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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 - 9 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:



Identify
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 § 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 preference 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 determined that the petitioner had failed to demonstrate that she had made a qualifying investment of lawfully obtained funds. Specifically, the director noted the path of funds was not fully documented and questioned whether funds transferred to the president of the new commercial enterprise were eventually transferred to the new commercial enterprise itself.

On appeal, counsel argues the petitioner demonstrated the deposit of \$800,000 not recognized by the director. While counsel asserted he would submit additional information in 60 days, as of this date, more than five months later, the Administrative Appeals Office has received nothing further. The appeal will be adjudicated on the record as it now stands.

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 record indicates that the petition is based on an investment in a business, Actoday Remodeling, Inc., not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

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.

The petitioner submitted wire transfer receipts, cancelled checks, and deposit slips as evidence of her investment. The director noted that the checks were issued by the petitioner to Kyle Tsai, the president of Actoday. While the director acknowledged that the deposit slips indicated the

deposit of funds with Actoday, the director concluded the petitioner had not demonstrated that the funds transferred [REDACTED] were eventually deposited with Actoday. The director also noted that the path of funds from Taiwan, through New Zealand, to the United States and eventually to Actoday is unclear.

On appeal, counsel notes that the deposit slips match the amount and date of the funds transferred to [REDACTED]

The record strongly suggests that the funds transferred to [REDACTED] were deposited with Actoday. While not discussed by the director,¹ however, the record does not reflect that all of the funds deposited with Actoday were invested in the corporation as defined in 8 C.F.R. 204.6(e). Actoday's 1998 tax return, schedule L, reflects only \$30,000 stock, no additional paid-in-capital, and \$186,753 in loans from shareholders. While the stock and paid-in-capital amounts remained the same in 1999, the loans from shareholders increased to \$762,447. As quoted above, the regulations specifically preclude debt arrangements whereby the petitioner merely loans funds to the new commercial enterprise.

Moreover, the record suggests that Actoday has several checking accounts. Without additional evidence of how the funds deposited in any of these accounts were used, the record cannot establish that the petitioner's funds were used for business capital expenses.² The record contains a closing statement reflecting Actoday's purchase of 5050 Airline Road. This address, however, is not the address of the corporation, and it is not clear how this property relates to the business. Funds diverted to a passive real estate investment cannot be considered to have been made available to the employment-creating entity, in this case, the remodeling business.

In light of the above, we concur with the director that the petitioner has not established 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;

¹ An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

² Without evidence of how the petitioner formed her business, such as invoices for equipment, leases, deeds, etc., the petitioner has also failed to demonstrate that she created an original business, as opposed to purchasing an existing business.

(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 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. 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).

The director concluded that the petitioner had not clearly documented the path of her funds and that the petitioner had only submitted her husband's tax returns as evidence of the ultimate source of her funds. On appeal, counsel asserts that the wire transfer receipts and spouse's tax returns established the source and path of the "invested" funds. Counsel also requested 60 days to obtain additional documents from Taiwan and New Zealand as well as documentation of the numerous financial transactions which occurred over several years. Over five months later, counsel has submitted nothing further.

We concur with the director that the petitioner has not demonstrated a clear path from lawful income in Taiwan to Actoday. The petitioner's spouse's tax returns do not reflect income which could account for an investment of \$1,000,000. The path of funds from Taiwan through New Zealand to the United States, sometimes several years before the petitioner's alleged investment, is simply not clearly documented.

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.