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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**



B7

DATE: **APR 09 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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.

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in a business the petitioner created, [REDACTED], which is the new commercial enterprise (NCE). The NCE is not 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 \$1,000,000. Counsel asserted that the petitioner had loaned money to various companies and that they had repaid those loans with interest by transferring the loan proceeds to the NCE. The petitioner, a resident of China, documents her assets in China and her husband's business interest in China. The petitioner submitted Chinese loan documents whereby the petitioner purportedly loaned five companies certain sums in April 2009 payable to the petitioner in April 2010 and wire transfer receipts documenting that the companies transferred funds to the NCE in April 2010. Two of the companies, [REDACTED] transferred funds from the United Arab Emirates rather than China. One of the companies, [REDACTED] appears to be a Pakistani company. The record contains no evidence that the petitioner has any business affiliations in Pakistan. The petitioner submitted a business plan with a "timeline" that, in fact, listed no projected dates for each milestone.

On appeal, counsel asserts that due to government restrictions on wire transfers, the petitioner arranged for five companies to wire transfer her investment funds to the NCE. Counsel also asserts that the petitioner's capital was obtained through lawful means through the sale of real estate in China; her possession of a certificate of deposit and real estate in China, of which the petitioner and her spouse are the full owners; and ownership in a [REDACTED] of which the petitioner's spouse owns 80 percent of the company stock. Finally, counsel asserts that the NCE has the need and potential to meet the job-creation requirements within the next two years and that the NCE currently employs six full-time employees.

For the reasons discussed below, the AAO concurs with the director's ultimate determination that the petitioner has not demonstrated that *she* has invested or is actively in the process of investing the required amount of capital at risk in the NCE in accordance with 8 C.F.R. § 204.6(j)(2). The AAO finds that the petitioner has not demonstrated that *she* has invested, or is actively in the process of investing capital obtained through lawful means. The AAO finds that counsel's passing reference to the NCE's job creation potential without identifying an error in the application of the law or in a statement of fact underlying the director's concerns with the submitted business plan is insufficient as a basis of the appeal. Thus, the petitioner has abandoned this issue on appeal.

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 BACKGROUND

On January 24, 2011, the director issued a request for evidence (RFE). Specifically, the director requested: (1) evidence the petitioner has invested the required amount of capital, which are her own funds; (2) evidence demonstrating that her investment funds were obtained through lawful means, to include five loans; and (3) "a sufficiently detailed business plan that permits USCIS to reasonably conclude that [the NCE] has the need and potential to meet the job-creation requirements." More specifically, the director requested that the petitioner provide "the timeline for completing the feasibility study of establishments of retail and warehouse facilities and the execution of the expansion plan, including project milestones and timelines for which direct job creation is based on and correlate these project milestone and timelines to job creation."

In response, counsel asserted that the petitioner provided her friend, [REDACTED] with more than \$1,000,000 and that [REDACTED] subsequently arranged for five companies to transfer the money to the NCE. [REDACTED] asserts that the petitioner transferred the funds to him on April 1, 2010 and April 16, 2010. The petitioner submitted receipts for the transfer of funds from the petitioner to [REDACTED] on those dates, approximately a year after the loan documents that the petitioner initially claimed as the ultimate source of her purported investment. The claim that the petitioner transferred the funds ultimately invested to [REDACTED] in April 2010 is inconsistent with the initial claim that the petitioner loaned money to companies in April 2009 which the companies repaid in 2010 by transferring the money to the NCE in the petitioner's name. The petitioner also submitted a revised business plan containing the same "timeline" without any projected dates for each milestone.

The director determined that the petitioner had failed to demonstrate: (1) that the funds various companies transferred into the NCE were her own, rather than deriving from an outside entity; (2) that the funds the petitioner purportedly invested in the NCE derive from a lawful source; and (3) that the business plan lacked sufficient detail to demonstrate that the NCE has the potential to meet the job creation requirements.

On appeal, counsel asserts that: (1) due to government restrictions on wire transfers, the petitioner arranged for five companies to wire transfer her investment funds to the NCE; (2) the petitioner's capital was obtained through lawful means through the sale of real estate in China; her possession of a certificate of deposit and real estate in China, of which the petitioner and her spouse are the full owners; and ownership in a Chinese real estate company, of which the petitioner's spouse owns 80

percent of the company stock; and (3) the NCE has the need and potential to meet the job-creation requirements within the next two years and that the NCE currently employs six full-time employees.

