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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: WAC-99-208-51279 Office: California Service Center Date: JUL 16 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:

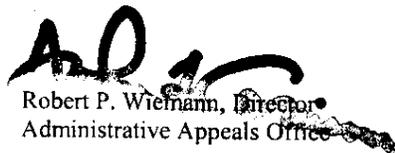
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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. Wiefmann, 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 established a new commercial enterprise because he is not the incorporator. The director further concluded that the petitioner had not established that he had invested the requisite lawfully acquired funds, or that he would create the necessary employment.

On appeal, counsel argues that an incorporator is often used to incorporate a business, but that it was established by the petitioner, that the petitioner has now invested more funds which cannot be traced due to the relationship between the United States and Iran, and that the petitioner need not submit a business plan at this time because the new commercial enterprise is small and well understood by the petitioner.

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, Computer International, Inc. While the director did not contest that the business was located in a targeted employment area for which the required amount of capital invested has been adjusted downward, the petitioner has yet to choose a location for the business. The petitioner's assurances that he will eventually start up a business in a targeted employment area in one of three California Counties or possibly even Arizona is insufficient. See 8 C.F.R. 204.6(j)(6) which requires evidence of the unemployment rates of the location where the new commercial enterprise *is* principally doing business. Thus, the required amount of capital in this case is \$1,000,000.

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).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is Computer International, Inc.

Initially, the petitioner submitted the articles of incorporation filed with the State of California on June 17, 1999. The incorporator is listed as counsel. The petitioner also submitted a stock certificate issued to him on the same date for 1,000 shares and the action of incorporator regarding the issuance of 1,000 shares to the petitioner and the appointment of the petitioner as president, secretary, and chief financial officer. In response to the director's request for additional documentation, the petitioner submitted an application for an employer identification number listing the petitioner as the principal officer. The director expressed concern that the petitioner was not listed as the incorporator and concluded that the petitioner had not demonstrated that he personally had established the corporation.

On appeal, counsel asserts that the principal founders of the corporation are not required to incorporate a corporation. The petitioner submits regulations supporting counsel's assertion. It is acknowledged that corporations are often incorporated by an attorney or representative of the founders. While the petitioner did not submit a Notice of Issuance of Shares to the State of California, the remaining documentation strongly suggests that the petitioner is the original owner of the corporation.

Nevertheless, as will be discussed below in more detail regarding the petitioner's risk, the record reveals that the corporation has yet to begin business. Without even a comprehensive business plan or location, it is not possible to determine whether [REDACTED] will purchase an existing business or start its own business. As discussed in Matter of Soffici, I.D. 3359, 10 (Assoc. Comm., Examinations, June 30, 1998), the incorporation of a new corporation which subsequently purchases an existing business cannot be considered the creation of an original business. As the law requires a petitioner to be seeking to enter the United States to manage a business that he has already established, the petitioner's subsequent reorganization or expansion of an existing business would not establish his eligibility at the time of filing. In light of the above, while the petitioner may have founded a new corporation, the record contains insufficient evidence that the petitioner has established a new commercial enterprise as defined in the regulations quoted above.

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 a bank letter reflecting that [REDACTED] account [REDACTED] at California Federal Bank, had an opening balance of \$5,000 on July 1, 1999. The petitioner also submitted a deposit receipt reflecting two deposits of \$178,000 into the same account, one on July 12, 1999 and the other on July 13, 1999. One of those deposits was returned for insufficient funds. Finally, the petitioner submitted a wire transfer receipt reflecting the transfer of \$49,985 on July 9, 1999 from A. Weneck at Bank Edouard Constant to account [REDACTED]. In response to the director's request for additional documentation, the petitioner submitted two additional wire receipts, one for \$49,975 on August 4, 1999 from [REDACTED] at Bank Edouard Constant to the same account and the other for \$40,000 on December 6, 1999 from [REDACTED] at Lespan S.A. in Uruguay to account number [REDACTED] at California Federal. The opening deposit and the funds wired to [REDACTED] total \$144,960. The petitioner also submitted bank statements for account number [REDACTED] reflecting an opening deposit of \$280,606 on November 10, 1999, a deposit of \$40,000 on December 6, 1999 and a deposit of \$44,000 on December 21, 1999 for a final balance of \$330,534.68.

The director concluded that the petitioner had not established that he had invested the full \$500,000. On appeal, counsel asserts that a total of \$297,700 had been transferred to the company's account and an additional \$178,000 was transferred on July 12, 1999, for a total infusion of funds of \$475,000. Counsel asserts that an additional \$226,000 remains in Iran for future investment as needed. The petitioner submits wire transfer receipts showing the transfer to [REDACTED] of \$22,740.29 on March 28, 2001 from Mr. [REDACTED] \$40,000 on July 17, 2000 from [REDACTED] \$51,000 on February 10, 2000 from "One of Our Clients" in Switzerland; and \$44,000 on December 21, 1999 from Azteca Financial Corporation in the Virgin Islands for a total of \$157,740.29. The petitioner resubmitted the bank statement for account 142-4066981 showing the July 12, 1999 and July 13, 1999 deposits of \$178,000 each.

