



U.S. Department of Justice  
Immigration and Naturalization Service

B7

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



**PUBLIC COPY**

File: LIN-99-017-51013 Office: California Service Center Date: **JAN 25 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)

identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

IN BEHALF OF PETITIONER:



**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, 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 establishment of a new commercial enterprise, the lawful source of the invested funds, active management of the enterprise, and the necessary employment creation.

On appeal, the petitioner asserts that she has established a new commercial enterprise by expanding an existing enterprise, has documented the source of her funds as a gift from her father, is actively involved in the management of the enterprise, and has created more than 10 new jobs.

The petitioner also requests oral argument. Oral argument is limited to cases in which cause is shown. A petitioner or her counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied.

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).

#### **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).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise at issue here is [REDACTED] Corporation, in which the petitioner became the sole shareholder on May 15, 1998.

On the petition, the petitioner claimed to have established a new commercial enterprise resulting from the reorganization of an existing business. The petitioner submitted a "Restructuring Plan" presented at a Board meeting, a "Marketing and Sales Plan" prepared by the petitioner, a Business Plan, a chart of employees for [REDACTED] and [REDACTED] as of August 1998, and an unaudited balance sheet.

The director concluded that the mere transfer of \$1,000,000 to the corporation is insufficient to demonstrate the establishment of a new commercial enterprise.

On appeal, the petitioner claims to have expanded an existing business by both a 40% increase in net worth and employment. The

petitioner submits a letter from ██████ advising that the petitioner's investment was used to make improvements to the hotel, a letter from ██████ asserting that ██████ employed 36 people in May 1998 and 52 people in August 1998, payroll records, and ██████'s Quarterly Federal Tax Returns, Form 941 and Unemployment Insurance Tax Reports.

The record does not reveal that the petitioner reorganized the corporation to the extent of creating a new enterprise. While some reference is made to the building of a new hotel, ██████, the architect's letter regarding this new project is addressed to Daymer Corporation, not ██████. As will be discussed in greater detail below, the petitioner has not provided documentation which clearly explains the relationship between ██████, ██████, and ██████. Regardless, the record reveals that the business, a lodge and restaurant, did not change its mission or substantially expand its available services as a result of the petitioner's investment. As such, the petitioner did not reorganize an existing business.

The petitioner does not claim to have established ██████ as a new business. The record reveals that the corporation was incorporated two years before the petitioner invested any money.

The petitioner now claims to have expanded an existing business by 40%. The petitioner submits letters from ██████ attesting to the expansion of net worth and unaudited balance sheets. However, the petitioner fails to submit audited balance sheets and corporate tax returns complete with Schedule L. Without such documentation, the petitioner cannot demonstrate the true net worth of the corporation before and after her investment.

Furthermore, as will be discussed in more detail below, the petitioner is now the sole shareholder, owning all authorized 200,000 shares. However, the corporation was incorporated in 1996. The record does not reflect the number of shares owned by the previous shareholder or shareholders (one of whom was the petitioner's father) and how those shares were returned to the corporation to be reissued to the petitioner. If the corporation had to buy back the shares it ultimately sold to the petitioner, the documentation regarding that transaction is necessary to demonstrate any net gain to the corporation. 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).

Regarding employment, the petitioner also submits a letter from VVI as well as payroll and tax records. While the payroll records for the period ending May 31, 1998 shows 36 employees and the records for the period ending August 20, 1998 shows 52 employees, the Unemployment Insurance Tax Report indicates VVI had 71 employees in January 1998, 70 employees in February 1998, 65 employees in March

1998, 58 employees in April 1998, 27 employees in May 1998, 42 employees in June 1998, 47 employees in July 1998, 52 employees in August 1998, and 46 employees in September 1998. The nature of the business and these numbers clearly indicate the business has seasonal highs and lows. As such, the petitioner would need to document an increase in employment relative to the same time of year prior to her investment. The record contains no employment records for 1997.

In light of the above, the petitioner has not demonstrated the establishment of a new commercial enterprise, the reorganization of an existing commercial enterprise, or the substantial expansion of an existing commercial enterprise.

#### **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 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., Ex., July 13, 1998).

The petitioner claims that her father gave her a gift of \$1,200,000 of which she invested \$1,000,000 into the corporation in exchange for all of the corporation's stock, 200,000 shares. The record contains the stock certificate issued to the petitioner for 200,000 shares and the Articles of Incorporation which provide that the corporation may only issue 200,000 shares. The petitioner did not submit corporate tax returns complete with Schedule K-1 as further evidence of her ownership. The certificate of incorporation was issued on November 11, 1996 and the petitioner purchased her stock on April 30, 1998. The record also contains a letter from the petitioner's father identifying himself as the president and former shareholder in the corporation.

The above documents reveal that the corporation had issued at least some of its 200,000 shares to at least one other person prior to the petitioner's purchase of shares. The petitioner has not documented how the corporation reacquired its shares in order to issue them to the petitioner. Specifically, the petitioner has not

submitted the previous shareholder's investment agreement, any general shareholders' agreement, corporate tax returns for 1997 and 1998 complete with Schedule K-1, or documentation of the buy back transaction. As any money used to purchase stock from the previous shareholder(s) was not available to the employment creating enterprise, the absence of such documentation is significant.

The regulations provide that an investment is a contribution of capital for the purpose of generating a return. As such, the petitioner must infuse new capital into the enterprise and bear the risk of any losses. The petitioner has simply not documented the transactions sufficiently to demonstrate that she infused \$1,000,000 of new capital not previously available to the corporation. Given that the money allegedly invested originated from the previous shareholder, the petitioner's own father, it is incumbent upon the petitioner to document that any money invested in the enterprise is money previously unavailable to the corporation.<sup>1</sup> Without the previous shareholder's investment or shareholder's agreement and the buy back agreement, the petitioner cannot establish that she invested \$1,000,000 of new capital into the corporation. Without the petitioner's own investment or shareholder's agreement, the petitioner cannot establish that she bears the risk of any loss.

