



U.S. Citizenship  
and Immigration  
Services

B7

FILE: [REDACTED]  
WAC 03 095 54561

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 25 2005

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:

**PUBLIC COPY**  
2005

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*

S Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. On March 3, 2005, the AAO moved to reopen the matter and, pursuant to 8 C.F.R. § 103.5(5)(ii), afforded the petitioner 30 days in which to submit a brief. On March 22, 2005, counsel requested immediate action on the matter, effectively waiving the 30-day period mandated by the regulations. The previous decision of the AAO will be vacated, the appeal will be adjudicated on its merits and the petition will be denied.

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. On appeal, counsel stated that he would submit a brief and/or evidence to the AAO within 60 days. Counsel dated the appeal December 15, 2003. On December 17, 2004, the AAO summarily dismissed the appeal, concluding that no additional information had been received. The AAO has now received information that counsel submitted a brief and additional evidence to the director on February 18, 2004. Counsel asserts that a duplicate was simultaneously submitted to this office. In light of the above information and because the documents were filed with the Service Center before the record of proceedings was forwarded to the AAO, we have reopened the matter to consider the February 18, 2004 submission and adjudicate the appeal on its merits.

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, Elite Cabinets and Shutters, Inc. (hereinafter Elite Cabinets), 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 \$500,000.

### 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 director concluded that the evidence did not establish that the petitioner had contributed the full \$500,000 or that the infused funds were contributed as an equity investment. On appeal, counsel asserts that the petitioner has documented the path of the full investment from himself to the new commercial enterprise and that the representation of this "investment" as shareholder loans is purely for bookkeeping purposes.

On April 26, 2001, the petitioner purchased the furniture, fixtures, equipment, trade name and inventory of a business, Classic Concept. While the director relied on the original purchase price, \$305,000, the total cost, including fees, was \$326,510. The petitioner submitted cashier's checks and other transactional

documentation establishing that he transferred \$216,510 into escrow and issued a promissory note to the seller for \$105,000, secured by his personal residence. On May 1, 2002, the petitioner appears to have paid the full \$105,000 to the seller. The director accepted these funds as originating from the petitioner and being made available to the business. We concur.

The petitioner also submitted numerous checks, deposit slips, bank statements, credit card statements and invoices designed to demonstrate an investment of the remaining \$173,490. The petitioner transferred \$2,000 on February 14, 2001 and \$5,000 on March 20, 2001 from his Bank of America account [REDACTED] to Elite Cabinet's Bank of America account.

The \$5,000 was subsequently paid into escrow and, thus, is already considered under the cost of purchasing the business discussed above. The petitioner transferred the following amounts from his Bank of America account 87096-75154 (an equity loan account):

To the Franchise Tax Board: \$4,420 on September 17, 2001,  
In payment of estimated tax: \$16,689 on September 17, 2001,  
To the Enterprise Management Corporation: \$1,000 on September 17, 2001,  
To the seller of the business: \$65,000 on May 1, 2001, and  
To Elite Cabinet's Bank of America account 12208-02757: \$11,000 on September 13, 2001,<sup>1</sup>  
\$10,000 on September 27, 2001, and \$15,000 on October 11, 2001.

The \$65,000 to the seller of the business is already included in the \$316,510 cost of purchasing the business discussed above. The petitioner paid the remaining \$40,000 to the seller from his First Coastal Bank equity loan account. The petitioner also transferred the following amounts from his Bank of America account 10222-18275, all prior to depositing \$140,369.46 in that account on July 10, 2001:

To Elite Cabinet's Bank of America account [REDACTED] \$216,510 on May 1, 2001,  
\$15,000 on June 7, 2001, \$10,000 on June 20, 2001, \$5,000 on June 26, 2001, and \$3,000  
on July 6, 2001,  
To Elite Cabinet's Bank of America account [REDACTED] \$5,000 on June 7, 2001, \$650 on  
June 11, 2001,  
To Elite Cabinet's Bank of America account [REDACTED] \$5,000 on June 7, 2001, \$5,000  
on June 26, 2001 and \$4,000 on July 2, 2001.

Finally, the petitioner transferred the following amounts from his First Coastal Bank equity loan account to Elite Cabinet's First Coastal Bank account: \$14,000 on July 18, 2002, \$17,000 on July 18, 2002, \$17,000 on August 16, 2002 and \$50,000 on September 18, 2002.

