

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 13-01185 JVS (ANx) Date March 31, 2014

Title Lianming Zhao v. Janet Napolitano, et al.

Present: The Honorable James V. Selna

Karla J. Tunis  
Deputy Clerk

Not Present  
Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS)**

**Order Denying Plaintiff’s Motion for Summary Judgment (Fld 1-30-14) and Granting Defendants’ Motion for Summary Judgment (Fld 1-31-14)**

This case arises out of the U.S. Customs and Immigration Service’s (“USCIS”) denial of Plaintiff Lianming Zhao’s (“Zhao”) application for an Employment Based-5 (“EB-5”) visa. The EB-5 visa is available to aliens who invest a required amount of capital in a new commercial enterprise in the United States that will create at least ten full-time positions for qualifying employees. 8 C.F.R. §§ 204.6(j)(1)–(6). Zhao moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Docket No. 30.) Defendants Jeh Johnson *et al.* (the “Government”) oppose. (Docket No. 34.) For the following reasons, Zhao’s motion is DENIED.

The Government also moves for summary judgment. (Docket No. 32.) Zhao opposes. (Docket No. 33.) For the following reasons, the Government’s motion is GRANTED.

I. Background<sup>1</sup>

A. **Initial I-526 Petition**

<sup>1</sup> All facts discussed herein are established in the Administrative Record. *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985) (The Court “is not required to resolve any facts in a review of an administrative proceeding.”)

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Zhao is a citizen of the People’s Republic of China. (AR 569–73.) Zhao does not currently reside in the United States. (AR 478–80.) On July 10, 2011, through counsel, Zhao filed an I-526 Petition (the “Petition”) with the USCIS based on a May 26, 2011 investment of \$1,000,100 in an existing corporation, Berkeley Dog, Inc. (“Berkeley Dog”). (AR 2, 43, 241, 478–80, 556–57.) Berkeley Dog is a fast-food restaurant in California serving mainly sausages and hot dogs and has existed since 2009. (AR 376–403, 486–87.) In support of his Petition, Zhao submitted documentation relating to: (1) the establishment of Berkeley Dog; (2) Zhao’s ownership of the required amount of capital; (3) the capital investment’s benefit to the U.S. economy; (4) the lawful source of Zhao’s capital investment funds; (5) the job creation benefits of the investment; (6) Zhao’s proposed involvement in managing Berkeley Dog; and (7) the “at risk” nature of the investment. (AR 2, 478–638.)

1. *Documentation of the Establishment of Berkeley Dog*

Zhao submitted the following as evidence of the establishment of Berkeley Dog: (1) Articles of Incorporation of Berkeley Dog; (2) Minutes of Organization Meetings of Directors; (3) an assignment of federal tax identification number; (4) a lease of the business premises of the Brea, California store location; (5) a seller’s permit for the Brea location; (6) a business license for the Brea location; (7) a lease of the business premises for the Irvine, California location; (8) a seller’s permit for the Irvine location; and (9) a business license for the Irvine location. (AR 482–83; 486–555.)

2. *Documentation that Zhao Owns the Required Amount of Capital*

Zhao submitted the following documentation to demonstrate he owns the required amount of capital: (1) Zhao’s wire remittance for the \$1,000,100 submitted from HSBC bank to Berkeley Dog; (2) a fund transfer document verifying Berkeley Dog received the investment funds; (3) a Berkeley Dog bank statement; (4) a stock certificate issued to Zhao; and (5) a Notice of Transaction for the issuance of stock filed with the California Department of Corporations. (AR 483; 556–60.)

3. *Documentation of Investment’s Benefit to U.S. Economy*

Zhao submitted a statement indicating how his investment would benefit the U.S. economy. (AR 483; 561–63.) Zhao made five main points in his submission: (1) the

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capital was deposited in a local U.S. bank at a time when the U.S. banking system needed liquidity; (2) a cash inflow from overseas reduces the U.S. trade deficit; (3) Berkeley Dog will rent in two locations in Southern California, contributing to the commercial real estate market in these locations; (4) Berkeley Dog's tax payments will generate revenue for the government; and (5) Berkeley Dog will create at least 20 jobs in two years for local residents. (AR 562.)

4. *Documentation of the Lawful Source of Capital Investment*

Zhao submitted the following documentation in support of the lawful source of his capital investment: (1) a gift deed showing Zhao's father making a gift of \$1,000,000 to Zhao; (2) a UBS Bank Certificate showing Zhao's father had a balance of \$1,004,135; (3) bank wire remittance records verifying Zhao's father transferred \$1,000,000 to Zhao; (4) notarized certificate of birth for Zhao verifying his biological relationship to his father; (5) a business license of Hangzhou Hongshun Furniture Ind. Co., Ltd., showing Zhao's father as the legal representative; (6) a Certificate of Incorporation of Hong Kong Surpass Trade Company Limited showing Zhao's father as the sole shareholder of the company; (7) a Certificate of Incorporation of Hong Shun Holding Company Ltd., showing Zhao's father as the sole shareholder of the company; (8) a profit and loss statement of Hangzhao Hongshun Furniture Ind. Co., Ltd. for 2008–2010; (9) business tax records for Hangzhou Hongshun Furniture Ind. Co., Ltd. for 2008–2010. (AR 483–84, 563–94.)

