

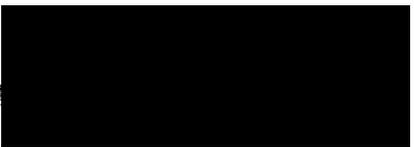
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U.S. Citizenship  
and Immigration  
Services

B7



FILE: [Redacted]  
SRC 05 101 50352

Office: TEXAS SERVICE CENTER Date: NOV 18 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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**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 of lawfully obtained funds or that the petitioner would meet the employment creation requirements.

On appeal, the petitioner discusses his efforts at obtaining lawful status and states:

After consideration I applied for Alien Entrepreneur although I knew that some of the requirements I did not meet as per the instructions, these are some of the reasons that made me seek for help first before making an application. Capital investment, proof of lawful funds and targeted areas, were the major evidence I did not meet but I did not want to limit myself, since my case is unique and I wanted it to be exempted and considered under **unusual circumstances**. The truth is I'm an alien and I started a business and I wish to use this opportunity, instead of other petition.

(Emphasis in original.) Thus, the petitioner does not appear to contest the director's conclusions regarding the petitioner's eligibility under the statutory and regulatory requirements. Rather, the petitioner appears to seek a waiver of those requirements. The petitioner provides no legal basis for waiving the statutory and regulatory requirements for the classification sought.

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 above statutory language makes clear that Congress intended this classification to encourage large business investments that create jobs. The law does not contemplate any "exemptions" for "unusual circumstances." The law was not intended as a humanitarian based means of obtaining lawful permanent status for every alien who starts a business.

**MINIMUM INVESTMENT AMOUNT**

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

The regulation at 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.

The regulation at 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). The new commercial enterprise is [REDACTED] located in Waco, Texas. The petitioner did not complete the last line of Part 3 of the petition requesting the county in which the new commercial enterprise is located.

The petitioner's response to the director's request for evidence that [REDACTED] is a targeted employment area did not address this issue. Thus, the director concluded that the petitioner had not established that his investment occurred in a targeted employment area. As stated above, the petitioner does not contest this conclusion on

appeal. There are no humanitarian grounds for reducing the required investment amount. Thus, the minimum investment amount in this matter is \$1,000,000.

**INVESTMENT OF CAPITAL**

The regulation at 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.

The regulation at 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).

On the petition, the petitioner claimed to have invested \$510,000 as of the date of filing. Part four reflects that this amount includes the value of all assets purchased for use in the enterprise. In support of this claim, the petitioner submitted proof of passive real estate investments and the 2003 tax return for CGI reflecting only \$1,000 in common stock and only \$23,079 in total assets.

In response to the director's request for additional evidence, the petitioner submitted May 2005 bank statements for CGI reflecting deposits from unknown sources after the date of filing, an accounts receivable inquiry dated June 2, 2005 reflecting 11 months sales of \$30,878.33, invoices for purchases by CGI and promissory notes. We note that the petitioner must establish eligibility as of the date of filing, February 25, 2005. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As stated above, the petitioner concedes on appeal that he does not have evidence of his "[c]apital investment." Rather than a technicality, the investment of \$500,000 to \$1,000,000 (depending on the location of the investment) is an integral and primary purpose of the law. The classification sought is not an amnesty for every business owner who, for whatever reason, was unable to maintain his nonimmigrant status.

As stated above, the full amount of the investment funds must be made to the employment generating entity. *Id.* Thus, any investment in passive real estate deals with no connection to the employment generating entity, a provider of computer services, cannot be considered. Moreover, CGI's 2003 tax return does not reflect equity of \$1,000,000 (or even the \$510,000 claimed). A corporation may obtain its assets from several sources unrelated to an investment by a shareholder, such as loans secured by the assets of the corporation or the reinvestment of proceeds, as claimed on appeal. According to the definition of capital quoted above, loans secured by the assets of the corporation cannot be credited as the petitioner's personal investment. Further, the regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. See generally *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997)(holding that the reinvestment of proceeds cannot be considered capital); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998)(holding that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation; and *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003)(holding even sole proprietors cannot rely on the reinvestment of proceeds). Thus, we will not presume that the corporation's total assets represent the petitioner's personal investment. Regardless, as stated above, CGI's assets in 2003 amounted to no more than \$23,079.

In light of the above, the petitioner has not demonstrated a personal investment of \$1,000,000, or even \$500,000.

**SOURCE OF FUNDS**

The regulation at 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). 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 has not submitted five years of tax returns or other evidence of how he obtained the alleged \$510,000 invested. Moreover, the record does not contain transactional evidence such as cancelled checks or wire transfer receipts documenting the transfer from the petitioner to CGI of the \$510,000 allegedly invested.

As stated above, the petitioner implies on appeal that the source of the funds allegedly invested is the corporation’s own proceeds. As discussed above, such funds cannot be credited to the petitioner as a personal investment.

The petitioner also implies that evidence of the lawful source of the funds allegedly invested does not exist. Submitting evidence regarding how the invested funds were accumulated and tracing the lawful source of the petitioner’s funds is a regulatory requirement further discussed in the precedent decisions discussed above.

We are bound by the regulations and the precedent decisions cannot waive those requirements based on “unusual circumstances.”

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

*Submitting secondary evidence and affidavits. (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Thus, the failure of the petitioner to submit the required initial evidence or comply with the above regulation regarding the submission of secondary evidence is fatal to his claim of eligibility.

### **EMPLOYMENT CREATION**

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.

The regulation at 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).

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 petitioner submitted two Forms W-2 and a business plan. Neither Form W-2 reflects wages that can account for full-time employment. The initial business plan calls for increasing employment to eight in the following year and 15 by the third year. The petitioner’s subsequent business plan calls for four field service technicians and two shop technicians to be hired by November 1, 2006 and one secretary, one salesperson and one housekeeping/stocker to be hired by January 1, 2006.

The director concluded that the plan failed “to set forth a reasonable methodology to demonstrate that these positions will be created or needed.” The petitioner does not address this requirement on appeal and we concur with the director. The petitioner has not demonstrated any full-time employees or submitted financial statements or tax returns reflecting a growing and expanding business.

Moreover, the record lacks evidence that the two employees already hired are qualifying employees as defined above. Specifically, the record lacks Forms I-9 for these 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.