

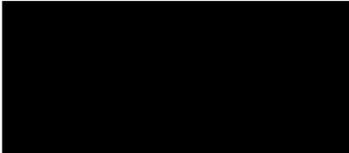


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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



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File: [Redacted]

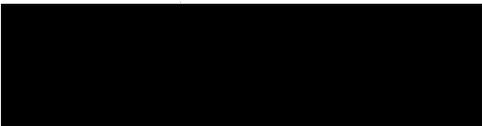
Office: Texas Service Center

Date: APR 5 2001

IN RE: Petitioner: [Redacted]

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

IN BEHALF OF PETITIONER:



Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds.

On appeal, counsel argues that the petitioner presented sufficient evidence of her investment and that her funds were obtained lawfully.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) 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
- (iii) 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).

On the Form I-526, the petitioner indicated that she established a new commercial enterprise, Sunda Investment and Developing, Inc. (Sunda), by creating an original business. The petitioner further indicated that she was the sole owner of Sunda, that she would be operating a restaurant and that she had invested \$1,129,195.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon

which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner 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. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of

borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

In a brief submitted with the petition, counsel asserted that Sunda had purchased real estate for \$790,000 and "properties in the premise" for \$10,000. Counsel further asserted an additional \$300,000 remained "in the bank" for preparation, operating permits, renovations, equipment, furniture, and operation of the restaurant.

The petitioner initially submitted a deed dated November 6, 1998 indicating Sunda purchased real estate at [REDACTED] from [REDACTED] for \$790,000; a purchase agreement whereby [REDACTED] agreed to purchase equipment from [REDACTED] for \$10,000; cancelled checks on account number 5102-0000000-008 issued by [REDACTED] to [REDACTED] Associates for \$750,000 and \$9,076.51; checks issued by [REDACTED] Associates, Escrow Agent, to [REDACTED] the settlement agent for the real estate purchase, and itself; a Bank of China letter confirming that [REDACTED] opened account number [REDACTED] on May 4, 1998 and closed the account with a balance of \$1,129,195.83 by transferring the funds to another [REDACTED] account, number [REDACTED]; a certificate of incorporation indicating Sunda was authorized to issue 200 shares for no par value; and a stock certificate issued to the petitioner for 200 shares.

On March 26, 1999, the director requested additional evidence of the petitioner's investment, including bank statements for Sunda and the petitioner demonstrating the transfer of funds and evidence of money transferred to Sunda in exchange for stock.

In response, the petitioner submitted [REDACTED] bank statements, account number [REDACTED] from January 1999 through April 1999 showing a transfer of \$196,000 from the petitioner's Hong Kong account on April 8, 1999; [REDACTED] bank statements, account number [REDACTED] from January 1999 through April 1999 showing balances of less than \$4,000 but no indication of the source of that money; the petitioner's bank statement, account number [REDACTED] showing a balance of over \$10,000 but documenting no transactions; and invoices all dated January 1999 or later.

The director concluded the petitioner had not demonstrated that the funds in Sunda's account were the petitioner's personal funds. The director further concluded that, as the cost of the property and equipment only amounted to \$800,000, the petitioner had not demonstrated that she had placed \$1,000,000 at risk. The director also noted the petitioner had failed to submit any contract or other agreement with Summit Associates.

On appeal, counsel argues the director misinterpreted the law and disregarded evidence. Counsel states:

Provided to the Service, as part of said Exhibit 5, was evidence of a wire transfer of December 16, 1997 from the account of [the petitioner] from the Bank of China, Hong Kong, to account number [REDACTED] in the name of the new enterprises at the Bank of China, Chinatown (New York). . . .

Further substantiating said transfer was a copy of a statement from the Bank of China, Hong Kong, indicating a balance of \$1,012,407.75 in the petitioner's account, number [REDACTED] as of December 1, 1997. Additionally provided were copies of receipts for currency exchange and wire transfer fees, with a copy of the petitioner's account book for the Bank of China, Hong Kong, certifying a balance of \$1,012,407.75 in account number [REDACTED] under the petitioner's name, further verifying the above noted wire transfer. . . .

Additionally provided as Exhibit 5 of the original petition was a certified statement from the Bank of China, New York, showing a balance of \$1,098,433.26 in the aforementioned US bank account, number [REDACTED] in the name of [REDACTED] Investment and Developing, Inc., as of December 17, 1997. . . .

Also provided with the original petition, as part of Exhibit 5, was a statement, dated December 11, 1999, from the Bank of China, in New York, stating that [REDACTED] Investment and Developing Inc. had transferred the above noted funds, which at that time were in the amount of \$1,129,195.83 into account no. [REDACTED] under the name of [REDACTED] Investment and Developing, Inc.