5. *Documentation of the Job Creation Effects of the Investment*

Zhao submitted Berkeley Dog's business plan showing the creation of at least 20 jobs within two years. (AR 484, 595.) The business plan notes the particular types of jobs that Berkeley Dog intends to create at each location and corporate office. (AR 617.) The business plan states that the first location opened in August 2010 and that two more are planned in central Orange County and Los Angeles County. (*Id.*) The plan notes a total of 32 employees for three locations. (*Id.*) The business plan is undated. (AR 595–622.) While the plan notes one current location and calls for the creation of two more, three locations were open when Zhao submitted his investment (Brea, Irvine, Mission Viejo). (AR 92.)

6. *Documentation of Zhao's Proposed Involvement in Managing the*

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*Enterprise*

In support of his proposed involvement in managing Berkeley Dog, Zhao submitted (1) a statement of position and job duties and (2) a Statement of Information indicating Zhao is a member of the Board of Directors and the CEO of Berkeley Dog. (AR 484, 624–26.)

7. *Documentation that Zhao’s Investment Capital Is “At Risk”*

Zhao submitted the following documentation as evidence that Zhao’s investment capital is at risk: (1) evidence that the investment was used to purchase stock in Berkeley Dog; (2) a commercial real estate lease for the Brea location of Berkeley Dog totaling \$180,000 in rent over five years; (3) a seller’s permit for the Brea location; (4) a business license for the Brea store; (5) a commercial real estate lease for the Irvine location for a total rent of \$423,583 over seven years; (6) a seller’s permit for the Irvine location; (7) a business license for the Irvine location; (8) trademark registration with the U.S. Patent & Trademark Office (“PTO”); (9) a newspaper advertisement regarding the opening of the Irvine location; and (10) various blog reviews of the new Irvine location, which opened in May 2011. (AR 484–85, 491–555, 627–38.)

**B. USCIS Issues First Request for Evidence**

On January 18, 2012, USCIS issued Zhao a Request for Evidence (“RFE”). (AR 223–33, 465–75.) USCIS requested Zhao provide: (1) evidence that he invested the required amount of capital into Berkeley Dog; (2) evidence that the capital was “at risk” through Berkeley Dog’s actual business activities; (3) a comprehensive business plan; (4) evidence of the required job creation; and (5) evidence of Zhao’s prospective managerial role in Berkeley Dog. (*Id.*)

1. *Evidence Zhao Invested the Required Amount of Capital*

The RFE noted types of documentation that would support Zhao’s application, including: (1) bank statements showing deposits to U.S. bank accounts; (2) evidence of all assets which have been purchased for use in the U.S. enterprise; (3) evidence of property transferred from abroad for use in the U.S. enterprise; (4) evidence of monies

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transferred or committed to the U.S. enterprise in exchange for stock that does not include terms requiring the enterprise to redeem it at the holder's request; or (5) evidence of loans or other borrowing which is secured by Zhao's assets for which Zhao is personally and primarily liable. (AR 226.) The RFE noted that one deficiency in Zhao's Petition was that Berkeley Dog had apparently issued approximately 200 more shares of stock than it was authorized to issue. (AR 226–27.) Berkeley Dog's Articles of Incorporation authorize it to issue 2,000,000 shares of stock. (AR 226–27; 487.) Zhao's Petition indicated he owned 46.25 percent of the enterprise. (AR 226–27; 479.) Zhao's Petition also indicated Chuan Chan Lee ("Lee") owned 46.25 percent of the enterprise. (AR 226–27; 481.) Because both Zhao and Lee owned the same percentage, Lee must also own 1,000,100 shares. (*Id.*) That totals to 2,000,200 shares, not including shares the other two listed owners (Cecillia Chi and John Chi) own. (*Id.*) Accordingly, the RFE directed Zhao to provide additional information regarding this discrepancy.

2. *Evidence Zhao's Investment Was "At Risk"*

The RFE directed Zhao to demonstrate that his investment has been placed "at risk" in conducting business activities necessary to expand the commercial enterprise. (AR 228.) The RFE also noted that Zhao could submit in support of his application the following documentation: (1) quarterly wage reports submitted to the California Employment Development Department ("EDD") or the federal government; (2) quarterly contribution return and report of wages submitted to the EDD; (3) payroll summaries; (4) federal income tax returns; (5) business licenses; (6) sales tax returns; (7) seller's permits; (8) major sales invoices; (9) IRS tax number; (10) utility bills; (11) invoices, sales receipts, or purchase contracts evidencing assets that have been purchased for use in the enterprise; (12) information about the worksite, including photographs; (13) lease agreements; or (14) escrow documents evidencing ownership of the worksite. (AR 228–29.)

3. *Evidence of Job-Creation Potential*

The RFE noted a discrepancy in Zhao's Petition concerning the timing of Berkeley Dog's Orange County expansion. (AR 230.) The business plan Zhao submitted in support of his Petition indicated Berkeley Dog planned to expand into Orange County and that Zhao's investment would facilitate this expansion. However, the Orange County locations were already up and running prior to Zhao's May 26, 2011 capital investment.

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(Id.) Accordingly, the RFE requested that Zhao submit evidence that his investment will expand the business from the date of investment, resulting in a substantial change in net worth or number of employees, as defined above. (Id.)

4. *Evidence of Job Creation*

The RFE requested that Zhao submit evidence such as tax records, pay stubs, and leave and earnings statements for each new employee that Berkeley Dog hired subsequent to the investment, as well as the citizenship or immigration status of these employees. (AR 231–32.)

