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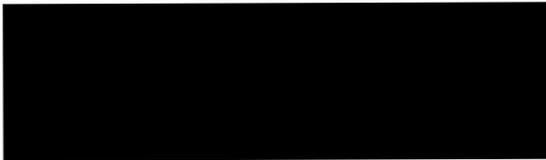
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FILE: WAC 06 060 50873 Office: CALIFORNIA SERVICE CENTER Date: NOV 13 2008

IN RE: Petitioner: [Redacted]

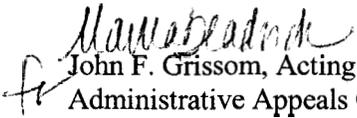
PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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 that would generate the necessary employment.

On appeal, the petitioner submits new evidence that postdates the filing of the petition. For the reasons discussed below, we affirm the director's findings. Ultimately, the petitioner has not demonstrated that he has \$500,000 or assets worth \$500,000 that he has invested or can invest within two years.

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, Jonathan Investments, Inc. doing business as Southgate Car Wash and Automotive. The director did not contest that the business was located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000.

INVESTMENT OF CAPITAL

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 \$600,000 on March 3, 2005 and to have invested a total of \$1,050,000 as of the date of filing, December 12, 2005. The petitioner indicated that \$1,050,000 was the total value of all property transferred from abroad to the new enterprise. The

petitioner claimed to own 40 percent of the enterprise. The initial submission did not include any evidence documenting the transfer of property or cash from the petitioner to the new commercial enterprise. Rather, the petitioner submitted evidence that [REDACTED], the other shareholder, purchased property at [REDACTED] in Southgate, California on February 18, 2005. The purchase was financed with a loan of \$3,400,000 from CHB America Bank.

On January 18, 2006, the director requested additional evidence. Specifically, the director requested a comprehensive list of all funds placed at risk in the commercial enterprise, documentary evidence of transfers of property from abroad such as U.S. Customs Service documentation as well as evidence of the property's fair market value and ownership. Noting that the beneficiary listed \$3,400,000 as debt financing on the Form I-526 petition, the director requested the security agreement for this financing.

In response, the petitioner submitted a "Business Plan" jointly signed by the petitioner and Mr. [REDACTED]. The plan indicates that the petitioner and [REDACTED] had entered into an oral agreement whereby the beneficiary would purchase 40 percent of the company for 40 percent of the purchase price paid by [REDACTED] including cash. The petitioner also submitted evidence that the new commercial enterprise borrowed \$4,060,000 on February 24, 2006, which is after the date the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). While the petitioner personally guarantied the loan, the loan was secured by [REDACTED] the location of the new commercial enterprise. A disbursement request reveals that \$3,450,000 of the \$4,060,000 borrowed was paid to CHB Bank, suggesting that this loan actually constitutes a refinancing of the original mortgage on [REDACTED]. The petitioner also submitted additional documentation for the original purchase of this property, reflecting that the CHB America Bank loan was also secured by [REDACTED].

Finally, the petitioner submitted Jonathan Investments' 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return. The petitioner is listed as a 40 percent owner on Schedule E. On Schedule L, the company's stock is reflected as \$500 while paid-in-capital increased from \$0 to \$1,489,554. The record, however, lacks transactional evidence tracing the path of any money from the petitioner to Jonathan Investments. Thus, the petitioner has not established that this increase in additional paid-in-capital is due to an infusion by him.

The director concluded that the petitioner had not established the transfer of any property from abroad and that both loans were secured by the new commercial enterprise rather than the petitioner's personal assets. The director further concluded that the record did not establish that the petitioner had invested at least \$500,000 of his own funds.

On appeal, the petitioner asserts that his purchase of the business "was not dependent on the Security of the business to justify any borrowed money but independent Collateral was used." The petitioner

further asserts: "it may be necessary to amend a portion of the original Application to correct any errors in the document as original submitted." Finally, the petitioner asserts that he is contemplating the purchase of additional land for another car wash and related business. Subsequently, the petitioner submitted settlement documents for the sale of Jonathan Investments by [REDACTED] to himself and the petitioner. Included are promissory notes and escrow agreements. All of these documents postdate the filing of the petition. As previously indicated, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49. Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 175.

The original \$3,400,000 mortgage was secured by [REDACTED]. As quoted above, the definition of capital at 8 C.F.R. § 204.6(e) precludes the use of indebtedness that is secured by an asset of the new commercial enterprise. The record contains no evidence that any of the remaining funds used to purchase that property trace back to the petitioner. The transaction was conducted by [REDACTED] on behalf of [REDACTED].

The record contains no other transactional documentation, such as canceled checks, bank statements or wire transfer receipts, that predates the filing of the petition. Thus, the petitioner has not established that, as of that date, he had infused any capital into [REDACTED].

