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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



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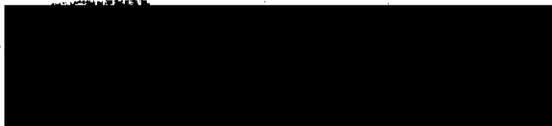
File: [Redacted] Office: Texas Service Center

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:



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, as opposed to loaned, \$500,000 of lawfully obtained funds. The director further concluded that the petitioner had not demonstrated that he had established a new commercial enterprise or that he would meet the employment-creation requirement.

On appeal, counsel argues the petitioner established a new commercial enterprise by expanding employment at an existing business by 40 percent. Counsel further argues that the petitioner invested the \$500,000 as paid-in capital.

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 a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$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(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 [REDACTED] of which the petitioner is the sole owner. The petitioner indicated on the Form I-526 that he had established a new commercial enterprise through creating a new business.

The record reveals that the petitioner incorporated Kou San on December 8, 1998. 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 January 20, 1999, Kou San purchased a rental property from [REDACTED] Enterprises of Canada Corporation; on January 29, 1999, [REDACTED] assumed the lease for the location of a grocery store from [REDACTED] Enterprises of Canada Corporation; and on February 4, 1999, [REDACTED] purchased the grocery business from [REDACTED] Enterprises of Canada Corporation, including inventory.

On September 23, 1999, the director noted that the petitioner had purchased an existing grocery store and requested additional evidence that the petitioner had created a new commercial enterprise. In response, prior counsel asserted the petitioner established a new commercial enterprise by expanding the employment at an existing business by 40 percent.

The petitioner resubmitted the alleged final Florida Unemployment Compensation Employer's Quarterly Report for Lau Enterprises of Canada indicating that that business employed three people. The document is unsigned.

The petitioner also submitted employer's quarterly reports for Kou San reflecting six employees. While prior counsel alleged this report only covers the grocery store, the petitioner has not submitted a separate employer's quarterly report for the rental property.

The director concluded the petitioner had not established that these handwritten documents were ever filed with the Internal Revenue Service (IRS) and determined the petitioner had not established that he increased employment by 40 percent. On appeal, counsel submits a letter addressed to Kou San from the Florida Bureau of Tax confirming the authenticity of the unemployment compensation employer's quarterly reports.

The law specifies that a petitioner must establish a commercial enterprise. Even accepting the petitioner's inclusion of two businesses in his commercial enterprise, the full amount of money must be made available to the business(es) most closely responsible for creating the employment. Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998) at 11. A petitioner may not qualify by establishing a new commercial enterprise that will create the necessary employment with only a \$200,000 investment and spend the remaining \$300,000 on an unrelated real estate investment which creates no additional employment.

Here, assuming the unemployment compensation employer's quarterly reports for [REDACTED] represent only the grocery store and that the unsigned unemployment compensation employer's quarterly report for [REDACTED] Enterprises of Canada is authentic, the petitioner has only increased employment by 40 percent at the grocery store. Thus, even if we accepted that the grocery store was a new commercial enterprise, the petitioner has not established that the rental property is a new commercial enterprise. The petitioner has not provided evidence of how many people were employed at the rental property prior to the purchase or how many people are currently employed there. Therefore, any money invested in the rental property cannot be considered an investment in a new commercial enterprise.

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 closing documentation regarding his purchase of rental property for \$222,086, and a grocery business for \$255,633.37. The documentation reflects the settlement agent was [REDACTED]. The petitioner also submitted the following Hemisphere National Bank cashier's checks purchased by [REDACTED] and issued to [REDACTED]: \$197,937.18 on January 20, 1999, and \$215,598.26 on February 4, 1999. In addition, the petitioner submitted an Interamerican Bank cashier's check issued to [REDACTED] for \$30,000 on February 4, 1999 with a bank statement from Kou San's account with Interamerican Bank showing a \$30,000 withdrawal on February 4, 1999; a copy of a check issued by Kou San on its Interamerican Bank account to [REDACTED] for \$1,500 on February 4, 1999; and two checks from [REDACTED] to [REDACTED] Enterprises of Canada for \$69,751.91 on January 21, 1999 and \$254,438.83 on February 3, 1999. Finally, the petitioner submitted unaudited financial statements reflecting no stock and a shareholder loan of \$578,000.