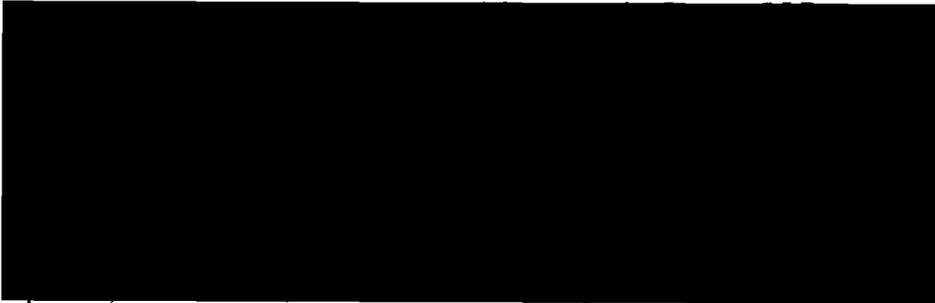
III. ISSUES PRESENTED ON APPEAL

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 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.

The petitioner claims the following investments of capital in the form of cash in the NCE:

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The total actual transfers from entities other than the petitioner listed above, derived from the transfer documents themselves, is \$ [REDACTED]. As evidence of the above investments, the petitioner provides wire transfer documents from each of the five entities, a loan agreement in a foreign language between each entity and the petitioner accompanied by the required translation, and the NCE's bank account documents reflecting the corresponding monetary transfers.

As evidence of the monetary transfer from the petitioner to [REDACTED] the petitioner provides three wire transfer receipts dated: April 1, 2010, in the amount of [REDACTED] Chinese Renminbi (RMB) equivalent to [REDACTED] on said date; April 16, 2010, in the amount of [REDACTED] RMB equivalent to [REDACTED] on said date; and April 20, 2010, in the amount of [REDACTED] RMB equivalent to \$ [REDACTED] on said date.¹ The petitioner has documented that she transferred [REDACTED] RMB, an amount equivalent to [REDACTED] U.S. dollars, to [REDACTED] in April 2010. However, counsel's briefs accompanying the response to the RFE and the appeal indicate that the petitioner provided [REDACTED]

¹ <http://www.oanda.com/currency/converter/>, [accessed on February 7, 2012, a copy of which is incorporated into the record of proceeding.] While this website is not endorsed by the U.S. Internal Revenue Service (IRS), it is listed as a reliable external source in which to rely on the IRS website. See <http://www.irs.gov/businesses/small/article/0,,id=130524,00.html>, [accessed on February 7, 2012, a copy of which is incorporated into the record of proceeding.]

██████████ RMB, allegedly equivalent to ██████████. Evidence accompanying both the RFE response and the appeal contains an undated translation of a letter from ██████████ and wire transfer receipts between the petitioner and ██████████. There is a large discrepancy between the amount of RMB the petitioner transferred to ██████████ on April 16, 2010. ██████████'s letter indicates that the petitioner provided him with ██████████ RMB on this date, while the translation of the actual wire transfer receipt indicates that she provided him with ██████████ RMB on the date in question. The AAO may not rely upon the petitioner's, counsel's, or ██████████ assertions of the amount transferred; it must rely upon the actual documentary evidence submitted in support of the petition. As it stands, the petitioner has failed to demonstrate that she provided ██████████ with the equivalent of \$1,000,000, which he allegedly provided to the five entities. Furthermore, the petitioner failed to provide evidence of the monetary transfer from ██████████ to any of the five entities, in which the petitioner entered into a loan agreement. The petitioner has documented that she wire transferred money to ██████████ entered into a loan agreement with each of the five entities, and that each entity transferred money into the NCE's corporate account. However, there is a break in the path of the funds between ██████████ and the five entities. As such, she cannot demonstrate that the capital invested in the NCE from the five overseas entities derives from her own assets.

The required amount of amount of capital to be invested in the NCE is \$1,000,000. The petitioner must demonstrate that, as of the petition filing date, *she* has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. The regulations repeatedly make it clear that the alien or the petitioner must demonstrate that *he or she* has invested or is actively in the process of investing the requisite amount of capital. *See* 8 C.F.R. §§ 204.6(e), (j), (j)(2), (j)(3). Additionally, the petitioner must demonstrate that she has placed her own assets at risk and that she is the actual owner of the invested capital. *Matter of Soffici*, 22 I&N Dec. 158, 165, n.3 (misabeled as n.5 in the footnote) (Assoc. Comm'r 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Assoc. Comm'r 1998); *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998).

The petitioner has failed to demonstrate that *she* has invested or is actively in the process of investing the required amount of capital in the NCE or that she is the owner of the invested capital. As such, she cannot comply with the regulation at 8 C.F.R. § 204.6(j)(2).

