and later administratively dissolved in September 2012. Ultimately, the record reflects the Petitioner included documents to register the NCE with the state, but it does not document that the Secretary of State of Georgia certified the registration such that the NCE could conduct business in Georgia. Second, in support of the Petitioner's assertion that he invested the requisite minimum amount in the NCE, he submitted a bank statement from February 2010 for an account ending in that lists as the account holder. The record does not, however, contain evidence showing that is the same entity as the NCE. The Petitioner did not respond within the 30 day time limit. We may summarily dismiss the appeal as abandoned, on the record, or for both reasons. 8 C.F.R § 103.2(b)(13). For the reasons discussed below, we will dismiss the appeal as abandoned and on the merits.

III. ISSUES PRESENTED ON APPEAL

A. Entity Organization and Relationships

As noted within our July 2015 NOID, the Petitioner has not demonstrated that the NCE was registered to conduct business in the state of Georgia. Even if he had established he registered the NCE in the state of Georgia, he has not shown that the NCE admitted him as a partner. Initially, the Petitioner attached documents including the "Confidential Investor Memorandum," which listed of Georgia as the NCE's general partner and reflected the plan for the NCE to loan funds to While the NCE is a limited partnership, the Petitioner did not submit its limited partnership agreement or any evidence that it admitted the Petitioner as a limited partner. Instead,

[1] While the Director dated the decision May 9, 2012, the remainder of the record, including the appeal that the Petitioner filed in June 2011, reveals that the Director actually issued the decision in May 2011.

the Petitioner provided an unsigned copy of operating agreement, which includes the following statement:

> [The NCE] intends to sell Units to foreign non US citizen investors and to admit as Authorized Members of the Company those investors whose subscriptions are accepted by the Managing Partner.

The Petitioner also submitted a blank Amended and Restated Authorized Membership Agreement Execution Page for _____, and a subscription agreement. While the subscription agreement indicated that it was between the Petitioner and the NCE, it referenced operating agreement. In addition, the managing partners of rather than the general partner of the NCE, signed the agreement admitting the Petitioner. This agreement does not resolve whether the NCE would loan the Petitioner's investment to or whether would admit the Petitioner as an equity-holding member. The initial submission also did not include evidence that the entity the Petitioner identified as the NCE on the petition admitted him as a limited partner.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent, objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless that 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 a 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.* The record does not resolve the above inconsistencies.

The Director informed the Petitioner in the RFE that he must demonstrate that the NCE will create ten jobs, and discussed the job creation figures deriving from It is the job-creating business that USCIS must examine in determining whether an NCE has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998). Moreover, the Petitioner did not base his petition on an NCE that is located within an approved regional center pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). Therefore, indirect jobs at DHH do not satisfy the job creation requirements set forth in the regulation at 8 C.F.R. § 204.6(j)(4)(B)(iii).

In response to the Director's RFE, the Petitioner included an amended business plan that, like the initial plan, related to rather than to the NCE. The Petitioner also affirmed that his investment was not in a regional center. The Director's final decision primarily focused on the fact that the business plan related to instead of the NCE, and the fact that the Petitioner did not submit a comprehensive business plan for the NCE.

On appeal, the Petitioner addresses these concerns stating:

> The direct employment creation can be easily clarified. The investment was directly made to [the NCE], which owns and runs solely, [redacted]. The entity previously in the middle was [redacted] which has been dissolved to make this a direct investment and job creator. [The NCE] is only running this one business. This will create a direct pathway from investment to job creation, thus fulfilling the EB5 requirement of 8 C.F.R. § 204.6(j).

A petitioner, however, must demonstrate eligibility at the time of filing, and a petition cannot be approved if, after filing, that petitioner becomes eligible under a new set of facts or circumstances. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (holding that a petitioner may not show the beneficiary's eligibility as a member of the professions based on coursework that postdates the filing of the petition). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS and regulatory requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175-176 (Assoc. Comm'r 1998) (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition."). *See also Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 1025, 1038, n.4 (E.D. Calif. 2001) *aff'd* 345 F.3d 583 (9th Cir. 2003) (upholding a finding that a construction management agreement with substantive changes "could not be accepted for the first time on appellate review"); *EB-5 Adjudications Policy*, PM-602-0083, 24-25 (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).

The Petitioner's assertion on appeal that there will be direct employment at the NCE reflects a material change from the investment structure the Petitioner initially provided. Accordingly, at issue on appeal is the Petitioner's original proposal.

B. Targeted Employment Area

Beyond the Director's decision, the Petitioner has not established that his investment is in a business that is located in a TEA. We conduct appellate review on a *de novo* basis. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The regulation 8 C.F.R. § 204.6(e) defines a rural area and a TEA. A rural area "means any area not within either a metropolitan statistical area (MSA) (as designated by the Office of Management and Budget [OMB]) or the outer boundary of any city or town having a population of 20,000 or more. A TEA "means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate." The regulation at 8 C.F.R. § 204.6(f) also explains that the minimum investment amount is generally $1,000,000, adjusted down to $500,000 if the investment is in a TEA.

