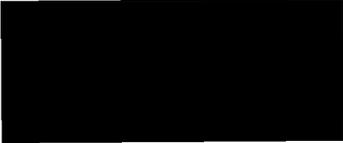




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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:



Public Copy

Date:

APR 25 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)

IN BEHALF OF PETITIONER: Self-represented

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 immigrant 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 a qualifying investment.

On appeal, the petitioner argues that he is the guarantor of the loan used to purchase the business.

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).

On the Form I-526, the petitioner indicated his petition was based on an investment in Best Western. Review of the record, however, indicates that the petitioner has an ownership interest in [REDACTED] Inc., which purchased a Best Western Hotel. The petitioner indicated the investment was in a business not located within a targeted employment area. Thus, the minimum investment amount in this case is \$1,000,000. The petitioner indicated on the petition that he had invested \$1,700,000.

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.

While the petitioner indicated an investment of \$1,700,000 on the petition, in a separate letter he indicated that he had only invested \$600,000 and would invest an additional \$500,000 or \$600,000 in the business at some point in the future. In support of the petition, the petitioner submitted corporate tax returns for Rigi, Inc.; bank statements for Rigi, Inc. which show balances of \$260,901 and \$214,207; a closing statement reflecting that the petitioner and Hiri Odedra purchased a hotel at 2916 Market Street on April 30, 1996, with a \$20,000 deposit, a \$325,919 downpayment, and a loan for \$1,300,000; a closing statement whereby Rigi, Inc. refinanced the remaining \$1,200,000 loan by paying \$9,915 in settlement charges and a \$41,277 downpayment.

On March 15, 2000, the director issued a notice of intent to deny, stating that as the property was purchased through [REDACTED] Inc., the petitioner could not consider those funds part of his investment.

In response, the petitioner resubmitted the closing documents; the deed of trust whereby [REDACTED] Inc. granted the lender an interest in the hotel; and invoices.

The director concluded that as the loan was obtained by the corporation, a separate legal entity, and not payable within two years, the petitioner had not established a qualifying investment of his own personal funds. On appeal, the petitioner submitted a guaranty agreement reflecting that he is a guarantor for the loan and a letter from the vice president of BB&T Bank asserting the petitioner could pay off the loan in three years, but would be subject to prepayment penalties.

We do not agree with the director's implication that no expenditures made by a corporation can be considered part of a shareholder's investment. We concur with director, however, insofar as his distinction between shareholders and the corporation suggests that regular loan payments made by the corporation are normal operating costs of the business, and not capital expenditures.

Furthermore, while not discussed by the director, the loan is secured by the hotel, and not the petitioner's personal assets. The fact that the petitioner may be a guarantor for the loan does not resolve this issue; 8 C.F.R. 204.6(e) (definition of capital) excludes any indebtedness secured even in part by the assets of the business. In order for a petitioner to demonstrate that a loan

reflects personal assets placed at risk, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Ex., July 31, 1998). As the \$1,200,000 loan is secured by the hotel, an asset of the new commercial enterprise, the petitioner may not include the loan as part of his investment.

Moreover, while the petitioner has submitted the closing statements which reflect significant downpayments and invoices documenting other capital expenditures, the record contains no evidence that the petitioner ever transferred money to the business or paid those expenses from his personal account. Thus, the petitioner has not established that he has contributed any funds to Rigi, Inc.

The record is also absent audited balance sheets indicating the outstanding capital stock or shareholder loans. The corporate tax returns submitted do not include schedule L which would also reflect outstanding stock and shareholder loans, if any. Therefore, the nature of any funds transferred to Rigi, Inc. cannot be determined.

In light of the above, we concur with the director's conclusion that the petitioner has not demonstrated a qualifying investment.

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).

In support of the petition, the petitioner submitted no evidence of the source of his funds. In his notice of intent to deny, dated March 15, 2000, the director noted the petitioner had not submitted any tax returns, documentation of assets, or other evidence of the lawful source of his funds.