5. *Evidence of Zhao's Managerial Role*

The RFE noted several deficiencies in Zhao's supporting documentation, including that the Statement of Information filed with the State of California did not list John L. Sun, Zhao's attorney, as a director (though an unendorsed attachment did), while the Minutes of the Meeting for May 9, 2011 did, and the Statement of Information was not endorsed. (AR 233.) Additionally, the RFE requested Zhao provide evidence of how he will be engaged in management, such as organizational charts, Zhao's pay records, and job description. (Id.)

6. *Zhao's Response to the First RFE*

On April 4, 2012, Zhao submitted a response to the RFE. (AR 234–464.) As evidence Zhao invested the required capital, he resubmitted the wire transfer, bank statement from Berkeley Dog, the corporate resolution authorizing the issuance of shares in return for the investment, the Notice of Transaction filed with the California Department of Corporation, and the stock certificate issued to Zhao. (AR 234; 240-48.) In response to the discrepancy of the number of authorized shares and number of shares issued, Zhao submitted documentation that the number of authorized shares was increased on May 9, 2011 to five million and that Berkeley Dog has only issued 2,150,200 shares. (AR 234–35, 249.) Zhao also submitted stock certificates issued to all shareholders, a stock ledger record, and federal income tax returns for 2011. (AR 235, 245–62.) In response to the RFE's request that Zhao demonstrate how his investment has

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expanded Berkeley Dog’s business, Zhao notes that Berkeley Dog qualifies as a new business, rather than an existing business. (AR 235.) Zhao noted that the “expansion of existing business” only applies to a “commercial enterprise established on or before November 29, 1990.” (AR 235, 263–65.) Zhao also submitted evidence that his investment has substantially expanded the net worth of Berkeley Dog, including that the total paid-in capital owned by Berkeley Dog nearly doubled due to Zhao’s investment and that the net worth of Berkeley Dog grew by 84 percent in 2011. (AR 236, 252–62.) Regarding the “at risk” requirement, Zhao submitted various employment and tax forms, including quarterly wage reports from 2011 and 2012 submitted to the state of California, quarterly federal tax returns from 2011 and 2012, payroll summary W-2 forms, federal income tax returns from 2010, current business licenses, sales tax returns, seller’s permits, IRS tax number, utility bills, worksite definitions, and photographs of the premises. (AR 236–37, 267–373.) Zhao also noted that the quarterly wage reports and I-9 forms, as well as the original business plan submitted with his Petition, suffice to demonstrate employment created after his investment. (AR 238.)

**C. USCIS Issues Second RFE**

On April 25, 2012, USCIS notified Zhao of further deficiencies in his petition and issued a second RFE. (AR 89–97.) The second RFE requested that Zhao provide: (1) evidence that Berkeley Dog would create at least ten full-time positions above the pre-investment employment level; (2) evidence that he had invested, or was actively in the process of investing, the required amount of capital into Berkeley Dog; and (3) evidence that he would be engaged in the management of Berkeley Dog. (*Id.*)

*1. Evidence that Zhao’s Investment Has Created Jobs*

The second RFE noted that the quarterly wage reports Zhao submitted in response to the first RFE indicated Zhao’s investment only created two new full-time jobs. (AR 92.) Additionally, the RFE noted that, even with the proposed expansion of the Berkeley Dog chain to Los Angeles County, Zhao would not meet the requirement of creating ten jobs. (*Id.*) This is because, based on the quarterly wage reports, only two new employees could potentially be full-time because only two earned at least the minimum quarterly wage for a full-time worker. Assuming the proposed additional location in Los Angeles creates jobs at the same rate as the other locations, that would only amount to an additional two full-time positions. (*Id.*) The second RFE requested that Zhao submit:

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projections and timetables for actual completion of the five outlets planned for Los Angeles and San Diego areas; clear and verifiable projections for expenditures on these outlets; actual dates of the infusion of Zhao's investment into the enterprise in relation to job creation within two years of the start of the expansion into Los Angeles and San Diego areas; and details regarding the sources of input data and assumptions in these projections. (AR 93–94.) Further, the RFE noted that eight of the employees for which Zhao provided citizenship or immigration information presented permanent resident cards with alien numbers that belong to other individuals. (AR 94.)

2. *Evidence of the Active Investment of the Required Amount of Capital*

The second RFE noted that “[i]f the company was able to open three stores with minimal investment prior to [Zhao’s] investment, then it does not appear that the company would need an additional one million dollars for expansion of the business into five additional stores as planned.” (AR 95.) The RFE further noted, “[Zhao’s] investment funds have only been deposited into accounts managed by Morgan Stanley solely for the purposes of accumulating interest and [] the business is currently grossly overcapitalized.” (*Id.*) The RFE concluded Zhao had failed to show how his investment had been placed at risk and requested that Zhao provide evidence of how his funds would be used in the planned additional five stores. (AR 96.)

3. *Evidence of Zhao’s Proposed Management Role*

The second RFE noted that Zhao had failed to respond to the first RFE that requested additional information regarding Zhao’s proposed management role. (AR 97.) The second RFE renewed the request. (*Id.*)

4. *Zhao’s Response to the Second RFE*

On July 17, 2012, Zhao submitted his response to the second RFE. (AR 98–213.) Regarding the creation of at least ten jobs, Zhao noted that Berkeley Dog has, since its establishment, created more than ten new jobs, which the quarterly wage reports demonstrate. (AR 98–99.) Zhao notes that these documents indicate that 11 new jobs were created after Zhao’s investment. (AR 100.) Zhao noted that the second RFE did not identify which employees had inaccurate citizenship or immigration documentation, so Zhao could not correct this deficiency by replacing those employees. (*Id.*) Regarding the



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use of Zhao's investment, Zhao noted that his investment is at risk because Berkeley Dog's cash reserves of \$1,400,000 were reasonable for the planned expansion and potential operating loss of current stores. (AR 104.) Regarding Zhao's proposed management role, Zhao resubmitted information verifying that he serves as a director. (*Id.*) Zhao also noted that he has shareholder voting rights. (AR 104–05.) Zhao also submitted an organization chart, which lists 28 employees in the Irvine and Brea locations and shows Zhao's high place in the Berkeley Dog management chain. (AR 105.)

