

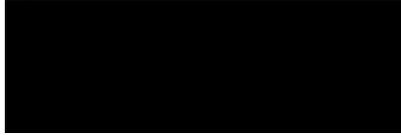


B7

U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

MISSION COPY



14 Jun

Date: JUN 14 1992

File: [Redacted] Office: Vermont Service Center

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**DISCUSSION:** The approved preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal.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 approved the petition on April 20, 1998. Upon further review, the director determined that the petitioner had failed to demonstrate a qualifying, at risk investment of lawfully obtained funds. The director issued a notice of intent to revoke on June 24, 1997 and issued the final notice of revocation on August 27, 1999.

On appeal, the petitioner submits new documentation regarding his investment and the source of his funds which counsel asserts is "self explanatory."

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 petitioner indicates that the petition is based on an investment in Dollar Mine, Inc., a business located in Brooklyn, New York, a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

#### **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).

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

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

In the brief accompanying the petition, counsel asserts that [REDACTED] in addition to doing business as 99 Cents Dream in Brooklyn, is a holding company [REDACTED]. While the corporate address for [REDACTED] is listed on the articles of incorporation as [REDACTED], [REDACTED] lease, invoices and tax returns reflect an address of 263- [REDACTED]. The invoices submitted in response to the notice of intent to revoke indicate that the store located at [REDACTED] does business as 99 Cents Dream, while the store located at [REDACTED] does business as Top Dollar Dream.

The record contains evidence indicating that Marge O. Grimaldi incorporated [REDACTED] on May 7, 1997. The Statement of Organization by the Sole Incorporator reflects that the sole initial director for the corporation was Mohammed Naeem, who would act as such until the first annual shareholders' meeting or until successors were elected and qualified. The record contains no evidence of a subsequent election. The petitioner submitted a stock certificate issued to him on August 4, 1997 for 100 no par value shares signed by him as the secretary and president. Subsequently, the petitioner submitted the 1998 S-Corporation tax return, Form 1120-S, for [REDACTED]. The petitioner did not include Schedule K-1, required to be submitted with 1120-S for each shareholder. The petitioner also submitted his personal tax return for 1998. The petitioner

indicated \$102,894 income from "rental real estate, royalties, partnerships, S corporations, trusts, etc.," and attached Schedule E reflecting \$81,172 passive income from Schedule K-1 and \$34,790 nonpassive income from Schedule K-1. Schedule E, however, refers to "statement 1" for the name of the investment entity. Schedule K-1 and Statement 1 are not in the record. Moreover, none of the above tax forms are certified by the Internal Revenue Service. As the only evidence in the record reflecting that the petitioner has an ownership interest in Dollar Mine is a self-serving stock certificate signed by the petitioner, the petitioner has not established that he has an ownership interest in Dollar Mine.

The record also contains evidence that [REDACTED] on September 12, 1997, also listing the corporate address as [REDACTED]. The Statement of Organization by the Sole Incorporator reflects that the petitioner was the initial director of this corporation. The record, however, does not contain a stock certificate issued to the petitioner. Serving as a director does not necessitate an ownership interest.

The record contains an agreement dated December 1, 1997, whereby the petitioner sold his alleged 100 shares in [REDACTED]. The agreement indicates the "allocated value" of the shares was \$500, and as payment for the shares [REDACTED] would issue its remaining 100 shares to the petitioner. Thus, prior to the agreement, the petitioner purportedly held 100 shares of stock in [REDACTED] and [REDACTED]. After the agreement, the petitioner purportedly owned 200 shares of stock in [REDACTED] and [REDACTED] owned all 100 shares of stock [REDACTED]. As will be discussed in more detail below, despite the "allocated value" of \$500 per share, the 1998 tax returns for both Dollar Center and Dollar Mine reflect capital stock worth \$50,000 for each company throughout 1998.

