



BY

U.S. Department of Justice
Immigration and Naturalization Service

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



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

File: [Redacted] Office: Texas Service Center

Date:

IN RE: Petitioner: [Redacted]

Nov 10 2011

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: SELF-REPRESENTED

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, Texas 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 petitioner had made the qualifying investment of lawfully obtained funds in a new commercial enterprise. The director also questioned whether the petitioner would create the necessary full-time jobs.

On appeal, the petitioner asserts that he is leasing a store that was vacant for two years and submits balance sheets in Spanish for his Panamanian company, previously submitted documentation, and invoices.

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, IGG & VI, Inc. doing business as Roger's Market, allegedly 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 claimed to be \$500,000.

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 made an initial investment of \$200,000 on August 16, 2001 and had made a total investment of \$250,000. The petitioner submitted IGG & VI, Inc. stock certificate number nine issued to the petitioner. While the certificate indicates the shares

have a par value of \$1, the space left for the number of shares is completed with the company's name instead. The petitioner also submitted rent receipts for \$55,000 and company invoices.

In his request for additional documentation, the director advised the petitioner that the record did not contain any evidence of his alleged investment. The director further advised the petitioner that \$250,000 was well below the minimum investment amount. In response, the petitioner stated that he has and is "actively in the process of investing the required amount of capital." Later, however, the petitioner stated that he invested \$88,700. The petitioner submitted IGG & VI, Inc. stock certificate number two issued to the petitioner. This certificate also fails to indicate the number of shares issued to the petitioner. In addition, the petitioner submitted a business plan and company bank statements. The business plan indicates that the operating costs for 2001 would be \$20,945 plus an additional \$15,100 in "cost of sales." The business plan also includes a "break down of operating expenses statement for 2002." While these costs are allegedly for 2002, they appear to cover some startup expenses for the company, including the deposit for the lease, machinery and butcher equipment, freezers and refrigerators, building preparation for opening, and the bank deposit to open a business account. These expenses amount to \$88,700. The petitioner also resubmitted the lease with an adhesive note advising that the aggregate rent for the entire lease through 2006 amounted to \$360,000. Finally, the petitioner submitted the company's Form 1120S tax return. Schedule L, however, which would reflect the amount of capital invested into the business on lines 22 and 23, is entirely blank.

The director concluded that the petitioner had not demonstrated an "active investment of capital." On appeal, the petitioner asserts that he is actively investing into the business and submits additional invoices and receipts.

The invoices and receipts demonstrate that Roger's Market is operating and purchasing inventory and other business items. These documents, however, do not demonstrate where Roger's Market obtained the funds in the first place. There are many sources of money for a business, such as loans and revenues. It remains, the petitioner has not submitted any evidence, such as wire transfer receipts or cancelled checks, reflecting that he is the source of the money being spent by the business.

As stated above, the stock certificates do not reflect the number of shares issued to the petitioner and Schedule L of the company's tax return is blank. Thus, even if the petitioner had demonstrated that he transferred money to the company's account, he has not demonstrated that that money was all contributed as capital, as opposed to being loaned to the company.

Finally, the claimed start up expenses for the business appear to be well under even the \$250,000 that the petitioner initially claimed to have invested. The costs for 2001 and 2002 amounted to only \$124,745, and some of those expenses are normal operating expenses paid out of revenues. Once the business is operational, normal operating expenses, such as utilities, rent, and inventory, are paid from revenues, and cannot be considered part of the petitioner's capital investment. As such, even if the petitioner had demonstrated that he had transferred the full investment amount to the business, all of that money would not be sufficiently at risk. Moreover, the business plan does not project any additional capital expenditures beyond normal

operating expenses. Thus, the petitioner's assertion that he continues to be actively investing is suspect. Regardless, as stated in 8 C.F.R. 204.6(j)(2), the petitioner must have committed the full investment amount and placed those funds at risk. Evidence of a mere intent to invest is insufficient. The record is absent evidence of additional funds that are irrevocably committed to the business, such as a secured promissory note or an irrevocable escrow account. In fact, the record contains no evidence of liquid assets belonging to the petitioner. That the lease will eventually amount to \$360,000 by 2006 is not helpful. As stated above, lease payments are normal operating expenses paid from revenues.