**D. USCIS Denies Zhao's Petition**

On September 26, 2012, USCIS denied Zhao's I-526 Petition. (AR 80–88.) The USCIS reasoned that Zhao failed to demonstrate sufficiently that: (1) his required capital investment had been, or would be made available to Berkeley Dog; (2) his investment in Berkeley Dog resulted in creating the required number of full-time jobs for qualifying employees; and (3) that Berkeley Dog had a comprehensive business plan sufficiently detailed to establish the requisite job-creation potential. (*Id.*)

Regarding the active investment of Zhao's funds, the denial noted that "none of the capital stock, either before or after [Zhao] made his investment, was depleted in the calendar year 2011. Therefore, [Zhao's] claim that over 25% of all the paid-in capital is spent and gone is not supported by its 2011 Federal Income Tax Return." (AR 84.)

Additionally, the denial noted that Zhao failed to submit a comprehensive business plan indicating how his investment will be used in the expansion and that eight of the employees for which Zhao submitted citizenship and immigration information are using alien numbers that belong to other individuals. Accordingly, the denial concluded Zhao had failed to demonstrate his investment will be used to create at least ten jobs. (AR 84–88.)

**E. Administrative Appeal**

On October 25, 2012, Zhao filed an administrative appeal with the USCIS Administrative Appeals Office ("AAO"). (AR 53–78.) Zhao challenged the denial's interpretation of Berkeley Dog's federal income tax returns and analysis of the company's capital stock. (AR 57.) Zhao also challenged the fact that USCIS never

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disclosed which employees used fraudulent residency documents, which prevented Berkeley Dog from replacing the employees. (AR 59.) Additionally, Zhao argued that because he had demonstrated that his investment has created ten jobs, he does not need a comprehensive business plan, but that the business plan he did submit satisfied the USCIS's request. (AR 60.)

On June 4, 2013, the AAO issued Zhao a notice of derogatory information and provided him with an opportunity to respond. (AR 45–47.) On June 10, 2013, Zhao submitted a response to the AAO. (AR 12–44.)

On June 25, 2013, the AAO affirmed the USCIS's denial of Zhao's I-526 Petition. (AR 1–10.) Regarding the capital stock listed on Berkeley Dog's tax returns, the AAO withdrew this portion of the denial because the tax returns did in fact reflect a reduction in equity. (AR 4.) However, the AAO noted that the evidence did not indicate the full amount of Zhao's investment was at risk. Restaurant improvements were not well-documented, as Zhao neglected to provide invoices, billing information, or Berkeley Dog's bank statements showing the improvements actually occurred. (AR 4–5.) Operating expenses were paid in part by reinvesting proceeds rather than through capital. (AR 5.) The unused funds were held in a Morgan Stanley fund and Zhao did not show how Berkeley Dog planned to use these funds for capital expenses or to cover net losses, indicating the company was overcapitalized. (*Id.*) Further, the AAO determined that Zhao had failed to demonstrate employment creation because Zhao did not establish the number of employees employed prior to the date of his investment, failed to establish whether current employees are full- or part-time, and submitted a business plan that lacked sufficient detail to support the job creation requirement. (AR 5–8.)

**F. Zhao Files Present Action**

On August 6, 2013, Zhao filed the present action. (Complaint, Docket No. 1.) The Complaint requests declaratory judgment that the denial of his Petition violated the Administrative Procedures Act, and that the Court direct the Government to approve his Petition. (*Id.*)

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**II. Legal Standard**

In the Ninth Circuit, a decision to deny a visa under the immigrant investor program is subject to judicial review. Spencer Enterprises, Inc. v. U.S., 345 F.3d 683, 691–92 (9th Cir. 2003); see also Repaka v. Beers, No. 13-cv-05 BTM-RBB, 2014 WL 50813, at \*2 (S.D. Cal. Jan. 6, 2014) (“For jurisdiction under the [Administrative Procedures Act], the agency action at issue must be final, it must adversely affect the party seeking review, and it must be non-discretionary.”) (quotation and citation omitted). “[T]he authority to issue a visa under the immigrant investor program is not specified by any statute to be discretionary. Instead, the authority comes directly from [8 U.S.C.] § 1153(b)(5), which both mandates issuance of such visas . . . and sets out a series of standards for eligibility that the visa petitioner must meet.” Spencer Enterprises, 345 F.3d at 691–92.

