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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



Office: Texas Service Center

Date:

JAN 15 2003

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


for 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 invested or was in the process of investing the minimum investment amount or that the funds invested were lawfully obtained.

On appeal, counsel asserts that the director's decision was arbitrary. More specifically, counsel asserts that the petitioner will invest additional capital after the petition is approved and that the petitioner is the president and chairman of one of Sichuan Province's biggest conglomerates.

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, Dazheng International, 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 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.

Initially, the petitioner indicated on the petition that he had made an initial investment of \$500,000 on January 3, 2000¹ and a total investment of \$643,354.18. On Part 4 of the petition, the petitioner indicated that Dazheng International, Inc. had \$621,010.18 in U.S. bank accounts and that the value of the assets purchased for use in the business was \$22,344. The petitioner submitted a bank statement from HSBC Bank reflecting two business accounts, 066-900930 with a balance of \$10,408.51 and 066-641632 with a balance of \$610,601.67. The latter account is a certificate of deposit account that initially matured on June 6, 2000. The petitioner also submitted a wire transfer receipt reflecting that the petitioner transferred \$500,000 from Standard [REDACTED] in [REDACTED] to [REDACTED] account 066-900930 at Hong Kong Bank on March 1, 2000. The business plan lists the projected start-up expenses including equipment, furniture, construction and improvements, and materials that total \$650,000. On June 10, 2000, Dazheng International entered into a six-month lease with X. J. Studio, Inc. and on June 10, 2000, [REDACTED] agreed to purchase all of X. J. Studio's sewing and sampling equipment for \$148,690. The agreement called for a down payment of \$22,344 and four payments of \$31,654 on October 10, 2000, January 10, 2001, April 10, 2001, and July 10, 2001. The petitioner submitted an uncanceled check for \$22,344 issued by [REDACTED] on Fleet Bank account 9418-009089 to X. J. Studio.

On September 18, 2000, the director requested [REDACTED] tax returns, the company's bank statements, and evidence that the petitioner had invested or was actively in the process of investing the required amount of capital. In response, counsel asserted "upon approval of the instant petition, the Petitioner will complete the required million dollars investment shortly." In addition, counsel asserted that the business was not operational prior to 2000 and that the 2000 tax return would not be available until "early 2001."

The petitioner submitted Dazheng International's bank statements for account 9418-009089 at Fleet bank and accounts 066-900930 and 066-641632 at Hong Kong Bank (later HSBC Bank). The first statement for Fleet Bank is for July 2000 and reflects an opening balance of \$500. The statements, which cover July through October 2000, reflect deposits and withdrawals of between a few hundred and a few thousand dollars. The largest deposits consist of a \$17,310 "business deposit" on October 10, 2000 and a \$11,955 "business deposit" on October 25, 2000. The October statement, however, does not reveal a check for \$31,654, the amount owed to X. J. Studio on October 10, 2000.

The earliest statement for HSBC account 066-900930 is for February 1999. This statement reflects that it is the first statement for this account and reflects an initial deposit of \$1,000 on February 3, 1999. On March 23, 1999, another \$12,596 was deposited. On April 1, 1999, another \$51,862 was deposited but on April 22, 1999, \$50,000 was transferred out to the Tiancheng China Corporation. The statements do not show that, in addition to the \$50,000 transferred to that company, at least \$22,344 were removed from Dazheng's account prior to June 2000, when Dazheng allegedly issued a check to X. J. Studio for that amount as a down

¹ The actual transfer occurred on March 1, 2000. It appears that whoever completed the petition misread the date on the wire transfer receipt that has the month second in the European style. The March 1, 2000 date is confirmed by subsequently submitted bank statements.

payment for equipment. No additional funds were deposited until a deposit of \$8,815.94 on December 14, 1999. The next deposit is the \$500,000 transferred by the petitioner on March 1, 2000. An additional \$86,153 was deposited on March 6, 2000. On the same date, the petitioner moved \$600,000 to the certificate of deposit, account 066-641632, leaving a remaining balance of \$10,408.51. The only activity for account 066-900930 between March 6, 2000 and the end of October 2000 is a single check issued August 17, 2000 for \$2,500. The certificate of deposit, account 066-64163, initially matured on June 5, 2000. As of July 6, 2000, no funds had been removed from that account.

The director noted that the petitioner had failed to submit the Fleet Bank statements from prior to July 2000 although all statements for that account had been requested. The director concluded that counsel's assurance that the petitioner would invest the additional funds after approval of the petition was insufficient, noting that evidence of mere intent to invest or of prospective investment arrangements entailing no present commitment is insufficient. This language is found at 8 C.F.R. 204.6(j)(2) and was quoted earlier in the director's decision. In addition, the director noted that \$600,000 of the "invested" capital was simply placed in a certificate of deposit and, thus, was "not made available for job creation."

