



U.S. Citizenship  
and Immigration  
Services

B7

FILE: [REDACTED]  
WAC 06 253 50072

Office: CALIFORNIA SERVICE CENTER

Date: DEC 30 2008

IN RE: Petitioner: [REDACTED]

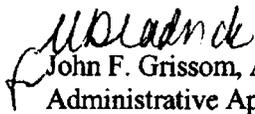
PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 lawfully obtained funds. The director also noted that the purpose of section 203(b)(5) of the Act is to create jobs for qualifying employees in the United States and questioned whether the petitioner's business proposal would do so.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's bases of denial. In addition, as will be explained below, we find that the petitioner has not demonstrated that he has created or will create jobs for qualifying employees.

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 [REDACTED] 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. In Part three of the petition, the petitioner indicated that the new commercial enterprise was a "partnership" that would provide information technology services. The petitioner also indicated on the petition that he owned 100 percent of the partnership. In an addendum, the petitioner indicated that his brother was "the registered partner" and would contribute additional capital after the petition was approved and would own 40 percent of the "partnership." The petitioner submitted the partnership's registration listing the petitioner and his brother as partners. The registration is not dated. The petitioner did not submit a partnership agreement. The record does not establish whether the new commercial enterprise is a general or limited partnership.

On the petition, the petitioner indicated that [REDACTED] would provide information technology services. In his cover letter, the petitioner stated that the company would "take full

advantage of the free trade agreement between Australia and [the] USA [and] Australia and China.” The petitioner then asserts: “China’s economy is hungry for energy and resources.” The petitioner then indicates that in addition to providing information technology services through hiring Australians and bringing them to the United States on “E3” visas, [REDACTED] will also sell scrap metal and other materials to China.

**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.

While the petitioner indicated that [REDACTED] was established in 2000, the petitioner also indicated on the petition that his initial investment was not until 2002. Specifically, he indicated that he had invested \$60,000 on June 10, 2002 and that he had invested a total of \$320,000 as of the date of filing, significantly less than even half of the required \$1,000,000.

In Part 4, the petitioner listed the composition of his investment as follows:

Total amount in U.S. bank account	\$200,000
Total value of all assets purchased for use in the enterprise	\$408,000
Total value of all property transferred from abroad to the new enterprise	\$759,000
Total of all debt financing	\$180,000
Total stock purchases	\$10,500
Other	N/A
Total	\$1,557,500

In his cover letter, the petitioner asserted that he would "relocate" the company's "main office" in Australia valued at between \$650,000 and \$680,000 and another "office" in Australia valued at between \$400,000 and \$410,000.

The petitioner submitted an October 2005 Bank of America statement for [REDACTED] [REDACTED]s," account number [REDACTED]. The statement shows the following deposits: \$222,622.01 on October 4, 2005, \$260,638.20 on October 11, 2005 and \$17,854.12 on October 19, 2005. The statement does not reflect the source of these deposits. Of equal concern, the statement shows the following transfers from this account, which is a checking account, to "checking" account [REDACTED]: \$196,046.65 on October 4, 2005 and \$241,902.87 on October 7, 2005. The record does not establish that account [REDACTED] is an [REDACTED] Consulting account. Thus, the record does not establish that the funds were maintained or used by the new commercial enterprise for business expenses.

The petitioner also submitted title insurance documentation and the closing statement for his purchase of [REDACTED], in Seattle, Washington. The title insurance documentation indicates that the title company charged its "residential resale rate." The sale closed on June 10, 2002. The purchase price plus fees is listed as \$284,999.95, of which \$220,000 was financed. The petitioner also submitted evidence that he purchased property in Australia in 2000 and 2002.

