



U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

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

[Redacted]

JAN 25 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]

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, 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 denied the petition finding that the petitioner failed to establish that he had made a qualifying at-risk investment in a new commercial enterprise, had failed to establish the source of his investment capital and thereby failed to show that it was lawfully acquired, and had failed to demonstrate that he had established a new commercial enterprise.

On appeal, counsel for the petitioner argued that the center director erred as a matter of fact and of law in denying the petition. A written brief was submitted.

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).

The petitioner is described as a native of Senegal and a citizen of France. He submitted documentation showing that he last entered the United States on February 24, 1989, as an E-2 Treaty Investor, such status valid until February 23, 1990. The petitioner's current immigration status is unknown.

The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, on November 24, 1997, indicating that the petition was based on his ownership interest in [REDACTED] Inc., a Texas corporation. The petitioner indicated on the petition form that the petition was based on the creation of an original business. The expressed purpose of [REDACTED], is to develop and operate three Burger King restaurants in the Dallas, Texas area. The

petitioner claimed eligibility for immigrant investor classification based on his having invested \$1,000,000 into the new commercial enterprise and the claim that the enterprise will create more than 10 new jobs.

The first issue in the center director's decision is whether the petitioner established that he has made a qualifying at-risk investment of at least \$1,000,000 into a new commercial 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. All capital shall be valued at fair market value in United States dollars.

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

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.

To address this requirement, the petitioner submitted, in pertinent part, a letter dated May 7, 1997, from Nations Bank, Atlanta, Georgia stating that a check for \$1,000,000 was drawn on the petitioner's account¹ and deposited into an account of [REDACTED] Inc., [REDACTED]. The letter stated that per instructions of the petitioner \$700,000 was placed into the account as cash and \$300,000 in a certificate of deposit.

¹ The petitioner's account [REDACTED] was held jointly with his spouse, [REDACTED].

To demonstrate a qualifying investment, 8 C.F.R. 204.6(j)(2) requires evidence that the requisite amount of capital is at risk for the purpose of generating a return. The regulation further states that evidence of a mere intent to invest is not sufficient.

Relying on Matter of Ho, Int. Dec. 3362 (Assoc. Comm., Ex., July 31, 1998), the director found that merely depositing \$1,000,000 into a corporate account was insufficient to establish a qualifying at-risk investment of the requisite amount of capital in the absence of proof of meaningful business activity.

On appeal, counsel argued that "Matter of Ho is inapposite or distinguishable" in this matter. Counsel argued that the petitioner in Ho was a single investor whereas the petitioner in this case is in a 50/50 partnership with another individual. Counsel further argued that all of the capital is available to Monsouni, Inc. and that no portion of the capital is set aside in the ways prohibited under Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Ex., July 13, 1998).

Counsel's arguments are not persuasive. First, the claim that the precedent decision is not applicable to a petition involving a partnership is without merit. In Matter of Ho, supra, it was held that before capital made available to a commercial enterprise can be considered to be at risk, a petitioner must present some evidence of the actual undertaking of meaningful concrete business activity. In that case, the petitioner had placed the requisite amount of capital in a corporate bank account and had leased business premises. The Associate Commissioner held that this was insufficient to establish that the entire amount of capital was at risk in the absence of evidence of "meaningful concrete business activity." The decision further held that the petition must be supported by a detailed comprehensive business plan including, in part, detailed timetables and financial projections. In the Ho decision the Associate Commissioner discussed the fact that the petitioner was the only known investor to date in the enterprise and that that fact raised additional concerns about the petitioner's sole control of the capital. But the Associate Commissioner also noted that the petitioner in Ho also held only 50 percent of the shares of outstanding stock of the enterprise. Contrary to counsel's argument, the findings in Matter of Ho are not limited to enterprises wholly owned by a single individual, but apply to all pertinent petitions under § 203(b)(5).

In this case, the petitioner submitted documentation that he deposited funds into a corporate account and that [REDACTED] Inc. had entered into negotiations for a franchise from Burger King Corporation. He also submitted documentation showing a sublease for a business office and documentation that they have taken steps to get preliminary authorization from Burger King Corporation for the site location for one restaurant. There is no evidence that

the property acquisition has been completed and there is no documentation relating to locations for the two additional restaurants claimed in the petition. Furthermore, while the petitioner claims that [REDACTED] Inc. is a 50/50 partnership, the corporation's balance sheet reflects that the petitioner's "partner" has invested only \$1,000 for his 50 percent share of the company's stock. The company was capitalized at \$1,001,000. The balance sheet reflects that the petitioner paid \$1,000 in exchange for 50 percent of the company's stock and that he paid an additional \$999,000 of paid in capital. The petitioner failed to submit a partnership agreement or any documentation governing his alleged investment of \$999,000 of capital into the company.

