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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

[redacted]

DATE: JUL 1 6 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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

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 (the Act), 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in a business, located in San Francisco, California. The required amount of capital in this case is $1,000,000. According to the business plan submitted in August 2011, specializes in tour arrangement, passenger bus chartering and hotel booking services.

The director determined that the petitioner has failed to demonstrate that the new commercial enterprise has created or will create not fewer than ten full-time positions for qualifying employees, as required under the regulation at 8 C.F.R. § 204.6(j)(4)(i).

On appeal, counsel asserts that the director erred. Counsel states that although the record does not indicate that created ten full-time positions when the petition was filed, it "show[s] a pattern of increasing hiring activities, making it probable that the enterprise will create 10 full-time jobs after the petitioner is able to move to the United States as [a] temporary permanent resident." For the reasons discussed below, the AAO finds that the petitioner has not overcome the director's ground for denial. In addition, the AAO finds that the petitioner has not established the lawful source of the required amount of capital.

I. LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the petition on December 1, 2010, supported by the following types of evidence: (1) partial copies of the petitioner's and his family members' passports, (2) checks payable to totaling $1,000,000, (3) bank statements showing corresponding deposits, totaling $918,000, (4) an English "summary translation" of a September 30,

2010 letter from explaining the source of the petitioner's funds, (5) an English "summary translation" of the petitioner's People's Republic of China Individual Income Tax Payment Receipt, (6) Articles of Incorporation, Internal Revenue Service (IRS) Application for Employer Identification Number (Form SS-4) and Business Registration Certifications from 2008 to 2011, (7) Corporation Income Tax Returns for fiscal years covering July 2008 to June 2009, and from July 2009 to June 2010, (8) a compilation of unaudited Financial Statements for the twelve months ending on June 30, 2010, and (9) Quarterly Reports for the three months ending on June 30, 2010; March 31, 2010; December 31, 2009; September 30, 2009; June 30, 2009; March 31, 2009; December 31, 2008; and September 30, 2008.

On May 31, 2011, the director issued a Request for Evidence (RFE), requesting the petitioner to provide additional information, including evidence of the lawful source of the petitioner's funds and evidence relating to employment creation. Specifically, the director requested "a comprehensive business plan sufficiently detailed to permit the USCIS to reasonably conclude that the enterprise has the potential to meet the job-creation requirements." *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

On August 17, 2011, counsel responded to the director's RFE with a letter dated August 13, 2011 and a number of documents. The documents are: (1) a Subscription Agreement, signed on August 25, 2008; (2) documents relating to the transfer of shares of stock to the petitioner; (3) a notarial certificate of the petitioner's marriage certificate; (4) documents relating the deposits of the petitioner's checks in the amount of $300,000, $250,000, $368,000, and deposit of the petitioner's wife check in the amount of $82,000; (5) purchasing agreements and invoices for tour bus purchases; (6) 2010 Transmittal of Wage and Tax Statements (Form W-3), 2010 Wage and Tax Statements (Form W-2) and 2010 Employer's Annual Federal Unemployment Tax Return (Form 940); (7) Corporation Income Tax Return (Form 1120) for the tax year from July 2010 to June 2011; (8) photographs of premises and tour buses; (9) California Commercial Lease Agreement, dated July 1, 2010; (10) an English "summary translation" of a Chinese document, entitled Commercial Real Estate Corporation Amendment to Articles," dated March 8, 2004; (11) an English "summary translation" of a Chinese document, entitled – Until February 7, 2005;" (12) English "summary translations" of two Chinese documents, both entitled Transfer Receipt" and both dated September 5, 2005; (13) an English "summary translation" of the petitioner's People's Republic of China Individual Income Tax Payment Receipt, dated January 24, 2006; (14) Employer's Quarterly Federal Tax Return (Form 941) from October to December 2010; (15) Quarterly Report for the three months ending on March 31, 2011; (16) a four-page business plan, dated August 1, 2011; and (17) bank statements from December 2008 to June 2011, with the June 2009 bank statement missing.

