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U.S. Citizenship
and Immigration
Services

B7

JUN 20 2004
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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 an investment of lawfully obtained funds.

On appeal, counsel argues that the director erred by failing to consider the assets of the commercial enterprise as the petitioner's personal assets.

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 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

On the petition, the petitioner claimed to have made an initial investment of \$559,395 on April 19, 1996 and a total investment of \$8,335,694 as of the date of filing. She further indicated that she owned 51 percent of SCG and that she had invested in an existing business. On Part 4 of the petition, the petitioner indicated that SCG had \$63,495 in cash, \$305,177 in assets purchased for the business, no stock, and \$145,726 in "other assets." She further indicated that the net worth of SCG had increased from \$94,153 at the time of her investment to \$514,398. On the attachment to the petition, the petitioner claimed that the \$514,398 net worth was evidenced by the total assets listed on SCG's 2002 tax return.

Also on the attachment to the petition, the petitioner calculated her investment in 1996 as follows: \$301,105 in cost of goods sold plus \$258,290 in "total deductions" for a total investment of \$559,395 in 1996. She used the same sums to reach a total investment of \$8,335,694 for 1996 through 2002.

In support of the petition, the petitioner submitted newspaper articles about the success of SCG. The first article, "Stadium miniatures scoring sales in big numbers," indicates that SCG is a division of Replicas [REDACTED]. The same article later states that the petitioner had been crafting replicas since arriving in the United States in 1989 and that, in May 1995, the petitioner invested \$180,000 into the company to branch out into handcrafted stadium replicas.

The Internet materials from Arizona's website provided by the petitioner reflect that [REDACTED] with [REDACTED] was incorporated on September 25, 1989, changed its name to [REDACTED] from [REDACTED] on March 28, 1991, and dissolved on December 10, 1994. The petitioner also submitted the 1995 tax return for Replicas Unlimited, Inc. According to the 1995 return, at the end of that year, Replicas Unlimited had \$200 in stock and \$315,178 in shareholder loans. The Internet Materials from Arizona's website also reflect that SCG was incorporated on April 19, 1996 and accepted on April 25, 1996. The petitioner submitted an amendment to the articles of incorporation for Replicas Unlimited also dated April 25, 1996, changing its name [REDACTED]. The amendment indicates that there were 200 outstanding shares at the time.

The tax returns for SCG reflect that during 1996, its initial year, stock increased from zero to \$54,200 and shareholder loans increased from zero to \$3,317. The petitioner owned 100 percent of the company. Stock remained at \$54,200 through 2002. Shareholder loans fluctuated, with a high of \$236,084 at the end of 2001 decreasing to \$43,813 by the end of 2002. By 2001, the petitioner's share of the company had decreased to 51 percent, with the remaining 49 percent owned by her brother. SCG's 1996 Schedule L shows no long-term assets and the record does not contain Form 4562 for that year. By the end of 2002, long-term assets had increased to only \$20,949 (not including depreciation), and the Forms 4562 for 1997 through 2002 reflect few expenditures for depreciable assets and no amortizable expenses. Finally, while the 1996 tax return reflects total assets of \$94,153 and the 2002 tax return reflects total assets of \$514,398, [REDACTED] of Accounting Terms 295 (3rd ed. 2000) defines net worth as total assets minus total liabilities. Applying this commonly used accounting term, SCG's net worth at the end of 1999 was only \$18,708 and at the end of 2002 was only \$108,989.

The petitioner also submitted numerous bank statements for SCG. None of these statements confirm deposits of funds transferred from the petitioner's personal bank account.

On November 20, 2003, the director issued a notice of intent to deny. In that notice, the director concluded that the cost of goods sold and deductions of operating expenses were "simply ongoing costs of doing business incurred by the commercial enterprise and in no way represents a capital investment into the commercial enterprise by the petitioner." The director noted that the stock in SCG had not increased from \$54,200 since 1996 and the tax returns did not evidence any additional paid-in-capital. The director further noted that the remainder of the company's funds derived from accounts payable, other liabilities and loans from shareholders. Acknowledging that SCG did demonstrate retained earnings in 2002, the director determined that the reinvestment of proceeds cannot be considered the petitioner's personal investment. In support of this determination, the director noted that the regulations require a *contribution* of capital and cited [REDACTED]. The director further noted counsel's mischaracterization of SCG's total assets as the company's net worth.

In response, counsel asserted that the petitioner had submitted bank statements reflecting \$1,425,539.30 of deposits in 2001 and \$1,375,022.80 in 2002. Counsel further asserted that the tax returns reflect purchases of inventory of \$3,272,205 from 1995 through 2002. Counsel concludes that “current law” only requires an infusion of new capital and precludes the use of reinvested proceeds where a promissory note constitutes the investment.

In his final decision, the director rejected counsel’s arguments. Citing *Matter of M.*, 8 I&N 24, 50 (BIA 1958), the director noted that a corporation is a separate legal entity from its shareholders. The director thus concluded, “any assets of an incorporated business entity cannot be considered the personal assets of the investor.” The director further concluded that the deposits into the corporate account were irrelevant because they did not derive from the petitioner’s personal funds. The director once again referenced the regulatory requirement for a *contribution* of capital [REDACTED] for the proposition that the exclusion of reinvested proceeds is not limited to investments structured as a promissory note.