On September 28, 2006, the director issued a request for additional evidence. The director stated that the record did not support the investment listed at Part 4 of the petition and requested a "comprehensive list of all funds placed at risk in the commercial enterprise by the petitioner." In addition, the director requested evidence of the \$408,000 in assets allegedly purchased for the new commercial enterprise, including invoices, receipts and sales contracts. The director also requested evidence of the transfer of property from abroad, including bills of lading and evidence of the fair market value of the property. The director further requested evidence that the \$180,000 debt financing was secured by the petitioner's own personal assets. Finally, the director noted the lack of evidence of \$10,500 in stock. We note that partnerships do not issue "stock." See Black's Law Dictionary 1428 (7<sup>th</sup> ed. 1999) (defining stock as the "capital or principal fund raised by a corporation through subscribers' contributions or the sale of shares.")

In response, the petitioner revised his initial claims as follows. First, he reaffirmed that the company has over \$200,000 in the bank, which he asserts is at risk "because customers can make claim against our asset in US court." The petitioner submitted a letter from Bank of America affirming that [REDACTED] has had an account with the bank since August 2004 and that the current balance is \$222,072. The letter does not list an account number. The petitioner also submitted a statement for account [REDACTED] covering October 30, 2006 through November 16, 2006. The statement reflects an opening balance of \$223,418.61 and an ending balance of \$210,099.58.

Second, the petitioner asserts that the \$408,000 claimed as assets purchased for the business refers to [REDACTED], which has a fair market value of \$480,000 less a mortgage of \$207,000. Despite the fact that the petitioner purchased and still owns this property, the petitioner asserts that it is "at risk by the enterprise because it can be claimed by [a] creditor in Business transactions since it is now the registered Office address of the enterprise." The petitioner submitted the deed whereby the seller deeded [REDACTED] to the petitioner and an appraisal for the property. The appraisal, which values the property at \$480,000, reveals that it consists of five one bedroom/one bathroom apartments with rental value. The petitioner also submitted a "Home Mortgage" statement from Wells Fargo reflecting a principal balance of \$207,400.03 on the outstanding mortgage for [REDACTED]. Finally, the petitioner submitted a list of deposits into escrow, reflecting that the petitioner deposited \$60,000 into escrow prior to the purchase.

Third, the petitioner asserts that once he is a permanent resident, he will "commercially transfer the two properties to [the] USA," identified as [REDACTED] and [REDACTED] in New South Wales, Australia. The petitioner asserts that [REDACTED] is valued at \$400,000 and [REDACTED] has equity of \$366,000 (\$650,000 market value less a \$284,000 mortgage). The petitioner

does not explain how he will “commercially transfer” real property in Australia to the United States. The petitioner submitted a letter from [REDACTED] predicting that [REDACTED] would sell for approximately \$400,000. Attached is a property price guide for what appears to be comparable properties in Toongabbie. All of these properties are residential homes, not office space. The petitioner also submitted a letter from [REDACTED] Real Estate affirming that [REDACTED] “should achieve market acceptance in the vicinity of \$50,000.” Nothing in this letter suggests [REDACTED] is commercial rather than residential property. Attached to the letter are the demographics for the post code in which the property is located containing the average price for a house in the area.

Finally, the petitioner submitted a Wells Fargo Bank statement for account [REDACTED]. The account holder for this account is [REDACTED]. The petitioner also submitted numerous notices from Wells Fargo advising of letters of credit issued on behalf of [REDACTED] by [REDACTED] in Singapore. The only documented connection between the new commercial enterprise, [REDACTED] and [REDACTED] Resources, is the Bank of America statement indicating that [REDACTED] does business as [REDACTED]. More than one business entity, however, can do business under a franchise trade name. The petitioner has not established that the Wells Fargo account is the partnership’s account or that the letters of credit were issued to the partnership [REDACTED],<sup>1</sup> the new commercial enterprise identified on the Form I-526 petition.

The director acknowledged the funds in the Bank of America account, but noted that the bank statements do not identify the source of these funds. The director further concluded that the petitioner had not demonstrated that the mortgage on [REDACTED] was secured by the petitioner’s personal assets and questioned whether this apartment complex could be considered office space. Regarding the \$60,000 deposited at closing for this property, the director noted the lack of transactional evidence tracing the funds from the petitioner to escrow. The director further concluded that the purchase of property in Australia could not be considered a qualifying investment that would create jobs for United States workers and that the record did not establish that any of these foreign assets had been transferred to the United States. The director also noted the lack of evidence regarding the purchase of stock. Finally, the director considered the letters of credit as potential evidence of the lawful source of the invested funds and concluded that the petitioner had not demonstrated that these funds constituted invested capital.