The petitioner also used his personal credit card for several business related expenses. On May 25, 2001, the petitioner withdrew a cash advance of \$5,000 and deposited those funds in Elite Cabinet's Bank of America account [REDACTED]. The credit statements and invoices reflect the following expenses paid by the petitioner: \$205.22; \$1,233.79; \$872.29; \$41.80; \$394.94; \$113.40; \$75.59; \$364.28 and \$313.15. While the petitioner also used this credit card for personal expenses, the invoices for these expenses demonstrate that they are business related. We differentiate the petitioner's payment of normal operating expenses, as demonstrated

<sup>1</sup> The petitioner claims to have transferred another \$11,000 with this amount, but the account number on the debited account is that of Elite Cabinet's Bank of America account, number [REDACTED]. As such, the petitioner cannot be credited with that transfer.

here, from the business' own payment of normal operating expenses out of its own proceeds. The former transaction can represent an investment by the petitioner while the latter cannot. *See generally Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

In addition to the \$316,510 already acknowledged as the cost of purchasing the business, the above documentation suggests additional infusions of more than the \$173,490 needed to demonstrate a \$500,000 contribution. While the numerous accounts and transfers make it difficult to confirm that none of the above funds are represented more than once, a review of the statements does not reveal any unusually large debits from Elite Cabinet accounts that might represent a return of funds to the petitioner. Thus, we are satisfied that the petitioner has established an infusion of more than \$500,000 into Elite Cabinets.

We do not find, however, that the petitioner has overcome the director's other concern that these funds were merely loaned to the commercial enterprise. As noted by the director, several of the checks issued by the petitioner to Elite Cabinets specifically indicate that they are loans. In addition, as further noted by the director, both the company's 2001 and 2002 federal income tax returns reflect significant shareholder loans and minimal equity investment. Specifically, Elite Cabinet's 2002 Form 1120 U.S. Corporation Income Tax Return, Schedule L, reflects \$20,000 in capital stock for the entire year with paid-in-capital increasing from \$2,265 to \$53,326 and shareholder loans increasing from \$298,219 to \$470,309.

On appeal, counsel first asserts that the director erred in rejecting the petitioner's explanation that the loans to the company were for internal bookkeeping and organizing purposes only. The director did not fail to consider any explanation as none was offered prior to appeal. Regardless, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, counsel's mere assertion on appeal that the loan references on the checks and the representation of these amounts as loans to the Internal Revenue Service (IRS) were for "internal bookkeeping and organizing purposes only" is insufficient. Moreover, we do not find such an explanation to have merit. If the petitioner is conceding that he misrepresented the nature of these funds to the IRS, a federal government body, his credibility before this federal government body is minimal.

Counsel next asserts that the issue of whether the funds were loaned "should be ignored" because the funds came directly from the petitioner, not an outside source, and were clearly placed at risk. Counsel's assertion is not on point. The issue is not whether the funds derived directly from the petitioner. The regulation at 8 C.F.R. § 204.6(e)(definition of invest), provides that 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.*" The plain language of this provision precludes any shareholder loans in all situations, making no exceptions for sole shareholders or shareholders who can demonstrate that they are the source of the loaned money. The difference is not merely one of semantics. The corporation is a separate legal entity even though the petitioner is the sole shareholder. Should it fail, the petitioner will be able to compete for a share of the remaining resources as one of the corporation's creditors. It is clear that the regulations require an equity, not a debt arrangement. We concur with the director that, in this case, the petitioner has not made a qualifying equity investment.

#### **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). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211. 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 director concluded that the petitioner had not established an income that could account for the accumulation of the funds made available to the commercial enterprise. On appeal, counsel asserts that similar documentation was deemed sufficient in a previous petition and that the director failed to consider all of the petitioner’s employment documentation. Counsel submits evidence indicating that domestic businesses and citizens of Kuwait do not pay income taxes. Thus, such documentation is unavailable.

We do not find that an approval of one immigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis on the evidence of record. The immigrant visa could have been issued based on different evidence or in error. Citizenship and Immigration Services (CIS) is not bound to treat acknowledged past errors as binding. *See Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327 (9th Cir. 1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517-518 (1994); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987).

Obviously, if the Kuwait government does not collect income taxes from its citizens and domestic corporations, the petitioner cannot be expected to provide such documentation. The unavailability of such documentation, however, does not relieve the petitioner from his burden of providing credible evidence of his income, if that is the source of his funds. In fact, the unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). That regulation, however, provides that where primary evidence is unavailable, secondary evidence may be submitted but must overcome the unavailability of primary evidence. Only where primary and secondary evidence is unavailable may a petitioner rely on affidavits, which must overcome the unavailability of primary and secondary evidence. *Id.*

Initially, the petitioner submitted affidavits from past employers attesting to the following employment:

1. Project Planning Manager for Musaad Al-Saleh & Sons from December 3, 1978 to November 1, 1981,
2. Chief engineer for Al Jazira Contracting & Investment Company from December 1, 1981 to November 30, 1983,
3. Resident Engineer for the National Housing Authority from July 4, 1984 to June 7, 1987 with a monthly wage between 1,043 and 1,170 Kuwaiti dinars (\$3,628.58 and \$4,070.41)<sup>2</sup>, and
4. Civil Engineer for the Ministry of Defense from June 12, 1990 to February 1, 1993.

