



U.S. Department of Justice

Immigration and Naturalization Service

B1

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



Public Copy

File: WAC-99-246-53084

Office: California Service Center  
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

Date: JUL 12 2001

IN RE: Petitioner: 

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:



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, California 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 established a new commercial enterprise, that she had invested the necessary lawfully obtained capital, or that she would create the necessary employment.

On appeal, counsel argues that the petitioner will be able to transfer her funds to the United States once she obtains an immigrant visa, that she is investing in a troubled business which she intends to renovate, and that the petitioner's funds were lawfully obtained.

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 alleged investment in a business, Three Rivers Inn, Inc., 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 \$500,000.

#### **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;

(2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or

(3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the 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).

8 C.F.R. 204.6(e) states that:

*Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. Moreover, 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, 10 (Assoc. Comm., Examinations, June 30, 1998).

The alleged new commercial enterprise listed on the Form I-526 is Three Rivers Inn, Inc., of which the petitioner claims to be the sole shareholder. The petitioner further indicated on the Form I-526 that she had established a new commercial enterprise by creating an original business. In his brief submitted in support of the original petition, counsel asserted that the petitioner had invested in a troubled business because the Inn had "been in business for over two years and has experienced a net loss of over 20% of the business [sic] net worth." On the next page, however, counsel asserts:

The Three Rivers Inn annually grosses approximately \$487,567.00 per year, with an annual gross profit of approximately \$366,664.00 per year. The 'profit and loss statement' when projected out for the entire year of 1998, showed a net

income of approximately \$185,777.00. More specifically, the monthly gross income and monthly net income have been rising and, with [the petitioner's] direction and management, should see a substantial growth over the current monthly gross and net incomes.

In support of the petition, the petitioner submitted the Articles of Incorporation for Three Rivers Inn, Inc., filed November 4, 1993. The articles indicate that the petitioner was not the incorporator or an initial director. The petitioner also submitted a purchase and sales agreement for the Three Rivers Inn and all the equipment in the restaurant and hotel. The agreement, signed on April 24, 1999 by the buyer and on May 10, 1999 by the seller, is between [redacted] (seller) and [redacted] (buyer) and reflects a closing date of October 29, 1999, "subject to obtaining Green Card." The petition was filed September 13, 1999, more than one month prior to the projected closing date. Finally, the petitioner submitted income statements for the inn for "the twelve periods ended December 31, 1998" reflecting a net income of \$108.19 for the "period" and \$185,777.46 for the year to date, and for the seven months ending July 31, 1999 reflecting a net income of \$116,572.54.

On November 3, 1999, the director requested additional evidence; specifically, the articles of incorporation of the petitioner's corporation and evidence that the petitioner was purchasing the hotel despite the buyer being listed as [redacted]. In response, the petitioner submitted a power of attorney dated May 10, 1999, whereby the petitioner authorized [redacted] to purchase land on her behalf. Neither the petitioner nor counsel offer any explanation for the fact that the power of attorney is dated after [redacted] signed the purchase agreement. Counsel asserted that the petitioner had "applied for a corporation license," but had not "received a confirmation of incorporation."

The director concluded that the petitioner had not participated in the creation of an original business, restructured or expanded an existing business, or invested in a troubled business.

On appeal, counsel reasserts that the petitioner invested in a troubled business and claims the petitioner plans to renovate the hotel and increase employment. While counsel further asserts that he will submit a supplemental brief in 30 days with additional arguments, more than eight months later, the AAU has received nothing further.

The law requires that a petitioner must be coming to the United States to manage a business which she *has established*. A petitioner must establish eligibility at the time of filing. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner must demonstrate that she has already established a new commercial enterprise at the time of filing. At the time of filing the instant petition, the petitioner had not formed a corporation or purchased a hotel. Moreover, as the hotel was an existing business, the petitioner cannot establish that she created an original business. While counsel claims that the petitioner will renovate the hotel and expand employment, counsel concedes that the petitioner still has not purchased the hotel and, thus, has not yet been able to renovate or expand employment at the hotel. As the petitioner must have already restructured or expanded an existing business by the time of filing to demonstrate the establishment of a new commercial enterprise, the petitioner in this case is

clearly unable to meet this requirement. Moreover, simply renovating a hotel which will continue operating as a hotel cannot constitute the type of restructuring contemplated by the regulations.

Finally, the petitioner had not invested in a troubled business at the time of filing. As stated above, the petitioner had not yet purchased the hotel at the time of filing. Moreover, the record clearly demonstrates that the hotel had a net income between January 1998 and May 1999. Therefore, the record does not support counsel's assertion that the inn was a troubled business which had suffered a net loss during the one or two year period before the time of filing. Regardless, the regulations do not indicate that an investment in a troubled business is sufficient to establish a new commercial enterprise unless the petitioner restructures or expands the business. As stated above, the regulations do not indicate that the petitioner has done either one. Whether or not a petitioner invested in a troubled business is relevant only to employment creation, as will be discussed below. The regulations mention "troubled business" in regards to establishment only to clarify that a petitioner who invests in a troubled business may be credited with employment preservation, rather than employment creation even when "establishing" that business by expanding employment.