On appeal, counsel simply reiterates his arguments made in response to the director's request for additional documentation, arguing that the bank statements reflect a major investment on March 1, 2000 and that these funds were not "merely deposited in a corporate account," but were used for rent, inventory, equipment, and salaries. Counsel does not address the director's concern that the petitioner has only demonstrated an unenforceable "intent" to invest the remaining sums. The petitioner resubmitted the previously submitted bank statements but does not include the Fleet Bank statements prior to July 2000 that were specifically noted as absent by the director.

We find that the director raised legitimate concerns, and counsel's broad assertion that the director's determination was "arbitrary" without addressing the specifics of the director's concerns is not persuasive.

As quoted by the director and above in this decision, 8 C.F.R. 204.6(j)(2) provides:

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.

As will be discussed in more detail below, the only funds traceable to the petitioner are the \$500,000 transferred on March 1, 2001. The record contains no evidence that the petitioner has irrevocably committed the remaining \$500,000, or even the remaining \$356,645.82 if we accepted the claimed investment of \$643,354.18 indicated on the petition. Counsel's assurances that the petitioner plans to invest the remaining funds "shortly" after the petition is approved is insufficient. First, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Second, even if the petitioner does plan to invest the remaining funds, the regulations specifically

state than an unenforceable intent to invest is insufficient. The record does not contain a secured promissory note meeting the requirements set forth in Matter of Hsiung, 22 I&N Dec. 201 (Comm. 1998), or evidence that the funds have been set aside in an irrevocable escrow account. In fact, the record does not demonstrate that the petitioner even has an additional \$500,000 in liquid assets. Thus, we concur with the director that the petitioner has not placed the requisite \$1,000,000 at risk.

In addition, counsel's attempt to distinguish this case from Matter of Ho, 22 I&N Dec. 206 (Comm. 1998) is not persuasive or even consistent with the evidence of record. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Id. at 209. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his 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, supra, at 210, specifically 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. Matter of Ho further states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

Id. at 210. As discussed above, the business plan only reflects projected start-up costs of \$650,000. The business plan does not include projected future capital expenses or otherwise explain how an additional \$350,000 would be spent. Moreover, the record does not support counsel's assertion that the petitioner's money has been used for business expenses. The down payment for the equipment was paid by a check issued on the Fleet Bank account in June 2000. As of June 2000, all of the funds traceable to the petitioner remained in HSBC Bank. The paychecks were also issued on the Fleet Bank account. While many of them are dated after the final bank statement in the record, it remains that the petitioner has not established that he ever transferred his funds from HSBC Bank to the Fleet Bank account from which Dazheng International appears to be paying all of its expenses. Moreover, once the business is operational, the payment of salaries is a normal operating expense paid from proceeds and cannot be considered part of the petitioner's investment.

In light of the above, we concur with the director that the petitioner has not established that the \$500,000 traceable to him was placed at risk or made available for job creation. Funds "invested" into an overcapitalized business are not sufficiently at risk. The record contains no evidence that the petitioner ever used the funds in the certificate of deposit account for business expenses. Moreover, the business plan, while ostensibly justifying \$650,000 in start-up costs, does not sufficiently explain the need for \$1,000,000 in capital. Even the projected \$650,000 in start-up costs is suspect as the business was already operational with employees as of the date of filing. Yet, as of that date, the full \$500,000 traceable to the petitioner remained in a certificate of deposit.

Finally, while not discussed by the director in his final decision, the record does not contain Dazheng International's 2000 tax return. In his appellate brief, dated October 30, 2002, counsel states:

Dazheng was established in January 1999 and did not begin its operation until 2000. The Certified Public Accountant for Dazheng [name and address omitted] is in the process of preparing Dazheng's tax returns. A certified copy will be available in early 2001 and submitted to INS for your review upon request.

While this explanation was understandable in response to the September 18, 2000 request for additional documentation, it is not persuasive in the 2002 appeal. Without tax returns certified by the Internal Revenue Service or audited balance sheets, we cannot determine the nature of the funds transfer to Dazheng. Specifically, the petitioner has not established whether those funds were invested as defined in the regulations or simply loaned to the company. In addition, we note that the petitioner is the chairman and president of [redacted] in China. Without certified tax returns that clearly identify the sole shareholder of [redacted] the petitioner cannot establish that he, and not his Chinese company, invested in [redacted]. A corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Thus, an investment by Dazheng Group could not be attributed to the petitioner personally.

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, supra, at 210-211; 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). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. Matter of Ho, supra, at 211. 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).

In support of the petition, the petitioner submitted a “certificate” from the Board of Directors for Dazheng Group purporting to verify that the petitioner owns 95 percent of the shares in that company, a brochure for Dazheng Group identifying the petitioner as the chairman and president of the company, and financial statements for Dazheng Group. The financial statements reflect that the company had paid-in-capital of approximately \$5,000,000 at the end of 1999 and “undivided profit” of nearly \$6,000,000 as of the same date. Dazheng Group enjoyed annual profits of between a few thousand dollars and \$2,000,000 during 1996 through 1999.