In his October 20, 2011 decision, the director concluded that the petitioner had not established that has created or will create ten qualifying positions. Specifically, the director concluded:

> The provided Business Plan is less than minimally acceptable. There is no marketing analysis including the names of competing tour/travel businesses in the area, their relative strengths and weaknesses, together with comparison of prices and target markets. There is no marketing strategy. There [is] no documented evidence[] to support staffing requirements or timetables for hiring or specific job descriptions for each position. There are no cost and income projections. This lack of strategic business planning costs the company the type of concrete goals which propel it to its projected achievement. The business plan has not been sufficiently detailed or expanded to [allow the director to] reasonably conclude that the enterprise has the potential to meet the job creation requirements.

On appeal, counsel asserts that the director erred. Counsel has provided an appellate brief and a number of documents in support of the appeal. These documents are: (1) a revised business plan; (2) Employer's Quarterly Federal Tax Returns (Form 941) for July to September 2010, October to December 2010, January to March 2011, and April to June 2011; (3) Payroll Register for the pay period ending on October 31, 2011; and (4) a number of Employment Eligibility Verifications (Form I-9), Employee's Withholding Allowance Certificates (Form W-4) and copies of permanent resident cards and naturalization certificates.

For the reasons discussed below, the AAO concurs with the director's denial of the petition, finding that the evidence in the record fails to establish that has created or will create at least ten qualifying positions. As such, the AAO will dismiss the petitioner's appeal.

III. ISSUE ON APPEAL

A. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9, or other similar documents for ten qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

The regulation at 8 C.F.R. § 204.6(e) defines "employee" as an individual who provides services directly to the new commercial enterprise and excludes independent contractors. The same regulation defines "qualifying employee" as "a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States." The definition excludes the petitioner, the petitioner's spouse, sons, or daughters, or any nonimmigrant alien. Section 203(b)(5)(D) of the Act, as amended, now defines "full-time employment" as "employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position." Full-time employment also means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Ca. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

It is undisputed that at the time of the filing of the petition on December 1, 2010, the petitioner's investment had not resulted in the creation of at least 10 qualifying positions. The petitioner claims to have invested in an existing business. Thus, the petitioner must create 10 additional jobs in addition to any jobs that existed as the time of his investment. The petitioner indicated on the petitioner that when he made his initial investment in October 2008, [redacted] had two full-time employees. The petitioner further indicated that when he filed the petition, [redacted] had seven full-time employees. In other words, the petitioner claimed to have created five qualifying positions when he filed the petition.

The IRS Form 941 Employer's Quarterly Tax Return for the third quarter of 2008 establishes that [redacted] had three employees as of September 12, 2008. The California State [redacted] turn lists three employees in July, August and September, revealing the business had [redacted] yees throughout the quarter. The California State quarterly return for the fourth quarter [redacted] o reveals three employees in October, November and December. Thus, [redacted] actually employed three employees when the petitioner made his investment in October 2008. The California State quarterly return for the fourth quarter of 2010 reflects that [redacted] employed six employees in October and November of that year and eight employees in December. Even assuming all eight were working there full-time as of December 1, 2010, the petitioner had created no more than five jobs as of the date of filing.

In response to the director's Request for Evidence, counsel asserted that [redacted] "had 7 qualifying employees when the petitioner filed his I-526 petition. Now, it has 9 qualifying employees. The company will add its payroll to 10 [employees] at the beginning of next year." On appeal, however, counsel concedes that the evidence does not establish the creation of five or seven qualifying positions when the petitioner filed the petition. Instead, counsel asserts that "the payroll tax records for the 3rd quarter of 2010 [show] 6 full-time employees who worked at least 35 hours per week." Counsel also asserts that as of October 2011, [redacted] "has 12 full-time employees." As supporting evidence, counsel provides a copy of [redacted] payroll register for the pay period ending on October 31, 2011. The document shows that [redacted] paid salaries or wages to 14 people, but it does not show how many hours each of them worked.