Moreover, in Matter of Ho the Associate Commissioner also held that a qualifying business plan must meet certain minimal requirements. The business plan submitted by the petitioner does not meet these requirements. It contains only a general discussion of the Burger King menu and of the customer base for a fast-food restaurant. The plan contains absolutely no financial projections of the costs of securing, constructing, and equipping the three Burger King restaurants on which the petition is based. There is no timetable for beginning operations of the new enterprise, no listing of the various licenses and permits required, no operating cost and revenue projections, no discussion of the uncommitted franchise locations that are available in the Dallas area, and no detailed staffing projections. Therefore, the business plan does not meet the standard set forth in Ho and is insufficient to demonstrate that the petitioner is actively in the process of investing in a new commercial enterprise.

Furthermore, in the absence of any analysis of the cost of developing the three restaurants, there is no evidence that the petitioner's alleged investment of exactly \$1,000,000 bears any relation to the actual cost of opening the restaurants. Therefore, the deposit of \$1,000,000 into a corporate account demonstrates only a mere intent to invest the requisite capital, which is insufficient.

It is further noted that the petitioner stated that he filed a previous petition based on the same enterprise that was denied because his investment consisted of loans secured by the assets of the new enterprise which was prohibited by the regulations. To demonstrate the business activity necessary to support the instant petition, the petitioner submitted a Target Reservation Agreement between [REDACTED], Inc. and Burger King Corporation. It is unknown whether this agreement was executed related to the previous filing or whether it is a new agreement. Nevertheless, the agreement stipulates at Article 2.5 that "time is of the essence" in successfully obtaining a franchise agreement from Burger King Corporation. The petitioner has not demonstrated that he is pursuing the franchise in a time-sensitive manner and it is again

noted that the business plan contains no timetable for implementation of the franchise agreement, construction of the restaurants, or the date the first restaurant is expected to be opened.

Accordingly, the petitioner has not demonstrated meaningful business activity related to his investment and has not provided a comprehensive business plan to support his claim that he is in the process of investing the requisite capital into a profit-generating enterprise. Considering the petitioner's claims in the most favorable manner possible, the best that can be determined is that the petition was filed prematurely. He is free to refile when the requisite business activity can be demonstrated.

Counsel's second argument relating to the absence of any set-aside funds prohibited under Matter of Izumii is immaterial. That was not cited as a basis for denial of the petition in the director's decision.

Based on the above, it cannot be concluded that the petitioner has overcome the director's objections. The petitioner has not established that he has made a qualifying at-risk investment of the requisite capital under the standard set forth in Matter of Ho, supra.

The next issue raised by the director is whether the petitioner adequately demonstrated the source of his capital and established that it was obtained through lawful means.

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 found that the petitioner failed to demonstrate that he obtained his capital through the sale of foreign and United States businesses and from gifts from his wife's family as claimed and thereby determined that this requirement was not satisfied.

On appeal, counsel argued that the petitioner's tax returns show over \$600,000 in interest income from the petitioner's investments, including his ownership of a Burger King restaurant, that he submitted evidence of the sale of a condominium in Mexico City for \$290,000, and that his wife received \$300,000 in gifts from her family. Counsel argued that the petitioner has demonstrated income of well over \$1.3 million in the ten years preceding filing and has satisfied the requirement.

Counsel further stated that:

On January 31, 1997, Mr. [REDACTED] received the sum of \$904,000.00 from the repayment of loans made to and prior investments in certain of his business ventures: [REDACTED], [REDACTED], and [REDACTED]. Previously, in October 1995, Mr. [REDACTED] received the sum of \$200,000 from the sale of Barbara Real Estate. These proceeds were subsequently placed in the account of [REDACTED], Inc....

Counsel's arguments are not persuasive. 8 C.F.R. 204.6(j)(3) requires, in part, the submission of tax returns for the five years preceding filing. The petition was filed in November 1997. The petitioner submitted copies of his United States joint tax returns for the years from 1991 to 1996. The total adjusted gross income for the five years totals \$675,966. However, contrary to counsel's assertion, merely documenting the petitioner's income for the five or ten year period preceding filing is not sufficient to demonstrate the source of the capital invested.

