U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted] **Public Copy**

File: [redacted] Office: Texas Service Center Date: JUL 11 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:

[redacted]

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 The appeal will be sustained, the director's decision will be withdrawn, and the petition will be approved.

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 established a new commercial enterprise or that he had made a qualifying investment of lawfully obtained capital. Finally, the director concluded that the petitioner had not established that he would create at least 10 jobs.

On appeal, counsel argues the petitioner's investment is qualifying and submits substantial documentation to address each of the director's concerns.

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,
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> (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
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> (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, Far-A-Field Acres, LLC (FAFA LLC), not located in a targeted employment area for which the required amount of capital invested has been adjusted downward.[1] Thus, the required amount of capital in this case is $1,000,000.

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[1] While the petitioner did not claim the business was located in a targeted employment area on the Form I-526, in his request for additional documentation, the director requested evidence regarding this issue if applicable. In response, the petitioner submitted information from the Office of Management and Budget which fails to address unemployment rates. The director, therefore, concluded the investment was not in a targeted employment area and counsel does not challenge this conclusion on appeal.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (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. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 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 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is FAFA, LLC. The articles of organization for this company were filed with the Commonwealth of Virginia on July 6, 1999. On August 10, 1999, the petitioner signed a letter of commitment, obligating himself to pay $1,000,000 into escrow for exclusive use by the company to pay expenses as they were incurred. The operating agreement reflects that the petitioner was an original member of the company.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

The director determined that Far-A-Field Farm (FAFA), the farm owned by Lieselott Wiendieck which is now the location of FAFA, LLC, was a preexisting business. The director concluded, therefore, that the petitioner had not created an original business. The director further concluded that the petitioner had not demonstrated a restructuring or reorganization as FAFA was involved in the breeding and sale of horses, the same business as FAFA, LLC. Finally, the director concluded the record did not reflect a 40 percent increase in net worth or employment.

On appeal, counsel continues to maintain that FAFA was not a commercial business but a farm which failed to turn a profit. Counsel further argues that, in the alternative, the petitioner both restructured and expanded an existing business. Counsel notes that [redacted] bred and sold a few untrained horses to trainers, but that FAFA, LLC will be running a breeding and training program and will sell well trained dressage and show jumping horses worth considerably more. The petitioner submits substantial documentation reflecting that FAFA, LLC has hired trainers and contracted for significant construction of training facilities and employee housing.

We concur with counsel that FAFA, LLC has fundamentally restructured and reorganized [redacted] farm such that a new commercial enterprise resulted. The breeding and sale of a few untrained foals to professional trainers hardly compares to the major breeding and show training business contemplated in the petitioner's business plan, which is in the process of being implemented. The proposed business reflects a clear change in mission and dramatically expands the services [redacted] farm. In addition, FAFA, LLC not only obtained land use rights from [redacted] hey also purchased additional farm land in Greene County. As the evidence demonstrates a qualifying restructuring, we conclude the petitioner has established a new commercial enterprise.

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 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. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

In support of the petition, the petitioner submitted the commitment letter and operating agreement discussed above as well as a confirmation from Wachovia Bank for the deposit of $1,000,000 into FAFA, LLC's account.

On January 3, 2000, the director requested additional documentation. In response, the petitioner submitted a wire transfer receipt documenting the transfer of $1,000,000 from the petitioner to FAFA, LLC on September 3, 1999 and a January 2000 bank statement for the company reflecting a balance of $197,285.85. The petitioner also submitted the closing statement for the

purchase of 6083 Amicus Road as a residence for the horse trainers[2] for $80,000; documentation regarding the purchase (cost unknown) and transportation ($4,350 in addition to 5,010 Deutsche Marks) of a horse, all addressed to [redacted] and the contract between FAFA, LLC and Virginia Frame Builders and Supply, Inc. for the construction of an arena, horse barn, 20 stalls, and miscellaneous interior work estimated at $374,475. Finally, the petitioner also submitted a February 11, 2000, affidavit from [redacted] asserting the company had spent $240,000 to date on renovating the facilities and purchasing housing for the workers.

