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U.S. Citizenship  
and Immigration  
Services

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

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

**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 at-risk investment of lawfully obtained funds in a targeted employment area. The director further determined that the petitioner had not demonstrated that she met the employment creation requirements of the classification sought or that she would be engaged in the management of the business.

The petitioner initially submitted no documentation to support her petition. On January 21, 2004, the director issued a detailed notice of intent to deny the petition, providing the petitioner all of the evidentiary requirements specified in the regulations. In response, the petitioner submitted a letter, but no documentation. The petitioner submits evidence to support her petition for the first time on appeal.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed. Regardless, the evidence submitted does not address all of the director's concerns.

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).

#### **MINIMUM INVESTMENT AMOUNT**

The petitioner indicates that the petition is based on an investment in a business, Veronica Catering, located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. The petitioner indicates that the business is located in San Diego County.

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

*Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

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

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

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

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

Initially, the petitioner submitted no evidence to support her petition. In a notice of intent to deny dated January 21, 2004, the director advised the petitioner of the regulatory requirements quoted above. In response, the petitioner states, "one of the minimum requirements is \$1,000,000 in revenue." Nothing submitted on appeal relates to this issue. Without any evidence that San Diego County or the metropolitan statistical area in which the business is located is a targeted employment area or that the State of California has designated a geographic area containing the location of the business as a targeted employment area, 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 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.*, 229 F. Supp. 2d at 1042 (citing *Matter of Ho*).

*Matter of Ho*, 22 I&N at 210, 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.

On the petition, the petitioner claimed to have invested \$18,000 in February 1997 and a total of \$27,000 as of the date of filing, December 8, 2003. The petitioner also claimed to have purchased \$30,000 in assets for the business. The petitioner submitted no evidence to support these assertions. In the above-referenced notice of intent to deny, the director advised the petitioner that \$27,000 was far below the \$1,000,000 investment required, that the petitioner had submitted no evidence of how the remaining investment would be made or that the funds were even available to the petitioner. The director also noted the lack of evidence that the business even existed. The director listed the evidentiary requirements quoted above.

In response, the petitioner asserts that she is unable to open a business bank account because she lacks a Social Security Number and asserts that once she becomes a resident, she will "revenue the minimum amount required."

In his final decision, the director noted the lack of evidence of an investment or even the availability of lawfully obtained funds to be invested and cited *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) for the proposition that the reinvestment of proceeds cannot be considered capital. The director further noted the continued lack of evidence that the business was operational.

On appeal, the petitioner submitted four photographs of a catering truck with the address of the business on it but no company name; an unaudited income statement for [REDACTED] reflecting gross income of \$12,000 and net income of \$5,160; a letter of agreement dated March 19, 2004, signed by the owner of Moody's Lunch Service, Inc., allowing the petitioner to base her catering business from the same address as Moody's Lunch Service, Inc.; invoices for Moody's Lunch Service; 2002 and 2003 Sales and Use Tax Returns completed by the petitioner; and two letters from clients attesting to the petitioner's services.

While the evidence submitted on appeal is suggestive of the petitioner's involvement in catering activities, it does not establish that the new commercial enterprise listed on the petition exists as business entity or that the petitioner is actively engaged in making an equity investment of \$1,000,000 into the commercial enterprise listed on the petition. The record lacks any evidence tracing the path of any funds (\$1,000,000 or even the \$27,000 claimed) from the petitioner to the new commercial enterprise. The petitioner's lack of a Social Security Number does not entitle her to a lower evidentiary burden than aliens who are in the United States legitimately. We cannot presume a qualifying investment from the petitioner's bare assertion that she is unable to open a bank account.

Further, we concur with the director's statement that the petitioner cannot rely on the assertion that the business will eventually generate \$1,000,000 in revenues. In addition to the case cited by the director, which

involved a corporation, we note that a federal court reached the same conclusion relating to a sole proprietorship. See *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

### 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. at 210-211; *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.*, 229 F. Supp. 2d at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

In the notice of intent to deny and the final denial notice, the director noted the lack of evidence that the petitioner had obtained sufficient funds lawfully. The director listed the regulatory evidentiary requirements quoted above. The record continues to lack evidence that the petitioner lawfully acquired the \$27,000 allegedly invested or the remaining \$973,000. As noted by the director, the record lacks evidence that the petitioner has access to \$973,000.

### 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.*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

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.*

The director noted that lack of evidence relating to employment both in the notice of intent to deny and in the final notice of denial. On appeal, the petitioner submits a naturalization certificate for one alleged employee and a driver's license, permanent resident card and Social Security Card for another alleged employee. This evidence does not establish that the individuals work for the new commercial enterprise or that they work full-time. *See Matter of Ho*, 22 I&N Dec. at 212. Even Forms I-9, which the petitioner has not submitted, 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 her burden of establishing that she has created full-time employment within the United States. *Id.* Moreover, even if we accepted the evidence as establishing that the alleged commercial enterprise employs two workers, the petitioner would have to submit a comprehensive business plan meeting the specifications quoted above. No business plan is contained in the record.

## MANAGEMENT

8 C.F.R. § 204.6(j)(5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

- (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
- (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
- (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

While the director raised this issue, it is clear from his decision that the ultimate concern is the lack of evidence that the commercial enterprise identified on the petition is an existing business entity. We concur with this concern. While the law no longer requires that a petitioner personally establish the new commercial

enterprise, we find that the regulation relating to this earlier requirement, 8 C.F.R. § 204.6(j)(1), is still relevant in demonstrating the existence of a new commercial enterprise. The director requested significant evidence to establish that the new commercial enterprise exists and is operational. The information submitted on appeal is ambiguous, revealing that another entity operates a food establishment at the location alleged to be the business address of the new commercial enterprise. The relationship between that entity and the new commercial enterprise is unclear. If the petitioner is simply an independent contractor for Moody's Lunch Service, there is no commercial enterprise in which she invested and she cannot be said to be engaged in the management of a new commercial enterprise. Nor can she be credited for any employment at that establishment.

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.