identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

**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

[redacted]

DATE: AUG 20 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 filed the petition on February 24, 2010, seeking 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 petitioner indicates that he created Harbor Automotive, Inc. as a new commercial enterprise (NCE) through the expansion of an existing business. The petitioner explained that Harbor Automotive, Inc. would engage in the repair of foreign and domestic cars, body work, painting, and car rental. The director determined that the petitioner had not demonstrated a qualifying investment of lawfully obtained funds and denied the petition accordingly. The petitioner filed the instant appeal.

The AAO affirms the director's ultimate determination that the petitioner has not demonstrated that she has made or is actively in the process of making an at-risk investment of the required amount of lawfully obtained capital in the NCE. Further, the NCE does not meet the definition of a troubled business. Consequently, the petitioner has not demonstrated that the NCE will meet the job creation requirements.

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

## II. PROCEDURAL AND FACTUAL HISTORY

The record indicates that the petition is based on an investment in Harbor Automotive, Inc. As the NCE is not located within a targeted employment area, the required amount of capital in this case is $1,000,000.

On December 16, 2010, the director issued a request for evidence (RFE). The director requested evidence that: (1) the petitioner has invested the requisite amount of capital in the NCE, including evidence to substantiate the claim that the business' bank account held more than $1,000,000; (2) the investment funds were placed at risk; (3) the NCE has undertaken actual business activity; and (4) the invested capital was obtained through lawful means by demonstrating the path, sources, and origins of

the invested funds prior to the date the petitioner made the initial investment. The petitioner responded on March 9, 2011, with additional documentation.

The director determined that the petitioner had only placed a portion of the required amount of capital at risk as of the petition filing date, and that the petitioner failed to establish the lawful source of funds because she failed to document the full path of the funds.

On June 3, 2011, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts that: (1) the petitioner has submitted sufficient evidence to demonstrate that she has deposited $1,000,000 into the NCE; (2) the petitioner's invested capital was placed at risk; (3) the petitioner made these investments or committed to them prior to filing the petition; and (4) the petitioner sufficiently documented that the invested funds were obtained through lawful means.

## III. ANALYSIS

### A. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines the terms "capital" and "invest." The regulation at 8 C.F.R. § 204.6(j)(2) explains that, as of the filing date, 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 claimed on the Form I-526 petition that she had made an initial investment of $100,000 and, in section 3.2 of the initial undated business plan, that the remaining $900,000 was scheduled to be paid after USCIS approved the petitioner's visa. The petitioner provided a photocopy of the front of the January 19, 2010 check drawn on GBC International Bank account ***-**1078. The petitioner's name and address are handwritten on the check. She also provided a GBC International Bank account verification of deposit for savings account ***-**6565 showing a balance of $1,032,567 as of December 18, 2009.

In her RFE, the director noted the existence of a GBC International Bank account ***-**6565 in which the petitioner claimed a balance of $1,032,567 as of December 18, 2009, and requested a current bank statement relating to this account. In response to the RFE, the petitioner provided photocopies of the front of three checks, all drawn on GBC International Bank account ***-**1078, a Harbor Automotive, Inc. bank statement reflecting a $300,000 deposit on June 15, 2010, and a GBC International Bank account statement for account ***-**1078 dated February 15, 2011, reflecting the petitioner as the account holder and a remaining balance of more than $600,000. The three checks submitted in response to the RFE contained the following dates and amounts: January 19, 2010, in the amount of $100,000; June 15, 2010 in the amount of $300,000; and February 14, 2011 in the amount of $600,000.

The director determined that the evidence was insufficient to demonstrate that the petitioner had invested or was actively in the process of investing the requisite capital. Specifically, the director found that the checks failed to demonstrate a monetary transaction actually took place. Additionally, the director found that the petitioner had not demonstrated that the amount in her personal savings account was committed to the NCE. Therefore, these funds could not be considered to be at risk.

In the appellate brief, counsel claims that the petitioner made the following cash investments in the NCE, all from her GBC International Bank account:

- $100,000 on January 19, 2010;
- $300,000 on June 15, 2010; and
- $600,000 on February 14, 2011.

The funds in the February 15, 2011 GBC International Bank account statement remained under the petitioner's control and cannot be considered to be an investment placed at risk for the purpose of generating a return on the capital placed at risk, as the funds were not committed to the NCE.

