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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

[REDACTED]

File: WAC-99-240-51171 Office: California 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:

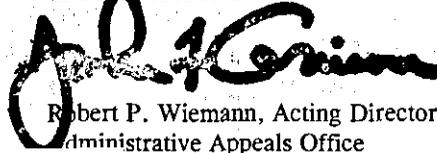
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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, 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 a qualifying investment of lawfully obtained funds.

On appeal, counsel argues the petitioner invested over \$1,000,000 of lawfully obtained capital into the new commercial enterprise.

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 indicated on the Form I-526 that the petition is based on an investment in a business, [REDACTED], LLC, located in a targeted employment area for which the required amount of capital invested has been adjusted downward. The petitioner, however, failed to support that assertion and concedes on appeal that the business is not located in a targeted employment area. Therefore, the minimum investment amount in this case is \$1,000,000.

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.

Initially, the petitioner submitted the operating agreement, minutes from the organizational meeting, articles of organization and certificates of interest for ██████████ Enterprises, LLC. These documents reflect that the petitioner was the initial manager of the company, that the petitioner and his wife jointly own one percent of the ownership interest in ██████████ Enterprises, that the HSK Family Trust owns the remaining 99 percent interest, and that the members contributed \$10 for each percentage of ownership interest.

The petitioner also submitted an unaudited balance sheet for ██████████ Enterprises, LLC reflecting \$965,983 in capital and \$38,500 in member loans; a closing statement reflecting that ██████████ Enterprises purchased a car wash through Team Escrow for \$1,780,000, financed with a loan for \$950,000; the loan documents reflecting that the loan was secured by the assets of the business; official checks purchased by ██████████ Enterprises issued to Team Escrow totaling \$831,000; and cancelled checks issued by the petitioner to Sunville Enterprises totaling \$1,025,000.

In his decision, the director stated the trust documents and cancelled checks showing the transfer of funds to the enterprise were not part of the record and concluded that the petitioner had not established that he had invested funds which were placed at risk.

On appeal, counsel notes the cancelled checks were submitted initially, resubmits those checks and submits the trust documents. The record reflects that the petitioner did transfer over \$1,000,000 of his personal funds to the new commercial enterprise, \$831,000 of which were apparently spent to purchase the business.¹

The trust documents reflect that the petitioner established a self-settled trust. Specifically, the petitioner is the trustor, trustee, and beneficiary of the ██████████ Trust. The declaration indicates the petitioner will contribute the property listed on schedule A; however, schedule A is blank. A trust, however, is only valid if it involves specific property. Black's Law

¹ The record does not contain bank statements for Sunville Enterprises which would confirm whether other funds were obtained from other sources to pay the downpayment and settlement costs.

Dictionary 1513 (7th ed. 1999). As no property was ever specified, it is not clear that the [REDACTED] Trust is valid. Moreover, the petitioner has not provided any bank statements for the trust or transactional documentation reflecting the trust's contribution to [REDACTED] Enterprises. Therefore, it is not clear how the Trust obtained its interest in [REDACTED] Enterprises.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies between the stock certificates showing minimal investments by the trust and the petitioner, the balance sheets showing significant capital, and the financial documents showing transfers only from the petitioner.

Finally, the petitioner's contribution is designated as \$10 in the meeting minutes and operating agreement. Therefore, it is not clear that the remaining funds transferred to [REDACTED] Enterprises were "invested" as defined in the regulations. The balance sheet reflects \$965,983 in capital and \$38,500 in member loans. As the balance sheet is unaudited, it cannot establish that the full \$965,983 is actual capital. Moreover, the balance sheet does not differentiate between capital contributed by the petitioner and the trust. Any funds contributed by the trust cannot be counted as the petitioner's investment. As with a corporation, a trust is a separate legal entity. Further, the record does not contain any evidence that the petitioner's percentage interest has increased from one percent. Thus, even if we accepted the balance sheet, it only reflects a \$9,660 investment by the petitioner. Finally, even if we accepted that the balance sheet is accurate and that the capital was all contributed by the petitioner, it is still short of the \$1,000,000 investment required.²

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. Therefore, any funds invested after the date of filing cannot be considered as the petitioner has not demonstrated they were irrevocably committed to the enterprise prior to the date of filing.

² The \$38,500 member loan cannot be considered capital according to 8 C.F.R. 204.6(e) (definition of capital).

In light of the above, the petitioner has not established a qualifying investment of his personal funds.

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. at 26. 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 claims to have obtained his funds through a \$3,000,000 gift from his mother and that his mother obtained the funds from the sale of real estate. In support of the petition, the petitioner submitted an affidavit from his mother, [REDACTED] and a translated real estate register indicating [REDACTED]

██████████ purchased property in 1971 and trusted the property to ██████████ in 1995.

The director noted that the affidavit was dated 1977, prior to the alleged gift in 1995, and that the real estate register did not indicate the purchase price or the petitioner's mother's name as it appears on the affidavit. The director also noted the lack of tax returns.

On appeal, the petitioner submits a new copy of the translated register, attested to by the translator on the same date as the first translation, reflecting the petitioner's mother's name correctly spelled and a translated real estate agreement by which ██████████ agreed to sell ██████████ property for \$14,642,033.79. The petitioner also submitted a tax receipt indicating Ms. ██████████ paid capital gains taxes of \$1,589,000 in 1996.

These documents do not resolve the issue of the lawful source of the petitioner's funds. The petitioner provides no explanation for the new translation, which appears to be a copy of the old translation with the name changed from ██████████ to ██████████. The petitioner does not submit a new attestation from the translator explaining the discrepancy.

In addition, the register indicates the property was "trusted" to ██████████ while the real estate agreement indicates ██████████ sold the property to Mr. ██████████.

Finally, while not raised by the director, the record lacks any transactional documentation reflecting that Ms. ██████████ transferred any funds to the petitioner's Swiss account from which he transferred money to his U.S. account and, ultimately, the new commercial enterprise.

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 ██████████ Enterprises, LLC, in which the petitioner holds a one percent interest and his self-settled trust owns the remaining 99 percent.

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. On the petition, the petitioner claims to have established a new commercial enterprise through the reorganization of an existing business.

On August 25, 1998, ██████████ Enterprises purchased the In & Out Service Center Car Wash from the Arben Corporation. In the brief accompanying the petition, counsel claimed the petitioner restructured the business by placing it under new management. A simple change in ownership, however, does not constitute the kind of restructuring contemplated by the regulations. Id. The business remained a car wash.

Counsel also claimed the petitioner expanded the business by increasing employment more than 40 percent, from 25 employees to 37 employees. This assertion is not supported by the record. The petitioner submitted the payroll list for ██████████ Corporation for the third quarter of 1998 which lists 39 employees; the 1998 third quarter quarterly wage and withholding report for ██████████ Corporation indicating 38 employees in July, 32 employees in August (the month

the business was sold) and zero in September; a payroll register for ██████████ Enterprises for May 1, 1999 indicating 40 employees (29 full-time according to handwritten notes); and a "payroll journal" for August 15, 1998 through October 10, 1998, listing 44 names (37 of whom received checks on October 10, 1998).

The evidence indicates ██████████ Corporation employed between 32 and 39 employees. An increase of 40 percent would require ██████████ to employ at least 45 employees. The record does not reflect that ██████████ employed 45 employees at any one time prior to the filing of the petition. As the law requires that the petitioner have already established the new commercial enterprise at the time of filing, a petitioner who claims eligibility based on expanding the employment at an existing business must have already expanded the employment by 40 percent by the time of filing. In light of the above, the petitioner has not demonstrated that he has established a new commercial enterprise.

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.