



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



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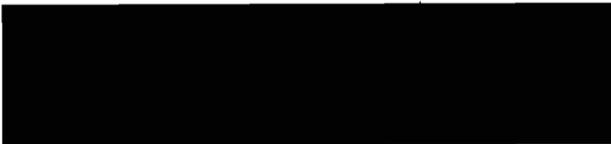
JAN 23 2001

File: WAC-98-194-50913 Office: California Service Center Date:

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

Mary C. Mulrean, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The immigrant visa petition was denied by the Director, California Service Center. The matter 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 denied the petition finding that the petitioner failed to adequately document the source of his funds and thereby failed to establish that the funds were obtained through lawful means as required.

On appeal, counsel for the petitioner argued that the decision was arbitrary and capricious and did not conform with the great weight of evidentiary material supplied. Counsel submitted a statement from the petitioner's uncle stating that he gave the \$1,000,000 to his nephew as a gift. Counsel also submitted documentation of the uncle's foreign assets.

§ 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 petitioner is a 23-year-old native and citizen of India. He was last admitted to the United States as a B-1 nonimmigrant visitor on October 6, 1997, with an authorized stay extended to July 5, 1998. His current immigration status is unknown.

On July 6, 1998, the petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition was based on an investment in an original business. The petitioner indicated on the petition form that he invested \$1,000,000 in a new commercial enterprise. The new commercial enterprise on which the petition is based is [REDACTED], Inc., a California Corporation, established on May 19, 1998. In a cover letter dated July 2, 1998, submitted by counsel, it was stated that [REDACTED]

██████████ Inc. would operate with three divisions: ██████████ and an unnamed "jewelry and diamond division."

#### 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.

The director denied the petition citing the petitioner's failure to establish the source of the investment capital. The director noted in her decision that a written request dated March 23, 1999, was issued to the petitioner requesting his tax returns for the five years preceding filing as required by 8 C.F.R. 204.6(j)(3)(ii), but that the petitioner failed to comply with that request.

On appeal, counsel stated, in pertinent part, that:

As stated in previous correspondences with your office, Mr. ██████████ obtained the funds used for the investment through his uncle ██████████

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Therefore, the petitioner has more than satisfied this element which details the source of funds used for the investment, thus establishing eligibility.

On review, as proof of the source of the investment capital the petitioner originally submitted a letter dated June 30, 1998, from a Bank of America branch in Los Angeles, California verifying that [REDACTED] opened a personal checking account in May 1998 and that it had a current balance of \$1,001,001.25. On appeal, counsel submitted a signed statement from the petitioner's uncle, Mr. [REDACTED] a resident of Israel, stating, "I gifted US \$1,000,000.00 on 29th June 1998 to my nephew [REDACTED]."

After full review of the record, it must be concluded that the petitioner has failed to overcome the director's objection. 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. Ex., July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 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. Matter of Izumii, supra, at 26. The petitioner bears the burden of proof in this matter. § 291 of the Act. 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).

A one time bank account balance and a letter from a family member is insufficient to satisfy the petitioner's burden of proof. First, the petitioner did not submit documentation showing the path of the funds from his uncle in Israel to his personal account in Los Angeles. There is no evidence of the source account or of the mode of transmission.

Second, there is no evidence of the nature of the purported gift. While the written statement of the uncle is acknowledged, there is no evidence of the lawful transmission of the funds as a gift such as the reporting of the money as a gift on the two parties' tax returns.

Third, the director explicitly requested the petitioner's tax returns as required documentary evidence. The director noted that the tax returns are required regardless of the petitioner's country of residence. The implication in counsel's response on appeal that a letter from the petitioner's uncle satisfies the documentary requirement in the alternate or that a claim that the funds were a gift exempts the petitioner from the documentary requirement are without merit.

Pursuant to 8 C.F.R. 103.2(b)(1), an application or petition must be completed as applicable and filed with any initial evidence required by regulation. The petitioner's tax returns are initial evidence required by 8 C.F.R. 204.6(j)(3) and the petitioner failed to submit such evidence. Pursuant to 8 C.F.R. 103.2(b)(13), if all requested evidence is not submitted by the required date, the petition shall be considered abandoned and, accordingly, shall be denied. The petitioner here has repeatedly failed to submit the required evidence despite a written request to do so.

In appeals from adverse decisions in visa petition proceedings the federal courts have affirmed a petitioner's burden to submit requested evidence. In INS v. Elias-Zacarias, 502 U.S. 478 (1992) the court found that if the director asks the petitioner for additional evidence, and the petitioner does not provide the requested evidence within the allotted time, the Administrative Appeals Office (AAO) will not reverse a decision denying the petition unless the evidence that was already in the record so clearly establishes that the intended beneficiary qualifies for the classification sought that a reasonable factfinder would have to conclude that the evidence that was already in the record clearly satisfies the burden of proof. In this case, it is clear that the evidence did not clearly satisfy the petitioner's burden of proof regarding the source of funds and the petition may be considered abandoned on that basis alone.

The regulations are silent in cases where the source of the investment capital is alleged to be a gift from a family member. Counsel submitted a series of bank letters from Israel verifying the petitioner's uncle's assets and business ventures. It must be concluded that such documentation is insufficient in the case of a claim of a gift as the source of capital. Based on the requirements of 8 C.F.R. 204.6(j)(3), the initial required evidence would be the tax returns of the petitioner and the family member allegedly remitting the gift. The returns should reflect the amount of the gift under the applicable reporting laws and the requisite reporting of funds transferred to the United States from abroad. The petitioner has failed to satisfy this requirement. Therefore, it must be concluded that the petitioner has failed to establish adequately the source of his capital investment and thereby failed to establish its lawful source.

