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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: WAC-98-030-53465 Office: California Service Center

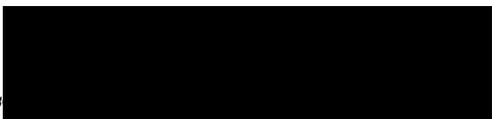
Date: AUG - 6 2002

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 immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 a qualifying investment of lawfully obtained funds or that he would create 10 full-time jobs for qualifying employees. Specifically, the director concluded that the petitioner's inclusion of the business' bank account number when she endorsed the checks for deposit with the business rendered the cancelled checks suspect. In addition, the director concluded that the evidence indicating the transferred funds were "invested" was "vague." Further, the director concluded that without evidence of the petitioner's personal liabilities, she could not demonstrate that her investment of cash was lawfully obtained. The director relied on language from precedents regarding whether borrowed funds were properly invested for that conclusion. Finally, the director concluded that the business had not yet created 10 full-time jobs for qualifying employees and that the business plan was insufficient.

On appeal, counsel notes that it is accepted practice when endorsing a check to include the number of the account in which the check is being deposited, especially when the account holder has several accounts. The petitioner submits bank statements reflecting the deposits of the checks at issue. Counsel further argues that the funds were used for legitimate expenses. While this argument does not appear to address the director's apparent concern that the funds were "invested capital" as those terms are defined in the regulations, the petitioner also submitted corporate tax returns which reflect \$1,000,000 in capital and no loans from shareholders. Counsel expresses confusion as to the director's concerns regarding the lawful source of the petitioner's funds but the petitioner submits additional documentation tracing some of those funds from Taiwan. Finally, the petitioner submits payroll records reflecting 13 full-time employees.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

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

INVESTMENT OF CAPITAL

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Initially, the petitioner submitted an escrow agreement for the impending purchase of [REDACTED]. In response to the director's request for additional documentation, the petitioner submitted the settlement documentation for [REDACTED], reflecting a purchase price of \$218,096, cancelled checks issued by the petitioner to [REDACTED] totaling \$1,027,000, Notice of Stock Issuance and stock certificate reflecting the petitioner's ownership of \$1,007,000 worth of stock, and receipts and a remodeling contract reflecting expenses of \$141,948.

As stated above, the director concluded that since the petitioner included the account number of [REDACTED] when endorsing the checks upon deposit, those checks are inherently suspicious and, apparently, have no evidentiary value.

On appeal, counsel states:

We rebut this horrific conclusion with the notion that when one has more than one account, as is obviously the case for [the petitioner] it is customary and common to write the account number of the deposit to ensure that the money is deposited into the proper account. If the depositor does not write the number there, the bank teller does.

The petitioner submits bank statements for [REDACTED] reflecting the deposits of all of the petitioner's checks at issue.

We concur with counsel that it is common practice to include the number of the account into which a check is being deposited at the time of endorsement. Moreover, even if it were not common practice and the petitioner, knowing she would be submitting the cancelled checks as evidence for the instant petition, included the account number to further stress where the checks were deposited, such an act does not nullify the evidentiary value of otherwise credible documentation supported by valid cancellations and, now, bank statements. As such, we find that the director's blanket dismissal of this evidence to be in error.

The director also concluded:

Although the petitioner submitted monetary bank transactions and expenses in excess of \$1,000,000, the evidence is [too] vague and general to establish that

monies were transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock as portrayed by the entrepreneur.

The director failed to discuss the Notice of Stock Issuance and stock certificate in the record or explain why these documents failed to document an exchange of stock for cash. As such, the petitioner was not provided a meaningful opportunity to respond to this concern on appeal. Nevertheless, on appeal, the petitioner submits [REDACTED] 1998 tax return that reflects \$1,000,000 in common stock issued as further evidence that the funds transferred to [REDACTED] were transferred as capital. No loans from shareholders are indicated. While certified tax returns would have more evidentiary value, the record as a whole is not inconsistent with an investment of at least \$1,000,000 capital.

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. 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 no evidence of how she accumulated her wealth. Nor was she able to trace the path of funds at that time. In response to the director's request for additional documentation, the petitioner submitted evidence that she and her husband own another restaurant and that they sold a piece of property on February 3, 1998 for \$1,180,000, \$515,409.27 of which was payable to the petitioner after payment of the mortgage. The petitioner also submitted evidence that she owns several shares of E-Commerce, Inc. Finally, the petitioner documented the transfer of several deposits totaling \$243,905 from different sources in Taiwan.

