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FILE: [REDACTED]  
SRC 05 135 51177

Office: TEXAS SERVICE CENTER

Date: DEC 19 2006

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:



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.

*Maui Johnson*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition, which 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 his personal funds.

On appeal, counsel asserted that the director failed to consider the evidence submitted and had not requested the document found lacking in the denial. Counsel asserted that he would send a brief and/or additional evidence to this office within 30 days. Counsel dated the appeal August 8, 2005. As of September 28, 2006, this office had received nothing further. Thus, on that date, this office advised counsel by facsimile that we had received nothing further and requested a copy of any additional materials that might have been submitted. The notice requested a response by facsimile within five days. As of this date, nearly three months later, counsel has submitted nothing further. Thus, the appeal will be adjudicated based on the assertions made on the Form I-290B Notice of Appeal.

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, Soni International Corporation, 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**

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.

Initially, the petitioner claimed to have invested \$50,000 on January 15, 2005 and a total of \$750,000 as of the date of filing. In Part 4 of the petition, the petitioner indicated his investment consisted of \$372,449.07 cash in a U.S. bank account, \$2,206,858 in assets purchased for the business and \$25,000 through the contribution of a truck and forklift. The petitioner acknowledged \$1,200,000 in debt financing. On an attachment, the petitioner indicated he had invested \$500,000 in commercial property, \$681,858 in marble inventory, \$25,000 for a truck and forklift and \$372,449.07 cash. On the same page, the petitioner breaks down the investment differently, asserting he had already paid \$100,000 to one marble supplier, paid \$25,000 for a truck and forklift, committed \$300,000+ for a building purchase and transferred \$372,000+ to the corporate bank account.

The petitioner submitted a sales contract between Soni and Florida Tires Distributors, Inc. for the purchase of property for \$1,500,000 with \$1,100,000 to be financed. An April 8, 2005, letter from [REDACTED] with [REDACTED], confirms holding \$150,000 in escrow for the purchase of the property. The proposed settlement document reflects that the financing will actually be \$1,200,000 with the lender not yet identified. Finally, the petitioner submitted a letter purportedly from [REDACTED] President and CEO of Casa Bonita Design and Development, Inc., a Florida corporation, claiming to have paid the beneficiary \$500,000 in consulting fees on February 11, 2005.

On April 26, 2005, the director requested all documents pertaining to the loans, including security agreements, and evidence tracing the funds from their source to Soni. In response, the petitioner submitted a June 6, 2005 Warranty Deed for the property purchased, the petitioner's personal guaranty for loans, advances of money and extensions of credit by Commercial Bank of Florida to Soni, a May 17, 2005 letter issued by [REDACTED] reflecting that [REDACTED] held \$300,000 in escrow for the purchase of property as of that date, an uncanceled check dated January 15, 2005 issued by [REDACTED] to the petitioner for \$300,000 with the memo "loan per agreement," a June 21, 2005 letter from [REDACTED] asserting that he loaned \$300,000 to the petitioner, and a January 30, 2005 promissory note between the petitioner and [REDACTED]. An attached Security and Guaranty document lists [REDACTED] the petitioner's residential address, as the security. Despite the director's specific request for evidence tracing the invested funds back to their source, the petitioner did not submit any transactional evidence confirming the alleged \$500,000 consulting fee and, as stated above, the \$300,000 check purportedly from [REDACTED] is not cancelled.

The director concluded that the petitioner had not demonstrated his ownership of the property securing the \$300,000 loan or that the full investment had been made and was at risk. On appeal, counsel asserts that proof of the petitioner's ownership of the property had not been requested and that the director failed to consider the inventory purchased, the mortgage guaranteed by the petitioner and the personal guaranties "for marble orders for the subject business."

It is the petitioner's burden to establish every element of eligibility. The regulations require that any indebtedness be secured by the petitioner's assets. Thus, it is the petitioner's burden to establish that he owns the property securing all loans claimed as a source of his investment. The most appropriate remedy for the director's alleged failure to specifically request such evidence would be to consider such evidence on appeal. The petitioner, however, fails to submit the deed for [REDACTED] on appeal. Thus, the petitioner has not met his burden of proof in demonstrating that the loan for \$300,000 is secured by his personal assets.

Moreover, the director did specifically request evidence tracing the funds from their source to the new commercial enterprise. The check for \$300,000 is not cancelled. The petitioner did not submit his personal bank statement reflecting a deposit of \$300,000 on or about January 15, 2005. Moreover, the check is issued to him, not Soni. The record contains no transactional evidence, such as cancelled checks, bank statements or wire transfer receipts, confirming the transfer of \$300,000 from the petitioner into escrow. Thus, while [REDACTED] confirms the existence of \$150,000 in escrow on April 8, 2005 and \$300,000 in escrow on May 17, 2005, the record does not trace those funds back to the petitioner.

