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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 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)

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, 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 invested the required amount of lawfully obtained capital in a new commercial enterprise or that he would meet the employment-creation requirement.

On appeal, the petitioner asserts that he has invested the necessary lawfully obtained funds and that he has established a new commercial enterprise. The petitioner asserts he will meet the employment-creation requirement "in the near future."

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 record indicates that the petition is based on an investment in a business, Humdol, Inc., not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000. The petitioner indicated he is a 50 percent owner of the corporation, that his business is involved in the purchase and sale of real estate and that he had invested \$3,500,000.

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(e) provides:

New means established after November 29, 1990.

8 C.F.R. 204.6(j)(1) states that in order to establish the establishment of a new commercial enterprise, the petition must be accompanied by:

(i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;

(ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect

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 [REDACTED] Inc., in which the petitioner is a shareholder.

In support of the petition, the petitioner submitted the certificate of incorporation which reflects that the petitioner incorporated [REDACTED] on November 15, 1990, prior to November 29, 1990. Therefore, as stated by the director, [REDACTED] is not new.

On appeal, the petitioner submits tax returns for [REDACTED] reflecting a date of incorporation of June 1, 1992. Tax returns are not among the documents listed in the regulations as evidence of establishment. Moreover, there is no evidence the tax returns were ever filed with the Internal Revenue Service. Furthermore, one of the sales contracts submitted initially is dated April 10, 1992 and reflects Humdol as the purchaser, reducing the credibility of a June 1, 1992 date of incorporation. In addition, the petitioner also submits on appeal a stock certificate issued to him by [REDACTED] on November 25, 1990.

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 inconsistency between the articles of incorporation certified by the State of Florida, the stock certificate, the uncertified tax returns, and the sales contract.

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 support of the petition, the petitioner submitted a June 1997 bank statement for [REDACTED] reflecting an average balance of \$77.081; a personal bank statement reflecting an average balance of \$656; personal securities statements reflecting a total value of \$145,032; and several contracts for the purchase of real estate. The petitioner submitted two contracts for the purchase of a condominium at [REDACTED] both signed on April 27, 1992. The first contract indicates [REDACTED] purchased the condominium while the second contract indicates the petitioner personally purchased the real estate. While later contracts reflect this address for [REDACTED], as it is a condominium, and not a business suite, it appears this address may be the petitioner's personal residence. The petitioner may not include the purchase of his personal residence as an investment in the corporation. While both sales contracts for the condominium reflect the condominium was purchased for \$49,500 cash, it is not clear that the condominium was purchased as an asset of the corporation.

The July 1997 contract for the purchase of [REDACTED] reflects that Humdol purchased that property with a mortgage for \$250,000 of the \$525,000 purchase price; the March 1998 contract for the purchase of Lot [REDACTED] reflects that Humdol purchased that property for \$270,000 cash; and the June 16, 1997 contract for the purchase of [REDACTED] indicates [REDACTED] financed \$700,000 of the \$1,000,000 purchase price. The petitioner also submitted a 1995 \$200,000 mortgage for [REDACTED] and evidence that the mortgage was fully paid in 1997.

On March 23, 1999, the director issued a notice of intent to deny, stating the petitioner needed to submit the evidence required by 8 C.F.R. 204.6(j) as evidence of his investment.

In response, the petitioner submitted personal bank statements, which do not reflect the transfer of any money from the petitioner to Humdol, and non-binding letters of intent to purchase property.

The director concluded the petitioner had failed to demonstrate that he had invested any of his personal funds into Humdol. The director noted that a corporation is a separate legal entity, and the corporation's expenses did not necessarily reflect an investment by the petitioner.

On appeal, the petitioner claims that he is the 50 percent stockholder of [REDACTED] therefore, he must have invested half of the corporation's expenses. He calculates his share to be \$1,925,000. The petitioner submits a stock certificate dated November 25, 1990 for 30 shares, and the articles of incorporation reflecting that [REDACTED] is authorized to issue 60 shares at no par value. The petitioner also submits additional real estate contracts.