On September 23, 1999, the director requested evidence that the checks had been cashed and deposited. The director also noted that loans to the corporation do not constitute an investment and requested evidence that the petitioner submit evidence of a \$500,000 investment in addition to the \$580,000 loan. In response, the petitioner submitted the corporate checks used to purchase the cashier checks and evidence that all checks to [REDACTED] were cashed. The petitioner also submitted a cancelled check issued by [REDACTED] to [REDACTED] for \$30,000 on December 22, 1998. Finally, the petitioner submitted a letter from the accountant asserting the previously submitted balance sheet erroneously identified the \$580,000 as a shareholder loan and a new balance sheet reflecting no capital stock and \$527,674.18 as paid-in capital.

The director concluded the new balance sheet did not resolve the issue of whether the petitioner invested or loaned the funds. On appeal, the petitioner submits a computer printout certified by the

IRS indicating that Kou San claimed \$500 stock and \$527,174 in paid-in capital on its 1999 corporate tax return, schedule L.

While the record now confirms that the petitioner did not loan the money to [REDACTED] the petitioner has not demonstrated that the full amount of the requisite investment has been made available to the business most closely responsible for creating the employment upon which the petition is based. See Matter of Izumii, supra. As stated above, the record does not establish that the rental property will generate any new employment. Thus, it appears to be a real estate investment of the corporation, and not an employment-generating business. Therefore, any money used towards the purchase of the rental property is not available to the employment-creating enterprise, the grocery store.

In light of the above, the petitioner has only shown an investment of \$255,633.37, the cost of the grocery store. The remaining funds have been utilized to purchase the rental property, and are no longer committed or available to the grocery store. As such, the petitioner has not made the requisite \$500,000 available for an employment-creating enterprise.

Finally, the record contains no evidence documenting the transfer of funds into either of Kou San's accounts. Therefore the petitioner has not demonstrated that the funds deposited in Kou San's account originated from his personal funds and not a business loan. A business loan secured by the assets of the business cannot be considered a qualifying investment: i.e., one where a petitioner places his own assets 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.

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.

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.

In support of the petition, the petitioner submitted a list of ten positions, seven of which had allegedly been filled; Unemployment Compensation Employer's Quarterly Reports reflecting six employees by March 1999; and Forms W-4.

On September 23, 1999, the director requested evidence that the petitioner had created 10 jobs which did not exist prior to the petitioner's purchase of the store. In response, prior counsel provided a list of 15 positions, 12 of which had allegedly been filled. The petitioner submitted a business plan projecting a need for 14 positions, with no hiring dates specified; seven Forms I-9, many incomplete; nine Forms W-4; and an employer's quarterly report for the third quarter of 1999 reflecting seven employees.

The director once again noted the lack of evidence that the tax documentation had ever been filed and concluded the petitioner had not established that he had created ten jobs beyond the initial three jobs already in existence at the time of purchase.

On appeal, counsel states:

As previously stated, [the petitioner] is now reporting twelve employment positions as evidenced by Exhibit 1. Considering his numerical projections in his business plan (Exhibit 2) and the increase in the number of employees since acquiring the business, it is very likely that the investment will create the one additional employment position required.

The most recent employer's quarterly report submitted on appeal is for the final quarter of 1999 and reflects only 10 jobs. Moreover, the petitioner has failed to submit payroll records reflecting the

hours worked by any of these employees. The wages of several of these employees do not indicate full-time employment at minimum wage. Therefore, we are unable to determine how many of these employees work full-time. Moreover, as stated above, many of the Forms I-9 are incomplete and unsigned. Therefore, it is not clear all of the employees are qualifying employees.