The director noted that the $1,000,000 deposited by the petitioner was initially placed in a 60 day certificate of deposit, that [redacted] affidavit indicated that only $240,000 of the company's funds had been spent, and that the checking account reflected a balance of only $197,285.85 as of January 31, 2000. Thus, the director concluded that the petitioner had not demonstrated that all the funds were placed at risk, or even that all of the funds not yet spent on business expenses remained in the company's bank accounts.

On appeal, counsel argues the petitioner deposited $1,150,000 into the company's account, that the funds were all placed at risk for business expenses, and asserts that the petitioner does not even have signatory authority to remove funds in the company's accounts. The petitioner submits numerous invoices, a letter from the company's bank, and bank statements for January 2000 through May 2000 with cancelled checks attached. The petitioner also submits a new contract with Virginia Frame Builders & Supply Company reflecting amendments which bring the total construction costs to $458,190.77.

The bank letter reflects that the $1,000,000 deposited by the petitioner were placed in short term certificates of deposit (CDs). When the CDs matured, some of the funds were returned to the operating account and some of the funds were placed in a new certificate of deposit. As of May 2000, the last month for which bank statements were submitted, $75,388.30 remained in the operating checking account and $500,000 remained in a certificate of deposit account. The invoices and bank statements reflect considerable business activity. A review of the cancelled checks reveals that the checks were issued to pay legitimate business expenses.

This case is easily distinguishable from Matter of Ho. Unlike that case, the petitioner is not the sole shareholder or member. In fact, two of the petitioner's fellow members are independent companies with no apparent relationship to the petitioner. Moreover, the bank letter confirms that the petitioner is not a signatory to the accounts. The record reflects that the original agreement to place the funds in escrow was abandoned and that all of the petitioner's funds were instead placed in company accounts. Thus, the petitioner is unable to remove his funds without the consent of the other member businesses.

In addition, FAFA, LLC has spent considerable sums for construction and the purchase of employee housing, demonstrating a commitment to the business. Unlike situations where a

[2] While housing for employees who must reside near the business is a legitimate capital expense in this case, passive real estate investments unrelated to the employment-generating business or the purchase of a personal residence is generally not a legitimate capital expense.

petitioner asserts funds set aside in a business certificate of deposit or money market account will be used to open a new store or expand an existing store, the petitioner's funds are currently being drawn down to pay for the original business to which the petitioner is committed. It must be taken into consideration that, unlike retail stores where an owner simply obtains a store and inventory and immediately begins to make money selling the inventory to pay for new inventory, or a hotel which does not require many employees until it is ready to open, a horse breeding and training business will take years before the final product can be sold at a profit. Moreover, the horses must be fed, cared for and trained during the start-up phase of the business. The business plan reasonably projects that only one horse will be sold in 1999, four in 2000, one in 2001, eight in 2002, five in 2003, eight in 2004, and ten in 2005, with operations reaching a "steady state" thereafter. In this unique situation, capital expenses of the business will include at least some operating expenses for a significant period of time.

Funds invested in a company that is grossly overcapitalized can hardly be said to be at risk. FAFA, LLC, however, spent approximately $30,000 to $100,000 per month between January 2000 and May 2000. In light of the above, it is reasonable to conclude that FAFA, LLC is not grossly overcapitalized and that the full $1,000,000 deposited by the petitioner was at risk and will be used for capital expenses.

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:
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> (i) Foreign business registration records;
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> (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;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (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, supra, at 22 (affirming a finding by the Service 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 petition, the petitioner submitted a letter from his attorney attesting to the lawful source of the petitioner's funds. On January 3, 2000, the director requested additional documentation of the petitioner's source of funds.