Moreover, while the director did not contest the petitioner's claim to have invested in a targeted employment area, the record reflects that the petitioner did not do so. 8 C.F.R. 204.6(e) states, in pertinent part, that:

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6)(ii) states that to demonstrate that the petitioner has or will create employment in a high unemployment targeted employment area, he must submit:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. Matter of Soffici, 22 I&N 158, 159 (Comm. 1998) cited with approval in *Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

Roger's Market is located in Tampa, Florida. The petitioner submitted unemployment statistics for the Tampa - St. Petersburg - Clearwater metropolitan area. These statistics cover August 2001, when the petitioner allegedly made his investment, and October 2001, when the petitioner filed his petition. Tampa had an unemployment rate of 3.4 percent in August 2001 and 3.9 percent in October 1991. The petitioner, however, failed to provide the national rate for those

months. As such, he has not established that the unemployment rate in Tampa was 150 percent of the national rate when he invested and when he filed the petition.¹

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, 22 I&N 201, 210-211 (Comm. 1998); Matter of Izummi, 22 I&N 169, 195 (Comm. 1998). 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).

¹ We have independently obtained the national unemployment rates for August and October 2001 from the Bureau of Labor Statistics website. That data reveals that the national unemployment rate was 4.9 percent in August 1991 and 5.4 percent in October 1991. As such, the unemployment rate in Tampa was actually below the national unemployment rate. Thus, Tampa was not a targeted employment area at the time of investment or at the time of filing.

Initially, the petitioner submitted no evidence regarding this issue. In response to the director's request for additional documentation, the petitioner submitted a real estate purchase agreement reflecting that he sold property for 500,000,000 Colombian pesos (approximately \$320,924) on June 15, 2001.

The director determined that the petitioner had not submitted evidence of his occupation that could account for the accumulation of significant investment funds. On appeal, the petitioner submitted an unaudited balance sheet in Spanish for a business he allegedly owns in Panama. The petitioner did not provide a certified translation as required by 8 C.F.R. 103.2(b)(3), although the balance sheet appears to reflect capital of over \$700,000. (Several of the digits in the number are illegible.)

A balance sheet is not a foreign business registration as set forth by 8 C.F.R. 204.6(j)(3)(i). This provision is applicable where the petitioner's income results from an interest in a foreign business. In addition, the petitioner has not submitted any tax returns for himself or his foreign business as set forth by 8 C.F.R. 204.6(j)(3)(ii). This provision is applicable where a petitioner's investment funds originate from income reportable on a tax return.

Moreover, as stated above, Matter of Izummi, *supra*, at 195, provides that a petitioner must be able to demonstrate the path of his funds. As the record contains no transactional evidence documenting the transfer of money from the petitioner to the business, he cannot establish the source of the money in the company's account.

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).

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

8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

² Whether or not the petitioner purchased an existing business is also relevant to whether the petitioner established a new commercial enterprise pursuant to 8 C.F.R. 204.6(h). Regardless, for the reasons discussed in the body of this decision, the petitioner failed to demonstrate a qualifying investment of lawfully obtained funds or that he would create the requisite employment. As such, we need not decide whether he established a new commercial enterprise.

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.

Id. at 213.

On the petition, the petitioner indicated that there were no employees when he made his investment and that the business had already created 12 jobs and would create another three. The petitioner did not provide any evidence of having 12 employees and did not submit a business plan. In response to the director's request for additional documentation, the petitioner submitted a business plan which indicates that the business had created only two jobs, a deli associate and a stocker, that it would have ten employees by December 2002 and four more by June 2003 for a total of 10. The business plan does not provide job descriptions for the jobs not yet created. The petitioner also submitted two Forms I-9 for his wife's parents.

The director concluded that the petitioner had purchased an existing store and had not demonstrated how many employees worked there prior to the petitioner's alleged investment. On appeal, the petitioner asserts that the store was vacant for two years prior to his investment.

The petitioner provides no evidence to support his assertion that the store was vacant when he purchased it.² Regardless, the store only employs two people. The business plan fails to explain why the store will require a 400 percent increase in employment. As stated above, the plan fails to even provide the job descriptions of the new jobs. Nor has the petitioner provided wage and withholding reports reflecting the wages earned by the two employees or payroll records reflecting the hours worked. As such, the petitioner has not even established that the two individuals identified on the Forms I-9 work for the business and work full-time.

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 Whether or not the petitioner purchased an existing business is also relevant to whether the petitioner established a new commercial enterprise pursuant to 8 C.F.R. 204.6(h). Regardless, for the reasons discussed in the body of this decision, the petitioner failed to demonstrate a qualifying investment of lawfully obtained funds or that he would created the requisite employment. As such, we need not decide whether he established a new commercial enterprise.