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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



File: WAC-00-004-52478

Office: California Service Center

Date:

APR 13 2001

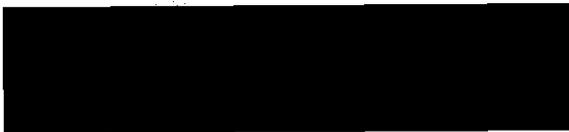
IN RE: Petitioner:



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:



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, California 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 necessary funds at risk or that he acquired his funds lawfully.

On appeal, counsel asserts the petitioner is providing additional documentation on appeal to further establish that the petitioner meets all of the eligibility requirements for the entrepreneur program.

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).

The petitioner indicates that the petition is based on an investment in [REDACTED] LLC. The petitioner submitted the articles of organization which were filed July 6, 1998, and the operating agreement which identifies the petitioner as a manager and a member whose contribution is \$1,000,000. The total investment of all members is reflected as \$6,000,000. On the Form I-526 the petitioner indicated [REDACTED] would be developing, constructing, and operating a hotel.

#### 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.

In support of the petition, the petitioner submitted a credit advice and personal bank statement documenting the transfer of \$1,100,000 from his account in Hong Kong to his account in the United States on July 16, 1999. The petitioner also submitted two cancelled checks issued on his personal bank account to [REDACTED] one for \$100,000 on July 26, 1999 and the second for \$900,000 on August 25, 1997. Finally, the petitioner submitted a receipt for \$1,000,000 from Wen Chang, a fellow manager.

The director stated:

Copies of cancelled checks without the indication of whether it has been negotiated does [sic] not prove that payment has been made. A signed copy of the operating procedure [sic] by itself does not prove that funds had been invested.

On appeal, counsel asserts the petitioner invested the full \$1,000,000.

We disagree with the director that cancelled checks do not prove that the payments have been made. While a copy of the bank statement reflecting the debit of the second check might have further verified the cancelled check, cancelled checks, unless suspect, are probative evidence of payments made. In addition, the operating agreement reflecting the petitioner's enforceable obligation to several other investors is strong evidence that the \$1,000,000 was an investment and not a loan. The operating agreement does not provide for a guaranteed return or interest payments, nor does it include guaranteed buy or sell back agreements that might suggest the petitioner's funds are anything but an investment. While audited balance sheets and certified tax returns might have further confirmed that the petitioner's funds were invested, we cannot simply discount the operating agreement.

Thus, the petitioner has demonstrated that he invested \$1,000,000 into Surf Beach.

The regulations, however, provide that a petition must also 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.

Matter of Ho, I.D. 3662 (Assoc. Comm., Examinations, July 31, 1998) at 5 states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise.

As evidence of business activity, the petitioner submitted a February 10, 1999 letter from the City of Half Moon Bay addressed to Mr. [REDACTED] a fellow manager, in care of [REDACTED] Corporation regarding the \$90,920 cost for a required environmental impact report for the proposed hotel; a check issued by [REDACTED] to the City for \$90,920; a letter from planning consultant [REDACTED] to Mr. [REDACTED] in care of [REDACTED] Corporation indicating another \$2,789 was owed to the City; a check issued by [REDACTED] to the City for \$2,789; a letter from the City to the architect; and a receipt from the City for \$54,000 issued to Mr. [REDACTED]. The petitioner also submits a business plan estimating \$15,000,000 in start-up costs, with \$8,500,000 to be financed by lenders; a preliminary development proforma; and newspaper articles regarding Mr. [REDACTED]'s proposals for the hotel and his retention of famous architect [REDACTED].

The director noted the letters from the City were addressed to [REDACTED] Corporation, and not [REDACTED]. The director subsequently noted that a petitioner must show meaningful concrete action and stated the petitioner had not met his burden of proof. Thus, the director apparently concluded the petitioner had not demonstrated any business activity.

On appeal, counsel asserts [REDACTED] has spent \$500,000 in capital expenditures. The petitioner submits a November 19, 1999 letter from the City of Half Moon Bay to the District Superintendent of the California Department of Parks and Recreation regarding the [REDACTED] an April 8, 1999 letter from Nolte Associates to Mr. [REDACTED] in care of [REDACTED] a Public Notice of Availability for a Draft Environmental Impact Report for the [REDACTED] which fails to list the owner or developer; the draft report; a notice of a neighborhood discussion meeting on the proposal; a November 20, 1998 letter from First American Title Insurance

Company addressed to [REDACTED] in care of Pacific Richland Corporation regarding a title insurance policy; and numerous checks issued by [REDACTED], totaling \$325,841.