#### **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

---

<sup>1</sup> In a situation like this one, a relative of the petitioner could sell his shares to the corporation for \$1,000,000 and give that money to the petitioner to buy those same shares from the corporation. Such a transaction results in no net gain to the corporation and is not an infusion of new capital, but would produce the same documentation as submitted in this case. While we do not speculate that this sequence of events occurred in this case, the example is provided to explain why the documentation submitted does not establish an investment of \$1,000,000 by the petitioner.

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. Matter of Izumii, supra, at 26. 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).

The petitioner initially submitted documentation of wire transfers from her account to the corporation totalling \$1,000,000, a letter from her father attesting to a gift of \$1,200,000, and her father's Brazilian tax return for 1997. The director correctly concluded that the petitioner had not traced the funds back to her father's account.

On appeal, the petitioner submits evidence that the money originated from her father's account. She also submits additional evidence of her father's assets in Brazil. However, the money was not transferred from her father's account in Brazil, but from his account in New York City. As discussed above, the petitioner has not established that these funds did not originate from the corporation. The assets of the corporation, transferred to the petitioner's father, then to her, and finally back to the corporation cannot be considered the investment of the petitioner's own funds. The petitioner provided only a letter from her father's bank attesting to the transfer of money to the petitioner. Without a series of bank statements, it is not possible to determine whether that money had been in the father's account for any length of time or whether it originated from another source, including, but not limited to, the very commercial enterprise into which the petitioner claims to be infusing new capital.

Regarding the director's concerns that the petitioner did not provide her own personal tax returns in accordance with the regulations, counsel argues that such documentation is only required as applicable and is not applicable to the petitioner as she obtained her investment funds as a gift. Counsel submits a letter from an accountant asserting that a gift is not taxable to the recipient in the United States. A petitioner's tax returns, however, are always relevant regardless of whether the source of funds are taxable. It is impossible to determine whether the tax returns could illuminate the nature of the petitioner's funds without reviewing them. We need not accept counsel's assurances that the returns are irrelevant. In light of the above discussion, the petitioner has not adequately documented the legitimate source of funds of her alleged investment.

#### **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.

As discussed above, given the seasonal nature of the business, without a comparison of employment for each month of 1997 to the same month in 1998, the petitioner cannot establish that the fluctuations in employment were due to her investment, and not the seasonal needs of the business. Moreover, while [REDACTED] claims the petitioner has created 12 new full-time jobs, and provides charts of the increase, the Unemployment Insurance Tax Reports for 1998 indicate the corporation had 71 employees in January, 70 in February, 65 in March, 48 in April, 27 in May, 42 in June, 47 in July, 52 in August, and 46 in September. Simply comparing two random months from the same year as the letters from VVI do (May and August) is disingenuous. It could just as easily be argued by comparing January and September that the petitioner's investment actually decreased employment.

Finally, while [REDACTED] claims all of the employees are United States citizens or Lawful Permanent Residents, the petitioner has not provided the I-9s of these employees as evidence of their status. 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. As such, the petitioner has not established that all of these employees are qualifying.

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 petitioner submits a "Restructuring Plan" which alludes to a new hotel to be built which will require 147 new employees. As stated above, however, the architect's letter regarding that hotel is addressed to Daymer Corporation. While the Restructuring Plan states that Daymer, Inc. is the parent corporation of [REDACTED], the petitioner is the sole shareholder of [REDACTED]. 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 this inconsistency. The petitioner has not provided any documentation of the relationship between [REDACTED] and [REDACTED] Corporation. The Restructuring Plan implies that the petitioner's investment allowed [REDACTED] to purchase furniture and equipment which [REDACTED] required before it would permit the purchase of the new hotel. The record does not fully explain why [REDACTED] permission is required for [REDACTED] to expand and why [REDACTED] would require a purchase of equipment before granting such permission.

In addition, the record does not establish whether this new hotel will be built on the same premises or elsewhere, although the Business Plan discusses closing during the breaking of ground for the new hotel. The record is simply incomplete regarding how the petitioner's investment will lead to a new hotel which will hire an additional 147 employees, especially as the petitioner's money was supposedly spent on capital improvements for the existing hotel. Moreover, the Business Plan does not provide a time table for hiring these new [REDACTED] employees. The number of employees for VPH is provided on a chart labeled "as of August 1998" but the petitioner does not claim [REDACTED] is already operational with all of these new positions created. The record simply fails to clearly document any increase of employment or that an increase will occur in the next two years.

#### ENGAGEMENT IN MANAGEMENT OF ENTERPRISE

8 C.F.R. 204.6(j) (5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

- (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
- (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
- (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

The director concluded the petitioner had not demonstrated that she was actively involved in the management of the enterprise because her position in the corporation was merely Executive Marketing Vice President. On appeal, the petitioner submits evidence that she is now a director and vice president of the corporation.

While we disagree with the director regarding the management responsibilities of an Executive Marketing Vice President, the petitioner has provided no documentation of her position other than a letter from [REDACTED] and, on appeal, a letter signed by herself and her father. Even if we agreed with counsel that the petitioner's tax returns were irrelevant regarding the petitioner's source of funds, clearly they would establish whether or not she was employed by the corporation. Moreover, the petitioner has also failed to provide the corporation's tax returns, complete with Schedule K-1 which would further document the petitioner's interest in the corporation.

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.