



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF Y-L-

DATE: MAY 10, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) § 203(b)(5), 8 U.S.C. section 1153(b)(5). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Chief, Immigrant Investor Program Office, denied the petition. Specifically, the Chief found that the Petitioner had not placed the required amount of capital at risk in the NCE.

The matter is now before us on appeal. In his appeal, the Petitioner submits a brief, along with additional documentation, and states that he will incur a profit or loss as business permits, and there was an unfortunate error in his previously submitted documentation.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. The commercial enterprise can be any lawful business that engages in for-profit activities. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. This job creation should generally occur within two years of the foreign national's admission to the United States as a conditional permanent resident. Specifically, section 203(b)(5)(A) of the Act, as amended, provides that a foreign national may seek to enter the United States for the purpose of engaging in an NCE:

- (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

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the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. ANALYSIS

A. Relevant Facts

On March 6, 2013, the Petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, based on an investment in [REDACTED]. The Petitioner stated in Part 3 (Information About Your Investment) that [REDACTED] was a retail business located at [REDACTED] California. He indicated that on February 6, 2013, he invested \$500,000 in [REDACTED] and would in turn own 47.5% of the company. In addition, the Petitioner claimed in Part 5 (Employment Creation Information) that [REDACTED] did not currently employ any individuals but his investment would create between 10-15 jobs. Moreover, in the Petitioner's cover letter, he indicated that [REDACTED] is "launghing [sic] its store" in [REDACTED] California, a targeted employment area (TEA) in which the required amount of capital invested has been adjusted downward to \$500,000. He also acknowledged that he was "in the early stages of creating his business in the USA."

The Petitioner submitted the following documentation: (1) a partially dated and signed operating agreement between [REDACTED] and [REDACTED] for the creation of [REDACTED];¹ (2) an undated and partially signed subscription agreement between [REDACTED] and the Petitioner;² (3) an application to form [REDACTED] as a limited liability company in California filed with the California Secretary of State on February 1, 2013, identifying the address of the LLC as [REDACTED] in [REDACTED], California; (4) a memorandum of understanding from the law offices of [REDACTED] regarding [REDACTED] operating agreement and the applicability of California limited liability laws; (5) documentation from the Internal Revenue Service (IRS) assigning [REDACTED] an employer identification number (EIN); and (6) documentation relating to the petitioner's source and path of funds. The Form I-526 was not accompanied by a comprehensive business plan or evidence of the existence of [REDACTED].

On September 8, 2014, the Petitioner submitted a "revised" Form I-526 with additional documentation. The Petitioner's cover letter stated that "[t]he original Form I-526 initially submitted incorrectly indicated the entity name and location." Specifically, [REDACTED] name was changed to [REDACTED] located in [REDACTED], California. According to the Petitioner:

The name change of the business was due in part to a decision made by the Petitioner and the other partners in starting a company which provided services geared towards the real estate and business industry. At the time the original I-526 was submitted,

¹ The Petitioner signed and partially dated the operating agreement in February 2013. Neither [REDACTED] nor [REDACTED] signed the agreement.

² The Petitioner signed the subscription agreement. The general partner's signature, name, title, and date are missing.

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Petitioner was still working with the business plan writer in creating a new business, at its very early stages, however, if you notice from the documents submitted, the name [REDACTED] was included in the planning stages. It was also planned for [REDACTED] to help with property management and real estate consulting. Moreover, the location used to file the Article[s] of Incorporation for [REDACTED] was not yet official, as a result, we are now updating the file with current and official documents after operating for over one (1) year.

* * *

[REDACTED] is a[n] [NCE] and has its main operation office and warehouse located at [REDACTED] in the State of California, [REDACTED]. At the time of submittal of the Form I-526, the new enterprise's office was located at [REDACTED] CA [REDACTED]. . . . The nature of the business did not change, [the] Petitioner merely created the official name and found an official location.

The Petitioner also submitted the following pertinent documentation: (1) a statement of information for an LLC in California, which was filed on April 5, 2013, reflecting the LLC's name as [REDACTED] with an address at [REDACTED] CA, and listing the type of business as a "wholesale & retail" company; (2) an operating agreement between [REDACTED] and [REDACTED] for the creation of [REDACTED] with the Petitioner and [REDACTED] owning 47.5% each and [REDACTED] owning 5%; (3) an amendment to the escrow agreement replacing [REDACTED] with [REDACTED] (4) a business plan for [REDACTED] "focus[ing] on real estate purchase, sales, refurbishing, and investment services"; (5) an LLC certificate of amendment in California filed on July 8, 2013, changing [REDACTED] to [REDACTED] and (6) a California Fictitious Business Name Statement, filed on January 15, 2014, registering [REDACTED] as a fictitious business name of [REDACTED]

On December 30, 2014, the Chief issued a request for evidence (RFE), indicating, in pertinent part, that according to the [REDACTED] operating agreement, 100% of the net profit and loss of [REDACTED] will be allocated to [REDACTED]. As such, the Chief determined that the Petitioner did not place his capital at risk in [REDACTED] as all of the net profits and losses would be allocated to a third party, [REDACTED]. Further, the Chief cited to the operating agreement reflecting that [REDACTED] would receive a fixed income of \$15,000 regardless of whether [REDACTED] made a profit or loss. In addition, the Chief found that although the Petitioner submitted an amended escrow agreement, the Petitioner did not present the original escrow agreement.

