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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



File: [Redacted]

Office: California Service Center

Date: AUG 30 2002

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:



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 a qualifying investment of lawfully obtained capital.

On appeal, counsel argues that the petitioner has invested equipment that cost \$1,139,946 with a fair market value of \$895,700. Counsel further asserts that the petitioner invested \$186,250 of his own funds and funds he borrowed from individuals and subsequently reinvested the profits of the business.

As discussed in more detail below, we concur with the director's conclusion that the petitioner has not demonstrated a qualifying investment, but for different reasons than those expressed by the director. We also concur with the director that the petitioner has not demonstrated the lawful source of his initial investment, however much that may have been.

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, Excel Knitting Company, 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.

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 petition, filed July 1, 1997, the petitioner indicated that the new commercial enterprise, Excel Knitting Company, Inc., was established on August 1, 1991 as an original business. The petitioner further indicated that he made an initial investment of \$4,644.43 on December 23, 1991 and that his total investment to date was \$537,138.

The record contains evidence that the petitioner registered the fictitious name, "Excel T-Shirt Printing and Knitting," on August 1, 1997 for his sole proprietorship. He abandoned that name on October 15, 1991, registering the fictitious name "Excel Knitting Company." On December 1, 1993, the petitioner moved the business from [REDACTED] in South El Monte to [REDACTED] in South El Monte. On May 6, 1996, the petitioner incorporated Excel Knitting Company.

The petitioner's tax returns list the basis of, or amount paid for, all the equipment purchased for use in the company as \$32,249 in 1992, increasing to \$145,699 in 1993, increasing to \$151,894 in 1994, and increasing to \$498,062 in 1995. Excel paid \$2,738 in interest payments in 1992, \$5,706 in 1993, \$7,736 in 1994, and \$30,978 in 1995, suggesting the purchase of the equipment was financed. The investment schedule submitted initially indicated that Excel had purchased equipment and furniture between 1991 and 1997 by paying a total of \$359,391.73 in deposits and \$156,289.10 in additional payments. The schedule indicated Excel owed another \$665,328 on the equipment. Throughout the proceedings, the petitioner has submitted invoices for equipment, security agreements reflecting that the financed portion of the sale was secured by the equipment, and personal guarantees for the financing signed by the petitioner and [REDACTED] the petitioner's wife. The petitioner has also submitted appraisals of Excel's assets.

In her notice of intent to revoke, the director questioned the appraisals and, thus, the value of the equipment the director determined was contributed to the new commercial enterprise. In response, counsel adopted the director's conclusion that the petitioner contributed equipment and argued that the depreciation would not reduce the value of the equipment below \$500,000.

The director determined that the petitioner had not overcome her concerns and revoked the petition.

As stated above, while we concur with the director's conclusion that this petitioner has not invested \$500,000 into Excel, we reject the director's reasoning. Excel has been in business since at least 1991.¹ When the petitioner incorporated Excel in 1996, he did not create a new business into which he contributed the equipment of the sole proprietorship. Rather, he simply changed the structure from a sole proprietorship to a corporation. Excel, not the petitioner, purchased the equipment initially with the petitioner's cash and subsequently with its own

¹ The petitioner entered the United States in June 1987 with a nonimmigrant investor visa. The visa is notated, "Tempo Knitting, Ltd." If the petitioner operated Excel under a different name prior to November 29, 1990, Excel is not an original business, raising concerns as to whether the petitioner created a new commercial enterprise.

proceeds. As such, the appraisal value of the equipment is simply irrelevant. What is relevant is how much cash the petitioner has invested into Excel for capital expenses.

On appeal, counsel asserts that the petitioner has only contributed \$186,250 cash into Excel. As of the end of 1992, Excel had only purchased \$32,249 worth of equipment, much of which was financed. While the record reveals that the petitioner and his wife personally guaranteed at least some of these equipment purchases, the loans were secured by the equipment purchased. As such, the petitioner was not personally and primarily liable on those loans. See Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998). In 1993, Excel began earning a profit. The update of equipment and the payment of loan payments after 1992 are normal operating expenses paid out of Excel's proceeds, and cannot be considered the petitioner's personal investment.

