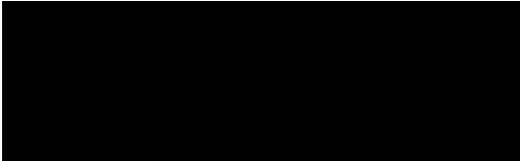




U.S. Citizenship
and Immigration
Services



Bt

FILE: [REDACTED]
WAC 05 165 52818

Office: CALIFORNIA SERVICE CENTER

Date: JAN 29 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).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) remanded the matter to the director for further action on appeal. The director issued a new decision denying the petition. The matter is now before the AAO on certification. The director's decision will be affirmed.

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 initially determined that the petitioner had failed to demonstrate a qualifying investment into one single commercial enterprise.

On appeal, the petitioner asserted that he had shifted sufficient funds from one enterprise to another, resulting in a qualifying investment in a single enterprise. The petitioner submitted evidence purporting to demonstrate this shift. The AAO found the director's basis of denial rational and noted that the petitioner could not make material changes to his claim of eligibility. Nevertheless, the AAO further concluded that more significant issues of ineligibility needed to be addressed such that the petitioner understood that the problems raised in the initial denial would not be resolved by filing a new petition. Thus, the AAO remanded the matter to the director for a more in depth analysis. The AAO stated that the director's final decision should be certified back to the AAO pursuant to the regulation at 8 C.F.R. § 103.4 regardless of outcome.

On May 17, 2007, the director issued a new notice of intent to deny. The petitioner responded. The director ultimately denied the petition, concluding that the petitioner had not established that he had invested the requisite amount in an ongoing commercial enterprise, that the invested funds were lawfully acquired and that the petitioner had created or would create the necessary employment. The director certified the decision to this office on September 4, 2007. Pursuant to the regulation at 8 C.F.R. § 103.4(a)(2), the director advised the petitioner that he could submit a brief or written statement to the AAO within 30 days. As of this date, more than 16 months later, this office has received nothing further. Thus, the director's decision will be reviewed based on the record before her. For the reasons discussed below, the director's decision is supported by the record.

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 was originally based on multiple investments in businesses 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.

NEW COMMERCIAL ENTERPRISE

Section 203(b) of the Act states that the alien must be seeking to engage in "a" new commercial enterprise. The regulation at 8 C.F.R. § 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) This requirement is not simply a technicality. Specifically, it is often difficult to demonstrate a nexus between the investment and employment creation where the bulk of the investment is in a different company than the one generating employment. 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 (Comm'r 1998). While that case involved different facts, it stands for the proposition that there must be some nexus between the petitioner's investment and the employment being created.

The initial denial was based solely on the petitioner's failure to invest in a single new commercial enterprise. On appeal, the petitioner claimed to have made a \$1,000,000 investment into a single corporation. Specifically, the petitioner claims to have sold his shares in one company for \$300,000 and to have increased his investment in another through the purchase of tax liens.

As noted by the AAO in its remand order, 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 (Reg'l. Comm'r. 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 U.S. Citizenship and Immigration Services (USCIS) requirements. See *Matter of Izummi*, 22 I&N Dec. at 175. We reaffirm that the petitioner has not established that he was actively in the process of investing additional funds in a single new commercial enterprise as of the date of filing.

As noted by the AAO in its remand order, however, denying the petition on this basis along suggests that the petitioner need only file a new petition. Thus, the AAO remanded the matter for a more in depth analysis of the following issues.

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.

The petitioner initially claimed the following investments:

- \$708,000 into [REDACTED], owned 100% by the petitioner.
- \$200,000 into [REDACTED], owned 50% by the petitioner.
- \$100,000 into [REDACTED], owned 10% by the petitioner.
- \$100,000 into [REDACTED], owned 50% by the petitioner.

As stated above, the petitioner claimed on appeal to have made a \$1,000,000 investment into [REDACTED] and [REDACTED] alone. Specifically, the petitioner claimed to have sold his shares in the liquor company for \$300,000 and to have increased his investment in [REDACTED] Inc. through the purchase of tax liens. The petitioner submitted an affidavit from [REDACTED] the former agent for [REDACTED], which does not clearly indicate that he actually purchased the petitioner's interest in the store and makes no reference to \$300,000. The petitioner also submitted documents regarding tax liens without explaining how these liens constitute an investment in [REDACTED]

Moreover, as stated above, 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 USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 175.