In response, the Petitioner stated that he serves as vice president of [REDACTED] owns 50% of the company, and is entitled to half of the net profits or losses. The Petitioner submitted [REDACTED] bylaws and indicated that as he also owns 47.5% of [REDACTED] he has placed his capital at risk for the purpose of generating a profit. The Petitioner also presented the original escrow agreement for [REDACTED]

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On September 9, 2015, the Chief denied the petition determining that the Petitioner did not establish that he placed his capital at risk with [REDACTED] for the purpose of generating a return on the capital at risk. In addition, the Chief indicated that according to the subscription agreement, the Petitioner invested his capital with [REDACTED] rather than [REDACTED].

On October 9, 2015, the Petitioner filed an appeal of the Chief's decision. Specifically, the Petitioner claims that the business structure was created to protect his investment from possible problems with other business partners, and his percentage of ownership of [REDACTED] should not be an issue. Furthermore, the Petitioner states that the reference to [REDACTED] "is an unfortunate error, as no such Regional Center exists and never has existed" and submits an updated subscription agreement.³

B. Capital Placed at Risk to Generate a Return

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. *See Matter of Izummi*, 22 I&N Dec. 169, 184-85 n. 16 (Assoc. Comm'r 1998) (noting that for the capital to be "at risk" there must be a risk of loss and a chance for gain); *see also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy 5* (May 30, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>.

Although on appeal the Petitioner submits a revised subscription agreement removing references to the nonexistent business, [REDACTED], the Petitioner did not submit a revised operating agreement.⁴ According to the operating agreement for [REDACTED] receives 100% of the net profits and losses of [REDACTED] and owns 47.5% of [REDACTED] shares. The Petitioner owns 47.5%, and [REDACTED] owns the remaining 5%. In addition, the operating agreement indicates that [REDACTED] will receive an annual \$15,000 fixed income from [REDACTED] regardless of any profits or losses. Therefore, a nonexistent business owns 5% of [REDACTED] and receives a yearly fixed income. Further, the Petitioner did not update his business plan, as page 10 reflects that [REDACTED] is a managing member of the investment structure with a 5% ownership interest.

In addition, the Petitioner's brief claims that he "owns 50% of the NCE [REDACTED]." This statement is in contradiction to the operating agreement reflecting that the Petitioner owns 47.5% of [REDACTED]. We must look to the plain language of the documents executed by the petitioner and not to unsupported statements. *Izummi*, 22 I&N Dec. at 185. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

³ The Petitioner signed the subscription agreement, but [REDACTED] the General Partner, did not sign or date the document.

⁴ As will be discussed further below, even had the Petitioner submitted a new operating agreement, the changes to the NCE constitute an impermissible material change that prevents approval of the petition.

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The Petitioner did not submit any documentary evidence establishing his 50% ownership of [REDACTED].

The Chief determined that the Petitioner did not place his capital at risk with [REDACTED] since [REDACTED] receives the net profits and losses from [REDACTED]. On appeal, the Petitioner states that the business structure was created to protect his investment from possible problems with other business partners, and this structure does not guarantee a return on his capital investment as he will incur a profit or loss as business permits.

The Chief's decision referenced and compared [REDACTED] bylaws to a redemption agreement. In no event may the petitioner enter into a redemption agreement prior to the end of the two-year period of conditional residence. *Izummi*, 22 I&N Dec. at 186-87. We find, however, that the business structure and allocation of profits and losses to [REDACTED] do not equate to a redemption agreement as there is no indication in the record that the Petitioner is guaranteed any return of his investment.

Nevertheless, as the Petitioner did not submit a valid operating agreement, he did not establish the operating structure and the ownership of profit and loss distributions. As previously discussed, the record indicates that a nonexistent entity is not only a partner in [REDACTED] but also will receive an annual guaranteed income of \$15,000. Therefore, the Petitioner has not demonstrated that he placed his capital investment at risk for the purpose of generating a return on the capital placed at risk under the regulation at 8 C.F.R. § 204.6(j)(2).

III. MATERIAL CHANGE AND ELIGIBILITY AT TIME OF FILING

A. Material Change

Although not addressed by the Chief, the Petitioner's revised Form I-526 submitted on September 8, 2014, constitutes a material change to the NCE. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS and regulatory requirements. *Izummi*, 22 I&N Dec. at 175-76 (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 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"); USCIS Policy Memorandum PM-602-0083, *supra*, at 24-25 (citing *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).