The petitioner's attempt to claim one half of the corporation's expenses is not persuasive. First, not all of the corporate expenses are capital expenses. A corporation involved in the purchase and sale of real estate cannot count the costs of each sale as a capital expense; those costs are normal operating costs. Second, as a corporation is a separate legal entity able to obtain funds in many ways, the petitioner must demonstrate that the funds used by the corporation are traceable to him.

As the shares in [REDACTED] have no par value, the stock certificate cannot demonstrate the value of the petitioner's investment. The stock certificate was issued to the petitioner on November 25, 1990. The petitioner indicates his initial investment of \$270,000 was made on April 24, 1992. The petitioner has not demonstrated that he was issued additional stock in 1992. Schedules L for all of the corporate tax returns submitted indicate no stock or paid-in capital, no assets, and no liabilities. The tax returns also indicate on schedule K that no one shareholder owns 50 percent or more of the outstanding stock.

It remains, the record shows no evidence of the petitioner transferring any personal funds to the corporation. While a petitioner who can demonstrate the transfer of funds to a corporation may take credit for the corporation's capital expenses which can be traced to the petitioner's contribution, such is not the case with the instant petition. A corporation can acquire funds through other sources, such as business loans, shareholder loans, consideration for shares issued to other shareholders, and proceeds from prior transactions. Any loans by the petitioner to

the corporation cannot be considered part of his investment according to 8 C.F.R. 204.6(e) (definition of invest). Any loans, such as mortgages, used to purchase assets for the corporation secured by the assets of the corporation are also precluded from the definition of capital. 8 C.F.R. 204.6(e) (definition of capital).

Moreover, the reinvestment of the proceeds from the sale of one piece of property to purchase a subsequent piece of property cannot be considered the petitioner's personal investment. In order for proceeds to be considered an investment by the petitioner, it is necessary that the petitioner be able to show that the proceeds were allocated to him, taxed, and then reinvested. The regulations specifically state that an investment is a contribution of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. See generally, Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

For the reasons discussed above, even if all of the corporation's expenses could be considered capital expenses, the petitioner has not demonstrated that he is the source of the funds used to pay those expenses.

Finally, as stated in Matter of Izumii, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. The purchase of real estate is not an employment-generating business. The petitioner acknowledged this fact in response to the director's notice of intent to deny and asserted he will eventually use the proceeds from selling real estate to open a laundry and gas station.

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), 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. This petitioner's de minimus action of signing a lease agreement, without more, is not enough. Id. at 5-6.

Review of the record reveals that the petition was not initially supported with any documentation of business activity for a laundry or gas station. The petitioner has not even submitted a business plan for this proposed business. Nor has the petitioner demonstrated that any of his personal funds were committed to the laundry or gas station at the time of filing.¹ Therefore, the petitioner has not demonstrated an investment in an employment-generating business.²

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.

¹ 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 Katiqbak, 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.

² Employment creation will be discussed in more detail below.

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).

As stated by the director, the petitioner has not submitted any evidence either that he ever had \$1,000,000 or that he transferred \$1,000,000 to Humdol. It is not possible to determine the source of funds which have not been shown to exist. The corporate returns submitted on appeal, purportedly as evidence of the lawful source of the "invested" funds, do not demonstrate the petitioner's income prior to his alleged investment.

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.) While the petitioner indicates he only owns 50 percent of the corporation, he has failed to document the source of the other investors' funds. In fact, the petitioner has failed to even identify the remaining shareholder or shareholders.

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.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

The petitioner concedes that he has yet to hire 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 only reference to creating employment in the record is the petitioner's statement in response to the notice of intent to deny, "with that cash flow we are planning to diversify in the service business (laundry and gas station) that answer the [sic] request of employment evidence." This one sentence does not constitute a comprehensive business plan. It is simply not reasonable to conclude that the petitioner will create 10 new jobs.

CLOSING

The petitioner appears to be attempting to qualify by demonstrating the ability to invest \$1,000,000 in a business (a laundry or gas station) which he has yet to establish. While his real estate investments could conceivably generate sufficient income to invest in a qualifying business, there is no indication that the petitioner had sufficient income at the time of filing or even that he has sufficient income at this time. It remains, the petitioner has not demonstrated that he has invested his personal funds or placed his own funds at risk in an established, employment-generating business.

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.