



101

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

[Redacted]

File: WAC-98-176-51505 Office: Vermont Service Center

Date: APR 13 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)

Public Copy

IN BEHALF OF PETITIONER:

[Redacted]

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, Vermont 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 in a targeted employment area or that he had or could reasonably be expected to create the required employment.

On appeal, counsel argues the petitioner's investment was made in a targeted employment area, that the petitioner is ready to invest additional funds, and that the petitioner's business will 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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

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

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has

experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

The petitioner indicated on the Form I-526 that the new commercial enterprise [REDACTED], Inc., was located at [REDACTED] Hughson, California. The petitioner further indicated that the targeted employment area consisted of Stanislaus County.

On August 6, 1999, the director requested evidence that the business was located in a targeted employment area. While the petitioner responded to that notice with documentation regarding other issues, the petitioner failed to provide any evidence regarding the unemployment statistics for Stanislaus County. Thus, the director concluded the petitioner has failed to establish that Doug Sing USA was doing business in a targeted employment area.

On appeal, counsel submits evidence that the unemployment rates in Stanislaus County, and especially Hughson, were more than 150 percent above the national average.

The record, however, does not indicate that [REDACTED] will be operating solely in [REDACTED]. The petitioner initially incorporated [REDACTED] subsequently rejected the idea of purchasing a farm and changed the name of the corporation to [REDACTED]. The statement by domestic stock corporation for [REDACTED] indicates the street address is in Hughson but the mailing address is [REDACTED] in Los Altos Hills, California. The 1998 bank statements are addressed to [REDACTED] USA in Los Altos, the 1999 bank statements indicate an address in [REDACTED] the September 1999 closing statement for [REDACTED] indicates [REDACTED] address is in [REDACTED] and the October 1999 payroll records are addressed to [REDACTED] Avenue, Sunnyvale, California. Sunnyvale and Los Altos are both located in Santa Clara County. The record indicates [REDACTED] secretary and chief financial officer, purchased [REDACTED] as his personal residence. The record does not contain the leases or deeds for the Hughson or Los Altos locations. Therefore, the petitioner has not established where the company is based.

Furthermore, most of the employees will be performing construction on various properties purchased allegedly by [REDACTED] for resale. Of all the properties so far identified, none are in Stanislaus County. Most are in Santa Clara County and one is in San Joaquin County. The record does not contain any information regarding the unemployment rates in Santa Clara or San Joaquin Counties. As such, the petitioner has not demonstrated that any employment creation will be taking place in a targeted employment area. Therefore, the minimum investment amount in this case is \$1,000,000.

INVESTMENT

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 petitioner initially submitted a fund transfer notification confirming the transfer of \$516,009.16 from the petitioner's Hong Kong account to [REDACTED] account number [REDACTED] at Bank of the West. On two occasions, the director requested that the petitioner submit additional evidence that the funds had been made available to the business and of actual business activity. The petitioner submitted a stock certificate dated June 2, 1999, documenting the petitioner's ownership of 50,000 shares in [REDACTED] and closing documents for [REDACTED] and [REDACTED]. The petitioner also submitted a business plan asserting [REDACTED] is in the business of purchasing, developing, and then selling property.

The closing documents reveal that [REDACTED] purchased all of the properties personally, and not on behalf of [REDACTED] although [REDACTED] is listed as the trust beneficiary and lender for [REDACTED]. The only piece of property purchased prior to the time of filing was [REDACTED]. The construction permit for [REDACTED] identifies the contractor as [REDACTED] not [REDACTED].

The director concluded that the petitioner had not established that his funds or Doug Sing USA's funds were used for the improvements to the properties which were developed and subsequently sold or that the corporation had any involvement in the transactions.

On appeal, counsel argues that the corporation had no credit history, so Mr. [REDACTED] had to personally perform the transactions but that he used the corporate funds. The petitioner submits an April 1998 letter denying credit to both [REDACTED] and [REDACTED] USA, checks issued by [REDACTED] to Bank of the West for \$500,000 and \$57,933.09, and a bank statement reflecting that these checks were cashed.

While Mr. [REDACTED] closed on [REDACTED] on May 15, 1998 with an outstanding balance of \$57,933.09, the petitioner has not submitted evidence that Mr. [REDACTED] used the \$57,933.09 check issued to Bank of the West to purchase a money order issued to the seller. Moreover, the bank statement also reflects a balance of \$516,368.88 at the beginning of the month and a transfer of \$60,000 from the

¹ The record also contains a letter from an escrow company regarding Mr. [REDACTED] purchase of [REDACTED]. As the letter congratulates Mr. [REDACTED] on the purchase of his home, however, this property cannot be considered to be relevant to the petitioner's claimed investment in [REDACTED].

corporation's money market account the same day the \$57,933.09 check was cashed. As the original source of the \$60,000 is unknown, it is even less clear that the outstanding balance at closing was paid with the petitioner's funds. Furthermore, the \$500,000 check is addressed to Bank of the West. The petitioner has not submitted any evidence indicating where those funds went. It remains, at the time of filing the petitioner had contributed, at most, \$57,933 towards the purchase of property as a real estate investment. Even those funds, however, went towards Mr. [REDACTED] purchase of property, which has not been demonstrated to be an expense of the corporation. The property purchased was never an asset of the corporation as it was bought and subsequently sold by Mr. [REDACTED] personally.