Counsel asserts this evidence is all resubmitted on appeal as Exhibit 3. Exhibit 3 includes the Bank of China letter regarding the transfer of funds from [REDACTED] to [REDACTED] a statement from account [REDACTED] documenting the transfer of \$129,195.83 from [REDACTED] on November 2, 1998; a credit advice regarding a transfer of \$1,010,000 on December 16, 1997 from the petitioner's Hong Kong account into [REDACTED] account [REDACTED] a bank letter indicating account [REDACTED] was opened on December 17, 1997 with \$1,098,433.26; a certificate of balance indicating the petitioner was the account holder for Hong Kong account number [REDACTED] with a balance of \$1,012,407.75 as of December 1, 1997; copies of the pages of the petitioner's passbook for account number [REDACTED] showing a debit of \$1,010,019.41 on December 16, 1997; exchange memos; notifications of debits for handling charges from the petitioner's Hong Kong

account; bank statements for the petitioner's United States account documenting no transfers to Sunda; and 1999 tax returns reflecting the petitioner's ownership in Sunda and outstanding common stock worth \$1,325,196.

Contrary to counsel's assertion, the wire transfer notices, passbook statements and credit advices were not originally submitted. Thus, the director could not have considered such documentation.

While the record now establishes that the petitioner transferred over \$1,000,000 to [REDACTED] in December 1997, the record does not establish that those funds were used to purchase the property and equipment. The petitioner transferred \$1,010,000 to Sunda account number [REDACTED]. The checks issued to Summit Associates, however, appear to be issued on account number [REDACTED] (although that account number has been added by a sticker and the statement on appeal for [REDACTED] shows a debit for check 1014 for \$750,000 on November 6, 1998). The checks used to pay the invoices are issued on account number [REDACTED]. The petitioner has documented that the \$1,129,195.83 in account number [REDACTED] were transferred to that account from account [REDACTED] on November 2, 1998. The petitioner has not, however, demonstrated the source of the funds in account number [REDACTED]. The record does not contain any evidence that the \$1,129,185.83 were transferred to account number [REDACTED] from account number [REDACTED] (the [REDACTED] account into which the petitioner transferred her personal funds) or another account owned by the petitioner. Thus, the petitioner has not documented an unbroken path from her account in Hong Kong to the account on which the checks to [REDACTED] Associates were issued. As such, the funds actually spent on the purchase of property have not been established as those contributed by the petitioner, as opposed to a business loan.

In addition, there is no evidence the tax returns submitted on appeal were filed with the Internal Revenue Service and the petitioner has not submitted audited balance sheets. Therefore, even if the petitioner established that her funds were used for the purchase of the property, she has not established the nature of those funds. Specifically, it is not clear whether those funds were invested or merely loaned to the corporation.

Furthermore, the record does not clearly reveal the role of [REDACTED] Associates. The settlement agent for the property and equipment sales is listed as [REDACTED]. [REDACTED] Associates is not identified on the closing documents. The closing documents do refer to a separate escrow agreement, but that agreement is not in the record. The director specifically requested that the petitioner submit any contracts involving [REDACTED] Associates. While the petitioner submits on appeal a letter from [REDACTED] indicating Summit

Associates was the title insurer, the petitioner failed to submit the actual contract as requested. While one of the Summit Associates checks is issued to [REDACTED] without the escrow agreement, we cannot determine whether the funds paid to [REDACTED] Associates were for the property and equipment.

Finally, while we do not agree with the director that a petitioner must demonstrate that the new commercial enterprise has actually spent \$1,000,000 in order for that amount to be at risk, we agree that the petitioner has not established that she had placed the full \$1,000,000 at risk in this case. Although a petitioner need not show the business has already spent the full \$1,000,000, a petitioner must show that she has invested or committed the full \$1,000,000 to the enterprise and that the enterprise has undertaken meaningful business activities.¹

In this case, \$1,000,000 in cash had been placed in one of the business' accounts and the business had spent \$800,000. While counsel asserted an additional \$300,000 would be spent on equipment, renovations, and operations, that assertion was not supported at the time of filing. The petitioner failed to submit estimates of the renovation costs, evidence of negotiations for the renovations or a list of needed equipment beyond the equipment purchased from [REDACTED] Inc. Nor did counsel specify which operations would be funded by the \$300,000. The payment of normal operating costs is not a capital contribution.

The invoices submitted in response to the director's request for additional evidence were all dated after the date of filing. While the invoices might suggest the full \$1,000,000 was committed at the time of filing, the petitioner failed to provide evidence of such commitment. In a case like the instant petition, where the petitioner is the sole shareholder and has sole control over the business' money, it is vital that the petitioner establish that any money not yet spent is at least committed.