The Petitioner indicated in Part 2 of the Form I-526, Immigrant Petition by Alien Entrepreneur, that his investment is based on a business that is located in a TEA for which the required amount of capital invested has been adjusted downward to $500,000. In Part 3, the Petitioner noted that the street address of the NCE was GA That address is located in Georgia. However, the cover letter provided: "[The NCE] will be located in Georgia." is located in Georgia. counties are separated by several intervening counties.

At issue is the location where the NCE will be principally doing business. 8 C.F.R. § 204.6(j)(6)(ii); *see also Matter of Izummi*, 22 I&N Dec. at 172-73 (finding that a credit company located outside a TEA and engaged in transactions benefitting companies outside a TEA cannot qualify for the reduced investment amount). It is the location where the NCE would be principally doing business according to the initial submission that determines whether the NCE is located in a TEA. The initial submission did include employment projections for in however, the Petitioner cannot rely on those jobs as they were not direct jobs of the NCE. The NCE would be primarily doing business in The Petitioner, however, did not submit any documentation establishing that Georgia, is located in a TEA. Furthermore, according to OMB, Georgia has been designated as an MSA of Georgia and was part of the Georgia MSA as of December 2009, prior to the Petitioner's investment in 2010.[2] Therefore, the NCE did not initially propose to primarily do business in a rural area. Absent evidence that the NCE will be primarily doing business in a rural or high unemployment area, the Petitioner is required to invest at least $1,000,000 pursuant to the regulation at 8 C.F.R. § 204.6(f)(1).

C. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) requires a petitioner to document any employment creation through photocopies of relevant tax records, Forms I-9, Employment Eligibility Verification, or other similar documents for ten (10) qualifying employees. Alternatively, if the NCE has not yet created the requisite ten 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.*

---

[2] *See* http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf, Page 23, accessed on January 27, 2015, and http://www.whitehouse.gov/sites/default/files/omb/assets/bulletins/b10-02.pdf, Page 24, accessed on January 27, 2015, and incorporated into the record of proceeding.

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 characterizes a qualifying employee as a U.S. 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.

At the initial filing of the petition, the Petitioner indicated in Part 5 of Form I-526 that his investment had not created any positions. Thus, the Petitioner was required to file a comprehensive business plan pursuant to the regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) and *Ho*, 22 I&N Dec. at 213, showing the need to hire at least ten employees. At the initial petition filing, the Petitioner provided a business plan for . In response to the RFE, the Petitioner submitted a revised business plan for This revised plan does not meet the relevant requirements as it does not project any direct employment at the NCE. *Id.*

On appeal, the Petitioner includes a May 31, 2011, letter from Chief Financial Officer of , projecting employment at a location based on employment at a location. This letter does not meet the requirements of *Matter of Ho*, 22 I&N Dec. at 213. The Petitioner also submitted letters from officials at the the City of and the all asserting that they have watched construct a 12-bed facility and/or that it is their understanding that the company obtained the necessary licenses. These letters contain similar language and the authors did not explain how they have firsthand knowledge of the licenses. While the letters are not without weight, primary evidence of having obtained the necessary licenses would be copies of the licenses themselves. *See* 8 C.F.R. § 103.2(b)(2) (requiring the submission of primary evidence unless non-existent or unavailable).

Even if the letters met the requirements of an affidavit, these are only acceptable in lieu of primary evidence where the Petitioner demonstrates that both primary and secondary evidence are either unavailable or do not exist. *Id.* The record does not contain the licenses, any documentation of development of property in or other materials that confirm the information in the letters. The Petitioner also did not explain why primary evidence of the licenses is either unavailable or does not exist. Notably, the Petitioner did not incorporate into the record a license for a hospice in Regardless, the letters do not meet the requirements for a comprehensive business plan. *Id.* at 213. As the Petitioner has not submitted a business plan for the NCE, the Petitioner has not established that the proposal for his investment supporting the initial filing of the petition will create at least ten positions as required pursuant to the regulation at 8 C.F.R. § 204.6(j)(4).

D. Multiple Investors

The regulation at 8 C.F.R. § 204.6(g)(1) states that the establishment of an NCE may be used as a basis of a petition for classification as a foreign 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 ten full-time positions. The regulation at 8 C.F.R. § 204.6(g)(2) confirms that USCIS shall recognize any reasonable agreement made among the foreign entrepreneurs in regard to the identification and allocation of qualifying positions.

At the time the Petitioner filed the petition, he attached a continuation sheet for Form I-526 reflecting that there are at least six investors seeking classification as an foreign entrepreneur pursuant to section 203(b)(5) of the Act. The Petitioner did not provide a business plan for the NCE reflecting that the total expected investment would create at least 60 positions. In addition, the Petitioner did not include any agreement among the other five investors in regard to the identification and allocation of any possible positions. Consequently, the Petitioner has not submitted evidence demonstrating that job creation from the NCE will comply with the regulation at 8 C.F.R. § 204.6(g)(2).