In response to the director's request for additional documentation, the petitioner submitted Dollar Center and Dollar Mine's 1998 tax returns. These returns reflect that both corporations filed Form 1120-S as "S-Corporations." On Schedule B, Line 3, the tax form asks, "Did the corporation at the end of the tax year own, directly or indirectly, 50% or more of the voting stock of a domestic corporation?" The response on Dollar Mine's tax return is "no." (The response on Dollar Center's return is also in the negative, but the petitioner is not claiming that Dollar Center is a holding company.) Moreover, in 1998, 26 C.F.R. 1.1361-1(f) defined an S-Corporation as having, among other things, no corporate shareholders. Thus, the Treasury regulations precluded [REDACTED] from being a shareholder of S-Corporation Dollar Center. In light of Dollar Mine's failure to indicate that it owned 50% or more of any company and the regulatory prohibition for corporate shareholders for Dollar Center, the self-serving agreement signed only by the petitioner whereby Dollar Mine purportedly purchased 100% ownership in Dollar Center is seriously suspect. In light of the above, the petitioner cannot establish that the new commercial enterprise identified on the petition, Dollar Mine, includes Dollar Center as a wholly owned subsidiary.

The petitioner also submitted the purported minutes of a teleconference between the director of the Vermont Service Center and the American Immigration Lawyers Association, New York Chapter, where the director allegedly stated that the Service would consider multiple companies as a single new commercial enterprise. The statute provides that a petitioner must be seeking to enter the United States to manage "a" new commercial enterprise. The opinion of one Service official cannot

supercede the law. Even if we do consider both Dollar Mine and Dollar Center as a single commercial enterprise, the ownership of these companies is still unresolved. Moreover, even if we concluded that it is not material whether Dollar Center is a wholly owned subsidiary of Dollar Mine, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). As such, the serious inconsistencies regarding the relationship between Dollar Center and Dollar Mine raise credibility issues regarding the remaining evidence.

### **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, the petitioner indicated that he initially invested \$142,000 on May 7, 1997 and that he had invested a total of \$558,000. He further indicated that the new commercial enterprise had a net worth "over \$500,000." In an attached letter, the petitioner asserted that he had initially invested over \$250,000 and obtained a loan and credit "valued at over \$300,000." The petitioner continued:

Please note that I have also obtained a lease of 12 years for the stores at New York City (targeted employment area). Please note that we have used up part of the loan and investment in purchase of fixtures, furniture, inventory purchase and other start up costs for the store opened at New York (targeted employment area).

In his business plan, the petitioner asserted that he intended to increase his investment to \$700,000 in the next few months. In response to the director's notice of intent to revoke the petition, the petitioner submitted the following "summary of investments" as of December 31, 1998:

Working Capital	Dollar Mine	Dollar Center	Total
Cash in Banks	\$1,669	\$17,564	\$19,233
Security Deposits	\$30,000	\$18,000	\$48,000
Inventory	\$211,044	\$119,650	\$330,694
Advances to Suppliers		\$50,500	\$50,500
<b>Total Working Capital</b>	<b>\$242,713</b>	<b>\$205,714</b>	<b>\$448,427</b>
<b>Initial Start up Expenses</b>	<b>\$15,768</b>	<b>\$48,640</b>	<b>\$64,408</b>
<b>Total Investment</b>	<b>\$258,481</b>	<b>\$254,354</b>	<b>\$512,835</b>
Add: Loans Returned			
JHM Management	\$100,000		\$100,000
Hasmukh Patel	\$40,000		\$40,000
<b>Total Loans Returned</b>	<b>\$140,000</b>		<b>\$140,000</b>

Total Investment	\$398,481	\$254,354	\$652,835
------------------	-----------	-----------	-----------

These numbers are not persuasive. Cash in the bank could result from numerous sources, especially as of December 31, 1998. Profits earned since the petitioner invested his own money cannot be considered part of the petitioner's personal investment. Similarly, inventory purchased and advances to suppliers after the company became operational are normal operating costs paid from prior proceeds. The petitioner cannot include all of the inventory purchased and advances to suppliers up until December 31, 1998 as his personal investment. We must examine the documentation submitted to determine whether the petitioner has established a qualifying investment.

Throughout the proceedings, the petitioner has submitted the following documentation of funds contributed to the stores:

1. Checks issued by the petitioner on his CoreStates Bank account as follows: to [REDACTED] dated February 2, 1998 for \$68,000; to U.S. [REDACTED] dated June 11, 1997 and June 16, 1997 for \$45,000 and \$57,000; to Dollar Center dated January 2, 1998, for \$45,000; to Coopersmith and Coopersmith, as Attorneys dated July 1, 1997 for \$10,000 and \$30,000; and to Portrem dated November 26, 1997 for \$6,000 and \$18,000. The checks to Coopersmith and Coopersmith and Portrem purportedly represent advance rent and security deposits for the Dollar Mine and Dollar Center store locations.
2. A check issued by the petitioner on his Staten Island Savings Bank account to [REDACTED] dated January 2, 1998 for \$12,000.
3. A check issued by JHM Management to [REDACTED] July 10, 1997 for \$150,000.
4. A check issued by Hasmukhbhai P. Patel to [REDACTED] on July 15, 1997 for \$50,000.
5. A check issued by Arvind and Madhukanta Patel to [REDACTED] dated November 28, 1997, for \$50,000. The memo notation for this check is "inv and loan."

