



BY

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536



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Office: California Service Center

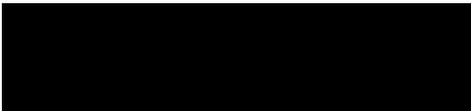
Date: AUG 03 2002

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:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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, 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 he had invested his own personal, lawfully obtained funds or that he would create the necessary employment.

On appeal, counsel argues that the petitioner has already explained how he obtained his investment funds and that the petitioner need not submit a business plan since he has already created the necessary employment. The petitioner submits previously submitted evidence. While counsel asserts that he will submit a brief and/or additional evidence within 30 days, this office has received nothing further in the following 14 months. The appeal will be adjudicated on the evidence in the record.

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).

### **SOURCE OF FUNDS**

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

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

- (i) Foreign business registration records;
- (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or

intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumij, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. An unsupported letter indicating the number and value of shares of capital stock held by the petitioner is also insufficient documentation of source of funds. Matter of Ho, supra, at 6. 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).

Initially, the petitioner submitted his personal bank statements for accounts in the United States and India at various times between 1991 and 1998 and investment statements. The petitioner also submitted statements for account [REDACTED] savings account in his name; account [REDACTED] a checking account in the name of the petitioner and [REDACTED] account [REDACTED] a money market account in the name of the new commercial enterprise, S&S Farms; and [REDACTED] business checking account in the name of S&S Farms. These latter statements reflect deposits from wires and other sources totaling \$1,076,034.

On September 17, 2000, the director requested additional documentation to demonstrate the source of the petitioner’s funds and that he had actually invested the necessary funds. In response, the petitioner submitted a personal affidavit asserting that he is the only son of parents who owned property and real estate in India, that he owned and subsequently sold a business in India, and that he leases another store in West Yorkshire, England. The petitioner did not submit civil records reflecting an inheritance, sales documentation for his business in India, or evidence that he leases a business in West Yorkshire.

The director concluded that the petitioner had not documented the path of the funds from himself to the new commercial enterprise or provided evidence of how he accumulated his investment funds.

On appeal, counsel argues that the petitioner has already submitted his personal statement regarding how he acquired his funds. The petitioner resubmits his affidavit.

As stated above, simply going on the record without supporting evidence is insufficient. Nor has the petitioner or counsel addressed the director's concern that the source or sources of the wire transfers to the petitioner's accounts are undocumented.

In light of the above, we concur with the director.

### **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.) While the director did not address this issue, we will consider whether the petitioner has established a new commercial enterprise, and, if so, what such enterprise includes, at this point in our decision in order to more fully address the remaining issues below.

8 C.F.R. 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

On the petition, the petitioner listed S&S Farms, Doaba Farming, and Kern-Tulare Almond Processing as the new commercial enterprise. In his brief, counsel asserts that the petitioner owns 70 percent of S&S Farms, 20 percent of Kern-Tulare Almond Processing and that S&S Farms owns 31.64 percent of Doaba Farming. The record is consistent with these assertions. As Doaba Farming is not a wholly-owned subsidiary of S&S Farms and the petitioner himself has no ownership interest in Doaba Farming, Doaba Farming cannot be considered part of the new commercial enterprise.

(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).

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.

On December 29, 1993, [REDACTED] deeded property to the petitioner and his partner in S&S Farms, Surgit Singh, although the closing documents are dated April 5, 1994. The petitioner and Mr. Singh each acquired a 50 percent interest. On August 16, 1995, the petitioner and Mr. Singh deeded the property to themselves, this time the petitioner gained a 70 percent interest and Mr. Singh gained only a 30 percent interest. The record does not reveal whether an almond farm existed on this property prior to the sale. If the petitioner simply purchased an existing almond farm, he has not created an original business or restructured an existing business. Without evidence regarding the net worth of or employment at the previous farm, the petitioner cannot establish that he expanded either by 40 percent.

The record contains no evidence regarding the start-up or acquisition of Kern-Tulare. As such, the petitioner has not established that it is an original business, a restructured preexisting business, or an expanded preexisting business.

In light of the above, the petitioner has not demonstrated that he 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.

