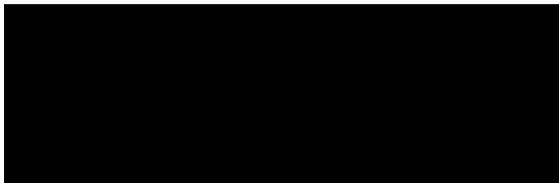




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy**



B7

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **OCT 27 2008**
SRC 06 026 50726

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

~~2~~ 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 or that he would create the requisite jobs.

On appeal, the petitioner asserts that he has invested the required amount in software designs and that he is submitting additional evidence regarding employment generation. The petitioner requests oral argument to demonstrate his software designs. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). This office does not have the expertise to determine the fair market value of the petitioner's software based on a demonstration of the software. Rather, it is the petitioner's burden to provide objective evidence of the software's fair market value. Thus, the petitioner has identified no factors or issues of law to be resolved by oral argument that could not be resolved through documentation. Consequently, the request for oral argument is denied.

For the reasons discussed below, we concur with the director that the petitioner's business plan is not credible and that the petitioner has not provided objective evidence demonstrating the fair market value of the software he purports to have designed and developed. In addition, the petitioner has not demonstrated that the software he claims to have contributed is qualifying capital, defined in the pertinent regulations as cash and *tangible* property. Further, the record is absent any evidence of business activity that might suggest the petitioner's claimed investment is at risk as characterized in relevant precedent decisions. Finally, the record lacks evidence of the petitioner's ownership of the software he claims to have developed, such as copyright documentation, and evidence that his current and previous employers would have no claim to that software, apparently developed while the petitioner was working for them.

Section 203(b)(5)(A) of the Act, as amended by the 21st 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, Splendid Solutions, 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. The petitioner proposes to market software he developed and provide IT consulting services.

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).

The petitioner indicated on the petition that Splendid Solutions did not yet employ any employees but would create 10 jobs. 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. 206, 213 (Comm. 1998). 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.

Initially, the petitioner submitted a business plan indicating the need for ten employees during the first year, including software developers, on-site technical support for clients, support staff to provide technical support by phone, data entry operators and IT consultants for outsourcing. On December 2, 2005, the director requested additional evidence, concluding that the business plan provided was not sufficiently detailed.

In response, the petitioner provided additional information about the proposed business. Under “Market Analysis,” the petitioner asserts that the Computing Research Association has concluded that the United States has a shortage of technical manpower and that he is submitting e-mail notices “from various prospective clients.” The petitioner lists the company’s Product Development Executive but fails to provide pay stubs confirming full-time employment or the executive’s Form I-9 establishing that he is a qualifying employee as defined above. In addition, the petitioner indicates that a marketing director would be hired as of April 2006, four software developers would be hired

by November 2006, two database developers would be hired by March 2007 and three technical support staff would be hired by October 2007.

The petitioner submitted (1) the report from the Computing Research Association, (2) e-mail notices from employers interested in hiring the petitioner, (3) a business license for Splendid Solutions and (4) a Change of Use Permit for the petitioner's residence, also Splendid Solutions' address, indicating the intended use as "customary home occupation." The permit application indicates that 25 percent of the floor space would be used for the business with zero employees and zero parking allowed.

The director concluded that the projected number of employees was based on hopeful speculation. On appeal, filed in April 2006, the petitioner submitted a more detailed business plan projecting one employee as of June 2006 and eight by May 2007. The petitioner did not submit any evidence of current employees despite his earlier projection that Splendid Solutions would employ two employees by April 2006.

We do not find the petitioner's current business plan to be more credible than his earlier plans. The record lacks any evidence of negotiations with clients to provide software or consultants. The e-mails alleged to be from prospective clients are actually from prospective employers who viewed the petitioner's resume on the Internet. None of them express any interest in purchasing the software packages the petitioner claims to have designed or leasing consultants. More significantly, the location of the proposed business appears to be a personal residence with a permit that does not allow for any employees or parking. Thus, any plan to hire employees to work at the business location is simply not credible.

In light of the above, the petitioner's business plan is not credible.

INVESTMENT OF CAPITAL

The petitioner claimed to have invested \$1,533,000 on October 19, 2005. On the petition, he breaks down the investment as \$33,000 in cash in a U.S. bank account and \$1,500,000 in "other." On page three of his business plan, the petitioner indicates that the "other" investment includes two assets, PharmaSOFT – Pharmaceutical Sales Tracking and Marketing Software valued at \$850,000 and VILitrac – Video Library Tracking System valued at \$650,000. On December 2, 2005, the director requested evidence "sufficient to demonstrate the value of the software contributed" and evidence that the software had been "placed at risk." In response, the petitioner asserts that an "infinite number of copies" of his software can be sold. He further asserts that the two software programs listed as assets "were built after several years of research, thousands of hours of design and development and coding. Therefore they are valued at \$850,000 and \$650,000." He further asserts that the two programs will be priced at \$95,000 and \$25,000 per copy. He submits a letter from Tim Henson, Project Manager at Solectron, asserting that his company usually needs to hire a team to design and develop software, which takes years. He concludes that software such as the

petitioner designed for Solectron “will cost us \$200,000 to build and will be quoted in the market at such price.”

The director concluded that the valuation of the petitioner’s software is based on is own estimate and “lacks any objective verifiability.” The director stated: “Projections of sales prices and future values and/or estimates of the time spent in developing the software do not suffice to demonstrate that the property has a value of over \$1,000,000.00.”

