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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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

[REDACTED]

APR 08 2003

File: [REDACTED] Office: Texas Service Center

Date:

IN RE: Petitioner: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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

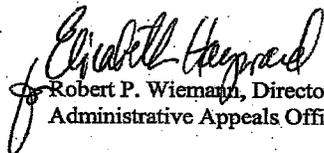
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office 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 a qualifying investment of lawfully obtained funds.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) 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
- (ii) 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, Jay Hospitality, Inc., doing business as Days Inn, 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 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.

In her cover letter, counsel asserts that the petitioner had invested at least \$1,000,186.70. Initially, the petitioner submitted closing documentation for the purchase of a hotel, numerous loan and refinancing documentation, checks, deposit slips, and invoices. As an explanation for this documentation, the petitioner submitted a letter from an accounting firm, [REDACTED] concludes that, based on a review of four transactions, the petitioner "invested" \$100,000 as an earnest money deposit for the purchase of the hotel, \$566,000 towards the purchase of the hotel through a tax-free exchange whereby the petitioner

sold half of his interest in another business, \$300,000 "personal money" for operating expenses, and \$65,000 "various personal cash contributions. [REDACTED] did not claim to have reviewed any balance sheets, tax returns, or other financial statements for the company. In response to the director's request for additional documentation, the petitioner submits a similar letter from CPA [REDACTED]

The record reveals that on February 23, 1998, Jay Hospitality, Inc. purchased a newly constructed hotel in Dawsonville, Georgia, for \$2,450,051. The settlement documentation reveals that the petitioner made a deposit of \$100,000, applied \$566,085.05 from a tax-free exchange pursuant to Section 1301 of the Internal Revenue Code, and financed \$1,800,000 through two loans with First State Bank. Jay Hospitality, Inc. is listed as the borrower for both loans and the property and hotel of the new commercial enterprise secure both loans. On March 16, 1999, Jay Hospitality, Inc. refinanced both loans with First National Bank of Union County. The new loans were also for \$1,500,000 and \$300,000. Counsel does not argue that the \$1,500,000 loan constitutes the petitioner's personal investment, but appears to argue that the \$300,000 loan does qualify because it was repaid prior to the filing of the petition. If the petitioner had contributed equity to the corporation for the purpose of paying off a \$300,000 loan, counsel's argument would be persuasive. The record does not reflect that the petitioner did so. On November 24, 1999, the petitioner issued a check to Jay Hospitality, Inc. for \$300,000. The same day, the corporation issued a check to Appalachian Community Bank to repay an outstanding loan balance of \$296,308. According to counsel, Appalachian Community Bank was the successor to First National Bank of Union County. The "memo" section of the check issued by the petitioner to the corporation, however, reads, "loan to Days Inn."

The above "memo" notation is consistent with the remainder of the record. Initially, the petitioner submitted a subscription agreement whereby he agreed to purchase 1,000 shares of stock in Jay Hospitality, Inc. for \$1,000. In response to the director's request for additional documentation, the petitioner submitted the corporate tax returns for 1998 through 2001. Every tax return, schedule L, reflects only \$1,000 in capital stock and no additional paid-in-capital. The tax returns also reflect the following loans from shareholders: \$655,567 at the beginning of 1998, \$658,636 by the end of that year, \$1,018,278 by the end of 1999, \$1,013,268 by the end of 2000, and \$686,430 by the end of 2001.

In her final decision, the director stated:

In addition to the fact that the tax returns for Jay Hospitality, Inc. show losses every year since the motel's opening, the tax returns also show that shareholders of the company have loaned the corporation a total of \$1,013,268. The petitioner is the sole shareholder of the company. Loans to the company do not constitute a qualifying investment under this classification.

On appeal, counsel states:

On pages 12 and 13, [the director] deal[s] with monies loaned to the corporation enterprise [sic] for the corporation's operations. However, this is irrelevant since

those funds were not the qualifying capital for this Petition and were never listed as such by the CPAs who made reports submitted in support of this petition.

Counsel's explanation is not persuasive. The accountants merely discuss the transactional documentation. Neither accountant claims to have reviewed the corporation's tax returns or prepared audited balance sheets for the corporation. In fact [REDACTED] states, "this was a very limited engagement, and we, of course, are not rendering any opinion as to the validity of this information. We have not applied any audit or other tests to this information." If the petitioner's loans to the corporation reflected on the tax returns do not represent the documented transactions of money from the petitioner to the corporation, the petitioner must explain where those transactions are reflected on the tax returns. As stated above, the tax returns reflect only \$1,000 in capital stock and no additional paid-in-capital. In addition, the petitioner must provide evidence of the additional transactions that must have occurred if the shareholder loans reflected on the tax returns do not represent the documented transactions. In other words, the implication of counsel's argument is that the petitioner contributed over \$1,000,000 in equity in addition to the approximately \$1,000,000 in shareholder loans. Thus, the petitioner would need to provide transactional evidence of more than \$2,000,000 going from him to the corporation. In the absence of such documentation, it must be presumed that the loans to the corporation documented by the tax returns reflect the documented transactions. Such an interpretation is further supported by the indication on the petitioner's check for \$300,000 that the funds represent a loan to the corporation.

As quoted above, the definition of "invest" at 8 C.F.R. § 204.6(e) precludes loans to the corporation. In light of the above, the petitioner has not established an investment of more than \$1,000.

Finally, we conclude that all of counsel's arguments regarding the relationship between S-Corporations and their shareholders are irrelevant. Loans to the new commercial enterprise cannot be considered a qualifying investment regardless of the organization of the new commercial enterprise, be it a corporation, partnership, or even a sole proprietorship.

