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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



Public Copy

File: [Redacted]

Office: Texas Service Center

Date: APR 9 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:



Identifying data is used to prevent clearly erroneous review of personal identity

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 that he had placed the required amount of capital at risk or that he had or would create the necessary employment.

On appeal, counsel argues the petitioner invested the necessary capital and that the petitioner submitted a sufficient business plan which indicated the petitioner would create the necessary employment.

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 he had invested \$201,000 in Vision Realty Corporation, of which he was a 50 percent owner. The petitioner indicated that the corporation would be operating a restaurant.

CAPITAL AT RISK

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

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)(2) states:

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.

The regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7.

In support of the petition, the petitioner submitted a business plan which called for the petitioner to invest \$1,200,000; the articles of incorporation which provide for 7,000 \$1.00 par value shares; minutes of a director's meeting whereby the directors resolved to issue the petitioner and Tobias Palmer each 700 shares; a stock certificate for 700 shares issued to the petitioner; the petitioner's October 1999 bank statement; the sale and purchase agreement for property indicating a purchase price of \$725,000; an engineer's contract; an architect's contract; and a contractor's estimate of costs for the completion of the restaurant.

On January 3, 2000, the director requested additional information regarding the petitioner's claimed investment. In response, the petitioner submitted a computer printout regarding [REDACTED] Corporation's bank account indicating a deposit of \$133,760 on March 8, 2000; a bank statement for the petitioner's German bank account number [REDACTED] indicating a deposit of 1,000,000 Deutsche Marks from [REDACTED] on December 10, 1999; a bank statement from the same account documenting a December 13, 1999 debit of 1,061,862.18 Deutsche Marks for a wire transfer to an unidentified source overseas; a bank statement for the petitioner's

German law firm showing a final balance of \$751,000 after debits totaling \$5,500,000 on December 3, 1999; a promissory note whereby the petitioner agreed to pay \$1,050,000 to [REDACTED] by December 31, 2005; a security agreement indicating the promissory note was secured by the petitioner's unidentified assets; the closing statement for the purchase of the land for the restaurant dated December 16, 1999 indicating \$676,253.93 was due to seller at that time; invoices; an architects agreement dated January 10, 2000; and documentation regarding the petitioner's interest in a German limited liability company not named in the translation.

The director determined that the business plan indicated costs of only \$830,748.03 by December 2004 and that the plan further called for proceeds to pay those costs. The director further noted that [REDACTED] Corporation closed on the property for the restaurant after the date of filing. The director also expressed concern that the petitioner's loan was not secured by specifically identified assets. Finally, the director noted the petitioner only claimed to have invested \$201,000. In light of the above, the director concluded the petitioner had not established that he had committed the full \$1,000,000 or that any money contributed had been placed at risk.

On appeal, counsel asserts the claim to have invested only \$201,000 was a mistake. Counsel fails, however, to clarify just how much the petitioner had contributed at the date of filing. Counsel further asserts that the business plan included projected operating costs and profits, but that these numbers were not part of the petitioner's investment. The petitioner submits a new security agreement specifically identifying the assets of the petitioner as collateral for the loan from Ms. [REDACTED]

The closing documents provide for a \$750,000 purchase price and the estimated costs for the construction of the restaurant amount to an additional \$685,000. Therefore, the business plan does call for an investment of over \$1,000,000 prior to the restaurant beginning operations.¹ In addition, the investment claimed on the I-526 is not controlling where the record demonstrates a different amount.

We concur with the director, however, that the petitioner did not demonstrate that his personal funds had been placed at risk. In addition, the record fails to document that the petitioner's funds were used to pay the start-up costs.

¹ The director's conclusion that the business plan only called for a total of \$830,748.03 by 2004 is simply wrong. That amount is for 2004 only. The business plan actually forecasts costs totaling over \$3,763,101 by 2004.

At the time of filing, [REDACTED] Corporation had not yet purchased the land on which it plans to build a restaurant. While a party to a sales agreement may be subject to penalties should the party back out of the agreement, such an agreement does not place all the investment funds at risk. On this issue, the petition was, at best, filed prematurely.

Further, the original promissory note was not secured by specifically identified assets of the petitioner. Regarding secured promissory notes, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Ex., July 31, 1998). Otherwise, the note is meaningless. While the petitioner has now amended the security agreement to identify his personal assets, the petitioner has not submitted any evidence that he personally owns the assets identified or that Ms. Becker would be able to seize those assets.

In addition, the record shows only money coming into the petitioner's German account and money going from that account to an unidentified account overseas. The bank statements for [REDACTED] Corporation are for well after the petitioner allegedly made his investment and do not document that Vision Realty Corporation ever received any money from the petitioner. The petitioner has not submitted cancelled checks to document that he ever transferred money to the corporation, the title company or architect. The petitioner has simply failed to document his alleged investment. Moreover, even if the record showed the money wired from the petitioner's German account was wired to Vision Realty Corporation, without an exchange rate, we cannot determine the amount of money in U.S. dollars.

Finally, the stock certificate only reflects an investment of \$700. Even if the petitioner had documented that he had contributed additional funds to the corporation, he has not shown that any funds beyond \$700 were contributed to the corporation as capital. Debt arrangements whereby the petitioner lends money to the corporation do not constitute an investment. 8 C.F.R. 204.6(e) (definition of invest).

In light of the above, the petitioner has not established that he invested \$1,000,000 in Vision Realty Corporation or that the full \$1,000,000 is at least irrevocably committed to that corporation.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

The petitioner has not documented that he has hired any employees. Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

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, supra.

Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The 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. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The director concluded the petitioner's business plan was insufficient because it contained insufficient information regarding the restaurant's job-creation potential.

The business plan indicates the restaurant, upon opening, will immediately hire four full-time cooks, two hosts, six servers, three people for general help and one manager totaling between 16 and 35 full-time employees. The business plan further indicates the restaurant will be open from 7:00 a.m. to 10:00 p.m. for all meals. In response to the director's request for additional documentation, the petitioner submitted an addendum indicating the restaurant would be 5,000 square feet and include an outside seating area. On appeal, counsel submits a brief analysis for several nearby restaurants.

It is credible that a restaurant of that size would require at least 10 people at peak meal times. It is not clear, however, that even a restaurant open all day would require the same amount of servers, helpers and cooks at 3:00 p.m. as during dinner time. The plan simply contains insufficient information regarding the shifts the full-time employees would be working.

In light of the above, we concur with the director that the business plan is insufficient to establish that the restaurant can reasonably be expected to hire 10 full-time employees.

SOURCE OF FUNDS

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

(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, supra, at 6; Matter of Izumii, supra, 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).

Beyond the decision of the director, the record fails to establish the lawful source of the petitioner's funds. While the petitioner submitted a promissory note for \$1,050,000, the record does not contain evidence that the petitioner received those funds from the lender. The only bank statement for the petitioner in the record shows a balance of \$204,929 and the only bank statement for Vision Realty Corporation shows a balance of \$134,239. It is not possible to trace funds which are not documented as existing back to a lawful source.



In addition, the petitioner has not documented that he will repay the loan with lawfully obtained funds. As stated above, the petitioner has not documented ownership of the assets used to secure the loan. Moreover, the petitioner has not provided translations of his tax returns or a currency exchange rate. Therefore, it is not possible to determine his income.

In light of the above, the petitioner has not established the lawful source of the funds allegedly contributed to Visual Realty Corporation.

SOURCE OF OTHER FUNDS

8 C.F.R. 204.6(g) (1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b) (5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.**

(Emphasis added.) The petitioner has not submitted any evidence regarding the source of the funds invested by his partner, Tobias Palmer.

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.