Under the Administrative Procedures Act (“APA”), a district court can only set aside a final agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>2</sup> 5 U.S.C. § 706(2)(A). A district court may not “substitute its judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A decision is arbitrary and capricious if:

the agency has relied on factors which Congress has not intended it to

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<sup>2</sup> At oral argument, counsel for Zhao repeatedly asserted that “abuse of discretion” is not the proper standard of review because the decision whether to issue an EB-5 visa is non-discretionary. However, counsel conceded that this Court reviews the AAO’s determination under the APA. The non-discretionary nature of the decision only bears on the Court’s jurisdiction to review the decision; it does not alter the standard of review. Spencer Enterprises, 345 F.3d 691–93; see also Repaka, 2014 WL 50813, at \*2 (finding district court had jurisdiction to review AAO’s denial of an exceptional ability visa under the APA because such decision was “non-discretionary”). As the Ninth Circuit determined in Spencer Enterprises, decisions whether to issue a visa under the immigrant investor program are subject to judicial review under the APA’s “arbitrary, capricious, [or] abuse of discretion” standard. Spencer Enterprises, 345 F.3d at 691–93; see also Repaka, 2014 WL 50813, at \*2.

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consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

“Courts routinely resolve APA challenges by summary judgment.” GCCG Inc. v. Holder, No. C 13-974, 2013 WL 6175180, at \*3 (N.D. Cal. Nov. 25, 2013) (citing Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric., 18 F.3d 1468, 1481 (9th Cir. 1994)). The district court “is not required to resolve any facts in a review of an administrative proceeding.” Occidental Eng’g Co. v. I.N.S., 753 F.2d 766, 769 (9th Cir. 1985). In deciding a motion for summary judgment, the district court “is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” Id.

### III. Discussion

The Immigration and Nationality Act (“INA”) provides for classification of “employment creation” immigrants who invest capital in new commercial enterprises (an “NCE”) in the United States that create full-time employment of United States workers. 8 U.S.C. § 1153(b)(5). This category is known as the employment-based, fifth preference (“EB-5”) immigrant investor visa. Applicants for the EB-5 visa must satisfy two requirements: (1) qualifying capital investment of \$1 million or \$500,000 in a “targeted employment area” (“TEA”); that (2) creates “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, son, or daughters).” 8 U.S.C. §§ 1153(b)(5)(A)(ii), (C); 8 C.F.R. § 204.6(f). An applicant must provide evidence he has satisfied or actively is satisfying these requirements. 8 C.F.R. §§ 204.6(j)(1)–(6).

In adjudicating an I-526 Petition, the USCIS must determine whether the facts stated in the petition and supporting documents are true and it may reject statements it finds unsubstantiated or without factual basis. 8 U.S.C. § 1154(b); Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The alien investor bears the burden of proving by a preponderance of the evidence his qualifications for the I-526 Petition. 8 U.S.C. §

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1361; Matter of Chawathe, 25 I. & N. Dec. 369, 374–76 (AAO 2010).

Here, the USCIS did not challenge that Zhao invested \$1,000,100 in Berkeley Dog. Rather, the USCIS challenged the “at risk” nature of his investment as well as its impact on the employment of qualified full-time workers. Accordingly, the Court addresses only these rationales for the denial of Zhao’s EB-5 visa.

**A. Whether Zhao’s Investment Meets the “At Risk” Requirement**

An alien demonstrates that he has invested or actively is in the process of investing the required amount of capital by providing USCIS with evidence he has “placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk.” 8 C.F.R. § 2404.6(j)(2). Evidence of the alien’s mere intent to invest or of a prospective investment arrangement that entails no present commitment is insufficient. Id. Additionally, the USCIS has established that the alien cannot satisfy the “at risk” requirement simply by depositing funds into an account held by the new commercial enterprise. Matter of Ho, 22 I. & N. Dec. 206, 210 (Assoc. Comm. 1998). Instead, the alien must provide evidence demonstrating how the new commercial enterprise will use the deposited funds. Id. at 210–11.

*1. AAO’s Reasons Supporting Denial*

The AAO affirmed the denial of Zhao’s petition in part because Zhao failed to demonstrate by a preponderance of the evidence that his investment in Berkeley Dog was “at risk.” This decision rested on five grounds:

1. The AAO noted that the original denial incorrectly assumed that paid-in capital would reflect operating losses. However, under proper accounting standards, operating losses would be reflected in a reduction of equity (shown as negative retained earnings), rather than a reduction in paid-in capital. As a result, the AAO withdrew this portion of the denial. (AR 4.)
2. The AAO noted that, while Zhao’s evidence of business activity (such as gross sales figures) indicated that a portion of his funds were at use in Berkeley Dog, the business activity did not indicate that the full amount of his investment was at risk. (Id.)
3. The AAO noted that, while the restaurant improvements qualified as capital

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- expenses, it could not be reasonably inferred from the documentation Zhao submitted that the expenses occurred subsequent to Zhao's investment. Specifically, the AAO noted that Zhao failed to submit documentation such as invoices, billing information, or Berkeley Dog's banking statements to prove that the improvements occurred, when they occurred, or the amount expended. (AR 4–5.) The only documentation submitted was the federal income tax return, which noted \$101,158 was expended on restaurant improvements, but it was not possible from this documentation to determine what portion of this expenditure was Zhao's investment. (*Id.*)
4. The AAO noted that not all operating expenses are covered through capital and some, including the sales and use taxes, utilities, and salaries, were paid at least in part through reinvestment of proceeds, which is not a qualifying investment. (AR 5.) While the operating loss of \$133,904 listed on Berkeley Dog's federal income tax return could not have been paid through proceeds, the amount is much less than Zhao's investment and it cannot be determined what portion of these losses were covered by capital from Zhao as opposed to previously invested capital. (*Id.*)
  5. The AAO determined that Zhao submitted insufficient evidence that the unused portion of his investment was at risk. (*Id.*) At the end of 2011, Berkeley Dog had \$1,401,045 invested with Morgan Stanley, but Zhao failed to establish how Berkeley Dog would use the remaining portion of his investment. (*Id.*) Without a supported explanation for the planned use of the investment, the AAO concluded Berkeley Dog was overcapitalized. (*Id.*)

