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U.S. Department of Justice

Immigration and Naturalization Service

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



PUBLIC COPY

File:

Office: Texas Service Center

Date: **AUG 27 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:



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, 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 placed her personal funds at risk or the lawful source of those funds.

On appeal, counsel submits additional evidence as to the path and source of the invested funds.

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, VBC Property Advisors, LLC (VBC), 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.

The petitioner submitted bank statements for [REDACTED] demonstrating deposits of \$149,000 on February 27, 1998, \$500,000 on June 10, 1998, and \$351,000 on October 13, 1998 from Barclays Bank in the Cayman Islands. The petitioner also submitted a letter from her mother attesting to a gift of \$1,000,000 as an advance on the petitioner's inheritance. In response to a request for additional documentation, the petitioner submitted a letter from J.P. Morgan confirming that the petitioner's mother, [REDACTED], maintained a bank account through her wholly owned company, Sunny Seas Corporation, which transferred \$1,001,000 to the petitioner's account at Barclays Bank in the Cayman Islands in three separate payments. The

petitioner also submitted a letter from Barclays Bank confirming the receipt of three payments from J.P. Morgan in Switzerland.

The director stated that the letter from J.P. Morgan was not on bank letterhead and concluded that the record contained no evidence regarding the source of the funds transferred to Barclays Bank. On appeal, the petitioner submits another letter from J.P. Morgan Bank attesting to the same facts set forth in the original letter.

The record contains confirmation from both J.P. Morgan and Barclays that \$1,000,000 was transferred from the first bank to the latter between February 1998 and October 1998. The record also demonstrates that those funds were then transferred to [REDACTED]. Thus, the petitioner has overcome the director's concerns that the petitioner had not demonstrated that the funds were her personal funds.

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 Izumij, 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). 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 director concluded that the petitioner had not established the lawful source of the funds purportedly transferred by the petitioner's mother. In response, the petitioner submits her own tax returns, the tax returns of her mother and father, and evidence of their substantial interest in two sugar companies in Colombia. The petitioner did not submit certified translations, or even any translations at all, for the tax returns as required by 8 C.F.R. 103.2(a)(3). The remaining evidence, however, establishes that the family's interest in the Colombian sugar industry can account for the accumulation of \$1,000,000 by the petitioner's mother. Thus, the petitioner has also overcome this ground of denial.

The director, however, failed to address other areas which may be insufficiently documented. The regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, she must establish that she placed her own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

The record contains a business plan which provides a detailed explanation of the petitioner's business and payroll records evidencing several employees. The record also contains balance sheets documenting \$1,000,000 capital and accounts receivable, suggesting ongoing business activity. The balance sheet, however, is not audited. The record does not contain corporate tax returns certified as filed with the Internal Revenue Service. Nor does the record contain contracts with customers, a lease for office space, invoices and cancelled checks for start-up costs, or any other independent evidence of business activity.

In addition, 8 CFR 204.6(j)(1) states that in order to establish the establishment of a new commercial enterprise, the petition must be accompanied by:

- (i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;
- (ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect

While the petitioner did submit the articles of organization for VBC, the record does not contain a license to do business, a lease for office space, or other evidence of how the petitioner started

the business. Thus, it is not clear whether the petitioner created an original business or purchased an existing business. The petitioner failed to indicate on the Form I-526, Part 4, whether she had created an original business. If not, the petitioner must demonstrate that she either restructured or expanded an existing business. See 8 C.F.R. 204.6(h).

The director, however, did not address either of the above issues and never requested additional evidence from the petitioner which might establish her eligibility with regard to these issues.

Therefore, this matter will be remanded for further consideration and action. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.