In response, the petitioner submits Bank of Scotland statements reflecting several withdrawals of between £10,000 and £200,000 in 1995; a foreign exchange confirmation for a withdrawal of £10,000 converted to \$15,525 and credited to a separate account; Fidelity Brokerage statements; NationsBank statements, account number 280023508, reflecting wire transfer credits of \$199,606 on January 18, 1996 and \$170,000 on April 24, 1996, both from unidentified sources; a wire transfer advice reflecting a transfer of \$16,000 from Fidelity Brokerage Services to account number 280023508; a wire transfer receipt reflecting a transfer of \$104,000 from Fidelity Brokerage to Mark Realty, Inc.; a 1993 confirmation letter from Wilson & Berry reflecting that the petitioner was owed £52,518 upon the sale of property; British Notices of Assessments reflecting "profits" of £37,535 in 1991, "chargeable gains" of £34,754 in 1993, and "partnership income" of £12,104 in 1993; and financial statements for Sears Food Store, of which the petitioner is a partner.

While not discussed by the director in his final decision, the above documentation does not demonstrate that the petitioner had accumulated \$1,000,000 for investment. The British bank statements do not reveal balances of \$1,000,000 and do not reflect the ultimate destination of the funds withdrawn from that account. The

U.S. bank statements fail to reflect the source of the wire transfer credits. As the petitioner has not established any relationship between himself and Mark Realty, Inc., the wire transfer notice regarding the \$104,000 transferred to Mark Realty, Inc. does not appear relevant to the petitioner's case. While one wire transfer advice indicates the petitioner transferred \$16,000 to his NationsBank account in the U.S., this amount is far short of the \$1,000,000 required.

Moreover, in a letter submitted initially, the petitioner indicated the hotel was his second investment in the United States. Therefore, any funds transferred to the United States might have been used to finance the first business. Furthermore, the tax statements simply do not reflect income which could account for accumulated savings of \$1,000,000.

This issue, however, is mostly moot because the petitioner has not demonstrated that either he or Rigi, Inc. were ever in possession of \$1,000,000. It is simply not possible to determine the source of funds which have not been shown to exist.

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 Rigi, Inc., of which the petitioner is a shareholder.

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 claimed to have established a new commercial enterprise through an investment in an existing business. The petitioner submitted 22 Forms W-2 and an appraisal of the property. However, the petitioner did not submit evidence of the employment at or net worth of the hotel prior to his purchase of the hotel.

In response to the director's notice of intent to deny, the petitioner submitted payroll records and Forms I-9.

While not discussed by the director in his final decision, the petitioner has failed to demonstrate that he has established a new commercial enterprise. The petitioner does not claim to have created an original business, and, as the record demonstrates that the petitioner purchased an existing hotel, the record does not support the creation of an original business. While the petitioner submits invoices for repairs and other maintenance, these are normal operating costs and cannot be considered a restructuring or reorganization such that a new business resulted. Finally, while the petitioner claims to have increased the employment from 10 to 14, the record does not contain any evidence regarding the number of employees prior to the petitioner's purchase of the hotel.

Similarly, while the petitioner submitted an appraisal of the current value of the hotel, he has not submitted any evidence of the value of the hotel prior to the purchase. Regardless, the appraised value of a hotel is not equivalent to the business' net worth. Net worth can only be demonstrated with audited balance sheets. The petitioner has not submitted balance sheets for either the hotel prior to the purchase or for Rigi, Inc. Thus, the petitioner cannot establish an expansion in net worth of at least 40 percent.

In light of the above, the petitioner has failed to demonstrate that he has established a new commercial enterprise according to 8 C.F.R. 204.6(h)(1), (2) or (3).

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.

Finally, while not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs.

A petitioner cannot directly cause a net loss of employment. Matter of Hsiung, supra. As stated above, the petitioner has not demonstrated the number of employees at the hotel prior to Rigi, Inc.'s purchase of the hotel. Therefore, it is not possible to determine whether the petitioner has created any new jobs.

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, the decision 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. Id. at 9.

The record does not include a business plan.

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. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.