



U.S. Citizenship
and Immigration
Services

B2

FILE: [REDACTED]
WAC 06 174 50492

Office: CALIFORNIA SERVICE CENTER

Date: JAN 06 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

J. Grissom
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 (AAO) 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. On appeal, the petitioner challenges the director's conclusions and asserts that he will submit a brief and/or additional evidence to the AAO within 30 days. The petitioner dated the appeal March 14, 2007. As of this date, more than 20 months later, the AAO has received nothing further. Thus, the appeal will be adjudicated on the record. In addition to upholding the director's concerns, we further find that the petitioner has not demonstrated that he has created or will create the necessary qualifying jobs.

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).

MINIMUM INVESTMENT AMOUNT

On the Form I-526 petition, the petitioner indicated that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

- (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
- (ii) In the case of a high unemployment area:

- (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

- (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003). The Form I-526 petition was filed on May 9, 2006. The petitioner indicated he made his initial investment on February 7, 2006.

The petitioner indicated on the Form I-526 petition that he had invested in a business, [REDACTED] located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. The petitioner listed [REDACTED] address as [REDACTED]. In Part 3 of the petition, the petitioner indicated that the targeted employment area in which he was investing includes Adelanto, San Bernardino County. The bank statements and corporate documentation submitted listed a corporate address at [REDACTED]. The Form SS-4, Application for Employer Identification Number filed by [REDACTED] in December 2005 indicates that the principal business would be located in Los Angeles and San Bernardino Counties. The petitioner also submitted 2004 data from the California Employment Development Department indicating that while Los Angeles and San Bernardino counties as a whole do not have qualifying unemployment rates, they both contain qualifying cities. Adelanto is a qualifying city in Bernardino County. The business plan discusses providing surveying, design, zoning, engineering and architectural services in the Victor Valley area, which includes several cities in addition to Adelanto.

On August 7, 2006, the director issued a request for additional evidence, noting that the addresses provided for [REDACTED] were not in designated targeted employment areas and that the data provided predated the petitioner's investment and the filing of the petition.

In response, the petitioner submits a cover letter from [REDACTED] who also signed the petition as the preparer. [REDACTED] letter is on Points and Authorities et al. letterhead, listing an address at [REDACTED]. Mr. [REDACTED] is also the president of [REDACTED]. Mr. [REDACTED] asserts that [REDACTED] "intends to maintain an operational field office in the City of Adelanto in San Bernardino County. This is in addition to [REDACTED] Culver City design office and its Woodland Hills incorporator and service-of-process/legal office registered with the California Department of Corporations." [REDACTED] further asserts that the 2004 data is the most recent available. [REDACTED] acknowledges, however, that [REDACTED] has not been able to locate an appropriate property in Adelanto and, thus, purchased [REDACTED] in Oceanside, California. Mr. [REDACTED] asserts that this location is only 20 to 30 minutes outside Imperial Beach and National City, which are both high unemployment areas. The previously submitted data shows that while Imperial Beach and National City did have high unemployment in 2004, Oceanside did not.

[REDACTED] entered into an agreement to purchase [REDACTED] on May 18, 2006. On May 20, 2006, [REDACTED] issued a check to [REDACTED] for \$30,000 as a deposit. The check was issued on a United Commercial Bank account. On August 15, 2006, [REDACTED] transferred \$382,500 from its Bank of America account to Commonwealth Land title. On September 12, 2006 and October 12, 2006, [REDACTED] issued checks for \$8,156.25 to the seller of [REDACTED] on its United Commercial Bank account.

The director concluded that the petitioner had not demonstrated that the new commercial enterprise would be in Adelanto as claimed or that the current locations of [REDACTED] were targeted employment areas. Thus, the director concluded that the minimum investment amount is \$1,000,000. The petitioner does not contest this conclusion on appeal. Rather, the petitioner claims for the first time to have invested \$2,000,000.

We concur with the director. In order to qualify for the reduced investment amount, all of the investment must benefit a targeted employment area. *See generally Matter of Izummi*, 22 I&N Dec. 169, 173 (Commr. 1998). As the petitioner has not established that all of the jobs will be created within a targeted employment area, the minimum investment amount 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.

