

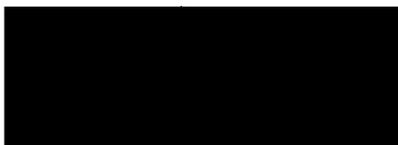


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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

JUL 6 2001

File: [Redacted]

Office: Vermont 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:



Identifying 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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The approved preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal.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 petitioner initially submitted the petition with little supporting documentation and the director issued a notice of intent to deny on June 3, 1998. On June 26, 1998, the director denied the petition, concluding the petitioner had abandoned his petition after requesting additional time in which to respond. The petitioner appealed, submitting additional documentation to support his petition. The director reopened and approved the petition on August 3, 1998. On August 3, 2000, the director issued a notice of intent to revoke and on October 24, 2000, the director revoked the prior approval.

In his notice of revocation, the director determined that the petitioner had failed to establish a qualifying investment of lawfully obtained funds or that the petitioner had or would create 10 new jobs.

On appeal, counsel asserts that the petitioner invested his own income and personally guaranteed business loans. Counsel further argues that the petitioner has hired 30 employees.

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 indicates that the petition is based on an investment in a new commercial enterprise, Woodpecker's Inc, located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the minimum investment amount in this case for each investor seeking to qualify for the entrepreneur program is \$500,000.

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.

In support of the initial appeal, counsel claimed that the petitioner's investment consisted of:

(a) re-investing ALL their earnings and profits into the same enterprise throughout the years 1993, 1994, 1995, 1996, 1997 and 1998. Thus since the inception of the enterprise and for the following five (5) continuous and uninterrupted years, the [petitioner and his brother] reinvested ALL their earnings and profits into the business.

(b) purchasing equipment [reference to evidence omitted] totaling the amount of \$95,204.88;

(c) purchasing two (2) trucks for the use in business [reference to evidence omitted] totaling amount of \$99,474;

(d) Stocking the inventory [reference to evidence omitted] totaling the amount of \$274,571.90;

(e) Accounts Receivable, totaling the amount of \$99,215.00.

The petitioner submitted an unaudited balance sheet for June 26, 1998 reflecting \$200 worth of outstanding stock, \$125,000 paid-in-capital, and shareholder loans of \$18,261; a letter from the Bank of New York confirming the bank had approved a term loan for \$100,000 for Woodpecker's Inc. to be signed July 1, 1998; numerous invoices for inventory; bank statements for Woodpecker's Inc. account; undated stock certificates issued to the petitioner and his brother for 100 shares each; and corporate tax returns for 1993 through 1997 reflecting stock of \$200, no additional paid-in-capital, and stockholder loans as high as \$20,634.

The petition was approved on August 3, 1998. On August 3, 2000, the director issued a notice of intent to revoke in which he acknowledged the company had incurred \$30,734 start-up expenses, noted that the reinvestment of proceeds to pay normal operating expenses could not be considered a qualifying investment, and concluded the petitioner had not demonstrated an investment of \$500,000.

In response, counsel asserted that the \$100,000 loan was secured by the assets of the petitioner's sister-in-law, who wrote a \$20,000 check to Woodpecker's "as collateral." Counsel further asserts that the petitioner and his brother have invested substantial sums in the form of equipment purchases and leases, financed by the guarantees of the petitioner and his brother. Counsel asserts the petitioner and his brother also purchased property for the business and that the petitioner and his brother personally guaranteed the mortgage. The petitioner submitted tax returns for 1998 and 1999 reflecting \$200 stock, \$125,000 additional paid-in-capital, and shareholder loans of up to \$21,261; cancelled checks issued by [redacted] the petitioner's sister-in-law, to Woodpecker's Inc. on June 15, 1998 for \$125,000 and on August 9, 2000 for

\$20,000; another bank letter from the Bank of New York confirming that Woodpecker's Inc. obtained a loan of \$100,000 secured by a certificate of deposit; an August 1999 sales agreement for the purchase of 323 Cortlandt Street reflecting a purchase price of \$900,000; a February 2000 letter from Sovereign Bank regarding a mortgage for \$625,000 secured by 323 Cortlandt Street; a cancelled check issued by Woodpecker's Inc. to Sovereign Bank for \$4,687 on March 3, 2000; cancelled checks issued by Woodpecker's Inc. for normal operating expenses such as inventory and utilities; documentation regarding the purchase and lease of equipment and machinery; June 30, 2000 financial statements for Woodpecker's Inc. reflecting stock of \$200 and paid-in-capital of \$125,000;

The director reviewed each investment claim, concluded that most of the petitioner's claimed investments consisted of the reinvestment of proceeds and loans which, while guaranteed by the petitioner, were secured by the assets of the business. Thus, the director concluded the petitioner had not demonstrated a qualifying investment of \$500,000.

