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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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Washington, D.C. 20536



26 JUL 2002

File: WAC-00-107-51978 Office: California Service Center Date:

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 that the new commercial enterprise would create at least 10 new jobs for qualifying employees.

On appeal, the petitioner submits a letter from the employee leasing company ProLease Pacific and several Forms DE-6 Wage and Withholding Reports.

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, Mirage Inkjet Technology, 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.

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:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. . . . This definition shall not include independent contractors.

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.

(Emphasis added.) 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.

The petitioner indicated on the Form I-526 that he owned 10 percent of the new commercial enterprise, that there were no employees at the time of his investment, January 5, 1999, and that there were currently 33 employees. Initially, the petitioner submitted Form DE-6, Wage and Withholding Report, for the fourth quarter of 1999 reflecting 24 employees in October, 30 employees in November, and 33 employees in December. The name of the company printed on the form, however, is Prolease Pacific Corporation located at [REDACTED] in Monterey Park, California, with "Mirage Inkjet Technology" handwritten on top. Mirage Inkjet Technology's address was previously [REDACTED] Rancho Cucamonga, California, and is currently [REDACTED] Rancho Cucamonga, California. The petitioner also submitted a business plan which makes no reference to employment needs.

On April 9, 2001, the director requested corporate tax returns, wage and withholding reports, W-2 and W-3 reports for 1998 through 2000, and a comprehensive business plan. The director also requested Forms I-9 or other evidence that the employees were all qualifying employees as defined above.

In response, the petitioner submitted Mirage Inkjet Technology's 1998 and 1999 tax returns and Form DE-6 Wage and Withholding Report for the first quarter of 2001. The tax returns indicate that the company spent \$142,525 in wages in 1998 and \$738,435 in 1999, exclusive of compensation paid to officers. The Form DE-6 names the company as Mirage Inkjet Technology, Inc. in care of Pacpro Management, Inc. at the same address as the previous DE-6.

The petitioner did not submit a new business plan, W-2 and W-3 reports, or Forms I-9 as requested.

The director concluded that the original business plan was deficient and that without W-2 and W-3 reports it was not possible to determine that 35 employees were working for Mirage Inkjet Technology, Inc. as claimed or whether 10 jobs had been created since the petitioner's investment in January 1999.

On appeal, counsel maintains that all of the employees on the wage and withholding reports are employees of Mirage Inkjet Technology. Counsel argues that the "doctrine of equity" entitles the petitioner to approval of the petition since he has "invested more than \$1,000,000 into the newly created enterprise -- MIT, which has hired more than ten (10) full-time employees consistently." Counsel continues that it is unfair to deny the petition based on "the incomplete evidence as perceived" by the director. Counsel argues, "evidential technicality shall not unreasonably cloud over substantive justice."

The petitioner submits a letter from William Wang, the Customer Service Manager at ProLease Pacific, who states:

This is to verify that the employees on the enclosed DE6 are employees of Mirage Inkjet Technology, Inc. and work at its physical location:

[Address omitted.]

Effective January 1999, Mirage Inkjet Technology, Inc. entered a service agreement with ProLease Pacific Corp., a professional employee leasing company, to outsource its human resources management functions to ProLease Pacific.

Per the terms of the agreement, ProLease would provide full human resource management services including payroll processing and payroll tax filing for all employees of Mirage Inkjet Technology, Inc.

For administrative and record keeping purposes, all employees of Mirage Inkjet Technology, Inc. are placed under ProLease Pacific's tax ID's, and year end W-2s are issued by ProLease Pacific.

Nevertheless, the above referenced employees are employees of Mirage Inkjet Technology, Inc., and under the direct control and supervision of Mirage Inkjet Technology, Inc.

The petitioner then submitted forms DE-6 for 1999, 2000, and the first three quarters of 2001. These documents reflect 11 employees in January 1999 increasing to 33 in December 1999. After that date, the forms are blank regarding the number of employees per month, but list

approximately 35 employee names. All of the forms are signed December 19, 2001. The Forms from 1999 list the employer as "PROLEASE PACIFIC CORP (MIRAGE INKJET TECHNOLOGY)," all printed on the form, whereas after 1999 the employer is listed as "MIRAGE INKJET TECHNOLOGY INC. C/O PACPRO MGMT INC.," also all preprinted on the form. As such, the Form DE-6 for the fourth quarter of 1999 submitted on appeal is not a copy of the Form DE-6 for the same quarter submitted initially, which only included Mirage Inkjet Technology as a handwritten addition to the printed employer name. The petitioner also submitted payroll records for the same period. The petitioner did not submit W-2 or W-3 reports or Forms I-9. Counsel asserts:

As explained in Mr. William Wang's letter, MIT cannot provide W-2s under its title. We understand that [the director] asked for W-2s and W-3s for the purpose of proving that MIT indeed hires more than 10 full time employees. However, the alternative evidence, DE-6s, can prove the same effect.

As quoted above, the definition of "employee" as provided in the regulations, excludes independent contractors. Employees must be direct employees of the new commercial enterprise. The petitioner has submitted Forms DE-6 listing the employer as an employee leasing company and has failed to submit Forms W-2 issued by the new commercial enterprise. As such, the petitioner has not established that the employees listed on the Forms DE-6 are direct employees of Mirage Inkjet Technology, Inc.

Counsel's arguments regarding a "doctrine of equity" are not persuasive. In addition to being defined as "fairness; impartiality; evenhanded dealing," equity can also mean, "the recourse to principles of justice to correct or supplement the law as applied to particular circumstances." Black's Law Dictionary 560 (7th Ed. 1999). Counsel does not cite to any examples of federal courts relying on a "doctrine of equity" to invalidate the plain language of the Service's regulations. It remains, the Service is bound by its regulations, which specifically exclude independent contractors from the definition of "employee."

