



U.S. Department of Justice

Immigration and Naturalization Service

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Public Copy

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



File: [Redacted]

Office: Texas Service Center

Date: JUL 10 2001

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 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 he had made a qualifying investment of lawfully obtained funds or that he had or would create the necessary employment.

On appeal, counsel argues that the petitioner's investment is the sum of a \$237,122 loan, the worth of a warehouse purchased for the business, and the funds deposited in the bank. Counsel further argues that the petitioner adequately demonstrated the source of his funds and submitted a sufficient business plan. While counsel asserts that he will provide additional documentation within 60 days, as of this date, more than six months later, this office has received nothing further. Therefore, a decision will be made 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).

#### **MINIMUM INVESTMENT AMOUNT**

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

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

*Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. Matter of Soffici, I.D. 3359, 2-3 (Assoc. Comm., Examinations, June 30, 1998) cited with approval in [REDACTED] v. United States, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

On page one of the director's decision, he appears to accept that the petitioner invested in a targeted employment area; but on page four the director states that the minimum investment amount is \$1,000,000. Regardless, this issue is raised at the beginning of this decision because the minimum investment amount is vital to any discussion of whether the petitioner made a qualifying investment.<sup>1</sup>

The petitioner filed his petition on October 23, 1998, indicating that his business [REDACTED] would be located at [REDACTED] targeted employment area. While the petitioner submitted evidence purporting to show that

<sup>1</sup> 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 [REDACTED] v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

Barrow County is a targeted employment area, he submitted no evidence regarding the location of his business. While the petitioner relies on an uncertified tax return reflecting a building as an assets of the company, the record does not contain the deed or closing documentation for that property. The tax return lists an address of [REDACTED] invoices for the clothing imported by Asmar Textile Mills, Inc. from the petitioner's Pakistani company list an address of [REDACTED]. It remains, the petitioner has not established the location of his alleged business.

Furthermore, in support of his claim that Barrow County is a targeted employment area, the petitioner submitted data from [www.census.gov](http://www.census.gov) for Barrow County, indicating the unemployment rate in that county was 5.1 percent in 1994. The petitioner did not provide unemployment statistics for 1998 for either Barrow County or the nation. In fact, the petitioner did not provide national statistics for any date. Thus, the petitioner has not demonstrated that Barrow County was a targeted employment area at the time of filing or even in 1994.

### 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 petition, the petitioner submitted a stock certificate for 10,000 \$10 par value shares in [redacted] issued to the petitioner on October 12, 1998; [redacted] 1997 tax returns reflecting a shareholder loan of \$225,619, \$500 stock, and \$100,000 additional paid-in-capital; and the petitioner's Pakistani bank statement.

On February 22, 1999, the director requested additional evidence that the petitioner had personally transferred funds to the business. In response, counsel argued the tax returns demonstrate that the petitioner purchased a warehouse worth \$561,033 for the business and that these funds in addition to the funds in the bank account demonstrate the petitioner's investment. The petitioner submitted additional bank statements for [redacted]

The director concluded that the petitioner had not demonstrated that he was the source of any funds deposited with the business. The director also noted that the tax returns reflect a substantial shareholder loan, which cannot be considered part of the petitioner's investment.

On appeal, counsel asserts:

The paid-in capital shown in [sic] Tax Return is paid by the petitioner and it is stated in the Tax Return. The loan money \$237,122 is also secured by the assets of the Petitioner. The warehouse building, showroom and the office is worth \$561,033. This, in addition to the deposit in the bank statement is worth more than the required amount.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence that the mortgage reflected on the tax return, \$237,122, is secured solely by the petitioner's personal assets as claimed by counsel. The petitioner has not submitted the closing documents or the mortgage for the warehouse. While tax returns certified by the Internal Revenue Service can demonstrate the nature of a documented funds transfer from the petitioner to the business, uncertified tax returns cannot serve as the petitioner's sole evidence of investment. As stated by the director, the record contains no transactional evidence such as cancelled checks or wire transfer receipts documenting the transfer of funds from the petitioner to the business. Moreover, the tax returns only reflect an investment of \$100,500 (capital stock plus additional paid-in-capital).