#### Multiple Investors

It is further noted that the record indicates that the new commercial enterprise has a great deal more capital than the petitioner's claim of \$1,000,000. In the case of a new commercial enterprise involving multiple investors, it is incumbent on the petitioner to identify the source of all investment capital and demonstrate that it has been obtained by lawful means.

8 C.F.R. 204.6(g)(1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.** (Emphasis added.)

Based on the claimed assets of the new enterprise's subsidiaries, there appear to be additional investors in the enterprise. The petitioner bears the burden to identify the source of investment capital from all of these investors and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition. There is no evidence identifying the source of the investment capital of the subsidiary corporations. The petitioner therefore failed to meet the requirements of 8 C.F.R. 204.6(g)(1) and the petition may not be approved on this basis as well.

#### **ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE**

Beyond the decision of the director, the petitioner failed to establish eligibility on additional grounds.

The petitioner has not demonstrated that he has established a new commercial enterprise as required by 8 C.F.R. 204.6(h). The definition of a "new commercial enterprise" includes a holding company and its wholly-owned subsidiaries. 8 C.F.R. 204.6(e). In this case the petitioner claimed that the new commercial enterprise, ██████ Investments, Inc., is a holding company operating three divisions.

While the record shows that the petitioner incorporated ██████ Investments, Inc. ██████, he did not document the creation or nature of the three "divisions" or subsidiaries. For example, in a letter dated July 2, 1998, counsel identified the real estate division as ██████ Property Management which operates "30 separate multi-unit apartment complexes" in southern California. In a subsequent letter dated May 27, 1999, counsel stated that ██████ was doing business as ██████ Residential Services and that ██████ is managing 57 separate apartment buildings consisting of over 3,000 individual units."

The petitioner has not demonstrated whether ██████ Property Management and ██████ Residential Services are one entity or two separate entities. Nor has he established that it or they are wholly-owned subsidiaries of ██████. Merely showing that the petitioner registered a corporation with the State of California is

not sufficient to demonstrate that he established a new commercial enterprise for the purposes of this proceeding. He must demonstrate the establishment and ownership of all its operating divisions or subsidiaries. He must also show that the subsidiaries are wholly-owned. 8 C.F.R. 204.6(e). Furthermore, if the three subsidiaries were existing enterprises, the petitioner must establish that they were "made new" as a result of the petitioner's investment as set forth under 8 C.F.R. 204.6(h) (2)&(3).

Alien entrepreneur classification is available to aliens "seeking to enter the United States for the purpose of engaging in a new commercial enterprise which the alien *has established*." (emphasis added.) § 203(b)(5) of the Act. In this case, the petitioner has shown that he established the holding company, but has not shown that he established the operating "divisions" of [REDACTED]. Therefore, the petitioner has not shown that he established the new commercial enterprise within the meaning of the Act.

#### QUALIFYING INVESTMENT OF CAPITAL

The petitioner has not established his claim of having invested \$1,000,000 into the new commercial enterprise. 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. 8 C.F.R. 204.6(j)(2). 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. *Id.* The alien must show actual commitment of the required amount of capital. *Id.*

The petitioner's above-referenced bank letter shows that he held a personal checking account with a balance of slightly over \$1,000,000 as of July 30, 1998. However, the petitioner furnished no evidence of having transferred that amount to a corporate account of [REDACTED] or to any of its subsidiaries. Where a holding company which is not the entity most closely engaged in employment-creation is utilized as the investment vehicle, making the investment funds available to the holding company is not sufficient. *Matter of Izumii, supra*, note 7. Even if the funds were deposited in a corporate account of [REDACTED], the petitioner still must show that those funds were placed at risk in meaningful, concrete business activity. *Matter of Ho, I.D. 3362 (Assoc. Comm. Ex., July 31, 1998)*.

It is clear that the purchase of 30 to 57 apartment buildings in southern California would require more than the \$1,000,000 the petitioner claimed to have invested. There is no evidence that the petitioner's claimed capital of \$1,000,000 went to one of the [REDACTED] real estate entities or to one or more of the other alleged job-

creating subsidiaries of [REDACTED] discussed in the petitioner's business plan. It is noted that the record contains no evidence that the other two "divisions" of [REDACTED] have actually been established or have engaged in any actual business activity. Therefore, it must be concluded that the petitioner has failed to establish that he has invested the requisite amount of capital and has failed to establish that the capital is at risk in a job-creating commercial enterprise.

**THE EMPLOYMENT-CREATION REQUIREMENT**

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(g) deals with multiple investors and states, in pertinent part:

(1) The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time employees.

(2) 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.

The petitioner must establish that his investment will result in the creation of at least ten full-time jobs. In this case, there is no evidence that [REDACTED], as the holding company, will create the required employment. It is noted that the lease for the offices of [REDACTED], Inc. at [REDACTED] contains space for a maximum of two employees. The petitioner has not established a qualifying relationship between [REDACTED] and its claimed subsidiaries that would allow any employment created by them to satisfy the employment-creation requirement. Therefore, the petitioner has failed to establish eligibility on this basis as well.

#### CONCLUSION

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to establish a qualifying capital investment of the requisite amount, has failed to demonstrate that he established a new commercial enterprise, has failed to show that he has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of his investment capital and show that it was obtained through lawful means, and has failed to demonstrate that the investment will result in the requisite employment creation. For these reasons, the petitioner has failed to establish eligibility for alien entrepreneur classification under § 203(b)(5) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

**ORDER:** The decision of the director is affirmed. The petition is denied.