The petitioner demonstrated that a check for \$1,000,000 was drawn on his Nations Bank account. He did not demonstrate the path of funds into that account. Pursuant to Matter of Ho, supra, the petitioner must demonstrate that he is the legal owner of the capital invested. There is no evidence of the sale of foreign property, of the alleged gifts from his wife's family, of his ownership of any gift from his wife's family, or a detailed account of his ownership of any United States businesses. The petitioner

submitted statements indicating bank transfers to his wife's accounts. However, merely submitting a collection of bank transfer statements does not establish the source of the funds and does not satisfy a petitioner's burden of proof.

The petitioner has not documented the alleged multiple transactions that resulted in the sudden realization of \$904,000 on January 31, 1997. Nor did he submit evidence showing his receipt of these funds or documentation of the loans and business transactions from which these funds allegedly were derived. The petitioner has not submitted a detailed account of his U.S. business investments² and his income from those investments, and has not documented the path of the funds into the Nations Bank account. Accordingly, the petitioner has not established the source of the \$1,000,000 or shown that it was obtained through lawful means.

In addition, it must be noted that the petitioner submitted his I-94 Arrival/Departure document reflecting his authorized stay in E-2 classification until February 23, 1990. He did not establish that he resided in the United States in a lawfully authorized status from February 24, 1990 to the date of filing on November 24, 1997. Any income earned while unlawfully employed or from unauthorized business activity in the United States does not constitute a lawful source of funds.

The final issue raised by the director is whether the petitioner demonstrated that he established a new commercial enterprise.

8 C.F.R. 204.6(h) states that 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

² Counsel referred to five corporations in which the petitioner is claimed to have had an ownership interest: [redacted] Inc.; [redacted] Inc.; [redacted] Inc.; [redacted] Inc.; and Barbara Real Estate. The petitioner submitted no documentation of the nature of the various businesses, the petitioner's ownership interest in the businesses, or the value of any such interest.

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 C.F.R. 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 C.F.R. 204.6(j)(4)(ii).

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

To show that a new commercial enterprise has been established by the petitioner in the United States, the petition must be accompanied by:

(i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;

(ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect.

The director found that the petitioner failed to produce a franchise agreement and thereby failed to show that he established a new commercial enterprise.

On appeal, counsel argued that the petitioner submitted a copy of the articles of incorporation showing that he is a member of the board of director's and thereby satisfied the regulatory requirements.

In this case, the petitioner submitted: the articles of incorporation showing that he is one of three members of the board of director's of [REDACTED] Inc.; documentation showing that [REDACTED] Inc. was incorporated on March 21, 1997; stock certificate #2 showing that he holds half, or 100,000 shares, of the authorized stock of [REDACTED], Inc.; and the Nations Bank letter showing the transfer of funds from the petitioner's account to the [REDACTED] Inc. account. The petition was filed on November 24, 1997.



On review, the director's reliance on the lack of a franchise contract pertaining to the issue of "establishment" was misplaced. Monsouni, Inc. was formed after November 29, 1990, and qualifies as a "new" enterprise pursuant to 8 C.F.R. 204.6(e). The petitioner submitted a stock certificate indicating that he owns one-half of the shares of stock and the articles of incorporation showing his seat on the board. However, the petitioner failed to failed to submit a partnership agreement wherein he became an owner of Monsouni, Inc. or any documentation relating to the stock purchase agreement wherein he acquired actual ownership of common stock. 8 C.F.R. 204.6(j)(1)(i) requires all pertinent business documentation "as applicable." A partnership agreement executed concurrently with incorporation and a stock purchase agreement detailing the ownership rights of the petitioner are clearly "applicable" to the issue of establishment. The simple submission of a printed stock certificate is not adequate proof of a lawful ownership interest. Cf. Matter of Rhee, 16 I&N Dec. 607, 610 (BIA 1978). In the absence of some contractual documentation showing the petitioner's ownership interest in [REDACTED] Inc. at the time of incorporation, it cannot be concluded that he established the new enterprise consistent with the governing regulations. Therefore, the director's finding on this issue is affirmed, albeit on different grounds.

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to establish that he has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of his funds or show that they were obtained by lawful means, and has failed to demonstrate that he established a qualifying new commercial enterprise.

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 sustained that burden.

ORDER: The appeal is dismissed.