The petitioner has not demonstrated a qualifying investment in the NCE through the January 19, 2010 transaction of $100,000 alone. Further, because the other funds in her personal savings account were not committed to the NCE as of February 24, 2010, the petition filing date, she has not established that those funds were at risk. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

To establish that the petitioner has invested, or is actively in the process of investing, she must show that she has placed the required amount of capital at risk. An actual commitment does not exist if the petitioner's assets are not at risk. *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Assoc. Comm'r 1998). A mere deposit into an account, such that the petitioner exercises sole control over the funds, does not qualify as an active, at-risk investment. Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. *See Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998).

On appeal, counsel asserts that the petitioner demonstrated her financial commitment to the NCE and agreement to invest $1,000,000 to the NCE upon signing the Harbor Automotive, Inc. Agreement of Purchase of Sale of Shares (Purchase Agreement). The petitioner signed this document on January 19, 2010, prior to the petition filing date. The petitioner did not place the $900,000 in an escrow account to be released to the NCE upon approval of the Form I-526. Item 2 of the Purchase Agreement provides that the petitioner would pay the balance of the purchase price

($900,000) by certified check on closing. Item 3 of the Purchase Agreement sets a closing date of "on or before March 2, 2010, or such later date as may be mutually agreed to in writing by all Parties." The petitioner did not document any additional transfers to the NCE prior to March 2, 2010, or that the parties mutually agreed to a later closing date.

The petitioner failed to establish that the Purchase Agreement constitutes a qualifying promissory note or other similarly binding agreement. A promissory note can constitute capital or evidence that the petitioner is actively in the process of investing. *Matter of Hsiung* at 202, 204 n.5; *Matter of Izummi,* 22 I&N Dec. 169, 193 (Assoc. Comm'r 1998). In either situation, the petitioner must demonstrate that she has placed the requisite amount at risk. *Matter of Hsiung,* 22 I&N Dec. at 204 n.5. The Purchase Agreement does not identify any collateral securing the petitioner's promise to invest the remaining $900,000, which is required to demonstrate that those funds are at risk. *Id.* at 204; *Matter of Izummi,* 22 I&N Dec. at 194 n.27.

Additionally, counsel asserts that "the respective parties had agreed to expand Harbor and both [parties] agreed that Petitioner's capital investment was for the sole purpose of said expansion;" however, item nine of the Purchase Agreement states:

> Entire Agreement
>
> This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof, and the final complete and excusive expression of the terms and conditions thereof. All prior agreements, representations, negotiations, and understandings of the parties hereto, oral or written, express, implied, are hereby suspended and merged herein.

Despite counsel's claim, the Purchase Agreement does not contain an expansion provision whereby the petitioner has committed to the expansion of the business. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner has failed to demonstrate that she had invested or was actively in the process of investing the required amount of capital in the NCE as of the date of filing. As such, she has failed to meet the regulatory requirements 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 evidence a petitioner must submit, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital, as applicable.

The petitioner initially submitted (1) evidence of ownership and property sales receipts of the petitioner's property in Vietnam dated in 2008 and 2009, (2) evidence of the petitioner's equitable interest in Phu An Corporation, (3) 2004 through 2009 foreign corporate tax filings and receipts, expenses and income reports for Phu An Corporation, (4) a Westpac bank statement for account **-*989 reflecting the petitioner's account balance as of December 12, 1999 in her personal account located in Australia, (5) a verification of deposit relating to the petitioner's personal savings account ***-**6565 in the United States with GBC International Bank dated December 18, 2009, and (6) a personal check drawn on GBC International Bank account ***-**-1078.

The director requested "documents to identify and trace all sources and origins of the funds invested into [Harbor Automotive, Inc.] . . . and any other evidence identifying the source(s) of the petitioner's investments into the new commercial enterprise." In response, the petitioner provided a stock sales contract and its translation into English, and two December 1999 Australian bank account statements for her personal accounts: **-*-989 and **-*166. As stated above, the petitioner also submitted two additional checks drawn on GBC International account ***-**-1078 on June 15, 2010 and February 14, 2011 and a bank statement for that account dated February 15, 2011.

The stock sales contract indicates that on October 1, 2006, Mrs. Nguyen Thuy Lien purchased stock in The Giang Dien Tourist JSC company through the petitioner's spouse as a representative of that company. The total sale amount for the stock was 9,165,600,000 Vietnamese Dong to be paid in installments. Finally, the contract states that the buyer would pay 8,890,632,000 Vietnam Dong directly to the petitioner.

