



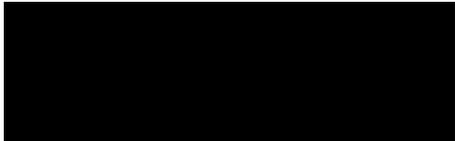
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U.S. Department of Justice

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-00-105-50880

Office: California Service Center

Date: 20 MAY 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 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 J. 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 her funds. The director further noted that the record suggested that the petitioner was not the sole owner of the new commercial enterprise as claimed, concluding that the petitioner had not established whether there were multiple foreign investors relying on the same job creation as the petitioner.

On appeal, counsel argues that the petitioner's funds were lawfully obtained and that she is the sole owner of the new commercial enterprise.

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, JLA Home, 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.

OWNERSHIP AND ESTABLISHMENT OF THE NEWCOMMERCIAL ENTERPRISE

On the Form I-526, the petitioner indicated that she was the sole owner of the new commercial enterprise. The director noted that the Payment Agreement reflecting the petitioner's purchase of 800 shares for \$1,000,000 indicates that the petitioner was purchasing 53.33 percent of all "outstanding shares." The director further noted that JLA Home's 1999 tax return listed four officers other than the petitioner, each of which owned 12.5 percent of the company's shares. The director expressed concern that the petitioner had not established whether any of these other shareholders were also seeking benefits under this section of law, which would require the

creation of more than 10 jobs for each investor in order for each investor to be eligible. See 8 C.F.R. 204.6(g)(2).

On appeal, counsel asserts that the other officers are employed under contracts which allow for stock incentives and that the accountant who prepared the tax return was under the impression that those officers had already obtained such incentives, although they had not. The petitioner submits the employment contract for [REDACTED] as of August 24, 2000, affidavits from the other four officers including [REDACTED] denying any current or former ownership in the company, and evidence that the other four officers are U.S. citizens or lawful permanent residents. It is noted that JLA Home invoices reference Mr. [REDACTED] since at least 1999.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has established that the other officers all have citizenship or lawful permanent resident status, thus overcoming the director's concern regarding multiple investors relying on the same employment creation.

The new documentation, however, when considered with the previous inconsistencies regarding ownership, raises concerns as to whether the petitioner established 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 [REDACTED] Inc., which the petitioner incorporated on September 30, 1998.

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's explanation that the accountant completing the tax returns was confused does not fully resolve why the payment schedule for the petitioner's purchase of shares in [REDACTED] Inc. reflected additional outstanding shares. The new documentation on appeal reveals that [REDACTED] Inc. and [REDACTED] Industries, the ultimate source of [REDACTED] capital, shared a common address and phone number for over one year.¹ As discussed below, the petitioner has not established that [REDACTED] Industries reflected its payments to the petitioner as a commission on its own tax return. [REDACTED] Inc. and [REDACTED] Industries are involved in the same type of business. Despite the director's specific request for evidence regarding all of [REDACTED] offices, the petitioner did not provide a lease or deed for the offices in New York and Arkansas. Given the documented relationship of money, business type and location between [REDACTED] Industries and [REDACTED] Inc., it is not unreasonable to question whether these two companies are entirely separate. If [REDACTED] is simply a successor, expansion or subsidiary of [REDACTED] Industries, the petitioner cannot be considered to have created an original business. Even if the petitioner established that the invested funds were her own, without documentation of the net worth or employment at [REDACTED] Industries prior to the investment, the petitioner cannot establish that she expanded either by 40 percent. Finally, as [REDACTED] performs the exact same type of services as [REDACTED] Industries, the petitioner cannot establish that she restructured or reorganized [REDACTED] Industries such that a new business resulted.

In light of the above, the petitioner has not resolved the inconsistencies in the record regarding the ownership of JLA Home and its relationship to [REDACTED] Industries. As such, the petitioner has not demonstrated that she established a new commercial enterprise.

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:

¹ On appeal, the petitioner submitted invoices for [REDACTED] Industries, Inc. which list the same address and phone number as the invoices submitted for [REDACTED] Home, Inc. previously, although the petitioner listed a different phone number for [REDACTED] Home, Inc. on the Form I-526 petition.

- (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).

The petitioner claims to have obtained the funds invested in [REDACTED] as a commission from E-Sheer Industries, Inc., a U.S. corporation. The petitioner initially submitted numerous checks issued to her personally by [REDACTED] Industries and personal bank statements reflecting that these checks were deposited in her personal account totaling \$887,014.83. The petitioner also submitted two checks from an unknown source for \$79,041.78 and \$94,530.74. These funds were all deposited in the petitioner's Schwab account, although the petitioner paid \$320,000 of her investment from her Merrill Lynch account.

On August 14, 2000, the director requested additional evidence regarding the lawful source of the petitioner's funds. In response, the petitioner submitted tax returns for her Chinese Company, [REDACTED] Clothing [REDACTED] Company, Ltd. In her final decision, the director concluded that the petitioner had not established that the taxes [REDACTED] Clothing [REDACTED] Ltd. paid included taxes on the petitioner's personal commission. The director also

questioned the credibility of a \$1,000,000 commission from [REDACTED] Industries without evidence that that company included the commission on its own tax returns.²

On appeal, the petitioner submits the registration certificate for her Chinese company and resubmits that company's Chinese tax returns. Counsel argues that China does not require additional income taxes from individuals and submits a certificate from the [REDACTED] District Local Tax Bureau, Hangzhou City as verification. Finally, the petitioner submits a letter from Edmund Jin, president of [REDACTED] Industries, Inc. confirming that he paid her a five to eight percent commission for textile imports due to the difficulty in importing goods from China; two letters from [REDACTED] Industries' clients, Fredericks of Hollywood and Warner Brothers, confirming that they do business with [REDACTED] Industries; copies of numerous checks issued to the petitioner; and invoices regarding some of the transactions resulting in the petitioner's commissions.