The petitioner initially projected 10 positions, prior counsel projected 15, and the business plan projects 14. The business plan does not provide hiring dates or specify which employees will work full-time. Nor is it comprehensive enough to explain how a small grocery store which once operated with only three employees currently operating with ten employees, some working only part-time, will eventually require fourteen full-time employees without a significant expansion of space or services. As the business plan is insufficient, the petitioner has not established that it is reasonable to conclude that he will create 10 new jobs.

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). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. Matter of Ho, supra, at 6.

In support of the petition, the petitioner submitted July and August 1998 Citigold statements for an investment account belonging to the petitioner and [REDACTED] an April 1999 statement for an investment account belonging to the petitioner and [REDACTED] and July and December 1998 Salomon Smith Barney statements for investment accounts belonging to the petitioner, [REDACTED] and [REDACTED]. Assuming none of the funds were moved from one account to another, the accounts document over \$3,000,000 in assets. The petitioner also submitted the death certificate for [REDACTED] dated January 12, 1996.

On September 23, 1999, the director requested evidence demonstrating the source and path of the petitioner's funds. In response, the petitioner submitted a letter from Willem Smit, an executive at Citibank Miami, a form letter dated May 22, 1997 addressed to the petitioner, [REDACTED] and [REDACTED] confirming the opening of a new account, a June 1995 bank statement for an account belonging to [REDACTED] and [REDACTED]; and a September 1999 statement for the previously documented account at Citigold belonging to the petitioner and [REDACTED].

In his letter, Mr. [REDACTED] asserts the following:

In this letter, we hope to clarify how [the petitioner] obtained part of his wealth that he has with Citibank, F.S.B. The parents of the above mentioned, [REDACTED] (father) and [REDACTED] (mother) have had accounts with Citibank F.S.B. since January of 1993. They grew these accounts to well over \$3,500,000. The previous banker visited the clients in their home country Venezuela to perform due diligence to see all the different business that the family owns. Their three children, [REDACTED], and [REDACTED] were listed as beneficiaries on the accounts. When [REDACTED] passed away in 1996, [REDACTED] de Su asked to change the accounts to include her children as signers. At that time only [REDACTED] and [REDACTED] were

present and with proper documentation, we added these two to the accounts in April 1996. Then when [the petitioner] was in Miami in early 1997, he was added as well as the fourth signer to the accounts. Then when [redacted] passed away in 1997, the moneys were split up in 2 Citigold accounts. One in name of [the petitioner] and [redacted] and the other in name of [redacted] and [the petitioner].

While the director did not question the authenticity of the documents or the amount of assets demonstrated, the director concluded the petitioner had not provided evidence of the businesses in Venezuela, and thus, the source of the money in the investment accounts. On appeal, counsel asserts that Mr. [redacted] letter and the bank statements adequately document the source of the petitioner's funds.

While Mr. [redacted] letter is helpful to explain the alleged source of the petitioner's funds, his letter is inadequately supported. The regulations specifically require, as applicable, foreign business registration records, business and personal tax returns, and certified copies of any judgments. Yet, the petitioner has failed to submit business records of his family's business in Venezuela, the tax returns of those businesses, his personal tax returns, or civil documentation of any money inherited from his parents. Such documentation is a regulatory requirement and cannot be replaced with a mere letter from a bank executive purporting to verify the visit of another bank executive to the businesses owned by the petitioner's parents and the petitioner's inheritance of a large sum of money.

Finally, even if the petitioner had demonstrated the source of the money in the Citigold and Solomon Smith Barney accounts, the record contains absolutely no evidence such as cancelled checks or wire transfer receipts documenting the transfer of funds from either of those accounts to either of [redacted] accounts. Therefore, as discussed above, the petitioner has not demonstrated that the funds deposited in Kou San's accounts originated from his joint investment accounts.

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.