U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

B7

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 1 2 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 additional transactional evidence reflecting that he personally paid many of the new commercial enterprise's expenses.

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

The petitioner indicates that the petition[1] is based on an investment in two businesses, Sparta Development, LLC and Kaistar Research and Development, LLC, both located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000. Both companies do business at [redacted] in Sussex County, New Jersey. Sparta Development purchased the property and appears to do no commercial business, while Kaistar is a metals manufacturer and research company doing business at the given address and paying rent to Sparta Development.

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.

* * *

[1] The petitioner initially submitted two Forms I-526 Immigrant Petitions by Alien Entrepreneur with a single fee.

> *Rural area* means an area ***not within either*** a metropolitan statistical area (as designated by the Office of Management and Budget) ***or*** the outer boundary of any city or town having a population of 20,000 or more.

(Emphasis added.) 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

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, 1041 (E.D. Calif. 2001).

The petitioner initially submitted a letter from the Township Manager of Hardyston Township in Sussex County, New Jersey, indicating that the township had a population of 6,171. The director accepted this letter as evidence that Hardyston is rural. The regulations quoted above, however, provide that a rural area cannot have a population of more than 20,000 *or* be located in a Metropolitan Statistical Area (MSA). A list of areas designated as MSAs is published at www.census.gov. This list reveals that Sussex County is located in the Newark-Union, NJ-PA Metropolitan Division of the New York-Newark-Edison, NY-NJ-PA MSA. Thus, Sussex County, and all the towns within it, is not a rural area. In light of the above, the minimum investment amount 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.

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). As stated above, Sparta Development appears to be a passive real estate company that will not create any jobs. Rather, the business plan reflects that all job creation will occur at Kaistar Research and Development. Thus, the petitioner must demonstrate that any qualifying investment was made available to Kaistar such that a sufficient nexus exists between funds invested in Sparta Development and job creation at Kaistar.

The petitioner formed Sparta Development on July 12, 2000. On September 22, 2000, the petitioner took out a credit line secured by his home for $150,000. On October 3, 2000, he purchased Lot 6, Block 62 (also known as [redacted] for $75,950 with a $50,000 mortgage. On December 14, 2000, the petitioner transferred that property to Sparta Development. On April 5, 2001, [redacted] appraised the property, including the proposed improvements, giving a value of $925,000, $353,600 of which is attributed to the land. On June 10, 2001, Sparta Development borrowed $350,000 for construction secured by [redacted] The petitioner refinanced this loan November 14, 2002 with a $475,000 loan also secured by [redacted]

On June 13, 2002, the petitioner formed Kaistar. According to the operating agreement, dated February 4, 2003, the petitioner owns an 86.5 percent interest, with the remaining interest owned by DXL Enterprises,

Inc. Ulrich Gernhardt is the president of DXL. The petitioner listed his contribution in the operating agreement as $1,800,000 in equipment. Specifically, the petitioner claimed to be contributing three electron-beam plants worth $850,000, $500,000, and $300,000 respectively and a water jet unit and various other tools worth a total of $170,000. On March 21, 2002, Kaistar entered a lease with Sparta Development, agreeing to pay Sparta Development $8,500 per month for 10,000 square feet of manufacturing space and 2,000 square feet of office space.

As evidence of his contributions of equipment, the petitioner submitted an equipment lease between U.S. Bancorp The petitioner signed the lease as the general manager of Metal Pure. According to the terms of the lease, the purchase price was $118,500, all of which was financed. The lease also indicates that the tools will be installed at . The petitioner also submitted two checks issued by Metal Pure to Shoe Machine Tool Sales on March 4, 2002 for $23,700 and $400. On February 13, 2003, Kaistar purchased $18,910.75 in equipment from Acer Group.

Finally, the petitioner submitted three promissory notes signed by the petitioner as the promisor. The first, held by is for $30,000 and is secured by property at The note is supported by evidence that the petitioner initially deposited a check from for $30,000 on January 6, 2003, which bounced January 9, 2003 (the same day the petitioner wrote a check to Metal Pure for $25,000). The petitioner made a second deposit of $30,000 on January 10, 2003. The second note, held by , is dated August 9, 2002, is for $20,000 and is secured by electron beam vacuum equipment. The note is supported by an official check for $20,000 issued to the petitioner and his wife. The final note is for $12,500 and is secured by vacuum equipment. The note does not identify the holder.