The record still does not establish that the taxes paid by [REDACTED] Clothing [REDACTED] include the petitioner's commissions. The checks reflect that in May 1998, [REDACTED] Industries, Inc. paid the petitioner \$256,450, or approximately RMB 2,128,535. Yet [REDACTED] Clothing [REDACTED] paid only RMB 219,000 in taxes for that month, reflecting at most a 10 percent tax rate assuming the company had no other income that month. Similarly, in June 1998, [REDACTED] Industries paid the petitioner \$238,800, or approximately RMB 1,982,040, but [REDACTED] Clothing [REDACTED] paid only RMB 209,000 in taxes for that month. The petitioner has not established that China's income tax rate is only 10 percent and that [REDACTED] had no other income in those months. Moreover, the money was paid directly to the petitioner. As such, it is not clear why it would be listed on [REDACTED] return as the company's income.

The record also contains some discrepancies regarding the nature of the transaction between [REDACTED] Industries and the petitioner. For example, check 146 issued by [REDACTED] Industries on June 28, 1999 and check 147 issued June 30, 1999 both indicate "loan" in the memo section. Check 145 issued June 21, 1999 indicates "interest" in the memo section. These notations do not conform with the petitioner's characterization of the transaction as a commission payment. Further, as discussed above, the new commercial enterprise [REDACTED] Inc., and [REDACTED] Industries shared an address and phone number for over a year. They engage in the same business, importing textiles. Given this close relationship between the new commercial enterprise and the business which, ultimately, was the source of the new commercial enterprise's initial funding, it is reasonable that the director noted the lack of [REDACTED] Industries' tax return as evidence of how the payments to the petitioner were reflected in that company's accounting.³ The petitioner does not provide [REDACTED] Industries' certified tax return for 1998 on appeal.

² In order for the petitioner to receive a five to eight percent commission of \$1,000,000 as claimed, E-Sheer Industries would have to demonstrate at least \$12,500,000 in gross receipts on its own income tax returns.

³ 8 C.F.R. 204.6(j) provides that the Service may require additional documentation beyond what is specified in the regulations.

In light of the above, the petitioner has not overcome the director's concerns regarding the lawful source of her investment funds.

CAPITAL AT RISK

Beyond the decision of the director, 8 C.F.R. 204.6(e) states, in pertinent part:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

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)(2) states:

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.

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 herself 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, she must establish that she placed her 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), states:

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.

It is acknowledged that, unlike the petitioner in Matter of Ho, this petitioner has an operating business. Regardless, the case stands for the proposition that all the funds must be at risk.

While the petitioner deposited \$967,000 into two bank accounts of [REDACTED] the record is absent sufficient evidence that an import company which does not manufacture anything requires that amount of capitalization. The new commercial enterprise was incorporated August 25, 1998 and by the end of the year had already earned \$351,706 in gross receipts. The 1998 tax return reflects that at the end of that year, the company had \$50,000 in stock, \$51,307 in cash, \$25,958 in inventory, and \$45,244 in buildings or other depreciable assets (all office equipment). The company claimed only \$309,518 in deductions in 1998, including employee wages and benefits, rent, repairs, taxes and licenses. By the end of 1999, [REDACTED] had \$1,000,000 in stock,

\$564,695 in cash, \$282,492 in inventory, and \$70,445 in buildings and other depreciable assets. While the company paid \$419,431 in wages, the company had \$1,429,980 in gross receipts. According to Schedule M-1, the company showed a \$75,982 profit in 1999. These numbers simply do not reflect \$1,000,000 in start-up costs. The costs for 1998 were only \$380,720 (\$309,518 in employee benefits, rent, repair, taxes and licenses, plus \$25,958 for inventory and \$45,244 for office equipment.) By 1999, the business was operational and paying its costs out of its earnings.

In addition, on the Form I-526, the petitioner listed the address of the new commercial enterprise as [REDACTED] Union City, California and the phone number as [REDACTED]. The invoices contain the same address, but list the company's phone number as [REDACTED]. On appeal, the petitioner submits several invoices for [REDACTED] Industries, Inc. These invoices list the [REDACTED] address and the [REDACTED] phone number. That [REDACTED] Inc. and E-Sheer Industries, Inc. initially shared the same address and phone number suggests that JLA Home did not require significant start-up costs since it was utilizing the space and utilities of the company which, ultimately, was the source of its capital.

In response to the director's request for additional documentation, including leases, the petitioner submitted a sublease agreement whereby the new commercial enterprise subleased office and storage space at [REDACTED] in Hayward, California as of February 11, 2000. On appeal, the petitioner submitted a sublease for office and storage space at [REDACTED] Boulevard in Hayward effective December 21, 2000. [REDACTED] Inc. claims that the company "is working with two logistical warehouses in Southern California," and is completing its own warehouse on Baumberg Avenue in Hayward to assume those services. The record contains no evidence of a build-to-suit agreement for the construction of a warehouse on [REDACTED]. Finally, while documentation in the record references a Brooklyn, New York address and an Arkansas address, the record does not contain a lease for office space in either location. Regardless, the petitioner has not established that this growth, which took place over a year after [REDACTED] was established, was financed with the petitioner's capital as opposed to J [REDACTED] revenues.

In light of the above, the petitioner has not satisfactorily established that the full \$1,000,000 was at risk at the time of filing. A petitioner cannot turn a small business investment into a qualifying investment simply by grossly overcapitalizing the business. While business reserve accounts are reasonable in some cases, where well over half of the "investment" is not used for start-up costs or other capital expenses to which the petitioner was committed at the time of filing, those funds cannot be considered 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.