2. *The AAO Reasonably Determined that Zhao Failed to Satisfy the “At Risk” Requirement*

Zhao argues his investment meets the “at risk” requirement because of the expansion, renovation, and operating losses Berkeley Dog incurred. (Zhao Mot. 8.) Zhao relies on the same evidence submitted to the USCIS, including evidence that the Morgan Stanley investment fund is fully committed (AR 240–51), a 2011 federal income tax return (AR 160–70), two leases (AR 491–554), and a 2012 federal income tax return (AR 40). Zhao points to Berkeley Dog's significant business losses of \$133,904 in 2011 and \$194,288 in 2012, totaling \$328,192. (AR 40, 160.) Zhao also points to gross sales figures as evidence that Berkeley Dog is undertaking business activity, including \$154,364 in 2010, \$701,126 in 2011, and \$661,199 in 2012. (AR 160, 333.) Additionally,

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Zhao cites to \$219,087 in physical improvements, as well as additional expenses in leases. (AR 164.) Finally, Zhao notes the planned expansions, which cost roughly \$159,000 each and require an additional \$100,000 in working capital each. (Zhao Mot. 10.)

However, the AAO's decision was reasonable in light of the evidence presented. While the evidence of operating costs, gross sales, restaurant improvements, and planned expansions provide some indication that a portion of Zhao's investment was at risk, the AAO was not unreasonable in concluding that Zhao had failed to demonstrate by a preponderance of the evidence that his full investment was at risk. Importantly, while Zhao submitted significant evidence that Berkeley Dog sustained operating losses and faced various expenditures including restaurant renovations, Zhao submitted no evidence tying his investment to these activities. Zhao submitted no invoices, billing information, or Berkeley Dog bank statements which the AAO could have used to draw an inference that the whole of his investment was at risk. Rather, the preponderance of the evidence presented indicates precisely what the AAO found: that Berkeley Dog was overcapitalized at the end of 2011, implying that Zhao's investment was not fully at risk. The federal income tax return Zhao submitted indicated the company had \$1,401,045 in capital reserves at the end of 2011. (AR 252–62.) This implies that much, if not all, of Zhao's investment was not put into the business. Zhao attempts to paint the overcapitalization argument as a "red herring," but Zhao misconstrues the impact of the argument. The impact is not that any profitable business is inherently suspect, but that the expenditures asserted as linked to the investment must be accompanied by evidence to that effect. Without such evidence, an investment sitting as capital reserves does not satisfy the regulations governing the EB-5 program. The USCIS's Policy Memorandum does not suggest otherwise. The Policy Memorandum notes: "The law does not specify what the degree of risk must be; the entire amount of capital need only be at risk to some degree." (Zhao Mot. Ex. 1, at 5.) Contrary to Zhao's argument at the hearing, the Policy Memorandum's guidance confirms that all of the capital invested by the alien must be at risk, which the AAO reasonably determined was not evidenced by Zhao's documentation. While Zhao submitted evidence of losses and expenses, the AAO reasonably determined that Zhao presented insufficient documentation that his entire investment was at risk.

**B. Whether Zhao's Investment Meets the Job Creation Requirement**

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To demonstrate his investment into the new commercial enterprise<sup>3</sup> will create at least ten full-time jobs for qualifying employees, the alien must provide USCIS with either tax records, Forms I-9, or other similar documents for workers already hired, or a comprehensive business plan indicating that the business will hire at least ten qualifying employees within the next two years. 8 C.F.R. §§ 204.6(j)(i)(A), (B). If the alien is investing in a preexisting business, he must demonstrate the pre-investment employment level and establish that his investment will add ten new jobs and not decrease employment. See Matter of Hsiung, 22 I. & N. Dec. 201, 205 (Assoc. Comm. 1998); Matter of Soffici, 22 I. & N. Dec. 158, 167 (Assoc. Comm. 1998). A full-time employee is a position that requires a minimum of 35 working hours per week. 8 C.F.R. § 204.6(e).

Alternatively, where an alien has not met the employment-creation requirement, the alien must submit a comprehensive business plan “from which it is clear that the business will in fact require 10 qualifying employees within the next two years. To be ‘comprehensive,’ a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential.” In re Ho, 22 I. & N. Dec. 206, 211–13 (Assoc. Comm. 1998).

*1. AAO’s Reasons Supporting Denial*

The AAO also upheld the denial of Zhao’s petition on the grounds that Zhao failed to demonstrate his investment meets the job-creation requirement. (AR 5–7.) The denial was based on two grounds. First, the AAO determined that Zhao had failed to demonstrate his investment had created ten full-time employment positions. Second, the AAO determined that Zhao’s business plan did not demonstrate the job-creation potential of Zhao’s investment.

*a. Ten Jobs Have Not Been Created*

The AAO noted that Zhao indicated on his I-526 Petition that there were five employees of Berkeley Dog at the time of his investment in May 2011 and 12 employees at the date he filed his Petition. (AR 6.) However, the AAO noted that Zhao did not

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<sup>3</sup> A “new commercial enterprise” (“NCE”) is any commercial enterprise established after November 29, 1990. 8 C.F.R. § 204.6(e). Berkeley Dog, established in 2009, is a NCE.



