U.S. Department of Homeland Security
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Washington, DC 20536

D7

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 2 9 2004

IN RE: Petitioner: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

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.

for Mari Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and 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 or that he would create the required number of jobs.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, 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, 21st Century Boston Import, Inc. (Boston Import), 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.

INVESTMENT OF CAPITAL

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.

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:
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> > (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 petition, the petitioner indicated that he had made an initial investment of $500,000 on an unspecified date and that the $500,000 constituted his entire investment. He indicated that the investment was made into an existing business with two employees at the time of investment, and that Boston Import was engaged in "trade and investment." On Part 4 of the petition, he indicated that the full $500,000 remained in the corporate account. In his cover letter, counsel asserted that the petitioner was "in the process of investing $1,000,000" and that Boston Import was formed to invest in other businesses. According to counsel, Boston Import had already purchased a restaurant and design firm in California.

In support of the petition, the petitioner submitted a stock certificate for 100,000 one dollar par value shares in Boston Import issued to on October 12, 2002; an approval notice for a visa petition filed in behalf of the petitioner classifying the petitioner as a nonimmigrant intracompany transferee; a fictitious name statement indicating that Boston Import was doing business in California as Sichuan Palace; and a business license for a restaurant issued to Boston Import and

The director requested evidence that Boston Import was doing business, that the petitioner had invested his own funds, and that the funds were sufficiently at risk. In response, counsel asserted that Boston Import was created in August 2002, is engaged in investment, consulting and international trade, has purchased a restaurant and a design company in Los Angeles, and has started providing consulting services in Boston. Counsel further asserted that the payroll documentation and documented losses suffered by the restaurant is evidence that the petitioner's funds are at-risk. Counsel concluded that $600,000 had been invested and that $400,000 "will be invested in stages over the next two years."

The petitioner submitted a printout from a Massachusetts State Government website confirming that Boston Import was organized on August 26, 2002 and the corporation's Certificate of Qualification filed with the State of California on December 9, 2002. The petitioner also submitted sales tax forms filed by Sichuan Palace and income statements reflecting net losses in every month from November 2002 through May 2003. Regarding the design company, the petitioner submitted a fictitious name statement filed by Boston Import for GM Design and Association, Inc. (GM Design). The statement indicates GM Design began transacting business under this name on September 29, 2002. The petitioner also submitted two unsigned design contracts on GM Design letterhead and consulting invoices on Boston Import letterhead.

In addition, the petitioner also submitted evidence tha ransferred $100,000 to Boston Import on September 2, 2002 and $500,000 to GM Design on October 15, 2002. The petitioner also submitted October 12, 2001 Minutes of the Organizational Meeting for esolving to issue 1,000,000 shares stock to the petitioner for two dollars per share and an October 24, 2001 stock certificate issued to the petitioner by for 1,000,000 shares. An accompanying stock transfer ledger seems to imply that the petitioner transferred ownership of those shares back to n the same date.

The director concluded that the transfer of funds through accounts controlled by the petitioner is not evidence that the funds have been actively invested and are at risk. On appeal, counsel references monthly income statements for Sichuan Palace as evidence that the funds are at risk. The petitioner submits new monthly income statements for Sichuan Palace and bank statements for Boston Import reflecting significant activity. Finally, the business plan on appeal asserts: "The principals of Sichuan Palace have already invested over $400,000 in the business and are prepared and able to invest well over $1,000,000."

The petitioner structured his alleged investment with two holding companies between himself and the employment generating entities. 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. 1998). While the facts in that decision were much more complicated than at issue here, the decision noted the difficulty in tracing funds through layers of holding or parent companies. Moreover, as will be discussed in more detail below, the petitioner transferred funds to Xing Ye nearly a year before transferring funds fro o Boston Import and GM Design. A corporation 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). Despite the petitioner's purported ownership ts investment into Boston Import is not an investment of the petitioner's personal funds.[2]

The evidence does not establish an at-risk investment of $600,000 into an employment generating entity. The transactional evidence does not show any funds being transferred to Sichuan Palace, the only entity creating more than a single job. The record lacks evidence of the restaurant's capital expenses and how they were paid. While income statements were submitted, the record lacks audited balance sheets or corporate income tax returns, Schedules L, reflecting invested capital and company ownership.

