



U.S. Citizenship  
and Immigration  
Services

B7

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 14 2002

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]

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.

*Mai Johnson*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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**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 a qualifying investment of lawfully obtained funds or that he had met the employment creation requirement.

On appeal, counsel initially requested 60 days to gather documents to support the appeal. Subsequently, counsel submitted a four-page brief asserting that the petitioner invested the required amount of money. Specifically, counsel asserts that the \$400,000 loan was a personal loan to the petitioner. Counsel also discusses the petitioner's position as Chief Executive Officer. Counsel does not address the other bases of the denial other than to assert in the conclusion that the business will create more jobs and the petitioner submits no 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, Walkerhill, Inc., doing business as Stanton Golf Center, 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.

On the petition, the petitioner indicated that he had invested \$1,100,000 on January 4, 2002. He further indicated that Walkerhill had \$700,000 in cash and \$400,000 in debt financing. The petitioner submitted the August 29, 2001 escrow instructions for the sale of a business listing the buyers as the petitioner, his wife, [REDACTED] and [REDACTED]. The sale includes "all stock in trade, fixtures, equipment, tradename, goodwill, lease, [and] leasehold improvement." The buyers had already deposited \$30,000 and agreed to pay another \$320,000 prior to closing, obtain a new loan for \$550,000 and assume an existing loan in favor of the City of Stanton for \$200,000. The instructions reference a security agreement for the existing \$200,000 loan. The closing statement, dated January 4, 2002, reflects that prior to closing, the petitioner's wife deposited \$30,000, the petitioner deposited \$395,000, and Walkerhill deposited \$405,053. The statement lists a new encumbrance with Pacific Union Bank for \$400,000 and prorates the personal property taxes for 2001-2002. The buyer is now listed as Walkerhill, Inc. The total purchase cost, with fees, is listed as \$1,491,286.09.

As evidence of the petitioner's personal contribution to the above purchase, the petitioner submitted a Verification of Deposit from Pacific Union Bank reflecting a balance of \$352,549 in Walkerhill's account, number 009-823670, as of November 1, 2001. The petitioner also submitted transactional documentation reflecting that \$323,239 and \$25,820 were transferred to an unidentified Walkerhill account from an unidentified account in Seoul, Korea on October 30, 2001. Finally, the petitioner submitted a sublease whereby Stanton Hill, LLC assigned its lease with the City of Stanton to Walkerhill.

On November 20, 2003, the director advised the petitioner of his intent to deny the petition. The director concluded that the record lacked evidence of \$700,000 in cash already held by Walkerhill or available to the petitioner or his wife, that the petitioner had not submitted evidence identifying the source of the wired funds, and that the petitioner had not established that the \$400,000 loan was secured by his personal assets alone. The director also requested evidence of ongoing business activity.

In response, the petitioner submitted numerous invoices and receipts listing Walkerhill as the purchaser and checks issued by Walkerhill. A business can have several sources of available cash including loan proceeds and payments by clients. Thus, evidence that the business spent money is not evidence of the petitioner's personal investment. While not specifically stated, from context it is clear that 8 C.F.R. § 204.6(j)(2)(ii) refers to purchases for the business made by the alien petitioner, not the new commercial enterprise. Otherwise, an alien petitioner could count an investment twice, once as cash deposited with the company (8 C.F.R. § 204.6(j)(2)(i)) and again when the company spent that money (8 C.F.R. § 204.6(j)(2)(ii)). We cannot conclude that the regulations favor such an absurd reading of 8 C.F.R. § 204.6(j)(2)(ii).

Included with the invoices discussed above are two contracts for the purchase of vehicles, a 1994 Plymouth Voyager for \$3,989, all due April 19, 2002, and a 2004 Honda Accord for \$18,234, including a \$5,000 down payment. While the petitioner is listed as the purchaser for both vehicles, Walkerhill paid the down payment on the Honda Accord and another payment. These vehicle purchases are not persuasive evidence of an investment by the petitioner.

Finally, also included with the invoices, the petitioner submitted credit card bills. The first credit card account does not identify the holder, but the petitioner's wife personally paid one of the bills. The second account lists the petitioner as the account holder, but Walkerhill paid the bills. These credit card bills are not persuasive evidence of the petitioner's personal investment into Walkerhill other than, at best, the \$47.42 paid by the petitioner's wife.

In addition to the evidence of business expenses, the petitioner submitted several Pacific Union Bank statements for a Walkerhill account. These statements contain several deposits defined as "NDPS Global dep." but the statements do not identify the source of these deposits. The petitioner also submitted a list of transfers from Korea to the United States, totaling \$564,433.33 between September 15, 2001 and June 17, 2002. \$120,000 of these funds were transferred to the petitioner or his wife, while the remaining funds were transferred directly to Walkerhill. This list includes the \$323,239 and \$26,820 transfers documented initially. The source of these transfers is not listed. Counsel asserted that the petitioner and his wife were the source of all the transfers, although relatives ordered the transfers. Counsel further asserted that due to elapsed time since the transfers took place, evidence identifying the source of the transfers is not available.

As evidence of financing, the petitioner submitted two loan applications and information sheets reflecting that Walkerhill acquired two credit lines, one for \$400,000 and one for \$35,000. The petitioner did not submit the security agreements or other terms for these credit lines.

Further, the petitioner submitted Walkerhill's 2001 and 2002 corporate tax returns. These returns, Schedule L, reflect shareholder loans of \$411,254, mortgages, notes, and bonds payable in one year or more of \$375,363, and \$100,600 in common stock. Schedule L also reflects \$174,143 in "other liabilities." According to an attached statement, this amount included a \$139,438 note payable to Pacific Union Bank. In 2002, the shareholder loans increased to \$471,042 the mortgages, notes, and bonds payable in one year or more increased to \$425,776, and the "other liabilities" decreased to zero. Common stock remained the same.

