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

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

[REDACTED]

File: [REDACTED] Office: Texas Service Center

Date: MAR 17 2003

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]

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 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. The Administrative Appeals Office (AAO), summarily dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed as untimely. The matter will be reopened on Bureau motion, the previous decision of the AAO will be withdrawn and the petition will be denied.

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 made a qualifying investment.

On appeal, counsel argued that the petitioner invested in a high unemployment area and that the petitioner personally invested \$1,000,000 into the business. Counsel asserted that he would submit a brief and/or evidence within 30 days.

On October 24, 2001, the AAO summarily dismissed the appeal, concluding that neither counsel nor the petitioner had submitted any additional evidence or a brief.

On April 30, 2002, counsel submitted a motion to reconsider. He asserts that he did not receive the AAO's decision until November 21, 2001 and submits a copy of the decision stamped "received" by his office on November 21, 2001. Counsel further argues that he submitted a brief and additional evidence on August 28, 2000 and submits a certified mail receipt signed on that date. Counsel also submits a copy of the brief and supporting exhibits.

8 C.F.R. § 103.5(a)(1)(i) provides that motions to reopen or reconsider must be filed within 30 days of the decision that the motion seeks to reopen. 8 C.F.R. 103.5a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Even if we accepted that the decision was issued later than October 24, 2001, counsel admits to having received it by November 21, 2001. As such, the motion, filed April 30, 2002, is untimely. 8 C.F.R. § 103.5(a)(1)(i) provides that a late motion may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. Counsel does not argue that the delay is reasonable or beyond the control of the petitioner other than to assert that the decision was not received until November 21, 2001, well over 30 days before the motion was filed. Thus, the motion is dismissed. Nevertheless, in fairness to the petitioner, we will reopen the proceedings on our own motion to consider the appellate brief and exhibits.

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).

MINIMUM INVESTMENT AMOUNT

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) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(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 Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1034 (E.D. Calif. 2001).

The petitioner asserts that the petition is based on an investment in a business, Toscano Construction, Inc., located in an area for which the required amount of capital invested has been adjusted downward. In his decision, the director acknowledged that the amount of capital was only \$500,000, but subsequently stated that the minimum investment amount was \$1,000,000. Counsel appears to believe that the confusion results from the use of the phrase "targeted employment area" in the McAllen, Texas proclamation so designating the city. Contrary to counsel's explanation, a targeted employment area is defined as either a high unemployment area or a rural area as further defined in the regulations. *See* 8 C.F.R. § 204.6(e) quoted above. As such, there is nothing contradictory about the proclamation designating McAllen as a targeted employment area and a high unemployment area. While the initial documentation only established that McAllen was a targeted employment area in 1996, subsequent evidence reflects that McAllen continued to suffer a sufficiently high requisite unemployment rate at the time of filing. Thus, the required amount of capital in this case is \$500,000. While the director reached this same conclusion, any subsequent references to a minimum investment amount of \$1,000,000 in the director's decision were in error.

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 claimed to have invested \$145,000 on September 24, 1997 and a total of \$694,000 as of the date of filing, June 10, 1999. In his cover letter, counsel asserted that the business had spent \$891,407, including \$420,407 cash for property, \$471,000 financed in the form of a mortgage, \$15,000 for development costs, and \$6,800 for an easement. The petitioner submitted the articles of incorporation, which authorize 100,000 shares at \$1 par value, a share certificate verifying the petitioner's ownership of 1,000 shares, and a ledger for the share certificate that does not reflect the consideration for the shares.

As evidence of Toscano Construction's expenses, the petitioner submitted the closing documents for lots 15 and 20 and portions of lots 9 and 13. Toscano Construction purchased lots 15 and 20 on September 24, 1997 for \$145,000 cash. Toscano Construction subsequently purchased

portions of lots 9 and 13 on December 9, 1998 for \$732,078, \$471,000 of which was financed by a mortgage secured by the property. Toscano Construction also purchased an easement near the property for an additional \$6,800. Finally, the petitioner submitted checks and invoices for the development of these properties. The checks are issued on Toscano Construction's account.