The AAO, in its remand order, noted the lack of transactional evidence, such as wire transfers receipts or checks, documenting the path of \$1,000,000 from the petitioner's personal account to [REDACTED] or in satisfaction of its expenses. The AAO questioned the petitioner's claim to have made an initial investment of \$600,000 in this company in December 1995 given that the company's 2001 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return, Schedule L, reflects stock of only \$100 and no additional paid in capital. The AAO further noted that even the petitioner's loan to the company, reflected on the same schedule, is only \$4,063. The company's total assets were only \$1,059.

In response to the director's notice of intent to deny, the petitioner reiterates that he sold the liquor store, the restaurant and his interest in [REDACTED]. He claimed to have invested in properties for the development of 15 single family luxury homes. He also claimed to have funds "in escrow in a joint venture to build a care home for 10 patients," noting that his wife is a registered nurse. He submitted a foreign language bank document from Deutsche Bank dated June 21, 1994. The document relates to the sum of \$955,957 and names [REDACTED], but not the petitioner or any of the businesses in which the petitioner claims to have invested. The petitioner did not submit a certified translation (or any translation) of the document as required by the regulation at 8 C.F.R. § 103.2(b)(3). Thus, the significance of this document is unknown.

The director concluded that the petitioner's response did not document the transfer of \$1,000,000 from the petitioner to a new commercial enterprise. The petitioner provides no response to the director's decision and we find the director's conclusion supported by the record.

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'r. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 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). Finally, 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 foreign business records and the petitioner's 2003 IRS Form 1040 Individual Tax Return reflecting an adjusted gross income of only \$37,301. In its remand order, the AAO noted that the petitioner had not complied with the regulation at 8 C.F.R. § 103.2(b)(3), of which he was advised in the request for additional evidence, which provides that all foreign language documents be accompanied by a complete and certified translation. The AAO further noted that the company records do not establish the petitioner's personal income from that company and, thus, cannot establish how he lawfully acquired \$1,000,000. See *Matter of Izummi*, 22 I&N Dec. at 195.

In response to the director's notice of intent to deny, which raised the issue of the lawful source of the petitioner's funds, the petitioner submitted the 1994 Deutsche Bank document referenced above. The director concluded that this document could not establish how the petitioner lawfully accumulated \$1,000,000. The petitioner did not respond to the director's certified denial and we find that the director's conclusion is supported by the record.

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 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.

The petitioner indicated on the petition that the commercial enterprises in the aggregate employed three employees when he made his investment, 22 as of the date of filing and would create an additional eight. The petitioner did not break down the number of employees per enterprise. This is significant as the petitioner now bases his claim on only a single commercial enterprise.

The AAO noted that, while the petitioner has a contractor's license, the only evidence of business activities by [REDACTED] consists of numerous documents regarding property sales and foreclosures and receipts for improvements by an unrelated company, [REDACTED]. [REDACTED]'s 2001 tax return indicates that its business is to buy and sell houses, not contracting. In addition, [REDACTED]'s 2001 tax return includes no officer compensation, wages or cost of labor expenses. The AAO questioned whether the evidence of employment creation, Transaction, Privilege, Use and Severance Tax Returns for [REDACTED] demonstrates the number of *qualifying*¹ employees at [REDACTED] and, even if it does, how that relates to direct employment creation by [REDACTED]. The AAO also noted that the petitioner had not submitted a business plan.

As noted above, the petitioner subsequently asserted that he plans to open a care facility. We concur with the director's conclusion that the petitioner's bare assertion that he intends to create a care facility for 10 patients cannot overcome the overwhelming evidence that the petitioner is primarily engaging in passive real estate investments with no opportunity to create new jobs. The record still lacks evidence of any employment creation by [REDACTED] or a business plan.

Finally, the petitioner has not overcome the inconsistencies noted by the AAO, such as the printout from the [REDACTED] Commission's website, submitted by the petitioner, indicating [REDACTED] dissolved on March 21, 2005. Second, while the petitioner claims to own 10% of the development firm [REDACTED], a letter from that company reveals that the petitioner is merely a consultant. Third, the petitioner claims that his company, [REDACTED] is involved in a development project, [REDACTED] at the [REDACTED]. The record, however, reflects that [REDACTED] is the developer for this project. In response to the director's notice of intent to deny, the petitioner simply asserts that he has sold his interest in that company.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The director's decision of September 4, 2007; the petition is denied.

¹ The record contains no Forms I-9 as required by the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A).