



U.S. Citizenship  
and Immigration  
Services

B7

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 07 2004

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:

SELF-REPRESENTED

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

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

On appeal, the petitioner submits new documentation.

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> 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, Coastal Management, LLC, 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 submitted an operating agreement reflecting that she had made a \$200,000 capital contribution to Coastal Management. She also submitted settlement statements for five condominium units she purchased in North Carolina. The closing costs for the units were \$192,353, \$187,346, \$187,346, \$182,338, and \$182,367. The statements reflect no debt financing. The petitioner also submitted a summary of these amounts, including a claim to have invested an additional \$218,327 in the limited liability company itself. Finally, the petitioner submitted Coastal Management's 2002 tax return reflecting \$141,239 in total assets. Schedule K-1 of that return reflects that the petitioner contributed \$218,327 in capital during 2002.

On March 17, 2004, the director noted that the costs for all the properties purchased total only \$919,500 and that the Schedule K-1 reflects only a \$218,327 capital contribution. The director requested Coastal Management's 2003 tax return, transactional evidence tracing the funds from the petitioner to Coastal Management and documentation relating to any loans the petitioner may have used to finance her alleged investment.

In response, the petitioner submitted single ledger balance reports relating to the purchase of the condominium units. These reports do not indicate the source of the deposits. The petitioner also submitted 2002 and early 2003 bank statements for Coastal Management that also fail to identify the source of any deposits. Finally, the petitioner submitted the 2003 tax return for Coastal Management. The return reflects

\$107,887 in total assets. Schedule K-1 reflects no additional capital contributions and a distribution to the petitioner of \$17,720, leaving a capital account of \$107,887.

The director concluded that the petitioner had not placed at least \$1,000,000 capital at risk. The director noted the lack of evidence that the condominium units had been contributed to Coastal Management and the low capital contributions stated on the Schedules K-1. Finally, the director concluded that the bank statements and single ledger balance reports failed to trace the path of the funds allegedly invested.

On appeal, the petitioner submitted a June 3, 2004 Quitclaim Deed granting Units 2 and 4 of Phase 3 and Unit 3 of Phase 2 of Osprey Creek to Coastal Management. The petitioner resubmitted the settlement statements of those three properties, reflecting original purchase prices in 2001 of \$192,353, \$187,346, and \$182,338, for a total of \$562,037. The petitioner also claims to have invested another \$250,000 cash. In support of this claim, the petitioner submits evidence of a transfer of £250,000 (\$458,063.93) to her account at Coastal Federal Bank on June 7, 2004. The evidence does not clearly identify the petitioner's bank account number at that bank. The petitioner also submitted evidence that an official check was issued on an unidentified account with Coastal Federal Bank on June 8, 2004.<sup>1</sup> Finally, the petitioner submitted a deposit slip and statement reflecting the deposit of \$250,000 with Coastal Management's account, number 5196181735, at BB&T Bank.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Moreover, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998). The record contains no evidence that the petitioner had contributed more than \$218,327 in capital at the time of filing, and no transactional evidence to support that contribution as claimed on her Schedule K-1. Moreover, the petitioner withdrew \$17,720 of that amount in 2003. This amount was not profit, but a reduction of her capital commitment.

We acknowledge that the regulations state that a petitioner must establish that she has invested or "is actively in the process of investing the required amount of capital." Precedent decisions interpreting that provision, however, have required irrevocable commitments, such as secured promissory notes, to establish that the full investment amount is fully committed. *See Matter of Izummi*, 22 I&N Dec. at 193; *Matter of Hsiung*, 22 I&N Dec. 201, 204, n. 5 (Comm. 1998). The record contains no evidence that the petitioner was legally obligated to transfer the properties to Coastal Management as of the filing date of the petition.

Regardless, we do not find that Coastal Management's ownership of the properties resolves the issue of whether the petitioner's funds are at risk other than the type of risk inherent in a passive, non employment-generating real estate investment. The regulations provide that a 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. 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. *Matter of Ho*, 22 I&N Dec. 206, 209 (Comm. 1998). Even if a petitioner transfers the requisite amount of money, she must establish that she placed her own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001)(citing *Matter of Ho*).

<sup>1</sup> While the "remitter" is identified as account number 5196181735, that number is actually the account number of Coastal Management at BB&T Bank. A statement for that account does not reflect that these funds were withdrawn from this account on June 7, 2004.