On March 10, 2000, the director issued a notice of intent to deny, noting that all of the money derived from the corporation, not the petitioner. In response, counsel asserted that the petitioner had spent \$368,000 cash towards the purchase of both properties, \$530,750 towards construction, and an additional \$155,104.75 for construction. The petitioner submitted the company's bank statements for November 1997 through November 1998. These statements reflect numerous three, four and five digit deposits (and a very small number of low six digit deposits). Without transactional documentation, however, these statements cannot demonstrate the source of any of those deposits, referenced as "normal regular deposits" and "miscellaneous credits" on the statements.

Finally, the petitioner submitted Toscano Construction's tax return for the period of November 1997 through October 1998. Schedule L of the return reflects \$1,000 in capital, \$176,181 in short-term liabilities, and \$881,431 in mortgages, notes, and bonds payable in one year or more. The record contains no audited balance sheets or tax returns, including schedules L, reflecting the company's assets, liabilities, and equity after October 1998.

The director cited *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958) and other cases for the proposition that a corporation is a separate legal entity from its shareholders. The director then concluded that because the corporation had authorized only 100,000 shares at \$1 par value and because the petitioner owned 100 percent of the corporation, he could be credited with only a \$100,000 investment. As the corporation, and not the petitioner, had purchased the property, the director concluded that any money spent by the corporation could not be considered an additional investment by the petitioner beyond the \$100,000 figure reached by the director. Finally, the director concluded that since the petitioner was not personally and primarily liable for Toscano Construction's debt, those funds could not be considered the petitioner's personal investment.

On appeal, counsel argued that the petitioner has invested well over \$1,000,000 in addition to the borrowed funds. Specifically, counsel argued that the value of the corporation, not the par value of the stock, reflect the value of the shares issued.

We find that both the director and counsel oversimplify the issue. Black's Law Dictionary (7th Ed. 1999) defines par value as follows:

The value of an instrument or security as shown on its face; esp., the arbitrary dollar amount assigned to a stock share by the corporate charter, or the principal of a bond.

Id. at 1145. The definition goes on to quote outside material asserting that par value is not indicative of the price of stock other than the stock must be sold for equal to or greater than par

value. Given this definition, we cannot simply look at the par value of the stock without evidence of the actual consideration paid. Nevertheless, the value of the corporation is not necessarily the value of a shareholder's capital contribution to the corporation, as counsel implies. A corporation's net worth can increase due to factors other than a shareholder's contribution. For example, a corporation can make a profit and assign it to retained earnings.

The relevant inquiry for this classification is how much money the petitioner personally contributed to the corporation as capital. In order to demonstrate adequately such a contribution, the petitioner must submit transactional documentation reflecting the transfer of money from the petitioner's personal account to the corporate account. The record in this case contains no such evidence. As stated above, the corporation's bank statements contain no reference to the source of the deposits reflected on the statements.

Evidence that a corporation is paying its expenses is not evidence that its shareholder personally contributed the funds to the corporation. A business can obtain money from a variety of sources, including loans. As stated above, Toscano Construction's tax return for the period ending October 1998 reflects short-term liabilities of \$176,181 and \$881,431 in mortgages, notes, and bonds payable in one year or more. The petitioner did not purchase the second property, financed with a \$471,000 mortgage, until December 1998. Thus, the borrowed funds reflected on the October 1998 tax return are in addition to the \$471,000 borrowed in December 1998. Most significantly, the tax return reflects \$1,000 in capital stock and no additional paid-in-capital. Contrary to the director's conclusion, the petitioner only purchased 1,000 shares of \$1 par value stock. While par value is not always indicative of the price of stock, in this case the tax return reinforces the conclusion that the petitioner purchased 1,000 shares of stock for \$1 per share. Thus, in addition to the lack of transactional documentation, we conclude that the tax return and stock certificate reflect an investment of only \$1,000.