While the record reflects transfers of funds to Boston Import and GM Design, the record lacks evidence of the capital expenses for those entities and how those expenses were paid. The record also lacks audited balance sheets or corporate income tax returns, Schedules L, reflecting invested capital and company ownership.

Finally, even if we accepted that the transfer of $100,000 to Boston Import and $500,000 to GM Design by constituted the petitioner's personal investment, that amount is far less than the $1,000,000 required. As quoted above, 8 C.F.R. § 204.6(j)(2) provides: "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 petitioner has not demonstrated that he is irrevocably committed to investing the remaining $400,000.

SOURCE OF FUNDS

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:

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[1] The petitioner's alien file, A96 344 142, also contains a Form I-140 petition, WAC-03-097-52170, filed by in behalf of the petitioner seeking classification as a multinational executive or manager. On tax return for the period October 1, 2001 through September 30, 2002 submitted in support of that petition, the petitioner's Hong Kong company is listed on Statement 3 as the 100 percent owner of While the record also contains evidence, such as the stock certificates, indicating that the petitioner owns it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[2] In support of the Form I-140 referenced in the previous footnote, submitted a contract for goods betweer nd Shandong North Communications and wire transfer advices confirming the transfer of $2,090,000 from Shandong North Communications to Bank of America account 0797-07848, between June 7, 2002 and July 10, 2002 also submitted its tax returns for October 1, 2001 through September 30, 2002 reflecting gross income of $2,243,100 during that period. Thus was conducting business and receiving significant funds during the 11-month period between when the petitioner transferred funds to and when transferred funds to Boston Import.

(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. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* 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, supra*, at 211. 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 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).

In his initial cover letter, counsel asserted that the petitioner "obtained the money for his investment from the multi-million dollar business he owns in China." Counsel identifies the

The petitioner submitted promotional materials for Bestsbet, a trading and investment group located i December 31, 2001 balance sheet for Bestsbet reflecting capital of ¥16,515400, and a newspaper article on the company identifying as the Chairman. The petitioner also submitted a March 12, 2003 General Bank letter reflecting that on January 26, 2002, the petitioner opened a joint money market account with with a current balance of $552,986.41 and on February 4, 2002, the petitioner opened another joint money market account with the same individual with a current balance of $260,056.36.

In response to the director's request for additional evidence tracing the path of the invested funds back to their source, counsel asserted that the petitioner transferred funds from Hong Kong to Canada, from Canada to the United States, and from to Boston Import. Counsel further asserted that the petitioner is the sole owner o nd that wns 100 percent of Boston Import.

The petitioner submitted a letter signed jointly by the petitioner and the petitioner's brother, asserting that the petitioner owned 100 percent of Bestsbet from August 1995 to January 2001, at which time he sold 49 percent of his shares for an undisclosed sum.

The petitioner also submitted transactional documentation. This documentation reflects that on September 2, 2002 transferred $100,000 from its Bank of America account, number 07977-02088 to Boston Import. On October 15, 2002 transferred $500,000 from its East West Bank account, number 80911282, to GM Design.

The only evidence as to the source of the money in Bank of America account reflects that the account received deposits of $1,700,000 on October 23, 2001 and $299,900 on October 22, 2001. The $1,700,000 deposit is consistent with withdrawals of $900,000 from the petitioner's Bank of America account 0797-507218 and $800,000 from Bank of America account 0794-07322 on the same date. While transferred $1,000,000 from her account, 93-03936, at the Canadian Imperial Bank of Commerce (CIBC) to her Bank of America account on November 19, 2001, that transfer occurred after she transferred $800,000 out of that Bank of America account. Regardless, the record only establishes that $330,000 of those funds came from her joint account with the petitioner in Hong Kong on February 22, 2001.[3]

The deposit into Xing Ye's Bank of America account of $299,900 is somewhat consistent with the check drawn on General Bank account number 503927001 for $300,000. The funds in this account can only be traced back to transfers from other accounts at General Bank. The account holders of those accounts are unknown.