On appeal, the petitioner reiterates that Splendid Solution’s “inventory” is worth \$1,500,000 and asserts that he provided a “very detailed explanation.” The petitioner submits a new business plan that includes a balance sheet listing inventory of \$1,949,600 and no paid-in-capital but no objective basis for concluding that the software purportedly developed by the petitioner has a fair market value of \$1,500,000.

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. **All capital shall be valued at fair market value in United States dollars.**

(Bold emphasis added.) The definition of tangible property is property “that has physical form and characteristics.” Black’s Law Dictionary 1234 (7th ed. 1999). The definition of intangible property is property “that lacks a physical existence. Examples include bank accounts, stock options, and business goodwill.” *Id.* at 1233. The definition of intellectual property is as follows:

1. A category of **intangible rights** protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights, but also includes trade secret rights, publicity rights, moral rights, and rights **against unfair competition.**
2. A commercially valuable product of the human intellect, in a concrete **or abstract form**, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.

(Bold emphasis added.) *Id.* at 813.

The regulation at 8 C.F.R. § 204.6(e) further provides:

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.

All but one of the above examples involves cash transfers, either directly to the new commercial enterprise or in exchange for assets purchased for the new commercial enterprise. The example at 8 C.F.R. § 204.6(j)(2)(iii) allows for the transfer of property from abroad, but requires evidence of the *physical* importation of such property and sufficient information "to indicate the fair market value of such property." Thus, all of the above examples are consistent with investments of cash or *tangible* property.

In documenting the fair market value of capital, the petitioner must establish ownership of the contributed capital, *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Comm. 1998) and what a third party would pay for the contributed capital. *Matter of Izummi*, 22 I&N Dec. 169, 193 (Comm. 1998). At no time has the petitioner provided an independent third party technical evaluation and appraisal of the current fair market value of his software and the rights to market it. Thus, we uphold the director's concerns on this matter.

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).

In addition to the lack of objective evidence of the software's value, the petitioner has not submitted official copyright documents confirming his ownership of the intellectual property rights for either program he claims to have developed. As such, he has not demonstrated his ownership of the property allegedly contributed as capital.

Moreover, the inherent difficulty in evaluating the fair market value of intangible assets, especially those with no history in the market place, may explain why the definition of capital, quoted above, specifically limits qualifying capital to cash and tangible property. In this matter, the petitioner has not purchased software to operate his company; rather, he has developed an intellectual property that has value to the company only as an intellectual property right. This distinction is important in evaluating whether software, as an investment, is tangible or intangible. For example, while the acquisition of the rights to market software was found to be intangible and, thus, not eligible for an investment tax credit, *Ronnen v. Commissioner of Internal Revenue*, 90 T.C. 74 (1988), the acquisition of software "without any associated, exclusive, intangible intellectual property rights" for use in business operations was found to be tangible personal property eligible for the investment tax credit. *Northwest Corp. v. Commissioner of Internal Revenue*, 108 T.C. 358 (1997) *distinguishing but not overturning Ronnen*, 90 T.C. at 74. The Fourth Circuit, under whose jurisdiction this matter falls, further found that software is not tangible property for insurance purposes. *America Online, Inc. v. St. Paul Mercury Insurance Co.*, 347 F. 3d 89, 94-96 (4th Cir. 2003), provides:

The insurance policy in this case covers liability for "physical damage to tangible property," not damage to data and software, i.e., the abstract ideas, logic, instructions, and information. . . . These instructions, data, and information are abstract and intangible, and damage to them is not physical damage to tangible property.

Id.

The value of the petitioner's software is not as some type of equipment required for the operation of the petitioner's business or the value of the hardware that holds the program. Rather, the value is the exclusive intellectual property rights in the software that the petitioner intends to infinitely copy and

market. These intellectual property rights are intangible and, as such, are excluded from the definition of capital, quoted above.

Regarding the petitioner's alleged cash investment of \$33,000, the record lacks evidence that such funds have been committed to the business and can be traced back to the petitioner.

In light of the above, the petitioner has not demonstrated a qualifying investment of at least \$1,000,000.

In addition, 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. The petitioner asserted in response to the director's inquiry on this issue that his intellectual assets were at risk because another company could develop a competing product. The petitioner misconstrues the regulatory requirement that the investment be "at risk." At issue is whether the petitioner has committed himself to business operations. 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. at 209. That decision 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.

The record lacks any evidence that the petitioner in this matter has undertaken any business activity. Thus, the petitioner's claimed investment is not at risk.

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. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. 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 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).

The majority of the alleged invested capital consists of the software the petitioner has allegedly developed. The petitioner is currently in the United States on a nonimmigrant employment visa. Since April 2000, the petitioner has been the beneficiary of nonimmigrant employment-based visas for employment with Quantum Consultants, Inc., Compuwizards Staffing, International and Everest Computers, Inc. The petitioner has not demonstrated when he designed and developed PharmaSOFT and VILItac and, if designed and developed while employed with any of the above software companies, whether he lawfully acquired the rights to such software. It is not unusual for software designers to sign employment contracts giving their employers intellectual property rights in any software developed by the employee while working for the employer.

As stated above, the record contains no copyright documents confirming the petitioner’s ownership of the software he purports to have designed and developed. Without such evidence and evidence that such ownership was not in violation of any employment contract he may have signed, we cannot determine whether the alleged capital was obtained lawfully.

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.