E. Investment of Capital

Beyond the decision of the Director, the Petitioner has not established that he has placed the required amount of capital at risk in the NCE. 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 actually commit of the required amount of capital. The regulation then lists the types of documents 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. at 179.

As noted within our July 2015 NOID, the Petitioner has not shown that the holder of the bank account in which he placed his funds, ' is the same entity as the NCE. Therefore, he has not documented that he has placed the required amount of capital at risk in the NCE. Even if the Petitioner had demonstrated that is the same entity as the NCE, as discussed above, absent evidence that the NCE will be principally doing business in a rural or targeted employment area, the Petitioner is required to invest $1,000,000 into the NCE pursuant to the regulation at 8 C.F.R. § 204.6(f)(1). However, the Petitioner has only invested $500,000 and has not submitted any documentation of his commitment or even intent to fully invest $1,000,000. As such, the Petitioner has not established that he has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk pursuant to the regulation at 8 C.F.R. § 204.6(j)(2).

Regardless, although the Petitioner provided a wire transfer document reflecting he transferred $500,000 into the NCE's bank account on February 25, 2010, the Petitioner did not document that his capital has been placed at risk in the NCE. Merely establishing and capitalizing an NCE is not sufficient to show that the Petitioner has placed his capital at risk. *Matter of Ho*, 22 I&N Dec. at 210. A petitioner must submit some evidence of the actual undertaking of business activity. *Id.* While the Petitioner provided letters on appeal that indicate has built a facility

in [redacted] and obtained the necessary permits, the record does not contain support of those assertions, such as the licenses themselves.

The record also lacks evidence that the corporation used or has plans to use the funds the Petitioner deposited in the NCE's account. On February 25, 2010, the same day the Petitioner transferred $500,000 to the NCE's account, the NCE transferred $300,000 from that account to an unidentified deposit account. Accordingly, the Petitioner has not established that he has placed his capital at risk in the NCE pursuant to the regulation at 8 C.F.R. § 204.6(e).

F. Source of Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of documents a petitioner must provide, 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. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the Petitioner cannot meet his burden of demonstrating that the funds are his own funds. *Id.*

The initial cover letter indicated that the "total income of [the Petitioner] and his family is 144,126,218 Korea Won, which is equivalent to $127,534." The letter also asserted that the Petitioner sold property for $544,199 and has savings of $893,725. The Petitioner included a "Certificate of Income" relating to the Petitioner from 2004 to 2008 reflecting annual income between 236,066 Korea Won and 43,978,826 Korea Won. This Certificate of Income does not include the name of the foreign company that employed the Petitioner, and the Petitioner did not provide any evidence relating to the company that employs him that might demonstrate he derived his income through lawful means. Although the appellate brief indicates that he is employed as a physician, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The Petitioner also submitted an English version of a real estate sales contract relating to property in South Korea. This document contains language revealing that it is a translation as the middle of the page contains the text, "/S/ Official Seals Affixed." The translator, however, did not certify the translation in compliance with the regulation at 8 C.F.R. § 103.2(b). As noted by the Director in the RFE, this translation also is not accompanied by any foreign language document. The record does not contain the original foreign language document in response to the RFE or on appeal. As such, the Petitioner has not included probative evidence of a lawful real estate sale.

The Director requested documentation to identify and trace all sources and origins of the funds invested into the NCE. In response, the Petitioner resubmitted the same banking and income document and translation from the initial petition. On appeal, the Petitioner provides additional evidence reflecting his spouse's income, which he asserts was not included in the total discussed within the initial filing brief. The Petitioner's appellate brief states that the Petitioner's spouse "is a dentist and her income, combined with his, shows clearly that he was able to easily afford the investment and still live comfortably." The initial cover letter, however, indicated that the figure was the total income for the Petitioner and for his

family. The Petitioner has not explained or reconciled the inconsistencies with objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Specifically, the appellate brief does not explain why the Petitioner did not previously include his spouse's income when he affirmed it was a total for himself and his family.

Nonetheless, in support of this new assertion, the Petitioner submits a notarized translation of a Certificate of Income. The translator of this new document did not include the name of the company that employed the Petitioner's spouse, nor does the Petitioner provide any evidence relating to his spouse's employer. Although the appellate brief indicates that she is employed as a dentist in South Korea, going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The Petitioner does not submit any probative evidence to support his original assertion that he used funds from his income from 2004 to 2008. Moreover, the record does not include any probative evidence demonstrating that he acquired funds lawfully through the sale of real estate. Simply going on record without supporting documentation is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Id.* at 165. These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1040 *aff'd* 345 F.3d at 683 (affirming a finding that a petitioner had not established the lawful source of her funds due to the fact that she did not designate the nature of all of her employment or submit five years of tax returns).

As the Petitioner has not sufficiently documented the source of his funds with probative evidence, the Petitioner did not establish that he invested capital obtained through lawful means pursuant to the regulation at 8 C.F.R. § 204.6(j)(3).

IV. SUMMARY

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

ORDER: The appeal is dismissed.

Cite as *Matter of H-G-*, ID# 15098 (AAO Oct. 2, 2015)