



U.S. Department of Justice  
Immigration and Naturalization Service

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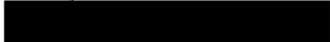
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



PUBLIC COPY

File:  Office: Texas Service Center

Date: FEB 12 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:



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

(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 petitioner indicates that the petition is based on an investment in [REDACTED], Inc., a new commercial enterprise which will create employment in three targeted employment areas for which the required amount of capital invested has been adjusted downward to \$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.

The cover letter for the petition asserted that the entire \$500,000 had been contributed. As evidence of this assertion, the petitioner submitted the Partnership Agreement for [REDACTED] L.P., his subscription agreement, and an "assignment." The petitioner also submitted copies of two uncanceled checks issued to counsel. The checks, totaling \$125,000, have a preprinted account number on the bottom, but the petitioner's name is handwritten on the check. The record contains no bank statements documenting ownership of the account or evidence that the checks were cashed. The subscription agreement states that the petitioner "commits" a total of \$500,000 to the partnership. However, the agreement only obligates the petitioner to pay in cash an initial \$100,000. Regarding the remaining investment, the agreement provides:

The balance of said capital investment USD \$400,000 is hereby pledged and collateralized by investor's assets hithertofore by an irrevocable assignment and has been preapproved by the General Partner.

The assignment provides that the petitioner:

assign[s] all rights, title and interest in all my world-wide assets for the purpose of collateralization of said payment (USD \$400,000) to [REDACTED] L.P. as capital contribution for my investment with [REDACTED] Corporation.

In the absence of a deed or other evidence that title had been transferred from the petitioner to the Partnership, the director correctly concluded that this agreement constitutes a promissory note with the petitioner's assets as collateral, to be seized only in the event the petitioner fails to pay the \$400,000.<sup>1</sup>

In order for a promissory note to be considered an investment, 8 C.F.R. 204.6(j)(v) requires that the note be secured by the petitioner's personal assets. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998), clarifies this requirement, providing that the petitioner must establish ownership of the assets, that the assets are in fact securing the note, that the security interest has been perfected or recorded according to local law, and that the assets are amenable to seizure by a U.S. note holder. Furthermore, the petitioner must show that the assets have sufficient fair market value to secure the amount of the note, considering the assessed value of the assets and the estimated cost of seizing the assets. Id. at 3-5.

As discussed below regarding the source of the petitioner's funds, the petitioner cannot establish that his assets are worth the \$400,000 pledged. The brief submitted on appeal does not argue that the director incorrectly concluded that the petitioner failed to establish the above factors. The argument that the director should not have relied on Matter of Hsiung will be discussed below.

In addition, as stated above, the petitioner's name is handwritten on the checks, which are not encoded as deposited. The record does not establish the ownership of the account on which the checks were drawn nor that the checks were ever cashed. Therefore, the petitioner has not demonstrated that *his* funds were the funds which were transferred to counsel.

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<sup>1</sup> In arguing that the precedent decisions should not be applied to the adjudication of this petition, counsel asserts, as an example of the petitioner's reliance on previous "standards," that the petitioner had no idea that his arrangement would be interpreted as a promissory note when he signed the assignment as it was prior to the issuance of the precedent decisions. However, in determining that the agreement was a promissory note, the director relied on Black's Law Dictionary, which was in existence at the time the petitioner signed the assignment.

In addition, the Offering provides that the investment funds "will initially be held in an escrow account in the name of the Partnership at their bank established for such purpose by the [REDACTED] Corp." However, as stated above, the checks were issued to counsel's law practice. The petitioner has not provided any documentation to demonstrate that counsel subsequently transferred \$100,000 to an escrow account in the Partnership's name. It remains, the petitioner has not demonstrated that he has contributed any capital to the Partnership.

The director further concluded that the petitioner had not demonstrated that any Partnership funds had been made available to the job-creating enterprise. The Partnership Agreement provides that its purpose is to create operating companies that will create employment in exchange for venture capital investment. The business plan provides that the first five operating companies already in process are [REDACTED] Conditioning, Inc., [REDACTED] Inc., [REDACTED] Inc., [REDACTED] Services Inc., and [REDACTED] Inc. d/b/a Top Notch Cleaning. In support of the petition, the petitioner submitted the articles of incorporation for the alleged operating companies, the agreement of sale between [REDACTED] Inc., and the lease agreements for the remaining businesses.

The director noted that the record did not contain an operating or other agreement outlining the financial obligations of the Partnership to any of the operating businesses. The articles of incorporation for [REDACTED] Inc., [REDACTED] Inc., [REDACTED] Inc., and [REDACTED] Inc. indicate that [REDACTED] (President and CEO of [REDACTED], Inc., the initial limited partner and trustee of the Partnership) is the registered agent of all four corporations. However, the record reveals no formal, legal or otherwise enforceable agreement between the Partnership and those corporations. The record does not contain any evidence connecting Accents and Decor, Inc. with the Partnership.

Moreover, even if the record did contain agreements between the corporations and "[REDACTED], L.P.," the record contains a registration of fictitious name for the Partnership. Therefore, according to 620.103(3) of the Partnership Laws of Florida, there is the possibility that there are several partnerships with this name in Florida. Any agreement with "[REDACTED], L.P." would need to provide more detail about the identity of the Partnership.

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<sup>2</sup> According to the record, the name of the corporation includes the incorrect spelling of "Caribbean."

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Examinations, July 13, 1998). The petitioner has not demonstrated that any of his funds have been made available to any of the operating businesses.

**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 petitioner 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.

The director correctly concluded that the petitioner had not established that he had contributed any of his personal funds. As stated above, it is not clear that the checks totaling \$125,000 were drawn on the petitioner's account or that they were deposited into the Partnership's account or even an escrow account.