In a request for additional evidence, the director noted that many of the loans were secured by the new commercial enterprise's property. In response, the petitioner's wife asserted that the petitioner had made the following investment: $80,073.22 for $50,000 mortgage, a $150,000 home equity loan "to develop virgin land," and a $350,000 mortgage that was refinanced for $475,000, $125,000 of which was paid to contractors. The petitioner also submitted a business plan for Kaistar. Section 14.1 reflects that Kaistar began in February 2003 with $2,130,000 in shareholder equity and was seeking an additional $2,000,000 in equity. The plan included projected balance sheets for Kaistar. The balance sheet for December 31, 2004 projects $4,200,000 in stock and paid-in-capital. The petitioner did not submit, however, Kaistar's tax returns, including the petitioner's Schedules K-1 for 2002 and 2003, chronicling his capital investments during those years.

The director concluded that all of the loans except the $150,000 home equity loan were secured by the assets of the new commercial enterprise and could not be considered an at risk investment by the petitioner. The director also noted the lack of evidence that the $150,000 were used for business purposes. The director declined to consider the petitioner's investment in Kaistar, noting that the petitioner had submitted only one fee.

On appeal, the petitioner argues that Kaistar requires a specific location, which is why the petitioner formed a real estate company to construct the appropriate manufacturing site. The petitioner requests that both businesses be considered together. The petitioner claims to have spent $87,560 in direct payments for construction costs from his home equity line, $157,500 in direct payments to Sparta Development from his home equity line, $13,778.04 in interest payments for the home equity loan, $27,409.87 in direct payments for construction from the petitioner's personal account, $40,000 in deposits with Sparta Development, and $16,616.74 paid on the construction loan directly by the petitioner. Finally, the petitioner claims that the construction costs delineated above should be added to the appraised value of the land, $342,864.65, in determining the petitioner's total investment.

The petitioner submitted bank statements for his credit line at Valley National Bank, account number and statements for Sparta Development, Valley National Bank, account number These statements reflect advances on the petitioner's credit line and highlighted deposits with Sparta Development totaling $321,424.24. Two advances, one for $50,765 and another for $25,600.24, are not included on the petitioner's summary of his investment. The statements for the two accounts do not overlap, precluding us from determining whether the $157,500 deposits with Sparta Development correspond with advances on the petitioner's credit line. While the petitioner stated that he would submit the checks demonstrating how the credit line advances not deposited with Sparta Development were spent, as of this date, this office has received nothing further.

The petitioner also submitted transactional evidence establishing that the petitioner issued checks on his personal account at Valley National Bank, account number in the following amounts in 2000 and 2001:

$425.76 to Ready Mix
$5,500 to Cash
$10,000 to So. Dick, Inc.
$3,304.11 to the Township of Hardyston
$3,200 to Lyon Engineering
$3,500 to KLAE Construction
$1,980 to Beardslee Engineering
A total of $8,200 to Sparta Development, and
A total of $8,400 to Metal Pure

In addition, the petitioner issued a check for $5,000 to KLAE Construction on April 30, 2001 on his American Express Centurion Bank account, number Further, the petitioner submitted checks issued on his other account at Valley National Bank, account number reflecting payments of $16,616.63 to Lakeland Bank and$20,500 to Metal Pure between June 2001 and March 2002.

The petitioner submitted Lakeland Bank mortgage bills in support of some of the payments to that bank reflecting that these payments were in satisfaction of Sparta Development's mortgage obligations. Finally, the petitioner submitted checks on his account with Lakeland Bank, accoun reflecting payments of $31,300 to Sparta Development and $47,560 to Metal Pure between December 2002 and October 2003. The only two of these payments made after the date of filing were two payments of $2,000 to Metal Pure on September 22, 2003 and October 22, 2003.

The above transactions can be summarized as follows. Assuming that the advances highlighted on the credit line statement were used as claimed and that deposits highlighted on Sparta Development's statement were from the petitioner's credit line and that the check issued to "cash" was also used for business expenses, the petitioner has established that he personally paid $115,469.87 in business expenses for Sparta Development. If we add the land payments of $50,764 and $25,600.24 from the petitioner's credit line, we get a total of $191,834.11. We cannot consider the interest payments by the petitioner on his own credit line as that is simply a personal cost of choosing to borrow his investment funds. The petitioner also has now demonstrated that he paid $197,500 to Sparta Development. Finally, as stated above, the petitioner personally paid $16,616.63 of Sparta Development's mortgage payments. These payments total $405,950.74.