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 Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 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*, 229 F. Supp. 2d 1025, 1040 (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).

According to a flow chart submitted in response to the director's request for additional documentation, the petitioner's "investment" derived from \$100,001 from the sale of one half of the petitioner's interest in Tamworth, Inc.; \$566,085.05 also from the sale of the petitioner's half interest in Tamworth to Two Gates, of which [REDACTED] is the President; \$37,501.80 from refinancing the petitioner's house; \$44,000 from the sale of a one third interest in a motel in Trion, Georgia to Express Hospitality; \$11,221 from the sale of a portion of the petitioner's interest in a Western Hotel in Manchester to Yogeshkumar Patel; \$100,000 and \$59,302.48 from the sale of the petitioner's interest in the Western Motel in Dawson, Georgia to LDJ, Inc.; and from the deposit of three personal checks totaling \$49,000. Ultimately, counsel claims that the petitioner began investing upon his initial entry into the United States in 1991 with \$171,500.

The director expressed concern that the petitioner was "investing" income earned while working in the United States without authorization. While the petitioner's tax returns do reflect some wages, we concur with counsel that the petitioner is claiming to have invested business income, not wages. Nevertheless, the petitioner has not adequately documented the above claims. In fact, the record contradicts some of the above claims.

As evidence of the funds the petitioner initially brought into the United States, he submits two 1991 personal checks amounting to \$171,500 but no evidence that these checks were deposited or how the petitioner accumulated those funds. Moreover, the checks are issued on U.S. Bank in

South Carolina, Palmetto Federal, and do not reflect that the funds were transferred from the United Kingdom.

The petitioner submitted some documentation of the sale of his half-interest in Western Motel in Manchester, Georgia. The sales contract, signed by the petitioner as "purchaser" and Dinesh Patel as "seller" reflects a purchase price of \$700,000 to be paid to the petitioner. The Exchange Agreement executed pursuant to Section 1301 of the Internal Revenue Code identifies Two Gates, Inc. as the purchaser, the petitioner as the exchangor, and Nationwide Corporation as the intermediary. The "relinquished property" is identified as the Western Motel. Paragraph 2(b) of the agreement provides:

Exchangor shall execute the proper deed in favor of Purchaser and instruct closing attorney to deliver such deed when said closing attorney holds for Intermediary the total sum of \$1,400,000 less any payment for costs of sale applicable thereto plus any prorations or costs of sale applicable to Exchangor as evidenced by closing attorney's "net sheet" approved by Intermediary and Exchangor and subject to encumbrances of record.

The "net sheet" is not part of the record. As such, the petitioner has not established how this paragraph is consistent with a purchase price of \$700,000. We acknowledge, however, that the settlement document for the purchase of the motel property by the new commercial enterprise does reflect that \$566,085.05 of the price derived from a Section 1301 exchange.

The petitioner did not document his alleged sales of his interests in other motels. Not only did the petitioner not submit the sales contracts for the sale of his interests to LDJ, Inc., [REDACTED] and Express Hospitality, Inc., the petitioner's tax returns do not reflect any capital gains in 1998 or 1999, the years in which the sales allegedly occurred. As those sales were not part of a Section 1301 exchange, any money gained from those sales should have been reflected as capital gain and documented on Schedule D. We acknowledge that the petitioner's 1999 tax return, Schedule E, does show a \$100,335 distribution from LDJ, Inc., in which he had a 50 percent interest, but the checks from LDJ reflect that that corporation actually paid the petitioner \$159,302.48 in 1999. Further, the petitioner's 1999 Schedule E reflects no income from Express Hospitality, Inc., although the record contains a check to the petitioner from that corporation for \$44,000 dated April 1, 1999. Finally, the May 19, 1999 check for \$11,221 from [REDACTED] allegedly for the purchase of the petitioner's interest in another hotel, is not reflected as income anywhere on the petitioner's 1999 tax return or schedules thereof.

In light of the documentary deficiencies discussed above, the petitioner has not adequately documented the transactions from which his "invested" funds allegedly derived. Thus, we cannot conclude that he has established the lawful source of his funds.

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:

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.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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*, 229 F. Supp. 2d 1025, 1039 (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 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.

Initially, the petitioner claimed that Jay Hospitality, Inc. employed 11 full-time employees and submitted 19 Forms W-2 including the petitioner's. The petitioner did not submit Forms I-9 as evidence that the employees were qualifying employees. In response to the director's request for additional documentation, counsel asserts that because the hotel is in a dry county, nearby planned development never happened, and reduced business due to the terrorist attacks of September 11, 2001, Jay Hospitality has not been able to maintain the 12 full-time employees planned. In response to the director's request for additional documentation, the petitioner submitted 18 original Forms W-2, including his own, issued by Epix I, Inc. and a one-page business plan consisting of a time line for hiring.

The director concluded that the petitioner had not demonstrated that the business would create at least 10 jobs for qualifying employees. The director also questioned the Forms W-2 from Epix I. On appeal, counsel asserts that a business plan was inadvertently omitted from earlier submissions and asserts that the economy has prevented the petitioner from filling at least ten jobs. The petitioner resubmits the one-page business plan. Counsel further asserts that Epix I is Jay Hospitality's payroll agent. The petitioner submits no evidence of this relationship.

Whatever projections appear in the business plan, counsel appears to concede that under current conditions, Jay Hospitality, Inc. will be unable to create 10 jobs. Moreover, the record still remains absent that any employees hired are qualifying employees.

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.