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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

[REDACTED]

AUG 27 2001

File: WAC-98-015-53419 Office: Vermont Service Center Date:

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]

Identifying 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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 she had invested or was in the process of investing the required amount of lawfully obtained capital or that she would create the necessary employment.

On appeal, counsel argues the petitioner submitted sufficient evidence of an investment of more than \$1,000,000 of lawfully obtained capital and that the director failed to review and consider all of the evidence submitted.

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, Golden Island Chinese Cuisine, Inc., (GICC) 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.

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.

As evidence of her investment, the petitioner submitted a resolution whereby the board of directors agreed to issue the petitioner 1,000,000 shares of stock in [REDACTED] "as partly paid," for 40 cents per share with the remainder due in two years. The petitioner also submitted a stock certificate issued by [REDACTED] to the petitioner on October 1, 1997, indicating the petitioner had "partly paid" for 1,000,000 shares and referred to the payment terms on the reverse, which

indicate \$600,000 is due in two years. The petitioner also submitted an agreement to purchase shares. The agreement reflects the petitioner was to be issued 1,000,000 shares at \$1 per share, the total amount due in two years beginning on December 1, 1997. The petitioner also agreed to pay a \$400,000 downpayment. Finally the agreement states:

[The petitioner] further agrees that she will remain personally liable for the unpaid balance owed to GICC. This commitment is represented by [the petitioner's] personally [sic] guarantee of GICC's lease with TOP LINE PROPERTIES attached herewith as Exhibit "A."

As stated in Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that she has placed her assets at risk. That is, 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). Otherwise, the note is meaningless. The director concluded that the petitioner had not established that the fair market value of the lease is \$600,000. While this may be true, it is more significant that the petitioner's personal guarantee on the lease is a personal liability, not an asset. Thus, the promise to pay the remaining \$600,000 appears to be secured, although that word is not used, by a liability. If the petitioner fails to pay the remaining \$600,000, GICC has nothing tangible it can seize to collect those funds. If [redacted] stopped paying its rent in some type of attempt to make the petitioner pay the remaining \$600,000 by assuming the company's rent payments, the petitioner's guarantee does not obligate the landlord to seek payment from her. Clearly, this is not a viable security for the petitioner's promise to pay.

It is also noted that a letter to the petitioner from counsel states:

Please be advised that the Purchase Agreement signed in May 1997 obligates you to make payment of the full amount within a two (2) year period commencing on December 1, 1997. Moreover, you will only receive dividends equal to the proportion of shares you have actually paid.

In Matter of Izumii, supra, the Administrative Appeals Office (AAO) held that guaranteed payments to the petitioner while she still owed money to the new commercial enterprise could not be considered part of her investment. While the AAO did not reach the issue of whether it is ever appropriate for a business to distribute profits to an alien who still owes money to the business, it clearly stated that guaranteed payments were problematic. Without additional information regarding the dividends owed to the petitioner, as might be contained in the by-laws of the corporation, we cannot determine the amount of those dividends and whether such funds must be deducted from the petitioner's investment as the return of a dividend payment does not infuse new capital into the business.

As the "Agreement to Purchase Shares" is unacceptable as evidence that the petitioner is actively in the process of investing \$1,000,000, it must be examined whether the petitioner had, in fact, invested the full \$1,000,000 prior to the date of filing.

The petitioner initially submitted receipts documenting the transfer of \$10,000 to [REDACTED] account number [REDACTED] from the petitioner on May 8, 1997; \$73,000 on April 23, 1997; and \$325,000 on April 23, 1997, for a total of \$408,000. Regarding how those funds were spent, the petitioner initially submitted an agreement between GICC and Sincere Manufacture, Inc. for renovations amounting to \$556,964.86.

In response to a request for additional documentation, the petitioner submitted bank statements for account [REDACTED] from April 25, 1997 through July 16, 1997, account [REDACTED] from June 12, 1997 through most of 1998, and account 6098-311863 for February 1998 through March 1999. The petitioner also submitted wire transfer receipts documenting the transfer of \$250,000 to [REDACTED] account number [REDACTED] on August 31, 1998 and \$345,000 to the same account on an unreadable date. None of the bank statements for [REDACTED] reflect that final deposit. The petitioner also submitted a tax return for 1998. The tax return, schedule L, reflects no stock in 1997, and \$608,020 at the beginning and end of 1998. The record simply does not indicate that the petitioner had invested the entire \$1,000,000 at the time of filing. While a petitioner need only demonstrate that that she is actively in the process of investing, the full amount must be committed. As the "Agreement to Purchase Shares" does not meet the requirements discussed above, the petitioner has not demonstrated that the full \$1,000,000 was committed at the time of filing. Thus, with regard to this element, the petition was at best filed prematurely.

The director also noted that the bank statements provided did not overlap sufficiently to trace the funds deposited in account [REDACTED] to the other accounts and questioned whether all three accounts truly belonged to [REDACTED]. While [REDACTED]'s employer identification number does not appear on each account, the company is named as the account holder on each account. Cancelled checks issued on the account reflect business expenses. We agree with the director, however, that the bank statements did not overlap sufficiently to trace the funds between accounts.

On appeal, the petitioner submits statements for account [REDACTED] for May 1997 through July 1997 which show the wire transfer deposits totaling \$408,520 and telephone transfers totaling \$370,000 between April 25, 1997 and May 9, 1997 which coincide with deposits into account [REDACTED]. The withdrawal of \$472,651.11 from account [REDACTED] 33 matches a deposit of that amount into account [REDACTED]. The record, however, is still absent statements for [REDACTED] for August 1997 through February 1998. As of August 8, 1997, that account had a balance of \$535,738.75. By February 10, 1998, that balance had decreased to \$9,882.67. While account 0224-349688 reflects various deposits during that period which were then applied toward business expenses, the petitioner has not fully documented that any of those funds came from account [REDACTED].