On the Form I-526 petition, the petitioner indicated that he had invested \$500,000 on February 7, 2006 and that this amount consisted of his entire investment. He indicated that he had a 33½ interest

in The petitioner submitted wire transfer advices for transfers of \$199,982 and \$299,985 from to Bank of America account on February 7, 2006. The petitioner also submitted evidence of his interest in . In addition, the petitioner submitted stock certificate number 3 for reflecting 1,000 shares issued to the petitioner and a corporate document reflecting that resolved to issue the petitioner 1,000 shares for \$500,000.

In response to the director's request for additional evidence, the petitioner submitted the evidence discussed above regarding the purchase of . The contract indicates that the purchase price was \$1,500,000 with \$1,200,000 to be financed. The director concluded that and not the petitioner, had purchased and that the petitioner had not traced the funds used for this transaction back to the petitioner. Finally, the director concluded that even if the petitioner had established that the \$500,000 transferred to the Bank of America account was a qualifying investment, the petitioner had not established the necessary \$1,000,000 investment.

On appeal, the petitioner asserts: "Part of the initial cash deposit of \$500,000 was used to purchase a \$1,500,000 commercial asset for use in and by the U.S. enterprise (commercial building and 2 parking lots). Thus, the total composition of [the] petitioner's investment is at least \$2,000,000 in capital." The petitioner does not explain how using part of a \$500,000 investment to purchase property worth \$1,500,000 converts a \$500,000 contribution of cash into a \$2,000,000 investment. Use of capital from the other shareholders or financing secured by the assets of cannot be considered the petitioner's personal investment. As stated above, the sales contract specified that \$1,200,000 of the purchase price would be financed. Further, we note that only \$382,000 of the funds used to purchas came from the Bank of America account that received the transfer from the petitioner's Chinese company. Regardless, we concur with the director that the petitioner has not traced more than \$500,000 from an entity related to the petitioner or the petitioner himself to or in satisfaction of a expense.

In light of the above, the petitioner has not established 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 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). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211.

The petitioner submitted a brochure identifying himself as the President of the [REDACTED], the group’s business license identifying the petitioner as the legal contact and confirmation of the group’s 2005 tax payment. In response to the director’s request for additional evidence, the petitioner submitted confirmation of [REDACTED]’s payment of taxes for 2003 through 2005 and general information about the company. The petitioner did not submit any evidence of his income from this company or evidence that the funds transferred by [REDACTED] to [REDACTED] represented a dividend payment or other distribution to the petitioner. On appeal, the petitioner asserted that he would submit more evidence of the company’s dealings. A corporation, however, is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Evidence of a corporation’s income is not evidence of the shareholder’s income. *Matter of Izummi*, 22 I&N Dec. at 195.

In light of the above, the petitioner has not demonstrated that the funds transferred by [REDACTED] [REDACTED] are the petitioner’s personal lawfully acquired funds.

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.

Finally, the regulation at 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

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).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of 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 U.S. Citizenship and Immigration Services (USCIS) 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 petition, the petitioner indicated that [REDACTED] had no employees at the time of his investment and that it was currently employing two workers. The petitioner indicated [REDACTED] would create another nine positions. Initially, the petitioner submitted no evidence of the two current employees and instead submitted a business plan. While the plan discusses the need for professional services in the area of intended investment, the plan does not explain how [REDACTED] will create any of these jobs. Specifically, [REDACTED] plans to form “a strategic alliance” with [REDACTED], a manufacturer of modular structures and to use [REDACTED] and [REDACTED] as its exclusive executive architect and engineer. It is not clear how the alliance with [REDACTED] would create jobs at [REDACTED] or why the other firms would supervise the petitioner’s own architects and engineers. Thus, it is not clear that [REDACTED] will actually create architecture and engineering positions of its own. The only contract for services in the record

is for surveying services by [REDACTED] with [REDACTED] listed as the paying client rather than a provider of services in its own right. While [REDACTED] asserted in response to the director's request for additional evidence that [REDACTED] two full-time employees and eight independent contractors who would be hired as direct employees, the petitioner submitted no Internal Revenue Service (IRS) Forms W-2, IRS Forms 1099, quarterly employer returns or payroll documentation to confirm these claims. Going on record without supporting documentary evidence is not sufficient for purposes 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. at 190). The petitioner also failed to submit Forms I-9 for employees already working for CSI.

In light of the above, the petitioner has not established that he has created or will create the requisite 10 jobs. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.