The petitioner also submitted an official check remitted by the petitioner and issued by [REDACTED] [REDACTED] July 17, 1999 for \$140,000. The money, however, was used to repay loans already claimed by the petitioner to be part of his investment. As such, the \$140,000 cannot be considered above and beyond the funds allegedly loaned to him for his investment.

The director concluded that the bank statement for [REDACTED] did not match the checks allegedly deposited in that account. The bank statement reflects a deposit of \$200,000 on July 14, 1997 and no additional deposits for the month of July. While this deposit could account for the \$150,000 check from [REDACTED] and the \$50,000 from [REDACTED] Patel, the check from [REDACTED] Patel is dated July 15, 1997, a day after the deposit. The \$80,000 deposit on January 2, 1998, not discussed by the director, could account for the \$12,000 and \$68,000 checks issued by the petitioner on that date.

Similarly, the \$50,000 deposit into Dollar Center's account on December 3, 1998 can account for the November 28, 1997 check from Arvind and Madhukanta Patel. More problematic, however, the bank statement for Dollar Center reflects a deposit of \$45,000 on December 1, 1997, whereas the petitioner's check for \$45,000 is dated January 2, 1998. The petitioner's personal bank statement reflects that the check, number 175, was paid January 5, 1998, over a month after it was allegedly deposited with Dollar Center. On appeal, the petitioner resolves this date discrepancy, submitting the January bank statement for Dollar Center reflecting a deposit of \$45,000 on January 2, 1998. The source of the \$45,000 deposited on December 1, 1997, however, is still unresolved.

As evidence that the above funds were used for business expenses, the petitioner submitted numerous invoices and several summaries of expenses. Specifically, initially the petitioner submitted the following summaries: \$15,767 in expenses plus \$40,000 "advance rent" for Dollar Mine between July 30, 1997 and August 20, 1997; \$163,595 in inventory for Dollar Mine between July 30, 1997 and August 26, 1997; \$48,640 in expenses (including rent and security deposit) plus an additional \$17,902 in expenses for Dollar Center during December 1997 and January 1998; \$87,919 in expenses for Dollar Center during December 1997; and \$76,878 in inventory for Dollar Center during December 1998. In the director's notice of intent to revoke, the director adjusted these amounts downward due to the fact that some represented normal operating expenses after the business was operational and other amounts were not supported by underlying invoices. In response to the director's concerns, the petitioner submitted voluminous stacks of invoices. The director did not address this issue in his final decision.

While most of the invoices are [REDACTED] some of the invoices are for the 99 Cent Dream Store in Irvington, New Jersey; [REDACTED] Staten Island, New York; Dollar Star in Elizabeth, New Jersey; and 99 Cent Dream in East Orange, New Jersey. The record does not establish that these stores are part of the new commercial enterprise. Moreover, the invoices are nearly all for dates after the businesses were operational and, thus, only represent normal operating expenses paid for by prior proceeds. As such, this large stack of documentation would only be relevant if the director had questioned the existence of an operational business, which he did not. Therefore, this documentation is simply not relevant.

Furthermore, several of the invoices indicating that merchandise was to be shipped to [REDACTED] reflect that the purchaser was another corporation [REDACTED] and [REDACTED] Pop [REDACTED]. Any payment of start up costs by other, related stores cannot be considered an investment by the petitioner.

#### Funds Contributed to the Enterprise

The record establishes that the petitioner has transferred only \$80,000 to [REDACTED] [REDACTED] for merchandise for [REDACTED] and \$45,000 to Dollar Center, Inc. The petitioner also paid Coopersmith and Coopersmith \$40,000, allegedly in satisfaction of advance rent and a security deposit for Dollar Mine, and \$24,000 to Portrem for advance rent and a security deposit for Dollar Center. The record shows JHM Management transferred an additional \$100,000 [REDACTED] Hasmukhbhai Patel transferred an additional \$50,000 to Dollar

[REDACTED] and Arvind and Madhukanta Patel transferred an additional \$50,000 to [REDACTED]. These funds total \$491,000.