On appeal, counsel asserts that the director’s denial is based on “a misunderstanding of the definition of *personal assets*.” (Emphasis in original.) Counsel notes that the definition of personal assets includes personal property and that the definition of personal property includes “everything that is the subject of ownership not coming under the denomination of real estate.” Based on these definitions, which make no reference to corporate assets, counsel concludes that as an owner of a 51 percent interest in SCG, 51 percent of the corporation’s assets are the petitioner’s personal property and, thus her personal assets. Finally, counsel notes that the petitioner has been residing in the United States under the nonimmigrant investor program and asserts that she had a reasonable expectation that she would also qualify for the immigrant investor program because she created 10 jobs and her investment “exceeded \$1 million dollars after two years of operations.”

Counsel’s argument is not persuasive. Her reliance on two definitions from Black’s Law Dictionary that do not relate to the distinction between personal and corporate assets cannot overcome the director’s reasoned decision based on a rational interpretation of the regulations that has been upheld in two federal court decisions, one of which is cited by the director. While we concur with the director for the reasons clearly stated in his decision, we will elaborate on his discussion in response to counsel’s appellate arguments.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

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.

(Bold emphasis added.) As stated by the director, the regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of “invest” does not include the reinvestment of proceeds.

Regarding the type of evidence that can be submitted in support of a qualifying investment, 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.

This list of evidence does not include evidence of the reinvestment of the proceeds of the new enterprise.¹ As also stated by the director, a federal court has upheld our interpretation that "invest" does not include spending of the commercial enterprise's own income. [REDACTED] the court stated:

¹ 8 C.F.R. § 204.6(j)(2)(ii) does permit evidence of the purchase of assets *for use* in the commercial enterprise. The provision does not specify, however, that the purchase of assets *by* the commercial enterprise is acceptable. Thus, evidence submitted under this provision would have to demonstrate either that the petitioner personally purchased the assets for the company with her personal funds or that the corporation purchased the assets with capital funds contributed by the petitioner.

The AAO's construction is consistent with an everyday usage of "invest" meaning to put money or capital into a venture. [Footnote citing ██████████ it is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. ██████████ 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of ██████████ on the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO notes ██████████ contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

Id. at 4-6. We continue to follow this reasoning. To hold otherwise and conclude that every normal operating expense paid out of the corporation's gross income is part of the petitioner's investment would lead to the untenable conclusion that every customer who pays for SCG's replicas is making an investment on behalf of the petitioner.

While counsel cites no statute, regulation, or precedent as an authority for her assertion that only an investment through the use of a promissory note precludes the reinvestment of proceeds, the assertion appears to be based on the regulatory definition of capital, which is also the basis of her appellate argument. Capital is defined at 8 C.F.R. § 204.6(e) as follows:

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.

The use of "personally and primarily liable" could arguably modify only indebtedness. Focusing on that language, however, the court ██████████ found that the reinvestment of corporate income or revenues cannot be considered the petitioner's investment of capital "for which the petitioner is personally and primarily liable." Moreover, counsel's argument would render the regulations meaningless. If an alien is relying on a promise to pay the commercial enterprise as her investment or as evidence that she is actively in the process of investing, the issue of reinvestment of proceeds simply would not arise.

Finally, the definitions cited by counsel on appeal are unrelated to the issue before us. The definition of personal property is clearly distinguishing chattel from real estate property and has no relevance to whether a shareholder is an owner not only of an interest in a corporation but also an owner of its assets. Absent from the list of definitions upon which counsel relies is the definition of "stock" as it relates to a corporation. Black's Law Dictionary 1428 (7th ed. 1999) defines corporate stock as: "A proportional part of a corporation's capital represented by the number of equal units (or shares) owned, and granting the holder the right to participate in the company's general management and to share in its net profits or earnings." Nothing in this

definition implies that a shareholder owns a similar proportion of the corporation's assets. Thus, while the petitioner's 51 percent interest in SCG may be her personal assets, 51 percent of the corporation's gross income is not.

As stated by the director, a corporation is a separate and distinct legal entity from its owners or stockholders.

17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Relying on these case [redacted] held that corporate earnings cannot be considered the earnings of the petitioner even if she is a shareholder of the corporation. Regardless, we note that the court [redacted] *supra*, goes further, extending the prohibition against the reinvestment of proceeds to sole proprietorships.

As a final example of why a review of the expenditures of the corporation (as opposed to infusions into the corporation) is not useful in determining the amount of the petitioner's investment, we note that corporations often borrow funds from banks, other third parties or their shareholders. The definition of capital clearly precludes indebtedness secured by the assets of the company (bank and third party loans by the company) and the definition of invest clearly precludes debt arrangements between the petitioner and the company (shareholder loans). Thus, if we were only to look at corporate expenditures as urged by counsel, we would be considering any money the corporation may have borrowed from third parties or shareholders. In this case, as noted by the director, the petitioner or her brother has lent substantial sums to SCG. Counsel's inclusion of all expenditures without consideration of funds lent to SCG and all deductions such as depreciation does not provide an accurate picture of the petitioner's at-risk investment. While we acknowledge that even subtracting the shareholder loans and depreciation, the expenditures of SCG between 1996 and 2002 would amount to more than \$1,000,000, we note the shareholder loans and depreciation merely as examples of why looking at corporate expenditures alone is not a useful means of determining an investment by a particular individual.

In light of the above, we concur with the director that the petitioner must demonstrate an infusion of \$1,000,000 from her personal account into the company. She has not done so.

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. [REDACTED] 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).

As noted by the director, the petitioner has not documented the path of the \$54,200 in equity (as listed on all the Schedules L) from the petitioner to the corporation. The remaining funds allegedly invested, the corporation’s own income, while lawfully acquired, cannot be considered a qualifying investment for the reasons discussed above.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved. Based on the information submitted, it is apparent that the petitioner is involved with a successful commercial enterprise. However, the petitioner has not established that she meets the minimum eligibility requirements for this visa classification.

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.