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submit documentation supporting the number of full-time employees that existed at the time of his investment. (*Id.*) The AAO also noted that Zhao's second RFE response included a statement by Zhao's counsel that five employees working at the Brea location were full-time and that the Irvine location employed ten full-time employees. (*Id.*) However, the AAO declined to credit counsel's assertion because it was unsupported by evidence. (*Id.*) The AAO also examined the City of Irvine Business License submitted in response to the first RFE. (*Id.*) The License listed eight employees at the Irvine location, while an online version listed four.<sup>4</sup> Both are inconsistent with Zhao's claims and Zhao provided no evidence resolving the inconsistency. (AR 6–7.) Additionally, the AAO reviewed I-9s and quarterly wage reports. However, the AAO noted that Zhao failed to provide paystubs or payroll records showing the number of hours worked in order to determine whether the employees are full-time. (AR 7.)

b. Business Plan Does Not Demonstrate Job-Creation Potential

Alternatively, the AAO considered whether Zhao had demonstrated the job-creation potential of his investment. However, the AAO determined that Zhao's business plan was not sufficiently detailed to permit the AAO to make such an inference and that the plan lacked credibility. (AR 7–8.) Specifically, the AAO noted that the business plan Zhao submitted did not include a job description for each position at Berkeley Dog. Additionally, the plan called for a total of 32 jobs at three stores within two years. The organizational chart Zhao submitted in response to the second RFE listed only 28 employees for only two stores. The AAO concluded that, because the "initial business plan failed to provide a job description for any of the positions, the petitioner has not established the similarities of any job duties between the original plan and the new positions listed within the organizational chart. . . ." (AR 8.) The AAO found an additional discrepancy in the business plan, which noted the two current locations of Berkeley Dog in Irvine and Brea. At one point the plan states that Berkeley Dog intends

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<sup>4</sup> At the hearing, Zhao disputed the propriety of the AAO's reliance on the online business license and reiterated that he only had to demonstrate by a preponderance of the evidence that he satisfied the EB-5 requirements. The USCIS Policy Memorandum Zhao referred to at oral argument also noted that the applicant must submit "credible evidence" in support of his application. (Zhao Mot. Ex. 1, at 2.) The online business license reduced the credibility of other documentation Zhao submitted that indicated a different number of employees.

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to expand into Los Angeles County, at another point the plan states that Berkeley Dog plans to open three outlets in Orange County and five in Los Angeles County, and at another point the plan states that the three initial locations will be Mission Viejo, Brea, and Irvine. Finally, the AAO noted that eight of the nine employees claiming lawful resident status were using alien registration numbers assigned to other lawful permanent residents. (AR 9.)

2. *The AAO Reasonably Determined that Zhao Failed to Satisfy the Employment Creation Requirement*

a. *Zhao Has Not Demonstrated His Investment Has Created Ten Full-Time Jobs*

Zhao submitted I-9s, quarterly wage reports, federal income tax returns, and W-2s in support of his argument that his investment meets the job-creation requirements. Zhao argues that this information is sufficient to show by a preponderance of evidence that the workers are full-time because the quarterly wage reports show employees earning over \$3,640. (Zhao Mot. 16–17.) However, an employee’s quarterly wages do not indicate whether the employee is full- or part-time. Zhao points to the second RFE and notes that the USCIS accepted the quarterly wage report as sufficient evidence of full-time employment. The second RFE noted that two employees whose quarterly wages exceeded the minimum quarterly wage of \$3,640 counted as two new full-time positions and directed Zhao to submit additional evidence documenting eight more full-time positions. (AR 92.) However, the AAO reviews decisions de novo and is thus permitted to arrive at different conclusions than the officer who initially evaluated the Petition.<sup>5</sup> See Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004). At the hearing, Zhao argued that he was “misled” because the AAO requested different documentation in support of the employment creation requirement than did the USCIS. However, Zhao conceded that the AAO has the power to request different documentation. Zhao appealed the denial of his Petition, which entitled the AAO to make its own determination based on the evidence submitted. It was not unreasonable for the AAO, upon reviewing the quarterly wage reports, to determine that evidence an employee earned at least \$3,640 is not by itself sufficient to demonstrate

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<sup>5</sup> In fact, the de novo review worked in Zhao’s favor in one regard: the AAO withdrew the flawed accounting analysis regarding the reflection of operating losses in paid-in capital. (AR 57.)

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that the employee is full-time.

The USCIS Interoffice Memorandum Zhao discussed at the hearing does not require a different result. (Zhao Mot. Ex. 3, at 3.) The Interoffice Memorandum noted: “when a case is approvable based on initial evidence, and there is not evidence justifying a particular concern to support a RFE or a referral to Fraud Detection and National Security (FDNS), the case should be approved without RFE or NOID.” (*Id.*) However, this merely directs the USCIS to approve applications without an RFE when those applications are “approvable,” that is, when they meet the EB-5 requirements. In this case, the USCIS had concerns about the number of employees created by the investment as well as Berkeley Dog’s use of the investment capital, which prompted the RFEs.