While the lease for the Dollar Center location is between Dollar Center and Portrem, the (unsigned) lease for the Dollar Mine location makes no mention of Coopersmith and Coopersmith. As such, the record does not established that the money paid to these attorneys represents the payment of advance rent and a security deposit. Thus, the \$40,000 cannot be considered part of the petitioner's investment.

The petitioner initially claimed to have borrowed \$100,000 from JHM Management and \$50,000 from [REDACTED]. The petitioner provided no explanation for the funds provided by [REDACTED]. The director noted in his notice of intent to revoke that the petitioner had not provided loan agreements for the purported loans. In response, the petitioner submitted evidence that he had transferred \$140,000 to Dollar Mine which had used the funds to repay the "loans." The director noted in his final decision that the record still did not contain any loan agreements. On appeal, the petitioner submitted three promissory notes. The note whereby the petitioner promises to pay JHM Management \$150,000 is dated July 10, 1997, the note whereby the petitioner promises to pay Hasmukhbhai Patel \$50,000 is dated July 15, 1997, and the note whereby the petitioner promises to pay Arvind Patel \$50,000 is dated November 28, 1997. All three loans require monthly payments beginning as of the date of the note and accrue interest at a rate of 12 percent. As such, at the time that Dollar Mine repaid the loans to JHM Management and [REDACTED] two years after he signed the promissory notes, he was already in default. Moreover, the money alleged to be repayment of the loan did not include any interest. Further, the record does not reflect that the petitioner has repaid any of the funds he allegedly borrowed from [REDACTED]. Finally, none of the loans are expressly secured by the petitioner's personal assets as required by the regulations. 8 C.F.R. 204.6(e)(definition of capital); Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998).

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7. At the time of filing, the petitioner had not established that the borrowed funds were secured by his own personal assets. In light of the above, the \$200,000 borrowed funds cannot be considered part of the petitioner's investment.

In light of the above, the record does not establish that the petitioner has contributed more than \$251,000 towards the new commercial enterprise.

#### Invested Capital Versus Debt Arrangements

While we agree with the director that the petitioner has not contributed the required \$500,000, we disagree with the implication that the petitioner need only show \$500,000 coming into the business and \$500,000 of start up costs. An individual starting a business may obtain capital from many

sources, not all of which constitute his personal investment. In addition, a business owner may transfer personal funds to his business without "investing" those funds as defined by the regulations. Likewise, some legitimate capital investments may fund expenditures other than start up costs, although the director was correct not to consider any normal operating costs paid from the corporate earnings.

The 1998 tax returns show shareholder loans of \$41,427 (some of which were repaid during the year) for [REDACTED] and \$70,024 for Dollar Center, Inc. As the petitioner claims to be the sole shareholder, the tax returns reveal that \$111,451<sup>1</sup> of the funds transferred by the petitioner to the businesses are merely loans to the new commercial enterprise. As quoted above, 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(e)(definition of invest). See Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 6.

In addition, while the agreement by which the petitioner allegedly sold his shares in Dollar Center, Inc. to [REDACTED] values the shares at \$500 per share, the tax returns, schedules L, indicate [REDACTED] only had \$50,000 of stock and [REDACTED] only had \$50,000 of stock. Neither tax return reflects any additional paid-in-capital. Therefore, the tax returns reflect no more than a \$100,000 capital investment by the petitioner.

#### Reinvestment of Proceeds

By submitting so many invoices, counsel seems to want the Service to consider the petitioner's reinvestment of proceeds as part of his investment. In order for proceeds to be considered an investment by the petitioner, it is necessary that the petitioner be able to show that the proceeds were allocated to him, taxed, and then reinvested. 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, Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); Matter of Izumii, *supra*, 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.

For all the reasons discussed above, the petitioner has not established an investment of \$500,000.

#### SOURCE OF FUNDS

---

<sup>1</sup> [REDACTED] repaid \$24,176 of the loan during 1998, the company's repayment of borrowed funds does not allow the petitioner to count those funds as "invested." As discussed in the body of this decision, the amount of capital stock or paid-in-capital did not increase while Dollar Mine was repaying the petitioner.

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, *supra*, at 6; Matter of Izumii, *supra*, 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. Matter of Izumii, *supra*, at 26. 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).