The petitioner submitted the following: his resume indicating employment from September 1985 as a freelance management consultant and workshop facilitator; his Masters and Doctorate degrees; his membership certificate for the American Society for International Law; a letter confirming the petitioner's 1980 award as best oralist in West German Regional Rounds of the International Law Moot Court Competition; a bank letter indicating



the petitioner had a January 15, 1998 balance of \$75,043 and a mortgage with a remaining principle balance of \$115,009; another bank letter confirming January 7, 1998 balances of \$27,087, \$15,572, and \$91; a bank letter confirming a January 8, 1998 balance of \$149,972 in a Citibank Florida account opened in January 1998; an income statement for 1992 through 1997 reflecting income from consultancy fees of approximately \$109,000 in 1997, \$93,000 in 1996, \$120,000 in 1995, \$110,000 in 1994, \$81,000 in 1993, and \$72,000 in 1992; an appraisal of the petitioner's property confirming a worth of approximately \$546,000; a 1988 mortgage letter; and a promissory note in which Centennial Textile Corporation promises to pay the petitioner \$60,000 by January 9, 1999.

While the documentation may establish that the petitioner has earned two advanced degrees and is earning money as a consultant, the evidence does not support the petitioner's ability to invest \$500,000. Assuming the petitioner must pay living costs, his consultant fees do not account for a savings of \$500,000. The petitioner's bank accounts only total \$267,765. The Citibank account showed a \$149,972 balance on January 8, 1998, while the checks allegedly issued to counsel and drawn on a Citibank account are dated January 9, 1998. While the petitioner's house appears to be worth more than \$500,000, the petitioner's equity in that house may be less due to any remaining mortgage. Moreover, as stated above, the petitioner has not demonstrated that his house is legally securing his promissory note offered as evidence of investment.

**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).

8 C.F.R. 204.6(e) states that:

*Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

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 [REDACTED] P., in which the petitioner allegedly became a limited partner on January 9, 1998.

The director correctly concluded that since the petitioner was unable to demonstrate that he had invested any funds in the Partnership he was unable to demonstrate that he had established what is claimed to be the new commercial enterprise. In addition, [REDACTED], Inc. and [REDACTED] Corp. entered into the Partnership Agreement on October 1, 1997, and amended the agreement January 1, 1998.

Moreover, 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.

The petitioner has not demonstrated that the "operating businesses" are not merely purchasing existing businesses. If that were the

case, the petitioner would need to demonstrate the necessary expansion as provided in 8 C.F.R. 204.6(h)(3).

Beyond the decision of the director, it is noted that the petitioner will not be engaging in the management of the enterprise. 8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the ULPA, she is sufficiently engaged in the management of the partnership. Article VIII of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the Florida Revised Uniform Limited Partnership Act. However, under Article XV of the Partnership Agreement, all limited partners irrevocably appoint the General Partner as his or her attorney-in-fact, with all power of substitution. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Article VIII, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA. As such, the petitioner is a purely passive investor.

#### **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.

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

The record does not reveal that any of the operating businesses have hired any employees. 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 business plan submitted indicates that in the first two years, the operating businesses will employ 220 employees. However, the plan does not adequately explain these corporations' staffing requirements and provide job descriptions for all positions.

#### RETROACTIVE APPLICATION OF PRECEDENT DECISIONS

In his decision, the director stated that the petition was reviewed in accordance with the four 1998 precedent decisions issued by the Administrative Appeals Office (AAO). The director cited 8 C.F.R. 103.3(c) which provides:

*Service precedent decisions.* In addition to Attorney General and Board decisions referred to in §3.1(g) of this chapter, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, *they are binding on all Service employees in the administration of the Act.* (Emphasis added.)

Despite the clear language of the regulations, the appellate brief argues that the AAO precedent decisions are not binding on Service employees where there is a hardship to the petitioner and that the petitioner relied on "the Regulations which were in existence at the time the initial steps were taken." The brief cites Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978) as well as other federal cases in support of his argument that the retroactive application of law is disfavored.

In Ruangswang, the court reviewed a situation where the Board of Immigration Appeals had overruled a previous standard in a previous

precedent. The resulting new precedent dramatically changed the standards under which the petition in question would be adjudicated. Specifically, the Board substituted an objective standard for the previous subjective standard of "substantial investment."

Counsel's reliance on the court's decision in Ruangswang is misplaced. The AAO precedent decisions were simply interpreting the published regulations on which the petitioner claims to have relied. The four decisions did not create new standards or new rules.

In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court distinguished Ruangswang and concluded that the AAO precedent decisions did not involve rule making.

The provision at issue in Ruangswang contained "objective criteria (a \$10,000 investment, and one year's experience or qualified training), which the petitioner had clearly met. There "simply [was] no room for the agency to interpret the regulation so as to add another requirement." [Citation omitted.] By contrast, in applying the precedent decisions here, the INS did not add any requirement. R.L. Investment Limited Partners, supra.

The court further found that the plaintiff had not demonstrated any hardship as the petitioner in that case still had his \$500,000. The petitioner of the instant petition has likewise not demonstrated any hardship to himself. The checks do not indicate that they are drawn on the petitioner's account or that they were cashed. Further, the record does not reveal that the assignment of his world-wide assets is enforceable should he fail to pay the additional \$400,000. Thus, the petitioner has not demonstrated that he has committed any of his own personal funds.

Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.)

Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. The decisions did not impose additional requirements beyond those already set forth by the regulations. Under any proper reading of the language of the regulations, this petitioner is not eligible for classification as an alien entrepreneur.

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.