In addition, it is not clear that the business requires \$1,000,000 capital. [REDACTED] undertook considerable leasehold improvements and purchased equipment and furnishings. These startup

costs were \$628,897 according to the depreciation schedule attached to ██████████ 1998 tax return. Some of those costs were incurred well after the business began operations. Thus, the costs might have been paid from profits as normal operating costs. The business is currently operational. The business plan does not indicate that any renovations are planned for the next two years or explain how additional capital will be utilized. As it is not clear that the business requires any additional capital, the infusion of the remaining \$400,000 will cause the business to be grossly overcapitalized. It cannot be concluded that funds invested in a grossly overcapitalized business are at risk. Finally, the 1998 tax return, Form 4562, also reflects depreciation of \$2,615 for various nonresidential real properties valued at \$93,398. The record reflects that the petitioner leases the restaurant space. Any passive real estate investments cannot be considered a capital expense of the employment-generating entity, the restaurant. Nor have such funds been made available to the employment-generating entity as required by Matter of Izumii, supra.

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, supra, at 26. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her 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). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted a stock portfolio reflecting a balance of HK\$881,400 as of January 31, 1996; receipts for stock transactions by the petitioner issued by [REDACTED], and the 1993 tax return, 1995 profit tax assessment and business registration for Inter Sanely, Ltd., of which the petitioner's spouse owns 110,000 HK\$1 shares. In response to the director's request for additional documentation, the petitioner submitted wire transfer receipts documenting funds transferred in the 1980s by [REDACTED] and [REDACTED] in Indonesia, allegedly the petitioner's siblings, to the petitioner in Hong Kong; a balance statement for several accounts at [REDACTED] Commercial Bank, Ltd.; Land Registry records regarding two pieces of property owned by the petitioner; property tax notifications; the petitioner's spouses tax returns; tax returns for [REDACTED] Ltd.; financial documents for [REDACTED] Ltd.; and more stock purchase receipts.

The director concluded that the flow of funds was "ambiguous," and that the petitioner had not established that the invested funds were hers, and not those of Inter Sanely, Ltd. On appeal, counsel asserts that the petitioner comes from a wealthy family whose members have retained their wealth through several generations. Counsel further asserts that the director "completely ignored" the evidence tracing the petitioner's funds back more than 10 years. The petitioner resubmits the above mentioned documents.

The petitioner's spouse's tax returns reflect income of \$49,687.60 for 1997/1998, \$55,985 for 1996/1997, an undeterminable amount for 1995/1996,¹ and \$26,426.16 for 1994/1995. The financial reports for [REDACTED] Ltd. (which fail to specify whether they reflect U.S. or Hong Kong dollar amounts) indicate no dividends were paid in 1993, 1994, 1996, and 1997, a dividend of \$216,000 was paid in 1995, and that the total remuneration for both directors was \$180,000 in 1992, \$187,500 in 1993, \$375,000 in 1994, \$474,000 in 1995, \$624,000 in 1996, and \$780,000 in 1997. The petitioner's spouse's income as reflected on the tax returns and by the numbers on the financial reports of [REDACTED] Ltd. do not account for the accumulation of \$1,000,000.

The record demonstrates that the petitioner also received substantial sums of money from family in Indonesia and that she invested those funds in the Hong Kong stock market and maintained several accounts at the [REDACTED] Commercial Bank. While the wire transfer receipts reflect that the petitioner's family transferred approximately \$1,880,372 to the petitioner from Indonesia between 1982 and 1989, counsel's assertion that these funds represent family wealth accumulated through generations is not supported by the record. The assertions of counsel do

¹ The petitioner submitted several "salary assessments," "personal assessments" and "additional assessments" for this year. The petitioner did not provide an explanation for how to compute her spouse's total income from these many forms.

not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

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.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

On the Form I-526, the petitioner indicated GICC had one employee and would require 16 to 20 additional full-time employees. The petitioner submitted a business plan which projected the need for 16 to 21 employees. In response to the director's request for additional documentation, the petitioner submitted quarterly wage and withholding reports for all four quarters of 1998. The reports reflect total employment of 19 in January 1998 increasing to 26 in December 1998 with a high of 29 in September 1998. The petitioner also submitted 14 Forms I-9 and 18 Forms W-4.

The director noted that the petitioner had not submitted any Forms W-2 or any other evidence to demonstrate whether or not the employees work full-time. On appeal, counsel accuses the director of failing to consider the Forms W-4 submitted and resubmits those documents. A Form W-4 is not the same document as a Form W-2 and does not reflect an employee's salary and, thus, whether that employee works full or part-time. A review of the wages reported on the third quarter quarterly reports reveals that at least nine employees could not have worked full-time at minimum wage. Without payroll records reflecting the hours worked or evidence of their hourly wage, we cannot determine how many of the 17 remaining employees worked full-time.

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 petitioner's business plan basically meets the criteria above and is credible. While the record is not completely clear regarding how many employees work full-time, it is clear that the restaurant has generated significant employment and, if it hasn't already, is likely to create 10 full-time jobs.

CLOSING

Based on the information submitted, it is apparent that the petitioner is an individual of considerable wealth who is involved with a successful commercial enterprise. The petitioner has not, however, established that she meets the minimum eligibility requirements for this visa classification.

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.