*Matter of Ho*, 22 I&N Dec. 206, 210 (Comm. 1998), 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.

We cannot conclude that the transfer of a passive real estate interest to Coastal Management, which has yet to engage in any documented employment-generating activities, is any more persuasive than the transfer of cash into a business that has not undertaken any business activity other than signing a lease. As discussed in more detail below, the tax returns reflect no gross receipts in 2002, little income in 2003 and no wages in 2002 or 2003.

Moreover, the petitioner has not addressed the director's concern that the record lacks transactional evidence tracing the cash allegedly contributed to Coastal Management in 2001 back to the petitioner.

While we uphold the director's decision, we find that the petition also cannot be approved in light of the following deficiencies.<sup>2</sup>

#### **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.

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<sup>2</sup> 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*, 229 F. Supp. 2d 1025, 1043, (E.D. Calif. 2001).

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).

The record contains accountant letters asserting that the alleged investment was funded with the lawfully acquired proceeds from the sale of the petitioner's house. This assertion was initially unsupported. In response to the director's request for additional documentation, the petitioner submitted the contract whereby she and her husband sold property for £750,000 in December 1996. This documentation is insufficient. The record contains no evidence of a pattern of income that could account for owning property of this value. The only personal tax returns in the file reflect no income at all. Moreover, it is not clear from the documentation whether or not the property was encumbered by a mortgage that needed to be satisfied upon sale. Finally, the property was sold in December 1996, nearly five years before the petitioner purchased the condominiums. The record contains no evidence that the funds obtained from the sale of the house remained untouched and available after all that time.

### 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.

On the petition, the petitioner claimed to employ six workers and did not indicate how many other jobs would be created. The business plan indicates that the petitioner’s initial plan was to provide condominiums and golf packages for vacationers to North Carolina’s shore. The “middle range plan” discusses a marketing approach termed “Par 3 Challenge” whereby “employees” set up portable tents at nearby golf courses, give out promotional gifts and obtain personal information for future marketing campaigns. The plan further states that Coastal Management currently has other employees entering the personal data obtained at the golf courses into a database. The petitioner submits six Forms W-4 and Forms I-9. The forms are all signed in December 2003 or January 2004. Coastal Management’s tax return for 2002 reflected no salaries or wages or cost of labor.

In response to the director’s request for a more detailed business plan, the petitioner submitted a new plan indicating that the Par 3 Challenges would operate all day five or more days a week and that Coastal Management “initially arranged to have 5 employees operating these daily Par 3 Challenge competitions.” The plan further states that another five employees will be hired to perform the same duties in August 2004. Finally, the petitioner asserts that an additional two employees will be needed to input the personal data into the database. Coastal Management’s 2003 tax return submitted at that time reflects no wages, salaries, or cost of labor. The petitioner has never submitted pay stubs or quarterly wage and withholding reports listing the names of the employees and wages paid during the quarter.

Forms I-9, verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as pay stubs and payroll records showing the number of hours worked, a petitioner cannot meet her burden of establishing that she has created full-time employment within the United States. *Id.* at 212. The record contains no evidence that the six individuals who completed the Forms W-4 and Forms I-9 in the record work for Coastal Management full-time, or even at all. The petitioner submitted no pay stubs or quarterly wage and withholding reports. This documentation would have been available as of the date of the petitioner’s response to the director’s request for additional documentation, received May 3, 2004, even for employees beginning work in January 2004.

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 Citizenship and Immigration Services (CIS) 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*, 22 I&N Dec. at 213. 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.* (Emphasis added.)

The petitioner’s business plan is simply not credible without further supporting documentation. Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion). The record does not adequately support the claim that the ten Par 3 Challenge employees would be permanent. Rather, the concept appears more likely to be a limited promotional plan to increase Coastal Management’s database of potential clients during its start-up phase. The record does not contain contracts or memoranda of understanding with any local golf course agreeing to the permanent presence of Coastal Management promoters and their tents at par three holes on the golf course’s property, approaching every golfer who plays the hole for his or her personal information. Without such supporting contracts or agreements with several golf courses and evidence of the full-time employment of the five employees already allegedly performing this service, we cannot conclude that this concept is likely to create 10 permanent jobs.

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.