In response, the petitioner submitted a 1998 Form 1042S issued to the petitioner from [redacted] reflecting gross income of $122,641.38; a November 25, 1991 letter from the Executive Vice President of Ford Motor Company commending the petitioner for three years as the Chairman of the Deal Council for Ford in Venezuela; and [redacted] statements for an investment account owned jointly by Sorell Capital, S.A. and the petitioner until December 1997 when it was owned solely by the petitioner. The [redacted] statements reveal the petitioner maintained a balance of over $2,000,000 and that the petitioner transferred funds on several occasions to NationsBank (subsequently Bank of America) account 4121357968, the account from which the petitioner wired $1,000,000 to FAFA, LLC.

The director noted the petitioner's failure to submit personal tax returns and concluded the petitioner had failed to establish the lawful source of the funds in his investment account which the petitioner eventually transferred to FAFA, LLC.

On appeal, counsel asserts the petitioner did not realize the detail required by the Service, and provides a chart documenting the path of the petitioner's funds. The chart indicates the petitioner earned funds from his salary and stock ownership in Autos Torovega, C.A., which he used to found Sorrell, S.A. in 1986. The funds derived from Sorrell were placed in the [redacted] account, from which they were transferred to the petitioner's Bank of America (originally NationsBank) account and then to FAFA, LLC. The petitioner submits personal Venezuelan tax returns for 1977 through 1998. The tax returns reflect substantial income for the petitioner prior to 1994, one year as high as $742,440, with many years reflecting income of approximately $200,000 - $300,000. After 1994 the petitioner's income was between $24,000 and $81,994. The petitioner further submits a U.S. tax return for 1999 reflecting interest income of $133,259. The petitioner also submits a letter from the current director of [redacted] C.A. confirming the petitioner was the Credit Manager and Assistant Manager for that

company from 1961 to 1966, the General Manager from 1967 to 1970, and the Director from 1971 to 1998 as well as financial statements for that company. Finally the petitioner submits the minutes from a Board of Directors Meeting for Sorrell Capital, S.A. resolving to grant full power of attorney to act on behalf of the corporation to the petitioner.

The record now clearly establishes the source of the petitioner's substantial assets. Further, the path from the petitioner's income, to his investment account, to his checking account, to FAFA, LLC is sufficiently traced. Therefore, the petitioner has established the lawful source of his funds.

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:
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> (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
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> (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.
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> *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, supra, (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.

On the Form I-526, the petitioner indicated he had created nine jobs and would create an additional two jobs. The petitioner also submitted a business plan which included an organization chart listing 14 positions all with corresponding employees' names. The chart included

In response to the director's request for additional documentation, the petitioner submitted payroll records reflecting eight employees including a list of 14

employees reflecting that counsel, the Business Development Manager, and the trainer were all contract employees and reflecting that two of the 14 had yet to be hired; and a comparison of the staffing requirements for other horse breeding and training businesses.

The director noted the petitioner had yet to hire 10 full-time qualifying employees, which cannot include contractors, and that the petitioner had not established how many employees worked at FAFA prior to the establishment of FAFA, LLC. The petitioner concluded the petitioner's business plan was insufficient.

On appeal, counsel asserts tha were the only two employees at FAFA before the establishment of FAFA, LLC, and that these two employees as well as the contractors were not considered part of the 10 new employees. This assertion is supported by the record. Counsel lists 11 current employees other than contractors and previous FAFA employees. The petitioner submits a list of 12 employees printed from the payroll records; quarterly tax returns reflecting seven employees for the second and third quarters of 2000; Forms I-9; and an employment contract for a new employee to start November 2000.

wages reflect that she does not work full-time even at minimum wage. Further, three of the thirteen employees on the attachment to the third quarter report earned no wages during that quarter. Thus, the record does not reflect that FAFA, LLC is maintaining 10 new full-time continuous qualifying employees.

The business plan, however, credibly demonstrates that the inventory of horses will be increasing through 2005 and that FAFA, LLC already maintains a higher horse to employee ratio than most breeding and training farms (5.4:1 whereas the average is 4:1). As such, it is reasonable that FAFA, LLC will hire another two full-time employees in the next two years to care for the increasing inventory and to reduce the horse to employee ratio.

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 sustained that burden.

ORDER: The director's decision of June 14, 2000 is withdrawn, and the petition is approved.