The petitioner also included a copy of a check dated July 12, 1999, from [REDACTED] for \$178,000 stamped "insufficient funds." The petitioner asserts that this check finally cleared on July 13, 1999, and represents both the July 12, 1999 deposit which was returned and the July 13, 1999 deposit which cleared. Finally, the petitioner submitted the 1999 and 2000 tax returns for [REDACTED]

The record reflects the transfer of \$302,700 from overseas plus the deposit of \$178,000 for a total of \$480,700. The petitioner, however, only deposited \$232,985 of that amount prior to the date of filing. While a petitioner need only demonstrate that he is actively in the process of investing, the funds must be fully committed to the investment at the time of filing. See 8 C.F.R. 204.6(j)(2) quoted above. The petitioner has not submitted any evidence of an irrevocable escrow agreement or other binding contract which committed his funds to the investment prior to the date of filing.

In addition, the tax returns indicate that the vast majority of the transferred funds were merely loaned to the company. The 1999 1120-A, Part III, reflects \$5,000 in capital stock and \$361,585 in loans from shareholders. The 2000 tax return, Schedule L, reflects \$5,000 in capital stock and loans from shareholders increasing to \$430,704 by the end of the year. A debt arrangement with the new commercial enterprise cannot be considered part of a qualifying investment. See 8 C.F.R. 204.6(e)(definition of invest) quoted above.

In light of the above, we concur with the director that the petitioner had not made a qualifying investment or legally committed to a qualifying investment at the time of filing.

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 discussed above, the petitioner submitted several wire transfer receipts reflecting the transfer of \$302,700 from various banks around the world. The petitioner also submitted evidence of a \$178,000 deposit apparently from [REDACTED]. The director concluded that the petitioner had failed to submit personal tax returns or other evidence specified in 8 C.F.R. 204.6(j)(3) quoted above. On appeal, counsel asserts:

The United States of America does not maintain full diplomatic relations with the Islamic Republic of Iran and, as such, the U.S. Department of State does not maintain an embassy in Iran. Just as any individual including an American citizen, must exit Iran and go to a neighboring country to conduct business with the U.S., so too must money (funds). Therefore, it is impossible to trace a funds transfer directly from the Petitioner in Iran to the business in the U.S. because money must exit Iran and be converted to U.S. dollars.

Attached are funds transfer notices, for the periods 1999-2001, indicating that a total of approximately \$297,700.00 has been transferred. In addition, a \$178,000.00 deposit was made on July 12, 1999. This deposit was made by check through an intermediary person. Therefore, the total deposits to the company are \$475,000.00.

Attached are two bank statements showing funds held in Iran. Funds held at Bank Saderat Esfahan equal \$167,645.60 and funds held at Bank Saderat Iran equal \$58,521.77 for a total of \$226,000.00. These funds will be sent to the United States as needed for investment or when the Visa is approved.

Petitioner owns other real estate in Iran, including his residence, which will be sold when he is approved to enter the U.S.

The petitioner submits the Iranian bank statements referenced by counsel. Counsel's explanation for the petitioner's failure to submit any evidence as to how he acquired his alleged wealth or to trace the path of his funds is insufficient. However the petitioner acquired his alleged wealth, inheritance, business activity, or by some other means, he must submit evidence to support that assertion. Moreover, regardless of the diplomatic situation, it is the petitioner's burden to submit documentation that traces the path of funds from his own accounts in Iran to the company's account, however convoluted. Finally, the petitioner has provided no explanation for the large sum of money apparently received from Mr. Salamat. In light of the above, we concur with the director that the petitioner has not established the lawful source of his funds.

EMPLOYMENT CREATION

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

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(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.

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).

The petitioner does not claim to have created any employment to date and the 1999 and 2000 tax returns for the company reflect no wages. 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.

In response to the director's request for additional documentation, the petitioner submitted a two-page "business plan." The plan includes the following time table: "arrive in United States, select location of operation that meets requirements, secure a lease on a building at the designated site, set up office, warehouse and work areas, establish contact with vendors, suppliers and business

leaders, develop personnel policies and procedures and job descriptions, hire employees as needed with minimum of 10 full-time positions within a two-year period.” The organization chart includes two sales persons, one repair supervisor, five repair technicians, one customer service clerk, one warehouse supervisor, two shipping and receiving clerks, one administrator/accountant, and one office clerk. The petitioner indicated that the business would buy and sell new computers for export and repair and sell used computers domestically and abroad. The petitioner indicated that his brother operated a similar business and that he would seek advice from his brother. The director concluded that the petitioner’s business plan was not comprehensive as defined in Matter of Ho, *supra*.

On appeal, counsel argues that a business plan is no guarantee of success and states: “Petitioner is familiar with the business, which is a relatively small business, and will exercise day to day management and control. Therefore, a more comprehensive plan is not warranted at present.”

Counsel’s personal assessment of the utility of business plans does not exempt the petitioner from the regulatory requirements. Regardless of whether a business plan would assist the petitioner, the Service is unable to determine the credibility of the petitioner’s claim that his business will create at least 10 jobs without a comprehensive business plan. As such, we concur with the director on this issue.

CAPITAL AT RISK

The petitioner’s failure to submit a comprehensive business plan and evidence of any business activity raises another issue not addressed by the director. The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), specifies:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

Review of the record reveals that the petition was not initially supported with any documentation of business activity. In fact, the petitioner has not even chosen a general location for the business, much less committed to a lease. Thus, the petitioner has accomplished far less than the

petitioner in Matter of Ho, supra. The company tax returns reflect \$1,949 in gross receipts or sales in 1999 but only interest income in 2000. Neither tax return reflects any costs of goods sold, rent, or wages. The petitioner provides no explanation for the 1999 income.

Moreover, without a comprehensive business plan detailing how the alleged capital will be utilized, we cannot conclude that the full amount transferred to the company is at risk. Grossly overcapitalizing a small business does not place the extra "capital" at risk.

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.