Further, while we acknowledge that the petitioner issued a personal guaranty for loans, advances of money and extensions of credit by Commercial Bank of Florida to Soni, the petitioner did not submit the primary security agreement for the \$1,200,000 mortgage as explicitly requested. If Soni's assets primarily secure the mortgage, the petitioner's personal guaranty of the loan does not transform the loan into the petitioner's personal investment. As quoted above, the definition of capital provided in the regulation at 8 C.F.R. § 204.6(e) specifically provides that indebtedness secured by the assets of the new commercial enterprise cannot constitute qualifying capital. The petitioner's personal guaranty does change the fact that the assets of the new commercial enterprise also secure the loan. *Matter of Soffici*, 22 I&N Dec. 158, 162-163 (Comm. 1998).

The remaining claimed investment includes inventory (marble) and equipment (a truck and forklift) purchased for Soni. The record contains a letter from the El-Shrouk Company confirming the receipt of \$100,000 from Soni on an account for an order of \$600,000. The petitioner also submitted invoices from Dream Stone. None of this evidence traces the money back to the petitioner. As a corporation, Soni is a separate legal entity from the petitioner, *see Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980), and could have acquired funds other than as equity from the petitioner. We note that the petitioner's personal guaranty does not simply reference the \$1,200,000 mortgage, but loans in general and extensions of credit. As such, Soni may have acquired start-up cash from the Commercial Bank of Florida in addition to the mortgage. Thus, without evidence tracing the funds from the petitioner to the vendors, we cannot conclude that the petitioner personally purchased the marble. Finally, the record contains no evidence that the petitioner or Soni purchased a truck or forklift as claimed.

In light of the above, we concur with the director that the petitioner has not established a qualifying investment of \$1,000,000.

**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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *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 director concluded that the petitioner had not “clearly demonstrated the source” of the allegedly invested funds. Counsel does not address this issue on appeal.

Initially, the sole evidence of the source of the petitioner’s funds submitted by the petitioner was the April 6, 2005 letter from [REDACTED] asserting that his firm, Casa Bonita Design and Development,

Inc. in Florida, paid the petitioner a \$500,000 consulting fee on February 11, 2005. The petitioner did not submit evidence that Casa Bonita Design and Development is an operational company, the consulting contract, or evidence tracing \$500,000 from Casa Bonita Design and Development to the petitioner. We note that the petitioner is in the United States pursuant to a nonimmigrant employment based visa. According to the nonimmigrant petitions filed in his behalf, receipt numbers EAC-05-247-51274 and WAC-06-261-52789, the prevailing wages for his occupation with Platinum Marble were only \$33,405 in 2005 and \$49,462 in 2006. The petitioner provides no credible explanation for his ability to secure a \$500,000 consulting fee. It is simply not credible that a company would pay a \$500,000 consulting fee on a single date and be unable to produce any documentation of that fee beyond a letter from the President and Chief Executive Officer. While tax documentation of this fee would not have been previously available, at this point in time, any future attempt to document this fee must be supported with Internal Revenue Service (IRS) Form 1099 and the petitioner's personal tax return and cancelled check issued to the IRS documenting the payment of taxes on this fee.

Moreover, the minimum investment amount in this matter is \$1,000,000. Thus, even if we accepted that the petitioner commanded a \$500,000 consulting fee, and we do not for the reasons discussed above, the petitioner would still need to demonstrate how he lawfully accumulated an additional \$500,000. The alleged \$300,000 loan from [REDACTED] is insufficient. The petitioner failed to establish that he has or will have the lawfully acquired funds available to repay the loan. Moreover, in addition to the lack of evidence that the petitioner owns the property securing the \$300,000 loan, the petitioner failed to provide evidence as to the worth of that property or how he lawfully accumulated the funds used to purchase the property.

Ultimately, the petitioner failed to provide five years of tax returns that might demonstrate income consistent with the lawful accumulation of \$1,000,000. While the petitioner allegedly earned the \$500,000 consulting fee in 2005, for which his tax return would not yet be available as of the date of filing, it can be expected that his ability to command such a fee would be reflected in earlier years.

### **EMPLOYMENT CREATION**

While the director did not address this issue, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 indicated on the petition that Soni employed 10 individuals and initially submitted a list of ten employees. In the request for additional evidence, the director quoted the above regulations and requested evidence that the petitioner employs the requisite number of employees or a business plan. In response, the petitioner submitted seven Forms I-9, including one for a nonimmigrant, and a quarterly report for the first quarter of 2005 reflecting five employees in each month of the quarter. The petitioner also submitted a one-page "Business Plan" projecting the employment of 20-30 temporary employees in the construction phase and 19-22 employees upon opening, "which is an additional 9-12 over our current staff of 10."

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. *Matter of Ho*, 22 I&N Dec. at 212. The quarterly report for the first quarter of 2005 reflects only five employees at any given time. Thus, the petitioner must establish that he will create an additional five jobs. The one-page business plan lacks job descriptions, a timetable for hiring and sales, cost and income projections. Thus, the one-page business plan cannot be considered "comprehensive" as defined in *Matter of Ho*, 20 I&N Dec. at 213.

In light of the above, the petitioner has not demonstrated that he has created or will create the requisite jobs.

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.