



67

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: California Service Center

Date: APR 30 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that the petitioner had invested the required amount, documented the source of his funds, or would meet the employment-creation requirement.

On appeal, counsel argues the petitioner is actively in the process of investing the required amount, that the petitioner is able to trace the path and source of his investment funds, and that he will meet the employment-creation requirement.

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, [REDACTED] 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 \$500,000.

**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.

On the Form I-526, the petitioner indicated that he had invested \$172,952.47. The petitioner submitted a wire transfer receipt documenting the transfer of \$172,952.47 to New Immigrant Times,<sup>1</sup> and a business plan reflecting a proposed investment schedule as follows: \$170,000 in June 1999, \$150,000 in December 1999, and the final \$180,000 in March 2000.

The director concluded the petitioner had not invested the entire \$500,000 at the time of filing. On appeal, counsel asserts the petitioner is in the process of investing the full \$500,000 and invested an additional \$149,985 on January 18, 2000, before the director denied the petition.

While a petitioner need only be actively in the process of investing the required amount, he must demonstrate that the full amount was committed to the business at the time of filing. 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 business plan investment schedule is insufficient to demonstrate that the full \$500,000 was committed to the business at the time of filing. The plan does not constitute a secured promissory note or enforceable obligation to invest the full \$500,000. See Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) for a discussion of the requirements for a promissory note to constitute evidence of being actively in the process of investing.

In light of the above, the petitioner has not demonstrated that he had invested or committed the required \$500,000 at the time of filing.

#### **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

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<sup>1</sup> Whether these funds can be traced to the petitioner will be discussed below.

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 the brief submitted initially, counsel asserted the petitioner served as Vice General Manager for two different construction companies between September 1978 and January 1992 and has served as the President and General Manager of [REDACTED] Real Estate Development Company [REDACTED] since February 1992. The petitioner submitted a business license for Qiangyou listing the petitioner as the legal representative of that company, an investment certificate reflecting the petitioner invested 29,440,000 Yuan in [REDACTED] the General Principles of [REDACTED] balance sheets for [REDACTED] collective income tax returns for Qiangyou; a deposit certificate for [REDACTED] a letter of certification confirming the petitioner's wages of 7,195,600 Yuan (\$926,910) between 1992 and July 1997; and a couple of foreign documents without translations. The petitioner provided no evidence of his employment prior to working for Qiangyou.

As evidence of the path of the funds invested, the petitioner submitted a wire transfer receipt documenting the transfer of \$172,937.47 from Ngau Kee Money Changer to New Immigrant Times; receipts from Ngau Kee Money Changer in Hong Kong indicating that Wing Shing Engineering and Metal applied for and purchased the wire transfer; and a receipt for the transfer from [REDACTED] Bank, Ltd (no address) which fails to identify the petitioner.

The director concluded the petitioner had not demonstrated that he was the source of the funds wired to the New Immigrant Times.

On appeal, counsel asserts that, due to Chinese currency control laws, the petitioner carried cash to Hong Kong and transferred the money to the New Immigrant Times from there. Counsel asserts the petitioner withdrew \$1,500,000 Yuan and \$10,000 from his personal bank account on June 25, 1999, registered the cash with Customs upon traveling to Hong Kong, deposited 1,280,000 Yuan with the [REDACTED] Bank in Hong Kong on June 26, withdrew 2,275,000 Yuan from that account on June 28, 1999, exchanged the money for U.S. dollars and wired those funds to New Immigrant Times on that day.

While the petitioner supports counsel's claim with bank statements and official Customs documentation, the petitioner has not explained the role of [REDACTED] Engineering, reflected as the purchaser of the money transfer in previously submitted documentation.

The petitioner submits similar documentation regarding the subsequent transfer of \$149,985 transferred to New Immigrant Times on January 18, 2000. As with the above transfer, however, the funds were transferred by [REDACTED] Engineering. Thus, the petitioner has not adequately explained the source of either transfer.

#### 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 an employee detail reflecting three employees. The detail does not reflect whether the employees work full time and the petitioner failed to submit Forms I-9. Therefore, it is not clear whether the employees are qualifying. The business plan indicated New Immigrant Times would hire five employees by August 1999, including an editor-in-chief, two reporters/editors, one typist and secretary, and one art designer; would hire a salesperson and typist January 2000; and would finally hire a vice editor, a sales manager, and a special planner in June 2000.

The director concluded the record did not establish that the petitioner had or would hire the required number of employees.

On appeal, counsel asserts the business has five employees and notes that the business plan specified the business would require 10 employees. The petitioner submits a new employee detail listing five employees and five Forms I-9. The new documentation still fails to indicate how many of the employees are full-time employees. In addition, by the time the detail was printed, February 2000, the company should have had seven employees according to the business plan. Therefore, the business plan's credibility is diminished.

In light of the above, we cannot conclude the petitioner has established he will create the required number of jobs.

**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 New Immigrant Times, which the petitioner claims to own 100 percent.

Beyond the decision of the director, the petitioner has not established his ownership interest in the business. The petitioner failed to submit a stock certificate or tax returns reflecting the ownership of the corporation. Moreover, the statement of domestic stock corporation listing the petitioner as the CEO is not stamped as filed with the state. Furthermore, the certificate of registration for New Immigrant Times lists Baiging Yang as the owner. While the application for the certificate lists two spaces for owners, only Mr. [REDACTED] is listed.



In light of the above, we cannot conclude that the petitioner established New Immigrant Times.

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.