Regarding the source of funds in East West Bank account, the evidence reflects that the petitioner transferred $1,032,899.47 from account 93-05130 at CIBC to East West Bank account on December 17, 2001. The account holder for the CIBC account is unknown. Moreover, these funds cannot be traced back to Hong Kong or any other source. We acknowledge that the petitioner and did transfer an additional $2,000,000 out of Hong Kong to another account at CIBC, 92-88732, but these funds cannot be traced to either of the CIBC accounts from which the petitioner and transferred funds

The director concluded that the petitioner had not established the amount of compensation he received from Bestsbet or that those funds were the source of the funds transferred from Hong Kong. On appeal, counsel asserts that tax documentation for Bestsbet establish the source of the petitioner's funds. The petitioner submits monthly tax receipts for Bestsbet, none of which establish the petitioner's personal income. We note, however, that for August 2001, the company paid total monthly wages of ¥7,825, or $945.[4] The remaining monthly wage totals are similar. Even assuming the petitioner was the sole wage earner, an annual salary of approximately $11,340 cannot account for the accumulation of $1,000,000. While the petitioner claims to have accumulated the funds through the sale of 49 percent of his shares to his brother, the record contains no evidence of this transaction.

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[3] In addition, as stated above, received considerable funds from Shandong North Communications into account during the 11 months between when the petitioner and transferred funds to that account and when transferred funds from that account to Boston Import.

[4] The dollar amount was calculated using the exchange rate for August 15, 2001 according to www.oanda.com.

In summary, the record does not establish how the petitioner accumulated the $2,000,000 he transferred out of Hong Kong in February 2001. Moreover, the transactional evidence submitted does not sufficiently trace the path of the funds deposited with Boston Import and GM Design back to Hong Kong.

EMPLOYMENT CREATION

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:
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> (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
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> (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.

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, 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 1025, 1039 (E.D. Calif. 2001)(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 the Service 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, supra*. 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. at 213.

The petitioner submitted a Form DE 6 for the fourth quarter of 2002 reflecting that Sichuan Palace employed six employees in all three months of that quarter. A review of the wages for each employee reveals that only three of these employees could have worked full-time at minimum wage.

The director requested Forms I-9, evidence that any employees for which Forms I-9 were submitted had commenced full-time employment and a business plan if 10 jobs had not been created. In response, counsel asserted that the restaurant now employs 10 full-time workers.

The petitioner submitted Forms I-9 for one Massachusetts employee, six California employees, and an employee of unknown address and immigration status. All of these individuals are listed among the nine employees named on Boston Import's 2003 third quarter Form DE-6. The record contains no explanation for why a Massachusetts employee would be listed on a Form DE-6, a California quarterly employer return. Regardless, of the nine employees listed, only six could have worked full time for minimum wage and two of those employees have the same last name as the petitioner.

The director concluded that the petitioner had not submitted a business plan projecting the need for 10 full-time employees. On appeal, counsel asserts that seven jobs have been created and that a business plan is being submitted detailing the need for additional jobs. The petitioner submits a business plan for Sichuan Palace asserting the need for 27 employees within the next 27 months. The plan does not provide specific projected hiring dates or job titles for the open positions. Nor does the plan explain what changes will occur that will create the need for a staff three times that currently working. The record still lacks evidence that Sichuan Palace employs seven full-time employees not including the petitioner's immediate family members.

Moreover, while not discussed by the director, the record contains no evidence relating to the acquisition of Sichuan Palace by Boston Import. If Boston Import simply purchased an existing restaurant, the petitioner would need to demonstrate the number of jobs at the time of purchase and evidence that he would create 10 new jobs. The only exception would be if the petitioner demonstrated that Sichuan Palace was a troubled business at the time of purchase as defined at 8 C.F.R. § 204.6(e).

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.