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 Dec. 201, 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). 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, supra* at 1040 (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 his initial cover letter, counsel asserted that the petitioner obtained his funds from his Mexican business interests. The petitioner submitted Spanish language documents with no translations, financial statements of the petitioner’s Mexican companies, and the petitioner’s net worth and income statements. In his notice of intent to deny, the director stated that a list of assets was insufficient evidence that the assets were the source of the invested funds.

In response, the petitioner submitted Toscano Construction’s bank statements (as discussed above) and more Spanish language documents. In his final decision, the director did not address this issue. We find that the petitioner did not overcome the director’s concerns as expressed in his notice of intent to deny.

8 C.F.R. § 103.2(b)(3) requires a petitioner to submit certified translations of all foreign language documents. The petitioner did not submit certified translations of the Spanish language documents submitted. Regardless, as discussed above, the corporate bank statements do not indicate the source of the many deposits. As such, the petitioner has not established that he is the source of the funds deposited in Toscano Construction’s account. Moreover, if the petitioner obtained his funds through the sale of his Mexican businesses as claimed, the petitioner must provide evidence tracing the funds back to an account in Mexico. As stated above, the record contains no transactional evidence such as wire transfer receipts or cancelled checks. Thus, the petitioner has not enabled us to trace the path of the funds from the buyer of the petitioner’s Mexican business to Toscano Construction.

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.

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.

On the petition, the petitioner indicated that Toscano Construction employed two workers and would require an additional nine within two years. The petitioner submitted a one page business plan reflecting that Toscano Construction intended to manage the completed apartment building and would require a receptionist, a secretary, an assistant bookkeeper, a salesman, a building superintendent, an assistant building superintendent, a draftsman, two maintenance workers, a driver, and a cost estimate manager.

In his notice of intent to deny, the director concluded that the business plan did not meet the requirements set forth above. In response, the petitioner submitted Forms 941 (Employer's Quarterly Federal Tax Return), four Forms I-9, and a new business plan. The Forms 941 do not reflect the number of employees but show wages of \$1500 for the first quarter of 1999, \$768.60 in the second quarter of 1999, and \$1488 for the fourth quarter of 1999.

The new business plan discusses the company's intention to construct nine warehouses for Option Enterprises. The petitioner included a contract for services between Toscano Construction and Option Enterprises as an attached exhibit to the business plan. The parties entered into the contract on February 29, 2000 and work on the first warehouse was to begin August 31, 2000. The final warehouse was to be completed by June 30, 2002.

Also attached to the business plan were payroll projections. These projections forecasted general payroll at \$2,700 per month beginning in April 2000, increasing to \$5,020 in July 2000 and increasing again to \$5,246 in April 2001. Residential sales payroll was anticipated to be nothing until May 2000 at which time it would be \$4,116. It was forecast to rise to \$5,316 in September 2000 and to \$5,555 in April 2001. Further, warehouse payroll was projected at zero until July 2000, at which time it would be \$2,560. It would increase to \$2,675 in April 2001. Finally, the expenses for the management of the apartment include only contract labor expenditures. Thus, it appears that the petitioner no longer plans to directly employ the apartment management personnel.

The director did not discuss this issue in his final decision. We find that the new business plan still does not meet the requirements quoted above. While the new plan includes total payroll amounts, it does not include a list of anticipated positions and job descriptions. The job titles from the first business plan do not appear applicable as many of them relate to the management of the apartment, which is projected to be contracted out under the new plan. We note that construction jobs are often contracted out as different specialists are needed for different phases of the construction. Thus, while the payroll expenses may remain constant for the construction of the warehouses, the petitioner has not established that the employees will be permanent, continuous employees.

Moreover, the petitioner did not submit any quarterly returns, wage and withholding reports, or other documentation on appeal reflecting that Toscano Construction has increased employment in accordance with the projected payroll amounts.

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 AAO's decision of October 24, 2001 is withdrawn. The petition is denied.