The petitioner did not initially support his petition with any evidence of the source of his funds other than bank credit receipts reflecting that the petitioner received from [REDACTED] May 30, 1997, \$75,000 on June 12, 1997, \$50,000 on June 18, 1997, and \$50,000 on July 14, 1997. The petitioner also submitted evidence that he received \$104,982 from an unknown source in the United Arab Emirates on December 19, 1997.

In response to the director’s notice of intent to revoke, the petitioner stated, without explanation, “I have obtained the entire money used for the investment by lawful means,” and submitted his 1998 tax returns documenting an income of \$171,017.

The director concluded that the petitioner had not demonstrated the source of the money transferred from overseas, noting that the notations on the receipts reflected that the funds were repayment of a loan, and that the individual who appeared to be sending the money, Iqbal Patel, was also seeking benefits under the entrepreneur program based on an investment in two dollar stores.

On appeal, the petitioner submitted the passport of [REDACTED] and his affidavit declaring that he had never been in the United States and had never filed a Form I-526. The petitioner also submitted an "agreement to sell" whereby the petitioner agreed to sell a plot in the Pakistani Defence Officers Housing Authority in [REDACTED] for 14,000,000 Rupees, or \$322,000 to be paid on or before "the end of December, 1997." Further, the petitioner submitted a letter from the [REDACTED] firming that [REDACTED] transferred \$45,000 to the petitioner on May 30, 1997, \$75,000 to the petitioner on December 6, 1997, \$50,000 to the petitioner on June 18, 1997, and \$50,000 to the petitioner on July 14, 1997. Finally, the petitioner submitted a receipt from A.R.Y. International Exchange in the United Arab Emirates affirming the transfer of \$105,000 from the originator "Imran" to the petitioner on December 18, 1997. The receipt indicates that it was prepared on September 20, 1999 at the request of Mohammed Iqbal Patel.

The new documentation fails to overcome all of the director's concerns. As stated above, the inconsistencies regarding the agreement whereby the petitioner allegedly sold his shares in Dollar Center to Dollar Mine reduces the petitioner's overall credibility. As such and in light of the fact that the petitioner never previously claimed to have obtained his investment funds through the sale of property, the "agreement to sell" is insufficient by itself. The record contains no official documentation confirming that the petitioner owned this particular plot of land. Moreover, as noted by the director, the notations on the fund transfers indicated that the money was in repayment of a loan. Even assuming the petitioner's funds derived from the sale of property, the petitioner has not demonstrated how he accumulated the funds to purchase the property initially.

Finally, on appeal the petitioner submits a letter from his accountant [REDACTED] asserting that the petitioner accumulated \$176,487 during 1996 through 1998. [REDACTED] the petitioner's income, taxes, expenses, and concludes that the petitioner's "net surplus available for investment" in 1996 was \$24,253 of his \$52,253 income, in 1997 was \$49,097 of his \$94,297 income, and in 1998 was \$103,137 of his \$171,017 income. The petitioner submits his income taxes for those years in support of [REDACTED] assertions. [REDACTED] claims of such minimal expenses for a family of five (six in 1998) are unsubstantiated. As such, the petitioner has not established the source of the \$104,000 transferred to Dollar Mine, Inc. in 1999.

### **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.

On the petition, the petitioner claimed that the new commercial enterprise already employed 16 employees and would employ an additional two. The petitioner indicated in his attached letter that Dollar Mine and Dollar Center employed 15 cashiers, floor assistants, and security persons (\$9,555 to \$12,000) and one manager (\$12,000 plus incentives). The petitioner submitted two

letters from [REDACTED] asserting that Dollar Mine employed seven employees and one asserting that Dollar Center employed nine employees. The petitioner failed to provide Forms I-9 for these employees, quarterly wage and withholding reports, or payroll records. As such, the petitioner did not provide evidence to support [REDACTED] claims. Moreover, the credibility of these lists is suspect since several of the invoices are addressed to [REDACTED] and [REDACTED] who do not appear on either list. Finally, 15 employees paid the minimal salary claimed by the petitioner, \$9,555, plus one manager at \$12,000, equals total wages of \$155,325. The salaries listed on the 1998 tax returns for Dollar Mine and Dollar Center combined are \$147,963. Moreover, as the tax returns do not reflect any officer compensation, these amounts include any compensation paid to the petitioner.

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's business plan merely states that the petitioner intends to hire additional employees, but fails to provide a hiring schedule.

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.