The petitioner also submitted evidence that he was licensed to open an engineering office from 1980 to 1982. In 1987, the petitioner was an agent authorized to sign for Al Blooge Fashions, but the record does not establish his position or salary for that company. In 1990, the petitioner formed Al Masharik Building Contracts Company, a limited liability company. The petitioner's contribution was 56,100 Kuwaiti dinars (\$195,171). In 1976, the petitioner purchased property from the Ministry of Finance for 1,250 Kuwaiti dinars. The record does not establish that he petitioner has sold this property for a profit, or at all. Finally, the petitioner submitted evidence that he received \$100,000 on April 1, 1999 as the result of a lawsuit to recover a previous investment.

In response to the director's request for additional evidence, the petitioner submitted a more detailed accounting of his employment. Specifically, he submitted a 1995 certification from the Public Institution for Social Security verifying the petitioner's employment from September 1971 through June 1990. The certification is fairly consistent with the employment specified above, except that the certification does not include any employment for Al Blooge Fashions but does include employment for Al Fawaris Building & Construction Company from December 1, 1983 to March 31, 1984. The certification does not provide any information on the petitioner's wages, but specifies that he was entitled to a monthly retirement pension of "749.250" Kuwaiti dinars. It is not clear whether the above number represents 749.25 or 749,250. We note that a retirement pension of 749,250 Kuwaiti dinars is not credible as it far outweighs the petitioner's only

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<sup>2</sup> The exchange rates provided by counsel on appeal are recent. All the U.S dollar amounts in this decision have been calculated with the earliest exchange rate available at [www.oanda.com](http://www.oanda.com), January 1, 1991, except for the petitioner's pension which was converted using the rate on November 5, 1995, the date the certification verifying that pension was issued.

known monthly salary of 1,170 Kuwaiti dinars. Thus, we presume the petitioner's retirement pension is 749.25 Kuwaiti dinars (\$2,496.67).

Thus, while the petitioner has established employment since 1971, he has not established that he ever earned more than \$4,070.41 per month, or \$48,844.92 annually. The record does not include audited financial statements or annual reports for Al Masharik Building Contracts Company. Thus, the record does not establish that this was a successful business for the petitioner that could account for the accumulation of more than \$500,000.<sup>3</sup> In light of the above, we concur with the director that the petitioner has not established the lawful source of his funds.

### **EMPLOYMENT CREATION**

Beyond the decision of the director,<sup>4</sup> the evidence does not reflect that the petitioner has or will create 10 *new* jobs. The 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner filed his petition after that date, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

The regulation at 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

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<sup>3</sup> While we acknowledge that much of the contributed funds derive from the petitioner's equity loan on his house and a return of a prior investment, these direct sources beg the question of where the petitioner acquired the funds to purchase the house and make the prior investment in the first place.

<sup>4</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*, 299 F. Supp. 2d 1025, 1043, (E.D. Calif. 2001).

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.

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 at 212.

On the Form I-526 petition, the petitioner indicated that there were five employees when he made his investment and 10 at the time of filing. He claimed he would create another 10 jobs. At that time, however, he claimed to employ only 13 full-time employees.

The petitioner submitted quarterly wage and withholding reports and Forms W-2 reflecting several employees, but these documents do not establish how many worked full-time. The payroll documents for the third quarter of 2002, submitted initially, suggest that 17 of Elite Cabinet's 22 employees who worked that quarter worked full-time (more than 455 hours). The quarterly wage and withholding report for that quarter, however, reflects a total of 18 employees, only 15 of whom earned wages consistent with full-time employment at minimum wage. Thus, either the hours reflected on the quarterly payroll documents are year-to-date hours or there are serious discrepancies between the payroll documents and the wage and withholding report for the same quarter. The petitioner has not submitted a business plan, claiming in response to the request for additional evidence that he had already created 10 jobs, although he claimed at that time to employ only 13 full-time employees.

The petitioner purchased the business in April 2001. The record contains no evidence that, at the time of this sale, the business employed no more than five employees as claimed on the petition. Going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without evidence establishing the number of employees prior to the sale, we cannot determine how many positions the petitioner has created. The petitioner does not claim to have invested in a troubled business that would allow him to rely on employment maintenance pursuant to the regulation at 8 C.F.R. § 204.6(j)(4)(ii).

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 AAO's decision of December 14, 2004 is vacated pursuant to an AAO motion. The petition is denied.