In his determination on this issue, the director appears to confuse the lawful source of funds issue with the definition of capital. The director did state that a petitioner must document the source and path of her funds. Rather than focusing on whether the petitioner has established how she accumulated her invested funds, however, the director concludes that the petitioner has not demonstrated that she is primarily and personally liable "on these [sic] indebtedness." The director then states, "from the evidence submitted, the Service cannot attest that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness."

On appeal, counsel asserts, understandably, that the director's conclusion is confusing. In an attempt to address the director's concerns, the petitioner submits a certificate from the California Secretary of State asserting that [REDACTED] has no financing. In addition, the petitioner submits three certificates from the CSC-Sacramento confirming that [REDACTED] has no debts per the UCC Debtor Search, no federal tax liens, no state tax liens, and no local judgments.

The petitioner initially invested her personal cash which did not result from a loan to her or the business. Her company purchased a restaurant business with cash and no financing. As such, the director's focus on the issue of liability on indebtedness is not only unrelated to the issue of whether the petitioner's funds were lawfully obtained, but not justified by the facts in this case. Therefore, we find the basis for the director's conclusion on this issue to be in error.

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.

Initially, the petitioner submitted no evidence of employment. In response to the director's request for additional documentation, the petitioner submitted Forms DE-6 for the final quarter of 1997 through the first quarter of 1999. The forms indicate that employment at [REDACTED] fluctuated from five in December 1997 (the first month any employment is documented) up to eight in April 1998, down to four in September 1998, to a high of eleven in January 1999, and back down to nine in March 1999. The petitioner also submitted Forms I-9 for several employees. The Forms I-9 and accompanying documentation reflect that all of the employees at that time were either lawful permanent residents or naturalized citizens. Finally, the petitioner submitted a business plan that included an organizational chart projecting the need for between nine and fifteen employees and job descriptions of all jobs.

The director apparently performed some type of record check on the employees and determined that two of the employees were not lawful permanent residents or citizens. Without providing the petitioner with an opportunity to rebut this adverse information as required by 8 C.F.R. 103.2(b)(16)(i), the director concluded that two of the employees could not be considered qualifying employees. The director also concluded that six of the employees, including one of the apparently non-qualifying employees, did not work full-time. Finally, the petitioner concluded that the petitioner's business plan was insufficient, stating:

As a matter of fact, the job creation issue is disclosed in the "Marketing Plan" issue one paragraph long; and in the "Personal Management Organization Chart" and job description which is broad and general.

On appeal, the petitioner submits payroll records reflecting that thirteen employees earned wages above what would be minimum wage full-time during one two-week period and new Forms I-9.

Counsel asserts that the petitioner concedes being lied to by past employees regarding their eligibility to work but that she has replaced those workers.

Given the fluctuation in employment at the restaurant, the petitioner could have submitted stronger evidence than self-serving payroll records for one two-week period unsupported by Forms DE-6. Nevertheless, considering the director's decision as a whole, we cannot conclude that the petitioner was given a meaningful opportunity to address any deficiencies which might exist in the record.

Therefore, this matter will be remanded for reconsideration of the petitioner's eligibility. Specifically, we note that while the petitioner claimed on the I-526 to have created an original business, the petitioner purchased a restaurant building as well as its equipment, furniture, and fixtures, according to the escrow agreement. The DE-1 submitted by the petitioner reveals that [REDACTED] is an "on-going business just purchased." The "date of transfer" is indicated as November 18, 1997. The director's decision includes no discussion of whether this information is consistent with the creation of an original business.

In addition, we note that the tax returns submitted on appeal reflect that, of the \$1,000,000 invested as capital, over \$250,000 remains in cash, \$146,850 is in notes receivable, \$208,859 has been loaned back to the petitioner, and \$100,000 has been invested in [REDACTED] Inc. The petitioner claims that the cash will be used to open a second restaurant at [REDACTED] Mountain View, CA, for which the petitioner has submitted a renovation contract. The petitioner, however, already owns a restaurant at [REDACTED]. The director has not addressed whether the funds invested, loaned back to the petitioner, and slated for renovations of another restaurant previously owned by the petitioner are truly at-risk.

Finally, while we cannot concur with the director's reasons for concluding that the petitioner had not established the lawful source of her funds, we note that the funds from Taiwan come from several sources, some with the same last name as the petitioner. The record does not clearly establish whether these funds were gifts or loans, and the director did not address this issue. In addition, the director must determine whether the petitioner has demonstrated the lawful source of her U.S. acquired funds in the absence of five years of tax returns or evidence of lawful status.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.