The Westpac checking account statement, account **-*166, covers the period between September 22, 2009, and December 22, 2009. This statement reflects numerous debits and credits to the account; however, the petitioner failed to provide corresponding evidence demonstrating the origins of the credits and the destinations of the debits. The Westpac savings account statement, account **-*989, covers the period between July 24, 2009, and December 22, 2009. This statement also reflects numerous debits and credits, but is unaccompanied by corresponding evidence demonstrating the origins and destinations of the listed funds.

There are multiple breaks in the path of the invested funds. The initial break is between the sale of the stock and the Westpac checking account. The petitioner failed to provide evidence of the monetary transfers into the Australian banking account. There is an additional break in the path of the funds between the Westpac checking and the Westpac savings account in Australia, both of which belonged to the petitioner. There is a break in the path from the Westpac savings account and the GBC International Bank savings account, and from the GBC International Bank account into the NCE.

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).

On appeal, the petitioner submits additional documents in an attempt to establish the lawful source of her invested capital and the path through which the funds travelled to the NCE. Specifically she submits evidence of wire transfers reflecting the transfer from her Westpac account **-*166 of $300,000 to GBC International Bank account ***-**-6387 and $600,000 on July 12, 2009 to GBC International Bank account ***-**-6565. The AAO will not consider this evidence on appeal because the petitioner failed to provide it in response to the director's specific request for "all sources and origins of the funds invested into [Harbor Automotive, Inc.] . . . and any other evidence identifying the source(s) of the petitioner's investments into the new commercial enterprise."

The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner has established the beneficiary's eligibility for the benefit sought as of the filing date of the petition. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766; *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the director to consider the submitted evidence, she should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted on appeal.

As the petitioner has failed to document the complete path of the deposited funds into the NCE, she has failed to demonstrate that the funds are her own and the lawful source of the invested funds. As a result, she has failed 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). For this reason, the petition may not be approved.

C. Employment Preservation

The petitioner is claiming that the NCE meets the statutory employment creation requirement through employment preservation within a troubled business. The regulation at 8 C.F.R. § 204.6(e) defines a troubled business as one that has experienced a net loss in the 12 or 24 months prior to the filing date of the petition. This loss must be at least equal to 20 percent of the business's net worth prior to the loss. *Id.*

The petitioner is asserting that the NCE experienced a 20 percent decrease in net income from the 2008 to the 2009 tax year. Net loss, however, is an accounting term defined as the amount by which total costs and expenses exceed total revenue for the accounting period. Dictionary of Accounting Terms 312 (5th ed. 2010). The regulatory definition of a troubled business, therefore, does not compare two net incomes over two periods. A company with a simple decrease in net income rather than a net loss cannot meet that definition.

The petition filing date is February 24, 2010. Pursuant to the regulation at 8 C.F.R. § 204.6(e), the petitioner must demonstrate the NCE experienced a net loss in the 12 or 24-month period prior to this date. According to the NCE's Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, schedules L, the NCE began the 2008 tax year with a $6,244 net worth and the 2009 tax year with a $32,924 net worth.[1] Thus, in order to be a troubled business, the NCE would have to demonstrate a net loss of at least $1,248 in 2008 or over both 2008 and 2009, or a net loss of at least $6,584 in 2009. In fact, the NCE's tax returns reflect a net income of $31,924 in 2008 and a net income of $18,964 in 2009.[2]

The petitioner has failed to demonstrate that the NCE has experienced a net loss of at least 20 percent of its net worth in the 12 or 24 months prior to filing her petition. Instead, the NCE enjoyed a net income during that period. As a result, the NCE fails to meet the definition of a troubled business and may not rely upon employment preservation toward meeting the job creation requirements found at 8 C.F.R. § 204.6(j)(4)(ii). The regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) states that if the petitioner has not already created the necessary jobs, he or she must submit a comprehensive business plan. As the petitioner's business plan does not project the creation of an additional 10 jobs, the petitioner has not demonstrated that the NCE will meet the job creation requirements found at 8 C.F.R. § 204.6(j)(4).

---

[1] "Net worth" is total assets less total liabilities. Dictionary of Accounting Terms 313 (5th ed. 2010).

[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf [accessed on February 21, 2012] (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2007, 2008, 2009, the petitioner's net income is found on Schedule K of its tax returns.

## IV. CONCLUSION AND SUMMARY

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.