At best, the down payments for the purchase of new equipment might be considered a capital expense. In order to be considered the petitioner's personal investment, however, the down payment cannot come from Excel's proceeds. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. See generally, De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

It is acknowledged that the commercial enterprise in De Jong was a corporation, and not a sole proprietorship. Further, the court in that case did note that a corporation is a separate legal entity, which is admittedly not the case for a sole proprietorship. Regardless, a reinvestment of profits is simply not an infusion of new capital into a business. Certainly the personal assets of a sole proprietor are at risk and can be seized by a creditor. In addition, unlike a corporation, the owner of a sole proprietorship who reinvests the profits of the business is being taxed on those profits. The petitioner, however, deducted normal operating business expenses on Schedule C, and, thus, was not taxed on any proceeds not included in the company's profits. The payment of loan payments by Excel from proceeds is a normal operating expense upon which he was not taxed and cannot be considered the petitioner's capital investment. Any business, if operated long enough, could accumulate \$1,000,000. The use of proceeds to pay normal operating costs and to slowly grow a business over several years is not the type of infusion of capital contemplated by the regulations.

In addition, *retained* profits also do not constitute a *contribution* of capital as required by the regulations. Even if we considered the petitioner's business use of the profits upon which he was taxed, the profits of Excel were only \$17,343 prior to the date of filing. Finally, even if we considered all the down payments made prior to the date of filing regardless of whether they were paid from proceeds, they amount to only \$359,391.73.

In summary, the petitioner cannot claim to have invested the fair market value of the equipment "contributed" by the sole proprietorship to the corporation as they are the same business. In addition, the money used to purchase equipment after the business was operational cannot be considered the petitioner's capital investment unless the money came from the petitioner, and not the company's proceeds or even profits. Even if we considered the use of Excel's profits, which were taxable to the petitioner, those profits were far below the requisite investment amount. Finally, even if we didn't exclude down payments paid for from Excel's proceeds, the down payments at the time of filing did not amount to \$500,000. In light of the above, the petitioner has not demonstrated a qualifying investment of \$500,000.

SOURCE OF FUNDS

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

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

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

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

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

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful

source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

As stated above, the petitioner submitted his own tax returns as evidence of the lawful source of his funds. These returns reflect that while the business began earning money in 1993, the petitioner's income was negative \$6,798 in 1991, negative \$11,898 in 1992, negative \$16,780 in 1993, negative \$6,677 in 1994, and \$8,976 in 1995.

In the director's notice of intent to revoke, she concluded that the petitioner had not documented the source of the funds used to purchase equipment. In response, counsel asserted that the petitioner transferred \$45,000 to Excel from Taiwan in 1993, borrowed an additional \$141,250 from individuals, and reinvested the proceeds of Excel. The petitioner submitted a bank statement for his joint account with [REDACTED] reflecting a deposit of \$45,000 on January 22, 1993 and a check dated February 4, 1997 from [REDACTED] to Excel for \$40,000. The bank statement does not reveal the source of the \$45,000 or that it was eventually transferred to Excel. The record does not reveal how the loan from Mr. [REDACTED] was secured. If it was secured by the assets of Excel, it cannot be considered to be the petitioner's personal investment.

The director concluded that Excel's profits since 1991 did not amount to the \$500,000 allegedly invested. On appeal, counsel reiterates the claims made in response to the notice of intent to revoke.

As stated above, the petitioner has not established that he personally transferred \$45,000 to the joint account with [REDACTED] or that he then transferred those funds to Excel. In addition, the record does not establish the terms of the loan from [REDACTED]. Finally, as stated above, the reinvestment of proceeds is not a qualifying investment. Even if we considered the reinvestment of profits, as opposed to proceeds which are not taxed, to be a qualifying investment, as stated by the director, Excel has not demonstrated more than \$17,343 in profits.

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).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs for qualifying employees.

The copies of Forms I-9 submitted are not all signed and most contain handwritten information that is partially photocopied and partially original. Moreover, while the petitioner claims to have already hired more than ten employees and has submitted several wage and withholding reports reflecting between eight and thirty-six employees, those reports are suspect. The 1995 reports reflect between seven and nine employees, but the petitioner's tax return, schedule C, shows no wages or employee benefits paid by Excel. While the reports reflect that as of March 2000 Excel employed 31 workers, the 2000 corporate tax return reflects wages of only \$43,883. Such wages cannot account for thirty-one, or even ten, full-time employees earning at least minimum wage.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent



objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.