In light of the above, the petitioner has not demonstrated that she invested at least \$1,000,000 which were utilized by the business or placed at risk.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

¹ See Matter of Ho, I.D. 3662 (Assoc. Comm., Examinations, July 31, 1998), for a discussion of what constitutes meaningful business activity.

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his 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 Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In support of the petition, the petitioner submitted no evidence of how she accumulated over \$1,000,000. The director requested evidence of the lawful source of her funds. Specifically, the director requested the evidence required by the regulations as applicable quoted above.

In response, the petitioner submitted a letter from the corporate secretary for [REDACTED] asserting:

(A) Please note that no foreign business registration records are required of Petitioner and therefor none are included herein;

(B) Please note that no corporate tax return has been filed as yet for [REDACTED] Investment and Developing, Inc., and that Petitioner has not as yet been required to file an individual tax return, therefor copies of all corporate tax returns for [REDACTED] Investment and Developing, Inc., and individual tax returns for the Petitioner, both Federal and State, are not included herein, notwithstanding please refer to Exhibit 4 herein;

(C) Please note that there are no other sources of capital other than those included herein, therefor evidence of all other sources of capital is not included herein, please refer to Exhibit 5 herein. . . .

Exhibit 4 included employers quarterly federal tax returns for Sunda and Exhibit 5 included four 1995 five year Service Contract Agreements whereby the petitioner was retained to provide legal consulting services in China for Chinese businesses.

The director concluded the petitioner had not submitted the documentation required by the regulations and that the contracts submitted did not indicate the petitioner had ever been paid for her legal services or, if she was paid, when she was paid.

On appeal, the petitioner submits letters from the four companies which indicate the petitioner was paid a total of \$1,362,000. These letters, however, indicate that some of that money was paid to the petitioner after December 1997, when the petitioner transferred \$1,010,000 to [REDACTED]. Specifically, one letter indicates the petitioner was paid \$382,000 by September 1998, the second letter indicates the petitioner was paid \$324,000 by June 30, 1999, the third letter indicates the petitioner was paid \$320,000 "over the last four years," and the final letter indicates the petitioner was paid \$336,000 by January 30, 1999. Therefore, it is still unknown how much the petitioner had received for her legal services as of December 1997. Moreover, the fact that the petitioner was paid a little over \$1,000,000 does not explain how the petitioner accumulated \$1,000,000.

It is clear from the petitioner's response to the director's request for additional documentation and counsel's reiteration of that position on appeal that the petitioner and counsel both misinterpret the regulations and the director's request. The requested documentation goes to where the invested money originated. Thus, the foreign business records and corporate tax returns referenced in the regulations are not those of the new commercial enterprise, but, rather, the petitioner's other possible business interests which could account for the money invested by the petitioner in the new commercial enterprise. Thus, counsel's assertion that corporate tax returns were unavailable for [REDACTED] is not on point. Neither the petitioner nor counsel have asserted

that the petitioner has no ownership interest in any foreign businesses. Similarly, counsel asserts the petitioner has yet to pay taxes in the United States, thus, her tax returns are not available. The petitioner has not established, however, that she was not required to pay taxes in her native country. If these documents are "not applicable," as asserted, then it is not clear how documentation regarding any "other sources of capital" can also not be applicable, as the funds must have derived from some source.

It remains, the 1995 legal services contracts and letters referencing money paid to the petitioner after 1995 cannot account for the accumulation of \$1,010,000 by December 1997 in addition to any living expenses the petitioner might have had during those two years.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . which the alien has established" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is Sunda Investment and Developing, Inc.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

Beyond the decision of the director, the record indicates that the petitioner purchased property at 2000 Park Avenue and restaurant equipment located at that address. Thus, the record suggests that the petitioner purchased an existing restaurant. If so, the petitioner must show either that she restructured or expanded the existing restaurant. The record does not contain the balance sheets, employment information, or any other information regarding the previous restaurant at 2000 Park Avenue. Therefore, we are unable to determine whether the petitioner reorganized or expanded that business as defined above.²

CLOSING

The record reflects that the petitioner had substantial assets and that she transferred over \$1,000,000 to the new commercial enterprise, a business which had already purchased property and equipment for its proposed business at the time of filing and appears to be currently operating. Even on appeal, however, the petitioner has failed to submit the evidence requested by the director and required by the regulations which would adequately document her claimed investment or the source of her funds.

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.

² If the petitioner purchased an existing restaurant, she would also need to demonstrate that she created 10 jobs beyond any jobs at the location prior to her purchase. See Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) at 5.