The \$4,060,000 loan postdates the filing of the petition. Moreover, this loan is also secured by an asset of the new commercial enterprise, [REDACTED]. We acknowledge that the petitioner personally guarantied this loan. That personal guaranty, however, does not alter the fact that the loan is still secured by an asset of the new commercial enterprise. A personal guaranty of payment does not change the character of a mortgage. *Matter of Soffici*, 22 I&N Dec. 158, 162-63 (Commr. 1998). Thus, the director correctly concluded that this loan could not be considered part of the petitioner's qualifying investment.

The petitioner attested to an oral agreement between himself and [REDACTED] to purchase 40 percent of [REDACTED]. The petitioner did not provide the specifics of this agreement, such as the terms of payment. Thus, the director correctly determined from the record before him that the petitioner had not established a qualifying investment of at least \$500,000.

On appeal, the petitioner asserts that he has obtained a lawyer to prepare a written agreement to "memorialize" the original oral agreement. The petitioner submits: (1) a settlement agreement for the transfer of all stock in [REDACTED] for \$6,724,000; (2) an unsecured demand promissory note for \$6,742,000 signed by [REDACTED] and the petitioner; (3) a secured promissory note signed by [REDACTED] and the petitioner for \$500,000 payable in monthly installments of \$2,500 and due August 31, "20011"; (4) a security agreement for the \$500,000 note listing both [REDACTED] and the petitioner as the debtors and personal property at [REDACTED] as the collateral and (5) Capital Stock Sale Escrow Instructions for the sale of stock by [REDACTED] to himself and the petitioner for \$6,742,000. The escrow instructions, including

amended instructions, indicate that the sales price includes the cancellation of \$1,575,000 credited to [REDACTED] account and \$4,060,000 as an assumption of debt; that the “Buyer/Debtor” pledges his 40 percent of the capital stock as additional collateral and that the petitioner would work as the manager for five years at a salary 50 percent of market value and receive a credit of \$25,000 yearly toward any debt owed on the secured note.

All of the evidence submitted on appeal postdates the filing of the petition. Thus, we cannot consider this evidence as documenting that the petitioner’s funds were fully committed as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 175. Even if we were to consider the evidence on appeal because it is alleged to “memorialize” an oral agreement that predates the filing of the petition, the evidence does not demonstrate a qualifying investment.

In *Matter of Izummi*, 22 I&N Dec. at 181, we found that guaranteed payments to the petitioner while money was owed on a promissory note did not constitute a contribution of capital because the new commercial enterprise “receives no infusion of new funds from the petitioner.” Reducing the petitioner’s wages is no different from the guaranteed interest payments from required reserve accounts used in *Izummi*. Even without this finding, the petitioner’s investment plan is still disqualifying.

As stated in *Matter of Izummi*, 22 I&N Dec. at 191, the regulation at 8 C.F.R. § 204.6(e) provides that all capital must be valued at fair market value in United States dollars. See also *Matter of Hsiung*, 22 I&N Dec. 201, 203-204 (Commr. 1998). As the petitioner’s promissory note constitutes the only capital in the record, at issue is the fair market value of that note. First, the note must be adequately secured by the petitioner’s personal assets. *Id.*; 8 C.F.R. § 204.6(e) (definition of capital). In this case, the \$500,000 note is secured by the personal property at [REDACTED]. This address is the location of the new commercial enterprise. The list of personal property includes a cash register, air compressors, air hoses and vacuum nozzles, which all appear to be business property. Thus, the personal property is presumed to be [REDACTED] property. We acknowledge that an amendment to the escrow agreement indicates that the petitioner also pledged his interest in Jonathan Investments as security. Regardless, the assets of the new commercial enterprise cannot secure any of the indebtedness. In this case, the personal property at [REDACTED] assets of the new commercial enterprise, clearly secure the petitioner’s \$500,000 promissory note. Moreover, the petitioner must place \$500,000 of his personal funds or assets at risk. The petitioner stands to lose nothing in this arrangement other than the shares for which he has not yet paid. Finally, [REDACTED] cosigned the promissory note, revealing that the petitioner is not solely responsible for the note.

