

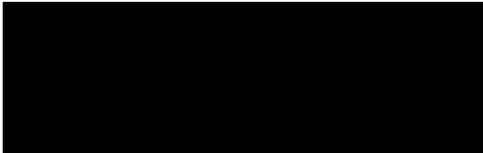


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-00-129-53962 Office: California Service Center

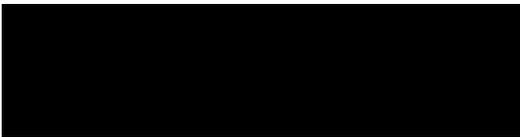
Date: MAY 13 2002

IN RE: Petitioner:



Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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 the lawful source of the invested funds.

On appeal, the petitioner submits tax documentation, bank statements, and her own affidavit.

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, Sunny Orchard, Inc., located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000.

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).

Initially, the petitioner submitted an affidavit from the president of [REDACTED] affirming the petitioner's employment there as a purchasing department manager since June 1, 1993. The petitioner further submitted an appraisal of property owned by her valued at US\$535,856 on October 7, 1998. The appraisal indicates that the property was not mortgaged, but fails to indicate when the property was purchased or that the petitioner subsequently sold the property, let alone for the appraised amount. The petitioner also submitted foreign bank statements reflecting a balance of NT\$10,000,000 as of August 15, 1999 in account number 013-010-8001110-9 at Grand Commercial Bank and a balance of US\$621,890 as of August 17, 1999 in account number 08062808668 at the Taiwan Business Bank. The petitioner further submitted evidence of a checking account at [REDACTED] with a balance of US\$73,811.12 and six deposit accounts at that bank with a total balance of \$588,647 as of March 1, 1999. The accounts at [REDACTED] were all opened between March 1996 and April 1998. Finally, the petitioner submitted a wire receipt reflecting that on January 27, 1999, the petitioner wired \$359,985 from her account at the Taiwan Business Bank to [REDACTED]. Two additional wire receipts reflect that, on the same date, the petitioner also wired \$139,985 and \$28,335 to [REDACTED] however, these receipts do not reflect the originating bank.

On August 15, 2000, the director requested additional evidence of the lawful source of the petitioner's funds. In response to this request, the petitioner claimed that the source of the investment was the sale of property. The petitioner resubmitted the previously submitted documentation.

The director concluded that the petitioner had not established that she had sold the property or where she obtained the money to purchase the property in the first place. On appeal, the petitioner asserts that the investment funds were actually obtained through savings. She submitted a statement of her and her husband's income from 1991 through 2000, an average of US\$117,897 annually, and her alleged expenses, US\$18,462 annually, asserting that remaining US\$84,835 per year was placed in savings, adding up to US\$509,012 by 2000. The petitioner also submits tax documentation for 1995 through 2000 confirming her income and bank statements (passbooks).

The petitioner's claim on appeal completely contradicts her earlier claim that she obtained her investment funds through the sale of property. That initial claim remains unsupported as the petitioner has not submitted any evidence that she ever sold the appraised property. Moreover, the claim that the petitioner's expenses were only 16 percent of her income is highly questionable without further evidence reflecting the cost of living in Taiwan. Further, such low expenses cannot account for the petitioner's ownership of property worth US\$535,856 mortgage free. Finally, the claim that the petitioner spent only US\$84,835 per year (NT\$600,002) is completely contradicted by the passbooks submitted which show that in 1995, the petitioner withdrew NT\$53,660,227 (US\$1,651,084) from her account at Taipei Bank, account number 540221003262. The record does not establish how those funds were used. That same year, the petitioner deposited NT\$43,325,784 (US\$1,333,101) into the same account, far more than the US\$117,897 she claims to have earned that year. The record does not establish the source of these funds.

In light of the above, the petitioner's claim on appeal to have earned \$117,897 annually between 1991 and 2000 and to have placed \$84,835 per year into savings is not only contrary to the petitioner's original claim to have obtained her investment funds through the sale of property, it is not supported by the remaining evidence submitted on appeal. As such, the petitioner has not established the lawful source of her funds.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Beyond the director's decision, 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 petitioner incorporated the alleged new commercial enterprise [REDACTED] and is the Chief Executive Officer and President.

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.

The petitioner indicated on the Form I-526 that she had established a new commercial enterprise through the creation of an original business. The record reflects that on January 1999, [REDACTED] purchased farmland from [REDACTED]. The original business plan indicates that this land included 73 acres and 13,000 plum trees. A subsequent business plan reflects that 40 acres of the land was already dedicated to yellow peaches and nectarines at the time of purchase. In light of this information, it appears that the petitioner purchased an operating farm. As such, the petitioner simply purchased an existing business and cannot be considered to have created an original business. It remains, then, to determine whether the petitioner has expanded or restructured an existing business.

The record contains no evidence regarding the net worth or number of employees¹ of the farm prior to the purchase by [REDACTED] and at the time of filing. Without such information, the petitioner cannot establish that, by the time of filing, she had increased the net worth or number of employees by 40 percent. Thus, the petitioner has not established that she has expanded an existing business.

The business plan indicates that the petitioner also leased an additional 10 acres of apple orchards, eliminated two species of plums, switched from yellow peaches and nectarines to white peaches, and built a packing house. With regard to the change in types of fruit trees, the nature

¹ In addition, without the number of employees prior to the petitioner's purchase of the farm, the petitioner cannot establish that her business plan calls for the creation of 10 new jobs on the farm.

of the business remained a fruit farming business. These changes cannot be considered to reflect a restructuring such that a new commercial enterprise resulted.

With regard to the packing house, the addition of previously contracted services must be evaluated on a case-by-case basis as to whether the additional services reflects a restructuring such that a new commercial enterprise resulted. Moreover, the law states that a petitioner must be coming to the United States to engage in the management of a new commercial enterprise which she has established. As such, the establishment of the business must be complete as of the date of filing. Where a petitioner claims to have established a new commercial enterprise by restructuring an existing business, the petitioner must demonstrate that the restructuring was complete as of the date of filing, in this case, March 27, 2000. With the initial petition, the petitioner submitted a cash disbursement list for February 5, 1999 through December 6, 1999. This list does not contain any funding for a packing house.² The record also includes several invoices, none of which relate to the building of a packing house. The photo of the new packing house was taken on September 22, 2000. A photo taken six months after the petition was filed cannot establish that the packing house is on the petitioner's farm or when it was built, specifically that it was built after the petitioner purchased the farm, and prior to the date of filing.

As the petitioner has not established that she had expanded the services of the farm to include a packing house as of the date of filing, we need not decide whether such new services could constitute a restructuring such that a new commercial enterprise resulted. In light of the above, the petitioner has not demonstrated that she has established a new commercial enterprise.

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.

² The list does, however, include \$91,780 for a "country house (5 times paid)." Any funds used to build a residence for the petitioner cannot be considered towards her investment.