In light of the above, the petitioner has not 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.

On the Form I-526, the petitioner indicated that she had invested \$1,900,000 on April 24, 1999. The petitioner submitted the sales agreement discussed above which reflects a purchase price of \$1,900,000, with a deposit of \$10,000 paid May 10, 1999 plus an additional \$40,000 referenced on an addendum. The petitioner submitted a copy of uncanceled checks issued to Land Title Company, the first issued by Leisure World U.S.A., Inc. for \$10,000 on April 23, 1999 and the second issued by [REDACTED] for \$20,000 on August 30, 1999. The petitioner also submitted bank letters confirming the balance of overseas accounts, the appraisals of property owned by the petitioner's father in Korea, and an "acknowledgement" from the petitioner's father that he intended to transfer ownership of the property to the petitioner.

On November 3, 1999, the director requested that the petitioner provide evidence of her claimed investment or of money committed to be invested in the business. In response, counsel asserts that the petitioner converted stock to cash in order to have cash available to transfer to the business once she obtained an immigrant visa. The petitioner submitted a transfer agreement whereby the petitioner sold 2,000,000 Won of stock on October 3, 1999, alleged by counsel to be the equivalent of \$1,666,666.67, and certificates of transferable deposits.

The director concluded that the petitioner had only committed \$30,000, and that the record did not even establish that the \$30,000 derived from the petitioner. On appeal, counsel asserts that the Korean government will not permit the petitioner to transfer her funds until she can produce evidence that she has obtained an immigrant visa.

While the law only requires that a petitioner be actively in the process of investing, the regulations require that the full amount of the investment be committed to the business. The Service cannot exempt a petitioner from this requirement based on a claim that the currency exchange laws of the petitioner's native country make it difficult to transfer funds to the United States. It remains, at the time of filing, the petitioner's funds were not committed to the business. The funds were not in an escrow account and the petitioner had not executed a promissory note which complied with the requirements set forth in Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998). Rather, the funds remained in a bank account from which the petitioner could remove the funds at any time. As stated by the director, the petitioner has merely demonstrated an intent to invest, and not that she is actively in the process of investing.

#### **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, *supra*, at 22 (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).

As stated above, the petitioner submitted evidence of substantial assets. She also submitted a Certificate of Grade A Income Tax Payment reflecting that the petitioner earned 2,000,000 Won per month between April 1998 and April 1999. According to the exchange rate claimed by counsel, that amounts to \$1,667 per month, or \$20,004 per year. This income cannot account for the accumulation of assets claimed by the petitioner. Moreover, the tax returns do not cover five years, as required. Thus, the director concluded the petitioner had failed to document the lawful source of her funds.

On appeal, counsel asserts:

Further, that the money in her bank accounts and property in Korea are matters of banking and public records and were obtained through legitimate investments, savings and earnings. All of the funds were derived from legal means and either through her efforts or efforts of her spouse and relatives.

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). It remains, the petitioner has not provided adequate evidence of her income or any evidence of the income of her spouse and relatives. Thus, the petitioner has not established the source of the funds she intends to invest.

### **EMPLOYMENT CREATION**

8 C.F.R. 204.6(j)(4) states:

(i) 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.

(ii) *Troubled Business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

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 [REDACTED] 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.

On the Form I-526, the petitioner indicated the inn had 11 employees when she made her initial investment and 14 employees at the time of filing. The petitioner did not indicate how many additional jobs she would create, stating, "employment creation already satisfied." In his brief, counsel asserted the inn was a troubled business and that the petitioner will maintain the 14 employees. The petitioner submitted a list of 15 employees. In response to the director's request for additional documentation, the petitioner submitted 10 Forms I-9.

The director noted the petitioner's failure to submit a business plan and concluded the petitioner had not demonstrated that she had or would create 10 new jobs. On appeal, counsel reiterates the claim that the petitioner invested in a troubled business and asserts the petitioner will create new jobs once she obtains an immigrant visa and purchases the inn.

While the director did not specifically discuss whether the petitioner could rely on the maintenance of employment instead of creating 10 new jobs, the director had already concluded that the petitioner had not demonstrated that she had invested in a troubled business. As discussed above, we concur that the petitioner has not demonstrated that the inn was a troubled business. The petitioner has provided no evidence that the inn ever suffered a net loss in the previous two years, let alone a loss of 20 percent of the inn's net worth. On appeal counsel asserts:

The original owner of the property passed away and left this property to his brother, who resides in another state and is not interested in managing this property; his primary goal is to sell this property and retain the process [sic].

The regulations unambiguously define troubled business with well defined accounting terms. A petitioner cannot establish that a company is a troubled business with mere speculation about the future of the company. Rather, a petitioner must submit audited balance sheets compiled according to normal accounting procedures which demonstrate a net loss of 20 percent of the net worth prior to the loss. The petitioner has not demonstrated that the inn suffered any net loss.

The record does not indicate that the petitioner has created any new jobs. In fact, the petitioner has not even purchased the inn. As noted by the director, the petitioner has not submitted a business plan, comprehensive or otherwise. Thus, the petitioner has not established that it is reasonable to conclude that she will create 10 jobs.

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.