The record also reflects that the petitioner paid $76,460 to Metal Pure, $4,000 of which was after the date of filing. It appears that Metal Pure, in which the petitioner has an interest,[2] is somehow involved in equipment obtained by Kaistar. Thus, these funds relate to Kaistar more than Sparta Development. The petitioner has not submitted invoices or other evidence, however, to establish that these payments represent the purchase of equipment for Kaistar. Thus, the petitioner has not demonstrated that these payments represent an investment in Kaistar, and not Metal Pure.

Section 203(b)(5) of the Act requires an investment in "a" new commercial enterprise. 8 C.F.R. § 204.6(e) provides:

> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

The statute and regulations imply that a petitioner must invest in a single commercial enterprise, which may consist of a holding company and its wholly owned subsidiaries. Sparta Development and Kaistar are not the wholly owned subsidiaries of one holding company. Even if we were to consider the investment in both companies, however, as stated above, the full amount of the investment must be made available to the employment-generating entity. The petitioner must demonstrate a sufficient nexus between the investment in Sparta Development and the proposed employment at Kaistar.

We find that the purchase of property invested in Sparta Development and the subsequent improvements thereon cannot be considered to be capital assets available to the job creating enterprise. As stated above, Kaistar is paying rent to occupy the premises, an expense it would not incur if the property had been invested into Kaistar. We note that if an unrelated company were renting space to Kaistar, that company would not be considered to have invested in Kaistar. In other words, a company's landlord is not considered an investor in the company.

Even if we considered the financing for Sparta Development, the evidence is not persuasive. As stated by the petitioner, all of the loans except the home equity credit line are secured by the assets of the new commercial enterprise. Nevertheless, we will consider any payments on these loans made by the petitioner prior to the date of filing. The payments to Sparta Development and for its expenses, however, total $405,950.74.

On December 14, 2000, the petitioner transferred property to Sparta Development. That transfer can be considered an investment in Sparta Development. The petitioner purchased that property for $75,950 on October 3, 2000, just over two months prior to transferring it to Sparta Development. Yet, on April 5, 2001, Kerr Appraisal Group appraised the land alone at $353,600. While the amount of a property investment should be the fair market value of the property transferred, such an analysis does not create a realistic view of the petitioner's investment in this case, where he purchased the property only two months before transferring it. The record contains no explanation for the significant discrepancy between the purchase price and the appraisal conducted six months later.

---

[2] The petitioner's tax returns, schedule E, reflects his ownership in Metal Pure, LLC. His 1997 Schedule K-1 reflects his percentage interest as 20 percent.

Any investment in Kaistar directly would be persuasive, as Kaistar is the entity that will actually be creating the employment. As stated above, the petitioner claims to have contributed $1,800,000 in equipment to Kaistar. On appeal, the petitioner asserts that the articles of organization are sufficient evidence of this investment. We cannot concur. Rather, the petitioner must submit invoices or receipts for the purchase of the equipment and transactional evidence demonstrating his payment of the purchase price. In addition, the petitioner's Schedules K-1 for Kaistar would further support the claim. The petitioner, however, submitted evidence demonstrating only that the petitioner leased equipment from Metal Pure by financing the entire $118,500 purchase price and that Kaistar itself purchased equipment from the Acer Group. As stated above, the petitioner has not demonstrated that his personal payments to Metal Pure, totaling $76,460, constitute purchases of equipment for Kaistar. Thus, the petitioner has not established that he made a qualifying investment into Kaistar.

Even if we considered the $405,950.74 paid in expenses, the $353,600 value of the property, and the $76,460 paid to Metal Pure, and we reiterate that these claims are not well supported as investments into an employment-generating entity, those amounts total only $836,010.74. As stated at the beginning of this decision, the minimum investment amount in this case is $1,000,000.

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. 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); *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). 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 petitioner submitted the evidence discussed above and his personal tax returns for 1997 through 2000. 1999 was the only year in which the petitioner did not declare negative income, and in that year he only declared an income of $1,863.

The director stated in the request for additional evidence and again in the final notice of denial that the petitioner had not established the lawful source of his investment funds. The petitioner has declined to address this issue. We concur with the director. Other than loans from banks and individuals, the petitioner has demonstrated no lawful source of income. The record is absent any evidence that the petitioner has the personal assets to repay these loans, most of which are secured by the assets of the new commercial enterprise, or evidence of income sufficient to account for the accumulation of such assets.

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.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

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, the petitioner has not met his burden of establishing that he has created full-time employment within the United States. *Id.* at 212.

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.

While the petitioner has submitted a detailed and credible business plan, the petitioner has not submitted any evidence confirming that he currently employs any full-time qualifying employees.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.