The record still remains absent documentation of the relationship between [REDACTED] and Pacific Richland Corporation. One of the newspaper articles identifies Surf Beach as a subsidiary of Pacific Richland Corporation. The list of members attached to the operating agreement, however, does not include Pacific Richland Corporation. Schedule A to the title insurance policy identifies the insured as Surf Beach and that the land is vested in Shirley Chen and Brenda Wen as trustors for Surf Beach, beneficiary, to secure indebtedness of \$450,000. Schedule B to the policy identifies Ms. Chen and Ms. Wen as trustors for Pacific Richland Corporation, beneficiary, to secure indebtedness of \$300,000. These documents do not resolve the relationship between Surf Beach and Pacific Richland Corporation.

The record also fails to establish who purchased the property on which the hotel is to be built or the final purchase price for the property. The title insurance policy suggests [REDACTED] borrowed \$450,000 and [REDACTED] borrowed \$300,000 towards the purchase price. The proforma indicates the land cost was \$2,344,402. The petitioner, however, has not submitted the closing statement and deed to the property.

Further, the petitioner has not submitted the security agreements for the loans or the cancelled checks for the balance of \$1,594,402. Therefore, the record does not establish whether the loans were secured by the business property or whose funds were used to pay the balance.

Even assuming that [REDACTED] paid the full \$1,594,402, which is not claimed or documented, the additional capital costs reflected by the cancelled checks is \$325,841, amounting to total capital expenditures of only \$1,920,243 as of the date of filing. The operating agreement reflects a total capital investment of \$6,000,000, only \$1,000,000 of which was contributed by the petitioner. Thus, the maximum expenditures suggested by the record only account for less than one third of the total capital investment, and may not include any of the petitioner's funds.

Finally, the petitioner has not demonstrated that the plans for the hotel have been approved. Without such approval, we cannot determine whether it is reasonable to expect that he will be able to complete the project.

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. At the time of filing, the petitioner had not established that the full \$1,000,000 contributed to the proposed business was at risk.

#### 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, 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).

The petitioner claimed to have acquired his funds from the sale of property in China, paid to him by a business owned by the buyer. In support of the petition, the petitioner submitted certificates of ownership for two pieces of property in China; real estate appraisals for the property; a brochure for Fuhua Mansion; a sales contract whereby the petitioner agreed to sell his property to [REDACTED] for \$592,219 and \$591,329 to be deposited in his Standard Charter account number [REDACTED]; withdrawal notices indicating [REDACTED] International Development, Ltd. transferred \$660,000 and \$500,000 from its account at Standard Charter to the petitioner's account number [REDACTED]; statements for account number [REDACTED] showing the receipt of the transferred funds and the transfer out of \$1,100,000 on July 16, 1999; and a letter of employment confirming the petitioner's employment for [REDACTED] Estate Development Company from 1994 to the present.

The director noted the petitioner had not established the source of the funds used to purchase the property or the funds transferred to his personal account and concluded the petitioner had not established the lawful source of his funds.

On appeal, the petitioner submits a board resolution for [REDACTED] Construction and Development Company indicating the petitioner served as deputy general manager for that company during the development of the [REDACTED] Mansion and that he was awarded two apartment buildings within the Mansion complex worth \$1.2 million as a bonus in 1996; the board decision awarding the petitioner the apartment buildings; the business license for Fuhua Construction and Development Company identifying the petitioner as the deputy general manager; and untranslated foreign language documents which appear to reflect some financial transactions of Fuhua Construction and Development Company.

In his decision, the director questioned the authenticity of the withdrawal notices because they did not reflect the name of the individual transferring the funds. In response, the petitioner submitted the original documents with the original bank stamp. The director, however, mischaracterized the problem caused by the missing information regarding the individual who transferred the funds. The documents themselves appear authentic. They do not, however, establish any relationship between the buyer of the petitioner's property, [REDACTED] and the account holder, [REDACTED] International Development. Without this connection, we are unable to determine that the funds eventually transferred to Surf Beach originated from the petitioner's sale of his property.

In addition, the two contracts for the sale of the petitioner's properties both indicate the seller will transfer the purchase price to the petitioner's account number [REDACTED] at [REDACTED]. Yet, Timford International Development transferred the funds to account number [REDACTED]. This discrepancy raises

further concerns that the funds transferred by Timford International Development reflect the purchase of the petitioner's property.

CLOSING

Based on the information submitted, it is apparent that the petitioner is an individual of considerable wealth who is involved with a substantial development project, which, if approved and completed, could provide significant employment opportunities. However, the petitioner has not established that he met the minimum eligibility requirements for this visa classification at the time of filing.

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.