



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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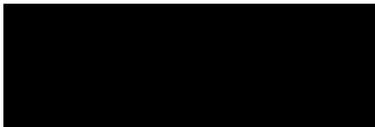
JAN 25 2001

File: WAC-98-234-52611 Office: California Service Center Date:

IN RE: Applicant: 

Application: 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 APPLICANT:



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 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 failed to establish that she had created a new business and that the money invested was obtained by lawful means.

On appeal, the petitioner argues that at the time of filing her petition, she was in the start-up phase of the business so it was impossible to show the required business activities. The petitioner also maintains that she has substantiated the source of her investment funds.

The petitioner indicates that the petition is based on an investment in a new commercial enterprise in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

INVESTMENT IN A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5) of the Immigration and Nationality Act, states in pertinent part:

(A) In general. - Visas shall be made available . . . 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).

Title 8 Code of Federal Regulations Section 204.6(h) states, in pertinent part:

The establishment of a new commercial enterprise may consist of:

- (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.

In support of her petition, the petitioner submitted articles of incorporation for [REDACTED] Inc. and the minutes of the first meeting of the board of directors. The minutes indicate that the petitioner is the chairman and sole shareholder for the corporation which intended to operate a business at [REDACTED]. On appeal, the petitioner submits documentation indicating that the corporation has changed its name to [REDACTED] Inc., and is now doing business at [REDACTED] California. The petitioner has not established that she has invested the necessary capital into this enterprise.

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.

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance

exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

The director expressed concern that the petitioner had not demonstrated any significant business activity. Review of the record reveals that the petition was not initially supported with any documentation of business activity other than a commercial lease, an application for certificate of occupancy, and a business license renewal notice for an unrelated address. A mere commercial lease was deemed insufficient in Matter of Ho. The fact that the business which the petitioner now claims to have established is operating from a different address demonstrates just how little commitment arises from a mere lease. While the petitioner now submits documentation of an operational business, the business is operating from a different location than originally planned.

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. At the time of filing, the petitioner had not established that any money contributed to the proposed business was at risk.

In addition, the petitioner has not established that any of her funds were invested into [REDACTED] Inc. The Labor Force Data submitted with the original petition reveals that the unemployment rate of Pomona is also 150% of the national average. Therefore, the new address is in a targeted area and the petitioner need only demonstrate that she invested \$500,000.

The petitioner submitted a [REDACTED] receipt dated July 31, 1998, for \$500,000 which does not reveal the name of the beneficiary or the remitter. The petitioner also submitted a verification of account dated August 3, 1998, from [REDACTED] indicating that, as of July 31, 1998, [REDACTED] Inc. maintained a balance of \$500,000 in a money-market account. Finally, the petitioner submitted a Customer Advice revealing that [REDACTED] remitted \$500,000 to the beneficiary's personal account at [REDACTED] on July 30, 1998.

On appeal, the petitioner submits an audit of her personal assets in the People's Republic of China, the articles of incorporation of [REDACTED], the petitioner's business in China, the balance sheet for that business, a letter signed by the petitioner authorizing [REDACTED] International to assign

and transfer 70% of the accounts receivable from a sales contract to the petitioner's personal account in the United States, and a sales contract for the sale of merchandise by [REDACTED] to [REDACTED] International. The sales contract shows that the purchase price for the merchandise is \$764,615.14, 70% of which is \$535,230.00.

Even if the petitioner established that the funds wired by [REDACTED] to her personal account were her funds, she has not established that the \$500,000 transferred to her personal account is the same \$500,000 in the corporate account. Moreover, the record indicates that the petitioner is the sole shareholder of the corporation. Therefore, even if the petitioner did contribute the \$500,000 in the corporation's money-market account as of August 3, 1998, that money is not properly at risk.

Matter of Ho, supra, states:

The regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment.

As in that case, the petitioner has not explained how the \$500,000 was used or is to be used. While the documentation submitted on appeal reveals that the business is operating, the documents do not demonstrate that any of the petitioner's funds were used. In fact, the bank statements for the corporation submitted on appeal indicate a different account number than the \$500,000 money-market account documented by the August 3, 1998, bank letter.

Counsel asserts on appeal that the corporation purchased the property on which it is conducting business. However, the grant deed submitted does not identify the property purchased. In addition, the petitioner has not demonstrated what funds were used for the purchase or whether the property was purchased with a mortgage or other loan not secured by the petitioner's personal assets.

The petitioner has failed to establish that she actually invested the \$500,000 wired to her personal account and that the money was placed at risk.

SOURCE OF FUNDS

Title 8, Code of Federal Regulations, Section 204.6(j) states:

A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing *lawfully obtained capital* in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. (Emphasis added.)

Furthermore, Title 8, Code of Federal Regulations, Section 204.6(j)(3) states:

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. (Emphasis added.)

As evidence that her funds were obtained lawfully, the petitioner submitted an audit of her personal assets abroad and a balance sheet of her solely-owned business in the People's Republic of China, [REDACTED] Company [REDACTED]. The petitioner has not submitted any evidence to establish how she earned the money to purchase her personal assets. While the \$500,000 allegedly contributed to [REDACTED] Products, Inc. appears to result from the sale of marble to [REDACTED] International by [REDACTED], it is not clear how the petitioner is able to lawfully divert 70% of the purchase price away from her company in this manner. The petitioner has not submitted any evidence that would indicate that the petitioner is entitled to 70% of the purchase price of every

sale rather than a percentage of the profits of the corporation itself.

While solely owned by her, the company is still a separate legal entity. The petitioner has not established that corporate law in China permits the proceeds of a sale to be lawfully paid to a shareholder instead of to the corporation itself for distribution in accordance with the articles of incorporation. The balance sheet for [REDACTED] does not indicate the business produces a \$500,000 profit. Using counsel's exchange rate of 1 U.S. dollar to 8.28 Yuan, the company's profit for 1998 was only 3,402 Chinese Yuan, or \$411. The undistributed profits as of January 1999 were 18,269 Chinese Yuan or \$2,206.

Moreover, this arrangement, instead of a direct transfer of the petitioner's personal funds, raises questions regarding the unlawful transfer of funds from the petitioner's home country. The petitioner has not established that this arrangement was not, in fact, an attempt to circumvent the foreign exchange controls of China.

Finally, the petitioner has not submitted any tax returns or other evidence of income which could explain the source of the capital used to finance the formation of [REDACTED]. Therefore, the petitioner has failed to establish the lawful source of the \$500,000 transferred to her personal account in the United States.

EMPLOYMENT CREATION

Title 8 Code of Federal Regulations section 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 or 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.

In addition, Title 8 Code of Federal Regulations section 204.6(e) states, in pertinent part:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.

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, of any nonimmigrant alien.

On appeal, counsel asserts the petitioner has hired ten employees, four of whom are full-time employees. The petitioner submits Form 941 and a State of California form both listing four employees. However, these forms do not establish that these employees work full-time. The petitioner has not submitted Form I-9s, pay stubs or payroll records. Therefore, the Service is unable to verify the employees' status in the United States and the number of hours worked. Regardless, the petitioner does not claim to have already hired 10 full-time 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 by the petitioner proposes hiring between 10 and 11 employees in the following two years. However, the plan does not contain sufficient detail regarding the business and its job-creation potential to be considered a comprehensive business plan. Specifically, the business plan does not analyze other similar companies in the area. Nor does the plan adequately explain why the business will require the services of each proposed employee and what their duties will be. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation. Id. The petitioner has not provided an updated business plan on appeal explaining why the business will need additional staff beyond the four full-time and six part-time employees purported to be working for the business at the time of the appeal.

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.