Zhao also argues that he was not provided with sufficient information regarding which employees used false residency documentation so he cannot correct this deficiency. (Zhao Mot. 18–19.) The Government argues that this issue has not been exhausted because the AAO declined to rule on it. (Government Opp. 11.) The Court agrees that this particular issue is not exhausted. The AAO declined to determine whether Zhao had demonstrated the added employees were “qualifying” because Zhao had failed to demonstrate that any employees were full-time. (AR 10.) However, like the AAO, the Court finds against Zhao for other dispositive reasons and need not remand the matter for further proceeding before the AAO.

b. Zhao Has Not Demonstrated the Job-Creation Potential of His Investment

Alternatively, Zhao argues that even if he failed to demonstrate his investment yielded at least ten new full-time positions for qualified workers, the business plan he submitted suffices to demonstrate his investment’s job-creation potential. (Zhao Mot. 22.) Zhao addresses the AAO’s concern about the discrepancy between the organizational chart and the business plan but notes that the two documents have different purposes, with the organizational chart demonstrating Zhao’s management role and the business plan demonstrating the creation of qualified employment positions. (Zhao Mot. 23–24.) Because the unpaid directors and officers and part-time workers are not qualifying full-time employees, Zhao excluded them from the business plan. (*Id.*) Zhao also addresses the inconsistencies in the business plan’s statements regarding the number and location of future stores. He reconciles the discrepancy by noting that the plan is to expand from the

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original locations in Irvine and Brea, establishing a third Orange County location in Mission Viejo and five additional locations in Los Angeles and San Diego counties. (Zhao Mot. 24–25.)

It is difficult to see how the AAO was to assume these explanations without a basis in evidence for them. This is particularly true with regard to the discrepancy between the organizational chart and the business plan. The discrepancy the AAO found was that the business plan identified more employees than the organizational chart, but Zhao's explanation seems to indicate that the organizational chart would display more employees. In fact, when one examines both the business plan (AR 617) and the organizational chart (AR 209), there is an even greater discrepancy than the AAO found. The business plan's count of 32 employees does not include the CFO, CEO, Corporate Secretary, and President, which were presumably included in the AAO's count of 28 employees in the organizational chart. If those are excluded from the organizational chart, as they are in the business plan, the total count in the organizational chart is only 24.

The Court agrees that the AAO was reasonable in concluding the business plan was not credible, but for different reasons than those cited by the AAO. One would not automatically assume the lists of employees in the business plan and the organizational chart would be identical, especially given that the organizational chart noted different numbers of grillers and servers/cashiers for the Brea and Irvine locations. However, there are other reasons to be suspect of the business plan's credibility. For instance, the plan notes that the first location opened in August 2010 and notes that two future locations will open in central Orange County and Los Angeles County. (AR 617.) The list of employees at store number one, which one can only reasonably assume means one of the existing locations, only lists four grillers. However, according to the organizational chart, the Brea store has three grillers and the Irvine store has five. (AR 209.) Additionally, the business plan notes that only one store exists (AR 617), which makes the Court doubt the validity of Zhao's attempted reconciliation of the various statements about store location and expansion in the business plan. While the plan is undated, the plan was obviously written well before Zhao submitted his Petition. Further, at least one additional store (the Irvine location) was open before Zhao submitted his Petition (AR 621–38), and possibly two additional stores (the Irvine and Mission Viejo locations) were open before Zhao submitted his Petition (See AR 92; but see AR 98). The business plan was not updated before Zhao submitted his Petition, so it is impossible to deduce the timeline for the planned expansion and whether the planned expansion described in the plan was already

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well underway by the time Zhao filed his Petition.<sup>6</sup> Thus, it is reasonable to conclude that the plan is not credible. See In re Ho, 22 I. & N. Dec. at 213 (“Most importantly, the business plan must be credible.”).

More fundamentally, the business plan is not comprehensive enough to support the requirement of job-creation potential. First, as the Court has explained, the plan is outdated. Second, the plan is very unspecific. It lacks job descriptions, as the AAO noted, as well as a timetable for hiring or a justification for the staff requirements. See In re Ho, 22 I. & N. Dec. at 213 (a comprehensive business plan “should explain the business’s staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions.”). The USCIS had previously asked Zhao to provide a timetable for hiring in its second RFE, but Zhao failed to do so. As discussed, the timing offered in the business plan is vague and may refer to expansions within Orange County that have already occurred. Further, the planned expansion in Orange County to three stores “within the next year” (AR 600) is the only planned expansion that could reasonably be considered within the two-year timing requirement of the EB-5 regulations. The planned expansion into Los Angeles and San Diego Counties is set to occur “within five years.” (AR 600.) Given that the Plan is undated, it is impossible to determine whether the broader expansion could occur within the two-year requirement.

Accordingly, the AAO’s decision to deny Zhao’s Petition was not unreasonable. The Court has identified multiple alternative grounds supporting the AAO’s decision.

#### IV. Conclusion

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<sup>6</sup> This also renders irrelevant the fact that the USCIS previously approved alien-investor Lee’s application with respect to his investment in Berkeley Dog based in part on the same business plan. (See Zhao’s Mot. 25.) Lee applied before Zhao and, as discussed, the timeline set forth by the business plan is critical to the Petition. Zhao’s emphasis at oral argument on the approval of Lee’s application does not overcome this hurdle. While the USCIS gives deference to prior approvals of certain aspects of an EB-5 application, the USCIS may not rely on prior favorable decisions where “the underlying facts . . . have materially changed.” (Zhao Mot. Ex. 2, at 23.) As the Government pointed out, Berkeley Dog was only a startup when Lee applied.

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For the reasons discussed above, the Court denies Zhao's motion for summary judgment and grants the Government's motion for summary judgment.

IT IS SO ORDERED.

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