



U.S. Department of Justice

Immigration and Naturalization Service

BN

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

~~XXXXXXXXXX~~

[REDACTED]

JAN 10 2001

File: [REDACTED] Office: Texas 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]

Public Copy

Identity information is to be redacted 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

Mary C. Mulrean, 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 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 he had invested his own funds, as opposed to the funds of his foreign corporation, and had failed to demonstrate that his "investment" caused the creation of at least 10 new jobs.

On appeal, counsel argues that the investment of corporate money into a new business is common and the investment of the petitioner's foreign corporation should be considered the petitioner's personal investment.

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).

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established*" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;

(2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or

(3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j) (2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j) (4) (ii).

According to the plain language of section 203(b) (5) (A) (i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is [REDACTED] which the petitioner claims to have established through the reorganization of an existing business.

The director concluded the record did not contain any evidence of the petitioner investing his own personal funds. [REDACTED] Business Plan asserts it was funded by the petitioner's equity in Petrolog, a Nigerian Corporation. Counsel argued previously and continues to argue on appeal that since the petitioner owns a foreign corporation, that corporation's funds should be considered his investment.

A corporation, however, is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Relying on those cases, the Administrative Appeals Office held that a petitioner's corporate earnings could not be considered the earnings of the petitioner. Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) at 26. See also Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997). Therefore, regardless of the business reasons for using corporate income rather than personal income to create or expand a business, such an arrangement will not qualify the individual for the entrepreneur program.

As the record contains not one piece of financial documentation such as a check or wire transfer tracing funds directly from the petitioner's personal accounts to [REDACTED] the director correctly concluded the petitioner did not establish that he had invested \$1,000,000 into [REDACTED]. The petitioner's affidavit submitted on appeal pledging his personal assets as security to finance [REDACTED] projects does not overcome the absence of any specific security agreements where the petitioner borrowed money secured primarily by his own assets as required by 8 C.F.R. 204.6(j)(5). See Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 6-7 regarding personal guarantees.

Regardless, while not discussed by the director, further review of the record reveals that the petitioner is unable to demonstrate a capital investment because he has not demonstrated any ownership interest in the alleged new commercial enterprise.

The petitioner indicated on the petition that [REDACTED] was established on August 8, 1991, but that he initially invested \$500,000 in January 1990.¹ The record contains the articles of incorporation for [REDACTED] which indicate that it was indeed incorporated on August 8, 1991, and that the original director was [REDACTED]. The petitioner also submits an *unsigned* stock certificate for 1,000 shares issued to the petitioner on April 17, 1997, and a Written Consent of the Sole Director of [REDACTED] also dated April 17, 1997 resolving to issue 1,000 shares to the petitioner signed by the petitioner as the sole director. The petitioner submitted the 1997 tax returns for [REDACTED] omitting schedule K-1, but indicating on Schedule K at line 5 that one person or entity owns 100% of the corporation's voting stock referencing "Statement 5." Statement 5 indicates that [REDACTED] owns 100% of the stock.²

In addition to being unsigned, the petitioner's stock certificate also indicates it is the second certificate issued. GSR's tax return for 1997, Schedule L, reveals no increase in stock between the beginning of 1997 and the end of 1997. The record does not contain any indication that the previous shareholder assigned the original stock certificate to the petitioner. Exhibit D, submitted in response to the director's intent to deny, entitled "Business

¹ The petitioner also claims that GSR hired an employee in April 1990, over a year before it was established. The Business Plan for [REDACTED] submitted on appeal indicates GSR was established in 1989. These very different assertions are some of the several inconsistencies not resolved by the petitioner.

² Even if the petitioner were to demonstrate that he owned non-voting stock, the question would arise of whether the petitioner had any managerial control over GSR.

Plan for [REDACTED]" lists the petitioner as the Managing Director of [REDACTED] but makes no mention of who owns [REDACTED]. The self-serving Written Consent purportedly resolving to issue the stock to the petitioner indicates he is the sole director. However, the petitioner has not submitted any documentation regarding his election to the position of director, succeeding Eric Schaeffer.

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 petitioner submits on appeal a letter from the County Clerk of Harris County, Texas confirming that the petitioner is the owner of a company doing business as [REDACTED]. Exhibit DD, entitled [REDACTED]" but actually a business plan for [REDACTED] indicates that [REDACTED] was established as an "independent operating unit" of [REDACTED] on January 27, 1999 by the petitioner. Significantly, while the business plan identifies the petitioner as the Managing Director of [REDACTED] International, [REDACTED] Limited, and [REDACTED] regarding [REDACTED] it merely states the petitioner "established [REDACTED] [REDACTED] in 1989." As [REDACTED] was actually incorporated in 1991 and the petitioner does not even claim to be a shareholder prior to April 1997, the quoted statement is suspect. It remains, nothing in the record resolves the inconsistencies between the unsigned stock certificate and the 1997 tax returns.

Furthermore, the petitioner claimed to have reorganized an existing business. Even if we were to accept that the petitioner had an ownership interest in [REDACTED] at the time of filing, there is no evidence that he reorganized [REDACTED] between April 1997 when he allegedly purchased his stock and July 1997 when he filed the petition. Section 203(b)(5)(A)(i) of the Act requires that a petitioner demonstrate that he "has established" the new commercial enterprise. Therefore, if a petitioner is claiming to have "established" a new enterprise through the reorganization of an existing business, the reorganization must have already occurred by the time of filing.

The joint venture agreement between [REDACTED] and the petitioner's Nigerian corporation, [REDACTED] became effective April 1, 1995, two years before the petitioner allegedly purchased stock in [REDACTED]. Nothing in the record demonstrates a restructuring or reorganization such that a new commercial enterprise resulted prior to the filing of the petition.

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.

Finally, the petitioner has submitted volumes of documentation regarding the operations, finances, and expansion plans of Petrolog and, to a lesser extent, GSR, as well as his own assets. The petitioner also has included a binder full of statistical data with no relevance whatsoever to whether or not he has invested any money into [REDACTED]

Despite the submission of such voluminous amounts of documentation, the petitioner has submitted only two documents purporting to establish his ownership interest in the "new commercial enterprise" identified on the petition. An unsigned questionable stock certificate and a self-serving Written Consent signed only by the petitioner cannot establish the petitioner's alleged ownership of [REDACTED] especially as they are contradicted by [REDACTED] tax returns. The record remains absent one financial document showing the transfer of any funds, even the \$1,000 allegedly paid for stock, from the petitioner personally to [REDACTED] directly.

As the petitioner has not demonstrated that he has any relationship to the new commercial enterprise identified on the petition other than being the owner of a separate corporation which entered into a joint venture agreement with that enterprise, any analysis of whether the petitioner has managerial control or has created any new jobs is unnecessary.

For the reasons set forth above 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.