Finally, the petitioner submitted several leases and subleases for the property where Walkerhill is now located. These leases reveal that the Savanna School District owns the property and leased it to the City of Stanton for 15 years in 1994 with renewal possible upon mutual agreement. The City of Stanton then sublet the property to #1 Golf Company, which assigned the lease to Stanton Golf Center, LLC, which ultimately sublet the property to Walkerhill. Section 32.7 of the sublease whereby the City of Stanton sublet the property to #1 Golf Company states that the sublessee may not pledge, hypothecate, mortgage or otherwise encumber the sublease or any interest therein for the purpose of securing a loan, debt, or other financial obligation without the consent of the City of Stanton and the Savanna School District.

The director concluded that the petitioner had not overcome his concerns. The director noted that the tax returns, schedules L, reflected an equity investment of only \$100,600. Acknowledging that the schedules L reflected significant shareholder loans, the director quoted the definition of "invest" at 8 C.F.R. § 204.6(e), quoted above, which excludes loans to the commercial enterprise. Finally, the director concluded that the petitioner had not established that the petitioner's personal assets secure Walkerhill's long-term liabilities.

On appeal, counsel notes that the property is leased and, thus, cannot secure Walkerhill's loans. Counsel asserts that the loans were personal loans based on the petitioner's past experience. Acknowledging that an "American" bank would not offer the petitioner a \$400,000 credit line without security, counsel concludes:

But the Korean American bank (Pacific Union Bank-well know [sic] Korean Bank in California. Owned by parent company in Korea) understood [the petitioner], the hard working nature, and successes they achieved in Korea, bad and good times, and decided to offer PERSONAL loans of \$400,000.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's appellate statements are unsupported by bank letters and the loan agreements themselves, setting forth the terms of the loan and specifying the security for those loans. Counsel's statement is also questionable in light of the petitioner's failure to list any prior business experience on Walkerhill's loan application even though specifically requested on the application. While Walkerhill may not own the property, it has other personal property assets that could be used as security. Thus, we concur with the director that the record does not establish that Walkerhill's loans are secured solely by the petitioner's personal assets.

Moreover, counsel fails to address the director's legitimate concern that the petitioner himself loaned over \$400,000 to Walkerhill in addition to the Pacific Union loan. The plain language of 8 C.F.R. § 204.6(e), quoted by the director and above in this decision, excludes loans to the new commercial enterprise as part of a qualifying investment. We concur with the director that Walkerhill's tax returns do not reflect an equity investment over \$100,600 and nothing in the record suggests that these numbers are inaccurate.

#### **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).

Initially, the petitioner submitted no evidence relating to how he accumulated the funds allegedly invested or, as stated above, tracing the funds deposited in escrow back to the petitioner’s personal bank account. Rather, the petitioner submitted bank verification letters asserting that as of October 27, 2001, the petitioner and his wife had bank balances totaling \$319,510. In response to the director’s notice of intent to deny, which noted this deficiency, the petitioner submitted the list of transfers discussed above and evidence of business interests and property interests held by the petitioner and his wife.

The director concluded that the petitioner had not established the value of his properties or his income from them. The director further concluded that the record lacked evidence that the petitioner had sufficient income to account for a \$1,000,000 investment. Counsel does not address this issue on appeal. We concur that the record lacks evidence of sufficient income to account for the petitioner’s accumulation of property in Korea. Moreover, the petitioner has not traced the claimed \$700,000 cash investment from his personal accounts to Walkerhill. Finally, the petitioner has not demonstrated that his lawfully acquired assets secure the remaining \$400,000 in alleged debt financing.

**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. *Matter of Ho*, 22 I&N Dec. 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.

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. *Id.* 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.*

The petitioner indicated on the petition that he had purchased an existing business. This claim is consistent with the record. The petitioner further indicated that there were two employees at the time of his investment, that he had increased that number to six, and that he would create another five to eight. We note that if he only added another five, he would only create nine new jobs, not ten.

In his notice of intent to deny, the director requested evidence of current employment. In response, counsel asserted that Walkerhill employed three employees and several independent contractors. The petitioner submitted Walkerhill's 2002 Form W-3 reflecting that it issued six Forms W-2 that year and the Forms W-2 it issued. Of those employees receiving Forms W-2, however, only two could have worked full-time all year at minimum wage. Moreover, the petitioner also submitted quarterly wage and withholding reports for the last three quarters of 2002 and the first quarter of 2003. These reports reflect that Walkerhill employed four employees each month in the second and third quarters of 2002 (the list of employees includes five names including the petitioner, but one of the employees could not have worked full-time.) In the fourth quarter of 2002, Walkerhill employed only three employees each month. The number of employees decreased to one each month in the first quarter of 2003. While counsel referenced a business plan in asserting that the petitioner's funds were at risk, the petitioner did not submit one.

The director concluded that the petitioner had not established that any employees currently working for Walkerhill were qualifying employees or the number of employees at the time of the investment. The director noted that independent contractors are excluded from the definition of "employee" at 8 C.F.R. § 204.6(e). Finally, the director noted that the petitioner had failed to submit a business plan.

In response, counsel merely asserts that the petitioner will hire ten or more workers. As stated above, the assertions of counsel are not evidence. Moreover, this bare assertion does not meet the rigorous requirements for a comprehensive business plan set forth in *Matter of Ho*, 22 I&N Dec. at 213. Thus, we concur with the director that the petitioner has not established that he will create ten new jobs in addition to any jobs that existed at the time of the petitioner's investment.

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.