On appeal, counsel merely states that the petitioner and his brother, "invested their own income in the business and personally guaranteed loans for the purchase of a building." Counsel fails to specifically address any of the arguments made by the director.

We concur with the director that the petitioner did not infuse \$500,000 of his own funds into the business. Rather, most of the claimed investment consisted of the "reinvestment" of the proceeds of the business. Even the down payment for the business property, purchased years after the business was established, was paid by the corporation, not the petitioner. In order for proceeds to be considered an investment by the petitioner, it is necessary that the petitioner be able to show that the proceeds were allocated to him, taxed, and then reinvested. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997) held that it was reasonable to conclude that a petitioner was not personally and primarily liable for the reinvestment of proceeds. Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) noted that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

Similarly, while the petitioner may have guaranteed the loans, the loans were still secured by the assets of the business. As stated by the director, the regulations expressly prohibit indebtedness even partially secured by the assets of the business. A personal guaranty does not change the fact that the loans remain secured also by the assets of the business. See Matter of Soffici, I.D. 3359, 6-7 (Assoc. Comm., Examinations, June 30, 1998). Finally, while not addressed specifically by the director, it is significant that at no time do the financial statements or tax returns, schedules L, reflect more than \$125,200 in stock and paid-in-capital. Thus, these documents cannot support the petitioner's claim that he and his brother contributed more than that amount in the aggregate, let alone \$500,000 each.

In light of the above, we concur with the director that the petitioner failed to demonstrate a qualifying investment.

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.

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 Izumij, 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. Id. 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). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

In support of the initial appeal, counsel asserted tax returns for the petitioner were unavailable because he had failed to pay his owed taxes for lack of a Social Security number. In response to the director's subsequent notice of intent to revoke, counsel stated:

The petitioners have provided documentation that the \$100,000 loan from the Bank of New York in June 1998 was secured by funds from [the petitioner's brother's] wife, Maria Elisia, [reference to evidence omitted.] Maria Elisia also gave a \$20,000 check to Woodpecker's Inc. in August 2000.

The director noted that the petitioner had not established how Ms. Elisia acquired the funds transferred to the business. On appeal, counsel fails to address this issue other than to assert the funds were obtained lawfully.

The petitioner recognized at Part 6 of the Forms I-526 that he had worked in the U.S. without permission. The petitioner concedes that he failed to pay any taxes in the United States. Therefore, even if we accepted the petitioner's claim that the source of the petitioner's investment is his income earned from unauthorized employment in the United States, the funds have not been lawfully obtained. We cannot conclude that Congress meant to encourage potential investors to accumulate their investment funds through unauthorized employment or by failing to pay owed taxes to the United States government.¹

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:

¹This is not inconsistent with section 245(i) of the Act. The problem here is not the simple fact that the petitioner worked and resided in the U.S. unlawfully; rather, the problem is that the petitioner is attempting to use unlawfully obtained funds to make his investment. Many immigrant-investor petitioners are residing unlawfully in the U.S. but are claiming, for example, that they are investing funds earned abroad.

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.

Full-time employment means continuous, permanent employment. See *Spencer Enterprises, Inc. v. United States*, supra, at 19 (finding this construction not to be an abuse of discretion).

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.

In support of the initial appeal, the petitioner submitted 12 Forms I-9.

In his subsequent intent to revoke, the director noted that in order for both the petitioner and his brother to qualify, the business must create at least 20 jobs. In response, the petitioner submitted Forms 941 and a business plan.

The director concluded that the evidence did not demonstrate that the business had paid sufficient wages to account for more than 14 full-time employees. Finally, the director found that the business plan was not credible.

On appeal, counsel merely asserts, "there are thirty (30) employees on the payroll." Counsel fails to address the director's concerns regarding the wages paid and provides no additional evidence regarding the number of employees and hours worked. Counsel also fails to address the director's concern regarding the sufficiency of the business plan. Thus, we must concur with the director that the record fails to establish that it is reasonable to conclude the business will create at least 20 full-time jobs for qualifying employees.

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.