U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: WAC-00-117-52010 Office: California Service Center Date: DEC 21 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:

[redacted]

Public Copy

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, 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 the path or lawful source of her invested funds.

On appeal, counsel argues that all the funds originated from three accounts in Canada. Counsel indicated further evidence would be submitted in 30 days. Subsequently, the petitioner submitted her marriage certificate as evidence that some of the invested funds originated from her husband. At that time, counsel requested an additional 30 days, until May 27, 2001, in which to submit more evidence. As of this date, this office has received nothing further. As such, the decision will be based on the evidence of record.

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,
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> (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
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> (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, Bestsellers, Ltd., allegedly located in a targeted employment area for which the required amount of capital invested has been adjusted downward.

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:
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> (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). 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).

Initially, counsel asserted that the petitioner had invested $366,455.24 between May 1996 and October 1998, transferred through both her business attorneys and her own U.S. accounts. As evidence of the transfer of funds through the petitioner's business attorneys, she submitted a wire transfer receipt reflecting the transfer of $150,000 from Burns Fry Toronto's account at the Bank of New York to Dwyer, Imanaka, Schraff & Kudo (attorneys) on May 9, 1996 and another receipt reflecting the transfer of $31,467.25 from the petitioner's account at Toronto-Dominion Bank to the attorneys on May 10, 1996. The petitioner also submitted a letter addressed to her from the Bank of Hawaii asserting that $69,996 had been deposited in account number 80-540213 on June 1, 1998, $39,996 was deposited into the same account on September 17, 1998, and $50,000 was deposited in account number 6001-3697459 on July 2, 1998. Both accounts are in the name of the petitioner. The petitioner submitted a second letter from Bank of Hawaii confirming the receipt of $24,996 into account number 80-540213 from Toronto-Dominion Bank, account holder unknown. The petitioner also submitted two statements for deposit accounts worth $50,000 and $100,000 at Bank of Hawaii. Both accounts are in the petitioner's name. Finally, the petitioner submitted statements, deposit slips, and checks for her account at Bankohama, account number 0319-90396. These documents reflect that she deposited $44,947.53 in cash and checks, source unknown, into that account during May 1996. She also

issued the following checks: $2,500 to an illegible payee on May 22, 1996, $12,687 to New City Nissan on May 20, 1996, and $2,094.74 to Sam's Club on May 23, 1996. The record does not demonstrate that any of those checks were issued to pay the business expenses of Bestsellers.

On August 14, 2000, the director requested additional evidence. In response, Andrew Tujios, Chief Operating Officer for Bestsellers, asserted that the petitioner had invested an additional $267,300. Mr. Tujios further states that all the funds derived from the petitioner's accounts with Burns Fry, now known as BMO Nesbitt Burns, Toronto-Dominion Bank, and the Royal Bank of Canada. He asserts that the attorneys transferred the petitioner's funds to her by cashier check and that she used those funds to purchase the deposit accounts and eventually purchase her shares in Bestsellers for $100,000. He further asserts that the remaining funds transferred from Canada to the petitioner were transferred to Bestsellers, for a total of $535,792. He asserts the petitioner spent an additional $55,216.63 from her own account toward start-up costs. Mr. Tujios refers to the subscription agreement and financial statements of the company as evidence of this investment. As stated above, 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, supra.

In support of these claims, the petitioner submitted a list of deposits into Bestsellers' account from August 19, 1996 through April 5, 2000 totaling $535,792.79 and bank statements for two accounts of Bestsellers reflecting the deposits. The only evidence of the source for any of these deposits is a letter from Hawaii National Bank confirming the deposit of a check for $67,300 of "Canadian origin," and a letter from the Royal Bank of Canada confirming that the petitioner personally closed her mutual fund account with that institution and transferred the $200,000 to Bestsellers on April 5, 2000. The source of the remaining deposits is unknown.

As evidence of the lawful source of the petitioner's funds, she submitted her personal tax returns for 1995 through 1997 and 1999, and a newspaper article regarding Brian Melzack's business. None of the petitioner's tax returns reflect any wages. The petitioner's 1995 tax return reflects $49,661.32 of interest and investment income. "Step 5" shows spousal income of $144,207. The petitioner's 1996 tax returns reflects $21,155 of interest, investment, and retirement income. "Step 5" lists no spousal income. The petitioner's 1997 tax return reflects $10,138 interest, investment, and retirement income. The "non-refundable tax credits" section lists no spousal income. The petitioner's 1999 tax return lists $4,044 interest and investment income and the "non-refundable tax credits" section lists no spousal income.

The director concluded that while much of the money appeared to have originated in Canada, the exact source of the funds was not documented in the record. The director further concluded that the income reflected on the tax returns did not establish how the petitioner acquired the funds providing interest income. Finally, the director noted that the record did not contain the petitioner's marriage certificate.

On appeal, counsel asserts that the wire transfer slips and bank letters provide clear evidence that the funds originated from accounts belonging to Mr. Melzack and the petitioner, but that additional documentation would be forthcoming. Subsequently, the petitioner submitted her

marriage certificate and requested until May 27, 2001 to submit additional financial documentation. As of this date, the Administrative Appeals Office (AAO) has received nothing further.