In addition, as discussed above, the petitioner submitted a wire transfer receipt reflecting that he transferred \$500,000 from [REDACTED] to [REDACTED] on March 1, 2000. The receipt reflects that the funds were debited from an account at Chartered Standard Bank.

On September 18, 2000, the director requested copies of all bank statements for all accounts owned by the petitioner, the petitioner’s “personal” tax returns for the last five years, and evidence identifying any other source of capital used. In response, counsel asserts that the

petitioner is "one of the most well-known and respected entrepreneurs in Sichuan, China," that Dazheng Group is "one of the biggest conglomerates in Sichuan," and that the petitioner's only bank account is with the Thai Farmers Bank in Bangkok. As stated above, the assertions of counsel are not evidence. The petitioner submits a letter from the Thai Farmers Bank and a "certificate for the tax paid by [the petitioner]" that is actually certifying the amounts paid in taxes by Dazheng Group. The petitioner resubmits Dazheng Group's financial statements.

The director concluded that the evidence did not establish how much annual income the petitioner derives from his acknowledged business interests. On appeal, counsel refers to the "certificate for the tax paid by [the petitioner]" resubmitted on appeal.

As stated above, the tax certificate actually indicates the tax paid by the petitioner on behalf of Dazheng Group. There is no evidence that the company's taxes bear any relation to the petitioner's personal income. While it would not be surprising for the chairman and president of a company with large profits to earn a considerable income, it is the petitioner's burden to establish his personal income, not simply the income of his business. See generally Matter of Izummi, supra, at 195. The petitioner has not submitted any evidence of his personal income in the form of personal income taxes or other equally persuasive documentation.

Further, as stated above, the only funds traceable to the petitioner are the \$500,000 transferred on March 1, 2000. The petitioner has not provided evidence tracing the additional \$143,354.18 allegedly invested as of the filing date. Moreover, the sum of \$500,000 was transferred from an account at Standard Chartered Bank in Hong Kong. Yet, counsel has twice asserted that the petitioner's only account is at the Thai Farmers Bank in Bangkok. This inconsistency raises the possibility that while the petitioner was the "applicant" for the funds transfer, the account holder could have been another entity for which the petitioner was authorized to transfer funds, such as Dazheng Group.

Finally, the letter from the Thai Farmers Bank reflects that, as of November 6, 2000, the petitioner had a balance of \$217,392. Thus, even if we accepted counsel's assurances that the petitioner intended to invest the remaining funds and that these funds derived from the petitioner's legitimate business interests, the petitioner has not demonstrated that he possesses sufficient lawfully obtained funds to complete his intended investment. As noted above, counsel asserts that the account at the Thai Farmers Bank is the petitioner's only 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.

While not directly discussed by the director,² the petitioner has also failed to demonstrate that his investment will create the required number of jobs. We acknowledge that the record contains evidence of more than 10 full-time employees. In response to the director's concern that Dazheng International had simply purchased X. J. Studio's business, counsel asserted that X. J. Studio had not been operational in two years. As stated above, the assertions of counsel are not evidence. The record contains no evidence from officials at X. J. Studio regarding its dates of operation or how many employees it may have had as of July 2000 when the petitioner leased its space from X. J. Studio. We note that all of the Forms I-9 are dated June 26, 2000, consistent with adopting the employees of a previous business. As implied in Matter of Soffici, 22 I&N Dec. 158, 166 (Comm. 1998) and Matter of Hsiung, *supra*, at 204-205, a petitioner must create 10 new jobs. A petitioner cannot cause a net loss of employment. Without evidence of how many employees X. J. Studio had, we cannot determine whether the petitioner has created any new jobs.

While 8 C.F.R. 204.6(j)(4)(ii) allows a petitioner who invests in a troubled business, defined at 8 C.F.R. 204.6(e), to simply maintain previous employment, the petitioner in this case does not claim to have invested in a troubled business. Such a claim would need to be supported with X. J. Studio's financial statements and evidence of how many employees X. J. Studio had at the time of investment.

² An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

Finally, the record is not persuasive that all of Dazheng International's employees are qualifying employees. Initially, the petitioner submitted 13 Forms I-9. Of these, six employees indicate that they are lawful permanent residents but provide no alien registration number on the form where required in Section 1. None of these six forms are supported with alien registration cards. In addition, another employee failed to complete whether she was a U.S. citizen, lawful permanent resident, or alien authorized to work in the U.S. and the only documentation listed on the Form I-9 and attached is a social security card that specifically states, "valid for work only with INS authorization." No such work authorization is attached. Such incomplete and incompletely supported Forms I-9 raise concerns that all of Dazheng's employees may not be "qualifying" as defined in 8 C.F.R. 204.6(e).

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.