



U.S. Citizenship  
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FILE: [REDACTED]  
SRC 05 255 51496

Office: TEXAS SERVICE CENTER Date: MAR 30 2007

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:

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.

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 the lawful source of her investment or that she would create the requisite number of jobs. The director also noted the petitioner's failure to submit the requested tax returns for the new commercial enterprise.

On appeal, counsel asserts that the petitioner created a new business that is creating new employment and that she provided sufficient evidence of the source of her funds.

As will be discussed below, we concur with the director that the record lacks evidence that the funds originating from companies in Hong Kong and Great Britain represent compensation for business consulting performed in West Africa. Further, while we withdraw the director's finding that the petitioner purchased an existing business, we concur with the director that the petitioner has not established that it is likely she will create the requisite employment.

The 21<sup>st</sup> 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. 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, Green Hill Investment, LLC, 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. The petitioner's investment is based on the purchase of farm property and improvements to that property to create a horse breeding business.

**SOURCE OF FUNDS**

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

- (i) Foreign business registration records;
- (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
- (iii) Evidence identifying any other source(s) of capital; or
- (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 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.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns). 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’s investment consists of the purchase of farm property for \$950,000 and investments in improvements in that property. The settlement statement reflects that the property was purchased on June 10, 2002 with no financing. The settlement agent was [REDACTED] According to

the sales contract, the seller's agent for this sale was Southern Traditions and the listing agent was Eualie Salley & Co. Realtors. While the evidence is persuasive that the petitioner did purchase this property, we simply note that on the sales contract, the selling agent and witness signed twice as [REDACTED] and once as [REDACTED]

In his initial cover letter, counsel asserted:

The funds used to invest in this commercial enterprise were obtained from payment of consultancy and brokerage fees for the operation of an oil producing marginal field offshore of Ghana, West Africa under a joint venture between Nigerian and Ghanaian companies as well as property and income generated from that property to its beneficiary, [the petitioner].

Counsel references three documents as evidence to demonstrate the lawful source of the invested funds: a letter from the Chairman of Lushann-Eternit Energy, an unsigned consultancy agreement between [REDACTED] and the petitioner's spouse and a trust deed.

The letter from [REDACTED] Chairman of Lushann-Eternit Energy, is addressed to [REDACTED] of Devore & Devore, P.A. in Florida advising that the source of funds for the "Greenhills Investment" derive from consultancy fees paid to the petitioner's spouse regarding the Saltpond offshore oil field. [REDACTED] lists Lushann-Eternit Energy's address as 8A Alhaji Tokan Street in Lagos, Nigeria.

The consultancy agreement, dated March 6, 2000, indicates that the petitioner's spouse has expertise, knowledge and contacts in West African crude oil exploitation and contracts with him to liaise with the Ghanaian Energy Commission to facilitate successful execution of the project, assist the company in obtaining subcontracts, permits, etc. and to arrange meetings and negotiations. The spouse's compensation is listed as \$1,000,000 upon the grant of all necessary approvals for the project.

The petitioner also submitted a September 26, 2000 trust in which her spouse is the settlor, Richard Obiamiwe (who lists Lushann-Eternit Energy's address as his office) and the petitioner is the beneficiary. The assets of the trust are listed as property in seven companies valued at 220,637,000 Naira.

As evidence of the path of the funds, the petitioner submitted a check issued on her spouse's account to Eualie Salley & Co. Realtors for \$25,000 on September 10, 2001; a disbursement summary from settlement reflecting a prior deposit of \$25,000 and \$927,061.64 in incoming funds from the petitioner; a wire transfer receipt reflecting a transfer of \$500,000 from Holmesdale International, Ltd.'s account at Lloyds TSB Bank to Southern Traditions escrow account number 39-8300-2724 on March 19, 2002; and an incoming funds transfer notice reflecting the transfer of \$199,980 from Cushman International, Ltd.'s account at HSBC Hong Kong to Southern Traditions on April 4, 2002. The petitioner also submitted March, April and June statements for the Southern Traditions escrow accounts, some of which have the account number blotted out. The statements reflect deposits in the

above amounts and another credit for \$238,980 on June 6, 2002. While the account's ending balance as of April 5, 2002 was \$712,928, the starting balance in June 2002 was only \$9,388.42.

While not submitted as evidence of the lawful source of the petitioner's funds, the petitioner also submitted a power of attorney completed by the petitioner granting her spouse the authority to purchase the farm property on her behalf. The purpose of this document is unclear, as the petitioner's spouse purchased the property in his own right and then transferred it to her. The document is two pages, faxed from two different locations on two different dates. Moreover, while the first page bears a South Carolina heading, the second page bears a Nigerian notary seal. Finally, the petitioner lists her address in care of [REDACTED]. We note that on the settlement document, the petitioner's spouse's address is also listed as in care of [REDACTED].

On October 3, 2005, the director issued a request for additional evidence, stating that the evidence submitted did not establish from where the \$500,000 originated.

In response, counsel asserted that the funds originated from the petitioner's spouse's consultancy fees, which were paid "at the request of [the spouse] through Cushman International Limited and Holmesdale International Limited on the instruction of Lushann-Eternit Energy Limited." The petitioner submitted a signed copy of the consultancy contract. While the signature page references a company seal, that seal is not visible on the photocopy. The petitioner also submitted a letter from [REDACTED] of Obioha Jude Idigbe & Co. (which lists Lushann-Eternit Energy's address as its own). [REDACTED] lists several transfers to Southern Traditions "at the request of [the petitioner's spouse] on the instructions of Lushann-Eternit Energy through Cushman International Limited's HSBC Hong Kong account . . . [and] Holmesdale International Limited's Lloyds TSB account." The list includes \$25,000 on September 2001, \$199,968 on April 4, 2002, \$229,019.26 on June 6, 2002 (all through Cushman) and \$500,000 on March 19, 2002 (through Holmesdale). The petitioner also submitted receipts of the 2002 transfers including, for the first time, the receipt for the June 6, 2002 transfer from Cushman International to Southern Traditions.