The most recent California quarterly return in the record, covering the second quarter of 2011, reflects nine employees each month, an increase of six employees from the date of the petitioner's investment. As the evidence does not show that the petitioner's investment has resulted in the creation of at least ten qualifying positions, the regulation at 8 C.F.R. § 204.6(j)(4)(i) requires the petitioner to provide a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. *See Matter of Soffici*, 22 I&N Dec. 158, 168 (Assoc. Comm'r 1998). As explained in the director's May 31, 2011 RFE, the comprehensive business plan "should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise . . . . It should explain the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contains a timetable for hiring, as well as job descriptions for all positions." *Matter of Ho*, 22 I&N Dec. at 213.

Based on the evidence in the record, the AAO concurs with the director's October 20, 2011 decision, which found that the four-page business plan the petitioner provided in response to the director's RFE "is less than minimally acceptable." Specifically, although the business plan states that [redacted] "anticipate[s its] growth will double and triple in the upcoming 10 years" and that it "will increase full-time employees to 20 people," the business plan is devoid of any information on a hiring timetable or descriptions of positions that will be created as a result of the petitioner's investment. Similarly, although the business plan states that [redacted] had "7 full-time employees" as of October 2010 and it anticipates that "by the end of 2011, [its] full[-]time employee[s] will reach . . . 10," the business plan contains no hiring timetable, staffing requirements, or a detailed descriptions of positions that will be created. The business plan also fails to address other issues raised in the director's Request of Evidence, including a marketing analysis and information on competing businesses.

Accordingly, the AAO concurs with the director's finding that the four-page business plan is not comprehensive, because it lacks sufficient details to permit the director or the AAO to draw reasonable inferences about the job-creation potential. *See Matter of Ho*, 22 I&N Dec. at 213. Mere conclusory assertions do not enable the director or the AAO to determine whether the job-creation projections are any more reliable than hopeful speculation. *See id.*

Although counsel has provided a revised business plan on appeal, the AAO will not consider this document. The regulation at 8 C.F.R. § 204.6(j) states that the director may request evidence she deems appropriate. The director put the petitioner on notice of required evidence, including a comprehensive business plan, and gave the petitioner a reasonable opportunity to provide it for the record before adjudicating the visa petition. The director advised the petitioner of every element that a comprehensive business plan must address. The petitioner failed to submit the requested evidence in response to the Request for Evidence. The AAO thus will not consider the revised business plan 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).

B. Source of Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital. A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho,* 22 I&N Dec. at 211.

According to a March 8, 2004 document entitled [redacted] Commercial Real Estate Corporation, Amendment to Articles," the petitioner invested 3,000 [redacted] and acquired 40 percent of [redacted] Commercial Real Estate Corporation. According to a document entitled "Change of Registered Capital," in February 2005, the petitioner's shares in the corporation decreased from 40 percent to 30 percent, but his shares in the corporation were valued at 30 million RMB in capital. In August 2005, approximately 17 months after investing 3,000 RMB, according to a September 30, 2010 letter from accountant [redacted] the petitioner sold 30 percent of the corporate shares for 150 million RMB. The record lacks any explanation on the petitioner's decrease in corporate shares and increase in capital. The AAO also notes that the petitioner has not provided any objective or independent evidence, such as the corporation's audited financial statements, to document that [redacted] Commercial Real Estate's value grew at a rate of 1,333,233 percent between March 8, 2004 and February 7, 2005, and a rate of 6,666,567 percent between March 8, 2004 and August 2005. Accordingly, the evidence fails to show the lawful source of funds that the petitioner has invested or is actively in the process of investing in [redacted] *See* 8 C.F.R. § 204.6(j)(3); *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

IV. 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.