As discussed above, the record does not establish the source of all of the funds transferred to Bestsellers. Even if the wire transfer receipts for the transfers from Canadian accounts established the owner of the accounts, the money was not transferred directly to Bestsellers. Rather, the funds were transferred to an attorney's account and the petitioner's personal accounts. The checks issued on the petitioner's account number 0319-90396 reflect payments to Sam's Club, New City Nissan, and an illegible payee. The petitioner has not established that these are legitimate business expenses for Bestsellers. The source of the deposits into Bestsellers' account are mostly documented by bank statements and deposit slips which do not reflect the source of the funds. The $200,000 traceable to the petitioner's mutual fund was transferred to Bestsellers April 5, 2000, after the date of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7. The record does not demonstrate the source of all of the funds transferred to Bestsellers prior to the date of filing, March 13, 2000.

While the petitioner has now resolved the issue of her marriage to Brian Melzack, she has not responded to the director's concern that she had not demonstrated how she and Mr. Melzack lawfully accumulated $500,000. The tax returns show minimal interest, dividend, and retirement income and cannot account for the accumulation of $500,000.

In light of the above, the petitioner has not overcome the director's concerns regarding the lawful source of the funds "invested" into Bestsellers.

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:
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> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (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;
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> (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
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> (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.

Beyond the decision of the director,[1] the record also fails to establish that the petitioner made a qualifying investment. The record reflects that approximately $535,800 was deposited in Bestsellers' account between August 19, 1997 and April 5, 2000.

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[1] An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

While the director did not contest that the new commercial enterprise was located in a targeted area, the Hawaii government letter submitted as evidence refers to only one of the two store locations. All of the employment benefits, however, must accrue to a targeted employment area in order to qualify for the reduced minimum investment amount. See Matter of Izumii, supra. As the petitioner has not established that she created at least 10 jobs at the store located in the targeted employment area, we cannot conclude that the petitioner has invested solely in a targeted employment area. Thus, the required amount of capital in this case is $1,000,000. The record does not reflect that the petitioner has irrevocably committed the remaining $464,200 to Bestsellers. Even if the petitioner were to demonstrate that all of the Bestseller's locations were in targeted employment areas, thus reducing the minimum investment amount to $500,000, the petitioner has not demonstrated that the full $535,800 represents her personal investment.

As discussed above, the source of all but $200,000 of the funds deposited in Bestsellers' account is undocumented. The $200,000 known to have originated from the petitioner was transferred to Bestsellers' account after the petition was filed, and cannot demonstrate that the petitioner had invested those funds or even irrevocably committed those funds at the time of filing.

Additionally, the stock certificates, ledgers, financial statements, and corporate tax returns cast doubt on whether the petitioner invested the funds as defined in the regulations. The record contains a subscription agreement dated June 25, 1996 whereby Bestsellers agreed to issue 1,000 shares to Shortlist Book Shop, Inc. for $100,000. The record contains an undated, cancelled stock certificate, numbered as certificate number one, issued to Shortlist Book Shop, Inc. The stock transfer ledger reveals that Shortlist Book Shop's 1,000 shares, represented by stock certificate number one, were transferred to the petitioner on July 19, 1996, represented by stock certificate number two. The record contains a subscription agreement and stock certificate number two, which reflect that Bestsellers issued 1,000 shares to the petitioner on July 18, 1996. As the ledger and original stock certificate indicate the petitioner purchased her shares in Bestsellers from Shortlist Book Shop, Inc., and the subscription agreement and separate stock certificate reflect that the petitioner purchased the shares directly from Bestsellers, the record is inconsistent.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the inconsistencies regarding the issuance of stock to the petitioner.

Of more concern, however, are the corporate tax returns and financial statements for Bestsellers, which do not reflect a $500,000 investment. All of the balance sheets reflect $100,000 in common stock and no additional paid-in-capital. The balance sheets further reflect shareholder loans of $246,809.43 on October 31, 1998, $202,175.71 on December 31, 1998, and $142,175.71 on June 30, 1999. Bestsellers' 1998 tax return reflects $11,809 in shareholder loans at the beginning of the year and $202,176 at the end of the year. The 1999 tax return reflects shareholder loans of $202,176 at the beginning of the year and $178,476 at the end of the year. Both tax returns reflect $100,000 in common stock and no paid-in-capital from the beginning of

1998 through the end of 1999. The record contains no financial documentation reflecting stock or paid-in-capital of more than $100,000. As quoted above, 8 C.F.R. 204.6(e) excludes loans to the new commercial enterprise from the definition of "invest."

Mr. Tujios asserts that the petitioner invested an additional $267,300 after the petition was filed. The record contains no ledger entry, subscription agreement, stock certificate, or audited financial statement to support this assertion. Moreover, as stated above, a petitioner must be eligible at the time of filing. While a petitioner need only be in the process of investing at the time of filing, the funds must be fully committed. The record does not demonstrate that the $267,300 was irrevocably committed to the business at the time of filing, such as through a secured promissory note or irrevocable escrow agreement.

The record reflects that Bestsellers was capitalized with only $100,000 at the time of filing and over $200,000 of the petitioner's alleged "investment" was actually loaned to the new commercial enterprise. Therefore, the petitioner has not established a qualifying investment of $1,000,000, or even $500,000.

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.