



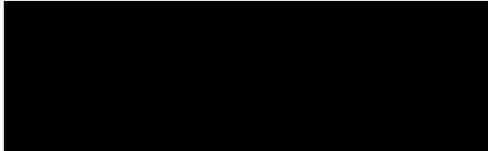
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U.S. Department of Justice

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: [Redacted] Office: Texas Service Center

Date: NOV 19 2002

IN RE: Petitioner: [Redacted]

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

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, 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 section 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 he had established a new commercial enterprise or that he had made a qualifying investment of lawfully obtained funds.

On appeal, counsel asserts that the petitioner increased both the net worth and the employment of the commercial enterprise by 40 percent. The petitioner submits affidavits regarding his investment, supported by personal and corporate bank statements for 1993. Finally, the petitioner submits additional evidence regarding the civil settlement that awarded him over \$3,000,000.

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, Com Com Systems, 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.

INVESTMENT IN 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 . . ." (Emphasis added.) 8 C.F.R. 204.6(e) defines "new" as "established after November 29, 1990."

On the petition, the petitioner indicated that he had created an original business. He listed the date of establishment as March 20, 1989. He also indicated that his initial investment of \$30,000 was made on October 26, 1990. The petitioner submitted the articles of incorporation filed in

Michigan on March 20, 1989; an application for an employer identification number indicating the business started on October 1, 1990; a check issued to Com Com for \$30,000 by an unidentified payor; an application for registration by foreign corporation filed with Florida on February 18, 1991; a lease dated September 25, 1990; and corporate tax returns beginning in 1990.

On October 25, 2001, the director issued a notice of intent to deny, concluding that the petitioner had not invested in a "new" commercial enterprise since it was established before November 29, 1990 and the petitioner had not claimed to have expanded or restructured the business. In response, counsel noted that the petitioner had invested over \$1,000,000 after November 29, 1990. The petitioner submitted a ledger detailing his investment between October 25, 1990 and June 13, 1994.

The director concluded that the petitioner had not overcome the concerns expressed in the notice of intent to deny. On appeal, counsel asserts that since the petitioner indicated on the Form I-526 that the business was established in March 1989 and that his initial investment was in October 1990:

it was clear that the petitioner sought classification as a new commercial enterprise, not because of a post November 29, 1990 creation, but because of the requisite amount of investment into an existing operation and the consequent increases in net worth and number of employees in that existing business.

This criticism of the director's decision is unfounded. On the Form I-526, part 4, the petitioner indicated that he established a new commercial enterprise as the result of creating an original business. In counsel's initial brief and in his brief in response to the notice of intent to deny, counsel essentially argued that the business was effectively established after November 29, 1990 since the petitioner invested more than \$1,000,000 after that date. Counsel argues for the first time on appeal that the petitioner expanded both the net worth and employment of the business by 40 percent. Nevertheless, we will consider whether the petitioner has, in fact, demonstrated that his investment increased by 40 percent either the company's net worth or number of employees.

Counsel argues that the company has enjoyed substantial "growth" due to the petitioner's investment. He refers to growth in revenues, which is not the same as net worth, defined in Barron's Dictionary of Accounting Terms 295 (Third ed. 2000) as "total assets less total liabilities." In support of counsel's assertions, the petitioner submits a letter jointly signed by two certified public accountants who reviewed the corporate tax returns. Attached to the letter is a chart reflecting the company's net worth between 1990 and 1995. The only 40 percent increase in net worth occurred during 1992, after which the net worth actually decreased. The 1992 tax return, upon which the accountants based their conclusions, reflects that paid-in-capital increased \$811,498 that year, from \$588,827 to \$1,400,325. The 1992 tax returns also show no loans from shareholders. The ledger confirms that in 1992, the petitioner transferred \$809,990 to the company. According to the ledger, however, \$730,000 of that money was merely loaned to

the company. A loan does not change the net worth of the company, the increase in assets is offset by the change in liabilities.