On appeal, the petitioner asserts that [REDACTED] is 100 percent owned by him, that the balance varies because it is a business account and that the \$200,000 or more in the account is “at risk as investment.” The petitioner is not persuasive. A start-up or operational company can obtain funds in many ways other than an infusion of cash from an owner. Specifically, the company could

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<sup>1</sup> Washington State’s business license query website, <https://fortress.wa.gov/dol/dolprod/bpdLicenseQuery> (accessed November 13, 2008 and incorporated into the record of proceedings), and the State’s Department of Revenue, <http://dor.wa.gov/content/doingbusiness/registermybusiness/BRD/> accessed November 13, 2008 and incorporated into the record of proceedings), confirm that both [REDACTED] a limited liability partnership, and [REDACTED] a limited liability company, are registered to do business in Washington State under the trade name [REDACTED].

borrow funds or receive income in the process of doing business. None of these funds could constitute a qualifying investment by the petitioner. Without transactional evidence such as cancelled checks or wire transfer receipts, we cannot trace the path of the October 2005 deposits or the funds that remained in the account in 2006 back to the petitioner.

The petitioner further asserts that the property at [REDACTED] was purchased based on his own personal credit and that "no other collateral was necessary." The petitioner submits his credit rating and the June 5, 2002 Deed of Trust that explicitly contradicts the petitioner's assertion. The deed is a security instrument that provides, on page 2 under "TRANSFER OF RIGHTS IN THE PROPERTY," that the petitioner irrevocably grants and conveys to Wells Fargo Home Mortgage the property at [REDACTED] as security for his promise to pay Wells Fargo the \$220,000 used to finance the purchase of the property. Thus, the director did not err in concluding that the mortgage was a typical mortgage where the purchased property serves as the collateral.

Regarding the \$60,000 deposit, the petitioner asserts that he already submitted a bank draft for this amount. The record does not contain any transactional documentation such as cancelled checks or wire transfer receipts verifying that the \$60,000 originated from the petitioner's personal account. The petitioner asserts that the Department of Housing and Urban Development (HUD) verified the legality of these funds. Even if true, nothing in the record suggests that HUD verified that the \$60,000 originated from the petitioner's personal account as opposed to another lawful source.

The petitioner further asserts that the director did not cite any legal authority for the proposition that the location of the new commercial enterprise is not suitable for a commercial enterprise. The petitioner asserts that the location has Internet access and submits a photograph of himself at a desk. He further asserts that the information technology consultants will work out of the offices of the company's clients. Once again, the petitioner is not persuasive. The location of the new commercial enterprise is clearly the petitioner's personal residential apartment. The purchase of this apartment included the purchase of four additional units, constituting a passive real estate investment that is unrelated to either the scrap metal trade or information technology consulting. We note that on page 4 of the Deed of Trust submitted on appeal, the petitioner is obligated to occupy the property as his principal place of residence within 60 days. The fact that the petitioner may be able to run a virtual office from his apartment does not transform the purchase of his home into an investment into the new commercial enterprise.

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 (Commr. 1998). The purchase of a private residence and additional units for personal rental income does not make any funds available to the business that the petitioner alleges will create jobs, information technology consulting. While not entirely on point, we note that the regulation at 8 C.F.R. § 204.6(e) explicitly excludes operating a personal residence from the definition of commercial enterprise. That the petitioner chose to create a business that may not require a large investment and could conceivably be run through the Internet from his own home does not waive the statutory requirement that the petitioner invest at least \$1,000,000 in the new commercial enterprise itself. Finally, the petitioner's assertion that he will eventually purchase more

office space is insufficient. The petitioner did not submit any evidence that, as of the date of filing, the petitioner was irrevocably committed to the purchase of additional office space, such as an irrevocable contract. The petitioner's mere intent to invest an undisclosed amount on an unspecified date cannot be considered. 8 C.F.R. § 204.6(j)(2).