B. Source of Funds

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

Within counsel's brief accompanying the initial petition, the petitioner claims that she entered into a loan with five separate entities in 2009, which subsequently paid back the loans with interest in 2010. In response to the director's RFE and on appeal, the petitioner abandons her claim that these were loans to other businesses. Instead, she claims that she appointed her friend, ██████████, to arrange for five companies to transfer money out of China and into the account of the NCE. Counsel indicates that this arrangement was designed to circumvent China's restrictions on foreign exchange remittances. The petitioner has not resolved the inconsistent nature of the alleged monetary

transactions. In one instance, she purports to have loaned five companies a sum of over \$1,000,000 in 2009, while in another she claims that she transferred funds to [REDACTED] in 2010 to arrange for the five companies to transfer her money out of China for her.

Additionally, counsel's appellate brief and the response to the RFE assert that the invested capital was obtained through lawful means, and as evidence the petitioner offers numerous forms of documents relating to the assets that she and her spouse possess in China. The petitioner has failed to provide a connection between her own assets and the capital invested in the NCE. There is no correlation or nexus between the petitioner's jointly held assets with her spouse and the capital invested in the NCE. Specifically, the petitioner has failed to demonstrate that the funds, which are invested in the NCE, are in any way attributable or derived from her assets.

The petitioner provides wire transfers dated in 2010 between herself and [REDACTED] loan agreements between herself and the five entities dated in 2009, and transfers of money from these entities into the NCE's corporate account in 2010. However, she has not provided evidence documenting any monetary transactions from her personal accounts to the accounts of the five entities that would support the loan documents either directly or through [REDACTED]. The petitioner has failed to provide evidence documenting the route in which her funds allegedly travelled after leaving her possession. If the claim in response to the RFE is true, there is a break in the path of the funds between [REDACTED] and the five entities that ultimately transferred funds into the NCE. If the initial claim that the petitioner loaned these companies money in 2009 that they repaid in 2010 is true, there is a break in the path of funds between the petitioner and the companies.

As such, the petitioner cannot demonstrate that the monetary transfers into the NCE's corporate account are actually loan repayments or that the funds originally belonged to her. Without the documentation of the full path of the funds, the five overseas entities are infusing the NCE with capital that the petitioner has failed to demonstrate are her own funds. As the petitioner has not documented the path of the funds, she has failed to meet her burden of establishing that the invested funds are her own. *See Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r) (citing *Matter of Soffici*, 22 I&N Dec. at 158.) If, in fact, the five companies actually made the investment from their own funds, USCIS will not credit the petitioner with that investment, even if she is a shareholder in these companies, something she has not documented. A corporation is a separate legal entity from the petitioner. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980) and *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980). *See also Matter of Izummi*, 22 I&N Dec. at 195 (noting that evidence of the earnings of the petitioner's corporation says nothing about the petitioner's level of income).

Finally, two of the companies routed money through the United Arab Emirates (UAE) and one of these companies is a Pakistani company. The petitioner has not demonstrated that she or [REDACTED] have any business affiliations in the UAE or Pakistan.

While the AAO is aware of the restrictions on persons transferring money out of China, and understands the concept the petitioner arranged in order to remove money from her home country,

she has failed to sufficiently document the full path of the transactions, which allegedly took place regarding the loans.

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 her burden of establishing that the funds are her own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D.Calif. 2001) *aff’d* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

As the petitioner has failed to document the complete path of the deposited funds from her personal accounts through [REDACTED] and the five companies to the NCE, she cannot demonstrate that the funds are her own and she cannot demonstrate the lawful source of the invested funds. As a result, she is unable to demonstrate that she has invested, or is actively in the process of investing capital obtained through lawful means in accordance with 8 C.F.R. § 204.6(j)(3).

C. Job Creation

The director discussed the evidence submitted pursuant 8 C.F.R. 204.6(j)(4)(i) and found that the petitioner failed to establish her eligibility. First, the petitioner’s response to the director’s RFE, which specifically requested project milestones and timelines correlated with job creation, included a revised business plan that did not include the requested information. The regulation at 8 C.F.R. § 204.6(j) states that USCIS may request evidence it deems appropriate. The director put the petitioner on notice of required evidence and gave a reasonable opportunity to provide it for the record before adjudicating the visa petition. The petitioner failed to submit the requested evidence. The AAO would thus not consider a new timeline on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

Regardless, on appeal, the petitioner makes only passing reference to this issue, asserting that the NCE has the need and potential to create 10 jobs in two years and has already created six jobs. The petitioner failed to identify an incorrect application of law or statement of fact underlying the director’s finding that the business plan’s “timeline,” which lacked any dates, did not correlate with the projected job creation and was insufficient. The AAO, therefore, considers this issue to be abandoned. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009) (a passing reference in the arguments section of a brief without substantive arguments is insufficient to raise that ground on appeal). Accordingly, the petitioner has not established her eligibility under 8 C.F.R. § 204.6(j)(4)(i).

IV. CONCLUSION

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.