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). On appeal, the petitioner submits an affidavit from [REDACTED] the secretary and treasurer of Com Com. Mr. [REDACTED] explains the "loans" on the ledger as follows:

This infusion of capital, noted as "loans" for internal purposes provisionally, have always been treated on the finalized books of the company as paid in capital. No promissory notes were ever issued to [the petitioner] to reflect any such "loans[;]" nor has [the petitioner] ever been paid any interest on these infusions of capital; nor have these infusions of capital been treated on any of the company's tax returns as anything but paid in capital. . . . No agreement exists between the Company and [the petitioner] to redeem any of his issued stock for money or anything else of value.

Mr. [REDACTED] explanation does not overcome the inconsistencies discussed above. As such, the petitioner has not demonstrated that his investment resulted in a 40 percent increase in net worth.

Nevertheless, the record reflects that the petitioner has sufficiently increased the employment at the company. Thus, we conclude that the petitioner has invested in a new commercial enterprise.

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 Form I-526, the petitioner indicated that he made an initial investment of \$30,000 on October 26, 1990 and a total investment of \$2,358,700 as of the date of filing. The petitioner submitted an October 25, 1990 check for \$30,000 issued on account number [REDACTED] at First National Bank, and corporate tax returns reflecting an increase in paid-in-capital from \$0 in 1990 to \$2,067,200 in 1998, at which time the petitioner owned 94 percent of the company.

In his notice of intent to deny, the director noted the lack of transactional evidence that the petitioner was the source of the capital indicated on the tax returns. In response, the petitioner submitted a company ledger reflecting that the petitioner invested \$1,129,490 and loaned \$1,009,000 to the company between October 25, 1990 and June 13, 1994. The director concluded that without transactional documentation, the petitioner could not establish that he was the source of the capital and noted that the definition of "invest" (quoted above) excludes loans to the company.

On appeal, the petitioner submits an affidavit from [REDACTED] who asserts that the loan amounts were actually paid in capital as reflected on the tax returns. Mr. [REDACTED] notes that, even if you exclude the loans indicated on the ledger, the petitioner's investment is over \$1,000,000. The petitioner also submits bank statements for Com Com and the petitioner which support the investments indicated on the ledger.

While the inconsistencies regarding the loans are troubling, we concur with [REDACTED] that the ledger does reflect more than \$1,000,000 in capital. In addition, the petitioner has now supported the assertions in the ledger and on the tax returns with bank statements for Com Com and himself. As such, we find that the petitioner has demonstrated a qualifying investment of more than \$1,000,000.

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, 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).

Initially, the petitioner submitted no evidence regarding the source of the invested funds. In response to the director's notice of intent to deny, the petitioner submitted a letter from [REDACTED] who handled the petitioner's civil lawsuit. Mr. [REDACTED] asserts that the petitioner was awarded \$3,510,584.20 in a complex civil lawsuit. The petitioner also submitted a summary of the transactions in his trust account managed by Mr. [REDACTED]

The director concluded that the petitioner had not submitted sufficient evidence of the outcome of his civil suit. On appeal, the petitioner submitted the actual stipulation of settlement and the judge's order enforcing the settlement. The documentation, however, does not entirely resolve this issue. The order reveals that the petitioner was the defendant in the suit, with Citibank as the garnishee. The record does not resolve the nature of the underlying transaction. Specifically, the petitioner has not demonstrated whether the award constituted new funds never previously available to the petitioner or whether it involved the release of the petitioner's previously owned funds garnished by the plaintiff at the onset of litigation. That information is relevant because if the \$3,510,584.20 was merely returned to the petitioner upon settlement, that fact begs the question of where the petitioner obtained the money in first place. The petitioner fails to submit any personal tax returns which might explain how the petitioner accumulated over \$3,000,000 prior to the instigation of the lawsuit. Any motion attempting to resolve this issue would need to include additional information on the litigation and credible evidence of the petitioner's income, such as personal tax returns, prior to 1991.¹

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.

¹ Any argument that such documentation is no longer available will not be persuasive. The petitioner completed his investment in 1994 but did not file the petition until 2001. The petitioner's choice to file the petition several years after his investment does not relieve him of the evidentiary requirements set forth in the regulations. We note that the regulations requiring five years of tax returns as applicable (and they are applicable where investment funds are obtained through reportable income) have been in effect since 1992.