The petitioner further asserts that he is "committed to transfer/invest the rest of the required amount of capital" and explains that "travel restrictions" placed upon the petitioner have prevented him from transferring his foreign property to the United States. The record establishes that the petitioner owns two houses in New South Wales, Australia. The petitioner has never explained how these houses and the properties they sit on will be "transferred" to the United States. Moreover, they are houses, not business assets. If the petitioner intends to sell these properties and transfer cash, then he must establish that the funds were already fully committed to the new commercial enterprise as of the date of filing. 8 C.F.R. § 204.6(j)(2). Otherwise, the petitioner is simply advancing another vague intent for a future investment. The petitioner has never even proposed how any funds from the sale of his Australian properties might be used much less provided contracts committing the petitioner to use these funds for business purposes.

The petitioner also details the nature of the letters of credit. These letters, however, were issued by a foreign company to purchase goods from [REDACTED]. Assuming this company is one and the same as the partnership identified on the Form I-526 petition, they merely represent proceeds received in the course of doing business. They do not represent a personal investment by the petitioner.

Finally, we note that the record lacks federal or state tax returns filed by the new commercial enterprise, including all schedules. Tax returns are useful documents in establishing the operation, ownership, capital accounts and organization of the business.

The petitioner asserts that the director erred in requiring a commitment of the full \$1,000,000, asserting that section 203(b)(5) of the Act allows an alien two years to complete his investment. As quoted above, however, the regulation at 8 C.F.R. § 204.6(j)(2) provides that the funds must be fully committed and a mere intent to invest at some point in the future is insufficient.

In light of the above, the record does not establish a qualifying investment in an employment-generating enterprise. Rather, the record simply establishes that the petitioner has purchased three houses, one in the United States and two in Australia, from which he has been able to run an Internet business that has generated no employment.

### **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. 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 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).

As stated above, the petitioner has not provided any transactional evidence such as cancelled checks or wire transfer receipts tracing any funds from his personal account to the new commercial enterprise. Moreover, the petitioner has not established that he has used any funds for purely business purposes. Rather, he has purchased a personal residence and a passive real estate investment. While the petitioner submitted two years of personal tax returns on appeal, they cannot account for the accumulation of \$1,000,000 as they only demonstrate an adjusted gross income of \$65,000 in both 2001 and 2002. While we acknowledge that the petitioner owns property in Australia, the petitioner has yet to invest any funds deriving from those properties.

### **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 at 1039 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.” To be considered comprehensive, a business plan must be sufficiently detailed to permit Citizenship and Immigration Services (CIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

On the Form I-526 petition, the petitioner indicated that the new commercial enterprise had one employee and that it would create an additional 10 to 20 jobs. The petitioner's initial submission included no evidence regarding this issue. In response to the director's request for additional evidence, the petitioner submitted a business plan. The plan includes the following paragraph regarding employment:

For IT consulting business, we will pull people from our current database of Information Professionals in Australia and introduce them to the network of hiring managers in the Northwest region that [the petitioner] encountered during his five years of Consulting work for Microsoft and other companies. We will sponsor these people under the E3 VISA category that was setup just for Australian citizen. We will hire some local senior technical recruiters and HR personnel as well.

Section 203(b)(5)(ii) of the Act requires the creation of at least 10 jobs for United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States. It does not include those seeking to be admitted as lawful permanent residents, but those who are already lawfully admitted. The petitioner's intent to create jobs for Australian citizens currently residing in Australia does not comport with the letter or the spirit of the law, which is to create jobs for those already in the United States. *See* Senator Simon's remarks at 136 Cong. Rec. S17106-01, S17112 (1990) (expressing the hope that the visa classification will create "up to 100,000 new jobs for Americans.")

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.**