Even if the \$500,000 was withdrawn for corporate capital expenses, the petitioner has not demonstrated that he "invested" those funds in [REDACTED] as defined in the regulations. The petitioner only owns 50,000 shares of stock in [REDACTED] and those were not issued to the petitioner until well after the petition was filed. Further, the record does not contain the articles of incorporation or minutes of a director's meeting setting the par value or consideration to be paid for those shares. In addition, the petitioner has not submitted audited balance sheets or corporate tax returns certified by the Internal Revenue Service complete with Schedule L. Thus, the petitioner has not demonstrated that the funds were invested as opposed to loaned to the corporation.

It is significant that the closing documents for [REDACTED] indicate the corporation lent \$300,000 to Mr. [REDACTED] for the purchase, sufficient cash to have purchased the property outright. Therefore, counsel's argument that Mr. [REDACTED] purchased the property personally because [REDACTED] lacked a credit history is not persuasive. Even when the corporation had the cash to purchase the property, it merely lent the money to Mr. [REDACTED] for the purchase. Once again, the property never became an asset of the corporation as it was purchased by Mr. [REDACTED] and never transferred to Doug Sing USA. Thus, [REDACTED] appears to be a credit company rather than a real estate development company. As a credit company, the loan of cash to Mr. [REDACTED] (at least beyond the initial loan) is an operating cost akin to the purchase of inventory for a retail business, and cannot be considered a capital expense. The petitioner has not established that the \$300,000 loaned to Mr. [REDACTED] was the petitioner's capital contribution as opposed to the profits from a prior loan. Moreover, the \$300,000 loan was made well after the date of filing, and cannot establish that the funds were at risk at the time of filing.

In light of the above, the petitioner has not demonstrated that he invested \$500,000 as claimed or that the funds transferred to [REDACTED] account were placed at risk. Finally, as the minimum

investment amount is \$1,000,000, the petitioner has not demonstrated that, at the time of filing, the full \$1,000,000 was fully committed to the business and at risk.

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.

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.

Initially, the petitioner provided no evidence that he had or would create 10 jobs. In response to two requests for additional documentation, the petitioner submitted October 1999 payroll records for Doug Sing USA listing six employees and a business plan discussing the purchase of three subdivisions.

The director noted the petitioner failed to submit Forms I-9 and tax documentation as requested and questioned the credibility of the business plan's assertion that the corporation would hire workers normally subcontracted by developers.

On appeal, counsel asserts that the petitioner intends to depart from industry standard by employing his own construction workers, electricians and plumbers. Counsel further asserts that the workers will be employed full-time year round because, in addition to performing services at properties purchased by Doug Sing USA, they will also perform services for other developers.

It remains, the petitioner has failed to submit Forms I-9 for his current employees. The payroll records also fail to reflect the hours worked by any of the employees. Therefore, the petitioner

has not established that any of [REDACTED]'s employees are qualifying employees. Moreover, the petitioner has not provided quarterly wage and withholding reports confirming the employment of the individuals listed on the payroll records.

Furthermore, Mr. [REDACTED] was a contractor prior to the petitioner's incorporation of [REDACTED] and his wife was a real estate agent. The record does not reveal whether the six employees listed on the payroll records, which include Mr. [REDACTED] his wife, and another family member, were employees of Mr. [REDACTED] prior to being employed by [REDACTED]. As discussed above, it appears that [REDACTED] is simply financing the real estate deals and development being performed by Mr. [REDACTED], who was already in the business prior to the petitioner's involvement.² In addition, it is acknowledged that Mr. [REDACTED] and his fellow employees will still be subcontracting for other developers. Therefore, it is not clear how the petitioner is creating any new jobs.

The business plan lists three projects "under consideration." All three projects appear to be subdivisions. The petitioner does not submit any evidence that he has purchased or even begun negotiating the purchase of these properties. As discussed above, the record only contains evidence of single lots purchased by Mr. [REDACTED]. In addition, the record does not contain any evidence that the petitioner will be able to contract his employees to other developers when their services are not needed by [REDACTED]. As such, we concur with the director that the petitioner's plan to keep trade people such as electricians and plumbers on permanent payroll lacks credibility.

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

² This fact also raises questions regarding whether the petitioner actually established a new commercial enterprise.

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).

Beyond the decision of the director, the petitioner has not fully documented the source of his funds. The record includes evidence that the petitioner is one of two owners of Huadu City Doug Sing Food Inc. The business was registered in 1994 with 5,000,000 Yuan of initial capital and produced significant dividends for the petitioner since that time. The record also indicates the petitioner sold property in 1995 and 1996. The record does not indicate, however, the source of the petitioner's income prior to 1994. Therefore, it is not clear where the petitioner obtained the initial capital to invest in Huadu City Doug Sing Food Inc. or to purchase the property sold in 1995 and 1996. Thus, we cannot conclude that the petitioner fully documented the source of his 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.