Second, the terms of the note itself are relevant. *Matter of Izummi*, 22 I&N Dec. at 192. The face value of a promissory note cannot be presumed to be the note’s fair market value because notes are regularly sold and discounted. *Id.* at 193. In this matter, the note accrues interest of 6 percent and the petitioner is required to make payments of \$2,500 per month, which annualizes to \$30,000 per year. At this rate, the note would not be paid off for almost 16 years. We acknowledge that the escrow instructions indicate the petitioner would be credited with an additional \$25,000 per year from his salary, amounting to a total of \$55,000 per year. At this rate, the loan would be paid in just over nine years, not including interest. We acknowledge that the loan provides that it will become due on August 31, “2011.” We

assume the agreement means the year 2011, a little more than five years from the date of the note, August 1, 2006. August 31, 2011 is the due date specified in number 31 of the escrow instructions. Number 31 of the escrow instructions also reflects that the note would be paid in 60 monthly installments of \$2,500 with a “balloon payment for any unpaid principal by the ending date.” After 60 months of payments of \$2,500, the petitioner would owe a balloon payment of \$350,000 without taking interest into account. Even if we added five years of salary withholding of \$25,000 for each year, the petitioner would still owe \$225,000 on the note without taking interest into account. The record lacks evidence that the petitioner has cash or other assets worth \$225,000. Certainly assets owned by the petitioner do not secure the loan. The petitioner has not established that the present value of a promise to pay \$500,000 according to the above terms was worth \$500,000 when it was made in 2006.

Finally, *Izummi* recognized that a promissory note that does not constitute capital could serve as evidence that the petitioner is in the process of investing. *Id.* In that situation, the regulation at 8 C.F.R. § 216.6(c)(1)(ii) requires that a petitioner substantially complete his payments on the note prior to the end of the two-year conditional period. *Id.* Moreover, the petitioner must be eligible as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Thus, the payments must be due to be substantially completed within two years of the date of filing. To hold otherwise would allow an alien to secure a priority date based on the speculation that at sometime during the proceeding he will be able to demonstrate that the payments will become substantially due in two years. In this matter, two years after the date of the note, which postdates the filing of the petition, the petitioner would have only paid \$110,000. The final balloon payment of at least \$225,000 is not due until August 31, 2011, which is more than two years after the note was issued and is even more than two years from today’s date.

The Capital Stock Sale Escrow Instructions, number 4, indicates that \$607,000 “good faith funds” would be deposited “on/or before demand of Escrow Holder.” The record does not include transactional documentation such as canceled checks, bank statements or wire transfer receipts, tracing this deposit to the petitioner.

As quoted above, the regulation at 8 C.F.R. § 204.6(j)(2) provides that 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. In light of the above, the petitioner has not demonstrated a qualifying investment or that he is “in the process” of making a qualifying investment.

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 (Commr. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 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 record lacks any evidence that the petitioner has ever accumulated at least \$500,000 in cash or assets. Rather, the petitioner appears to be attempting to demonstrate a qualifying investment through withholding of future wages. As stated above, the petitioner’s intent to invest is not a qualifying investment.

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.

The petitioner indicated on the Form I-526 petition that the new commercial enterprise had nine employees when he made his investment and currently employs 20 workers. The petitioner further indicated that his investment would create an additional five jobs beyond the 11 he claims to have already created.

The initial submission included no evidence relating to the issue of employment creation. The director requested quarterly returns or other evidence reflecting that the new commercial enterprise had hired 11 employees after the petitioner's alleged investment. The director also asked for evidence that the new employees were qualifying, although he did not specifically request Forms I-9. The director also requested a comprehensive business plan meeting the requirements set forth in *Matter of Ho*, 22 I&N Dec. at 213, quoted above. In response, the petitioner submitted a five-page business plan, a list of 11 employees and copies of birth certificates or permanent resident cards for ten of these employees. Three of the 11 employees alleged to work full time were not yet 16 years old as of the date the petitioner submitted his response. The petitioner also indicated his intention to purchase land to construct a second car wash and automotive business. The petitioner states that different locations are being considered and that the "time horizon is [a]pproximately one year to set the plan in motion." The petitioner did not submit quarterly returns or pay records for these employees.

The director concluded that the petitioner had not established the number of employees hired after the petitioner's alleged investment. In fact, the director concluded that since the petitioner had not established an investment, he could not establish that his investment created any of the jobs claimed. Finally, the director concluded that the petitioner had not submitted a business plan that complies with the requirements set forth in *Matter of Ho*, 22 I&N Dec. at 213, quoted above.

On appeal, the petitioner asserts that he intends to purchase additional land for a new car wash and related business venture that will create an additional 25 jobs. The petitioner did not, however, submit a business plan, comprehensive or otherwise.

Verification that named individuals could be considered "qualifying employees" does not establish that these individuals have begun working or that they work full-time. *Id.* at 212. Rather, the petitioner must submit pay stubs or other payroll records. *Id.*

We concur with the director that the petitioner has not established that Jonathan Investments employs 11 full-time employees or that any jobs at the business were created by the petitioner's alleged personal investment (an investment that has not been documented). The record contains no details about the petitioner's plan to purchase another car wash and related business venture. Thus, the petitioner has not demonstrated that his intended investment, much of which will not be infused into the business until 2011, will create 10 jobs within the next two years.

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.