Specifically, at the initial filing, the Petitioner indicated that [REDACTED] is a retail business; in his cover letter, he stated that [REDACTED] was launching a store; and on his statement of information, he indicated that [REDACTED] is a wholesale and retail company. In the Petitioner's revised Form I-526, however, the Petitioner changed the NCE's name and location, and more importantly, materially altered its industry focus to realty and investment services to include residential building construction;

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activities related to real estate; other professional, scientific, and technical services; and other personal services. There is no evidence that [REDACTED] is involved in any aspect of retail and wholesale services. Contrary to the Petitioner's claim that the nature of the business did not change, the record of proceedings shows that the NCE changed from a retail and wholesale company to a realty and investment business. In addition, the operating agreement's structure changed from the formation of [REDACTED] between [REDACTED] and [REDACTED] to the formation of [REDACTED] between [REDACTED] and [REDACTED]. Moreover, the location of the NCE was changed from [REDACTED] to [REDACTED].

Although the Petitioner claimed that [REDACTED] was included in the planning stages in documents submitted at the initial filing of the petition, there were only references to [REDACTED] in the operating agreement and subscription agreement. Furthermore, the Petitioner indicated that it was planned for [REDACTED] to assist with property management and real estate consulting. However, there is no evidence to support any of the Petitioner's assertions. 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The NCE's industry change and operating structure reflect a material deviation from the business' nature and investment structure the Petitioner initially provided. In addition, the Petitioner has not established that the NCE's location change from [REDACTED] to [REDACTED] does not constitute a material change. Accordingly, the Petitioner's amendment relating to [REDACTED] cannot be considered as a basis for eligibility.

B. Eligibility at Time of Filing

The Petitioner did not demonstrate that he was eligible at the time of his initial filing of Form I-526. Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions. *See* 8 C.F.R. § 103.2(a)(1). Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. *See* 8 C.F.R. § 103.2(b)(1). A petition must be accompanied by evidence that the investor has invested or is actively in the process of investing lawfully obtained capital in an NCE in the United States which will create full-time positions for not fewer than 10 qualifying employees. *See* 8 C.F.R. § 204.6(j). Moreover, 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 for 10 qualifying employees. Alternatively, if the NCE 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 10 qualifying employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). *See also* the filing instructions to Form I-526, May 10, 2012, edition, in effect at the time.

A comprehensive business plan, as contemplated by the regulations, should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan,

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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.*

As discussed above, the Petitioner indicated on his petition that his \$500,000 capital investment in [REDACTED] had not created any qualifying jobs but would create between 10-15 jobs. As the Petitioner did not create at least 10 qualifying positions, the Petitioner was required to submit a comprehensive business plan as required by both the regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) and the filing instructions, showing that his investment would create at least 10 qualifying positions at [REDACTED]. The Petitioner, however, did not submit a comprehensive business plan or any evidence supporting his claim that his investment would create between 10-15 jobs. In fact, the Petitioner stated that at the time he submitted his Form I-526, he was still working with the business plan writer in creating a new business. The business plan and creation of a new business, however, should have occurred prior to the filing of the petition. Furthermore, the record of proceedings reflects no evidence of how he would have created any jobs at [REDACTED]. Simply claiming that jobs would be created on the petition is insufficient to show that jobs will be created. In fact, as evidenced in the Petitioner's revised filing 18 months later, the Petitioner changed course and created a different industrial focus for his NCE.

As the Petitioner did not provide an explanation or submit documentary evidence showing how he intended to create jobs at [REDACTED], he did not demonstrate eligibility at the time of the filing of his initial petition. *See* 8 C.F.R. § 103.2(b)(1), (12). The petitioner must demonstrate eligibility for the benefit or the status at the time the petition is filed. *See Matter of Pazandeh*, 19 I&N Dec. 884, 886 (BIA 1989) (citing *Matter of Atembe*, 19 I&N Dec. 427, 429 (BIA 1986); *Matter of Drigo*, 18 I&N Dec. 223, 224-225 (BIA 1982); *Matter of Bardouille*, 18 I&N Dec. at 116). A petition may not be approved if the beneficiary or the self-petitioner was not qualified at the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). This follows the policy of preventing affected parties from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977). A petition should not become approvable under a new set of facts. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Reg'l Comm'r 1977). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

In the case here, the Petitioner filed for classification as an immigrant investor under section 203(b)(5) of the Act before he was prepared to establish eligibility. Accordingly, as the Petitioner did not demonstrate that his investment would create at least 10 qualifying positions at initial filing, the petition cannot be approved.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. The burden is on the Petitioner to show 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). The Petitioner in this case has not established that he qualifies for the immigrant investor classification. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-L-*, ID# 16384 (AAO May 10, 2016)