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).

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.

Beyond the decision of the director, the petitioner has not established that he has invested in a new commercial enterprise as defined in the regulations. On the Form I-526 the petitioner listed Mirage Inkjet Technology, Inc. as the new commercial enterprise and indicated it was an original business. He further indicated that there were no employees at the time of his initial investment on January 9, 1999.

The documentation in the record reveals that Chris Chen incorporated Mirage Inkjet Technology, Inc. on August 18, 1998. The petitioner submitted an undated stock certificate, number 72, issued to him by "Mirage Technology, Inc." An undated shareholder list for "Mirage Technology, Inc." lists the petitioner as a 6.3 percent owner. The petitioner signed an agreement accepting his duties as an elected director of Mirage Inkjet Technology on April 14, 1999. An August 31, 1999 Statement by Domestic Stock Corporation reports the petitioner as one of the directors for "Mirage Technology, Inc." As stated above, the tax returns for 1998 indicate \$142,525 in salaries and wages for that year, contradicting the petitioner's claim on the Form I-526 that the company had no employees as of January 1999 when he made his investment.

The tax return further indicates that the company had inventory worth \$1,793,069 at the beginning of 1998, the same amount as the common stock. Eighty-eight percent of the stock was owned by Dr. Graphix¹ at that time. Dr. Graphix owned only 25 percent of the company stock in 1999. While the petitioner did not submit Form 4652 for 1998, the petitioner subsequently submitted a 1999 tax return for "Mirage Technology, Inc. dba Mirage Inkjet Technology, Inc." including Form 4652. The instructions to Form 4652, page 8, permit a corporation to amortize start-up expenditures in Part VI. Part VI on the Form 5652 in the record, however, is blank.

¹ According to its website, www.drgraphix.com, Dr. Graphix sells the same type of products as Mirage Inkjet Technology, Inc., media and ink jet cartridges. The website further indicates that Chris Chen, the president of Mirage Inkjet Technology, Inc., founded Dr. Graphix in 1988 in Taiwan.

The business plan indicates that the cartridges are developed and built in-house and are patented. The plan does not indicate when those patents were obtained. While the plan lists two software companies working with Mirage Inkjet Technology, Inc., the plan makes no mention of the role of its original shareholder, Dr. Graphix, which still owns more shares than any other individual shareholder.

Without an explanation of the acquisition of inventory from Dr. Graphix,² as is evident from the 1998 tax return, and the current relationship between the two companies,³ the petitioner cannot establish that he created an original business. The petitioner would also need to demonstrate the number of employees at Mirage Inkjet Technology, Inc. who were acquired from Dr. Graphix. In addition, without evidence of the net worth or the employment at the portion of Dr. Graphix assumed by Mirage Inkjet Technology, Inc., the petitioner cannot demonstrate that he expanded an existing business.

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.

² The petitioner has not explained why Dr. Graphix, a successful inkjet and media manufacturer, would incorporate and contribute the initial inventory for a rival company and continue to hold a 20 percent interest in this rival company.

³ The founder of Dr. Graphix is the president of Mirage Inkjet Technology, Inc.

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).

Initially, counsel simply asserted that the petitioner was a successful businessman who became a millionaire through past business in truck transportation, trading of wood, and major real estate developments. Counsel continued that the petitioner was currently the owner of a large gas station, Guo-Pin Enterprise Company, Ltd. The petitioner submitted a property appraisal and tax return for Guo-Pin Enterprise Company, Ltd. The appraisal indicates that the land and building are worth NT\$26,219,250. The appraisal also indicates, however, a mortgage of NT\$68,400,000, more than the appraised value of the property. While the partial translation for the tax return indicates Guo-Pin Enterprise Company had a gross profit of NT\$174,613,044 (\$5,820,434), the company's net income does not appear on the translation. The petitioner also submitted three bank statements for account number [REDACTED] at E. Sun Commercial Bank in Taiwan. The statements reflect that the petitioner had a balance of \$500,000 on January 6, 1999, the day *after* he transferred \$501,500 to the new commercial enterprise, \$981,601.42 on January 8, 1999, and \$1,020,631.88 on January 11, 1999, the day *before* he transferred \$1,090,580 to the new commercial enterprise. (\$576,580 of the latter amount was a loan to the company.)

In response to the director's request for an explanation as to the accumulation of the amounts in the petitioner's bank account and evidence of his accumulation of wealth over the previous five years, counsel repeated that the petitioner was a successful businessman and referred to the two sales contracts discussed below as examples of the petitioner's real estate investments.

The petitioner submits two sales contracts dated October 1995 and March 1996 for the sale of land by Fang Bing Enterprise Corp. The petitioner also submits an "abstract of translation" reflecting his ownership of 15,000,000 out of 25,000,000 shares. The translation does not indicate the nature of the document translated, specifically, who issued it. The petitioner failed to submit evidence of his personal income during the previous five years as requested by the director. The petitioner has not demonstrated that this sale of property in October 1995 and March 1996 can account for an investment made in January 1999. Counsel concedes that the investment at issue is the petitioner's second investment through which he has attempted to obtain permanent residency under the entrepreneur program. The petitioner filed his prior Form I-526 on April 23, 1996, after the sale of both properties discussed above. Without additional evidence, such as income tax returns for the past five years as specified in the regulations and

specifically requested by the director, the petitioner cannot establish that he has accumulated sufficient funds for two major investments.

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.