Counsel appears to want the Service to add the petitioner's stock and paid-in-capital to other assets of the company including a building and cash in the bank. A shareholder's stock and additional paid-in-capital, however, represents the contribution of that shareholder, which the business may, in turn, use to purchase assets or as cash reserves. Thus, to include the assets of the business in addition to the petitioner's equity in the business would be to double count funds.

In addition, the value of the company's assets is not always equal to the owner's contribution or equity. A corporation has several options to obtain capital for the purchase of assets, only one of which involves investment by a shareholder. Thus, a petitioner cannot meet his burden of establishing an investment by merely demonstrating the worth of the business' assets.

Finally, counsel fails to address the director's concern regarding the shareholder loan for \$225,619. As stated by the director, 8 C.F.R. 204.6(e)(definition of invest) specifically precludes debt arrangements whereby a petitioner merely loans money to the business.

In light of the above, we concur with the director that the petitioner has not demonstrated an investment of \$1,000,000, or even \$500,000.

### **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 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 petitioner submitted substantial documentation regarding his company in Pakistan and his income in Pakistan. The director concluded that the petitioner had not demonstrated the source of the funds deposited in [REDACTED] Inc.'s account. On appeal, counsel argues the petitioner provided business registration records and personal tax returns as required.

As stated by the director, the petitioner has not documented the path of his funds. While the petitioner may own a company in Pakistan from which he derives income, there is no evidence that the funds deposited in [REDACTED] account came from the petitioner's personal account. Significantly, the petitioner's foreign business, [REDACTED] (PVT) Limited, is involved in the same type of business as [REDACTED]. The record reflects that the petitioner is, at this time, simply using [REDACTED] to export clothing from his Pakistani business to the United States. If the petitioner is simply expanding his Pakistani company into the United States by reinvesting the proceeds of the Pakistani company, the petitioner cannot be said to have personally invested in the United States corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Thus, the petitioner must establish that he personally, and not his Pakistani business, contributed the funds to [REDACTED].

In light of the above, we concur with the director that the petitioner has not documented the path of any invested funds from his own account to his United States corporation.

**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.

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.

The director concluded that the petitioner had not demonstrated that he had created any employment and had not submitted a "comprehensive" business plan. On appeal, counsel asserts:

The Petitioner has stated very clearly the description of business [sic], its products and objectives in his business plan. It also states the required permits and licenses obtained. The plan also points out the marketing strategy of the business and its supply sources.

Counsel's characterization of the petitioner's business plan is simply inaccurate. The plan consists of several computerized slides with little detail. It does not include a hiring schedule, job descriptions, or the number of employees that will be required. It does not state the required permits or licenses to be obtained and does not include a marketing strategy. The record contains no contracts or evidence of negotiations for the sale of clothing manufactured in the



United States. The plan asserts the business will increase from 250 to 700 stitching machines, but the record contains no evidence the petitioner has purchased the initial 250 machines. The tax returns reflecting a building worth \$561,033, unsupported by closing documentation and other basic information about the building, cannot establish that the business owns enough space to accommodate the manufacture of clothing. The only evidence of business activity is the import of clothing from the petitioner's Pakistani business.<sup>2</sup> Given the record as a whole, it is simply not reasonable to conclude that the petitioner will be able to create 10 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.

ORDER: The appeal is dismissed.

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<sup>2</sup> The record contains a subscription agreement whereby Asmar Textile Mills, Inc. purchased shares in Adnan Badar Waqas, Inc., however, there is no indication that Adnan Badar Waqas, Inc. was an operational business. If so, it raises questions regarding whether the petitioner actually established a new commercial enterprise.