While the director did not discuss this issue under a separate heading, when discussing the source of the petitioner's funds, the director did note that without documentation tracing the source of

funds from the petitioner to the business, he could not establish an investment of his personal funds.

Counsel does not address this concern on appeal, and we concur with the director for the following reasons. The petitioner's accountant initially asserted that the petitioner had invested \$1,076,034, \$96,351 of which was distributed back to the petitioner despite significant losses suffered by the partnership. The accountant asserts that the petitioner contributed \$179,012 in 1994, \$288,305 in 1995, \$161,173 in 1996, \$170,485 in 1997, and \$277,059 in 1998. The petitioner submitted his Forms K-1 for S&S Farms from 1994 through 1998 confirming those contributions. These forms, however, are not certified by the Internal Revenue Service as filed with that Service. Moreover, closing documentation and bank statements are insufficient support of those numbers.

The closing documentation for the purchase of farm property on April 5, 1994, indicates that the petitioner and Mr. Singh paid a \$291,550 deposit while the remaining \$291,426 was financed. Without transactional documentation, such as cancelled checks, the petitioner cannot demonstrate who paid that money to the seller. Of even more concern, all of the \$69,586 deposited in 1994 came from an unknown source and was deposited in the petitioner's personal account [REDACTED] or the account he shared with [REDACTED]. Mr. [REDACTED] is a member of Doaba Farms (organized January 31, 1996) and Kern-Tulare (organized March 18, 1998), but has no interest in S&S Farms. Thus, the petitioner cannot establish that these funds went toward the payment of S&S Farms' costs. Not until December 1995 were any of the funds allegedly invested deposited into the S&S Farms account. As the petitioner has not documented the source of the wire transfers or customer deposits, it is not known whether some of that money might come from account [REDACTED] or [REDACTED]. Such money cannot be counted as invested twice.

### **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, CIV-F-99-6117, 19 (E.D. Calif. 2001)(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 petition, the petitioner indicated that he employed nine workers and would create another five jobs. In his initial brief, counsel asserted that S&S Farms would be contracting with Doaba Farming for employees. The petitioner submitted a wage and record report for Doaba Farming for the fourth quarter of 1998 reflecting 18 employees in October, 16 in November and 12 employees in December of that year. The petitioner also submitted 30 Forms W-2 wage and tax statements issued by Doaba Farming.

The director requested evidence regarding the status of Doaba Farming employees, the number of hours worked, and contracts between S&S Farms and Doaba Farming. In response, the petitioner submitted an affidavit from Paramjit Dosanjh asserting that all employees of Doaba Farming are legal residents and that no employment contracts between S&S Farms and Doaba Farming exist although S&S Farms "pays fees" to Doaba Farming for the use of its employees. The petitioner also submitted 1999 tax returns for S&S Farms, Doaba Farming, and Kern-Tulare. Only Doaba Farming's tax returns reflects that it paid any wages that year. S&S Farms lists \$185,124 in contract labor costs in 1999. Finally, the petitioner submitted wage and record reports for Doaba Farming in 2000 and checks issued by S&S Farms to Doaba Farming.

The director concluded that, without a business plan, the petitioner could not establish that he would create and maintain 10 jobs.

On appeal, counsel asserts that since the petitioner has already created 10 jobs, he need not submit a business plan. The petitioner resubmits the 1998 W-2 wage and tax statements submitted previously.

While we agree that a petitioner who has already created at least 10 jobs need not submit a business plan, we do not agree that this petitioner has demonstrated that he has created 10 new jobs as defined in the regulations.

As stated above, Doaba Farming cannot be considered part of the new commercial enterprise because it is not a wholly-owned subsidiary of S&S Farms and the petitioner has no ownership interest in Doaba Farming. Thus, any employees of Doaba Farming cannot be considered employment created by the new commercial enterprise, even if they are contracted to S&S Farms. As quoted above, the definition of employee does not include independent contractors. Finally, as stated above, the petitioner has not established that he has created an original

business. If he purchased an existing farm, he must demonstrate that he created 10 new jobs. The record does not reflect how many jobs existed on the farm prior to the sale.

For the above reasons, the petitioner has not demonstrated that he has already created the requisite employment. The petitioner has also failed to submit a comprehensive business plan. As such, he cannot meet the employment-creation requirement.

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.