The director concluded that the petitioner had not documented that the funds originating from Cushman International and Holmesdale International were the funds of the petitioner or her spouse or that her spouse performed the consulting duties for Lushann-Eternit Energy. The director further noted that the trust property had not been documented.

On appeal, counsel asserts that it is unreasonable to require the petitioner to demonstrate that her spouse performed the consulting services for which he was contracted and notes that the contract itself was submitted. Counsel further asserts that the petitioner's spouse directed his funds to be transferred directly to escrow, which they were.

The petitioner in this matter is relying on the assertion that her spouse was entitled to a lump sum of \$1,000,000 for consulting services. The record lacks evidence that the petitioner's spouse has the type of experience in the oil and gas industry that would justify such a large consulting fee. Moreover, while not the typical employment income accrued over time, the funds are still essentially employment income. As quoted above, the regulation at 8 C.F.R. § 204.6(j)(3) requires evidence

from the list of documents “as applicable.” Where the source is taxable income, it would appear that personal tax returns are applicable. The petitioner has never asserted that these funds are not taxable in any nation; thus, the failure to submit personal tax returns for her spouse is of some concern. While we acknowledge the submission of the consulting contract, a contract carries far less weight as evidence that the fee was paid than tax documentation reflecting taxes paid on the income or transactional evidence tracing the funds back directly to the employer.

Most significantly, the funds do not trace back to Lushann-Eternit Energy. Counsel has asserted that the petitioner’s spouse directed that the funds be transferred through a company in Hong Kong and a company in Great Britain. [REDACTED] purports to confirm this information. The record, however, contains no evidence of any affiliation between Lushann-Eternit Energy, doing business in West Africa, and the companies that actually transferred the money. The record also lacks evidence that the petitioner’s spouse has any connection to these companies. Neither counsel nor [REDACTED] provides any reason, lawful or otherwise, for transferring the money through these two companies instead of directly from Lushann-Eternit Energy. Finally, the petitioner failed to submit any documentation that Lushann-Eternit Energy is the original source of the funds. Specifically, the record lacks transactional evidence documenting funds transfers from Lushann-Eternit Energy to Cushing International or Holmesdale International. Without such evidence, the petitioner cannot document the complete path of these funds.

In light of the above, we concur with the director that the petitioner has not established that the invested funds derived from Lushann-Eternit Energy as claimed.

### 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 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 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 initially submitted a business plan. The plan states the need for a general manager/farm manager, office manager, three maintenance workers and a horse operations crew of eight. The plan included no timetable for hiring these individuals but indicated an intention to purchase broodmares and yearling colts in 2005. The petition was filed on September 20, 2005. On October 3, 2005, the director issued a request for additional evidence, concluding that the petitioner had purchased an existing farm and would need to provide evidence of the employment at the farm prior to the sale and the creation of 10 new jobs above the number already working there at the time of sale. The director requested tax returns for the farm before the sale and the tax returns of the petitioner's commercial enterprise for 2003 and 2004.

In a December 23, 2005 response, counsel asserted that the petitioner only purchased the land and buildings, not an existing business. The petitioner submitted a letter from the previous owner and a new business plan.

the previous owner of the farm, asserts that they sold only the property to the petitioner. She notes that the sales contract is for property only and includes no equipment or horses. asserts that she moved her business to a new location.

The business plan indicates that would employ five employees in its first year, 10 in the second year and 13 by the third year. The only employee identified, however, is the farm manager. Although the farm was purchased in 2002, the financials of the farm attached to the business plan identify 2006 as year one, 2007 as year two and 2008 as year three.

The director noted that the requested tax returns were not submitted and concluded that while the petitioner might be hiring different employees than those previously employed by the farm, she still needed to document the creation of ten new positions above and beyond those that previously existed on the farm. Finally, the director noted that while the petitioner had purchased the farm three years ago, the record lacked evidence that even one employee had been hired.

On appeal, filed February 21, 2006, counsel references the letter from as evidence that the petitioner did not purchase an existing business and asserts that tax returns are not available because has yet to begin business.

As stated above, asserts that the petitioner did not purchase any horses, equipment or an operational business. Rather, asserts that she moved her business to a new location. The sales contract does not reference good will or any assumption of the liabilities of a previous business, such as contractual obligations. Finally, the sales contract does not reference current employees. Thus, the record is consistent with assertion that she did not sell an existing business. In light of this analysis, we withdraw the director's finding that the petitioner purchased an existing business.

The petitioner has indicated that she owns with her spouse and son. Farm was formed as a limited liability company in September 2002. According to Internal Revenue

Service (IRS) Publication 541, a limited liability company formed after 1996 with more than one member is classified as a partnership for federal tax purposes. The proper tax return is IRS Form 1065, U.S. Partnership Return of Income. IRS Publication 541 further states: "A partnership is not considered to engage in a trade or business, and is not required to file a Form 1065, for any tax year in which it neither receives income nor pays or incurs any expenses treated as deductions or credits for federal income tax purposes." The petitioner's spouse purchased the farm property and transferred it to the petitioner. Thus, the purchase and subsequent property taxes would not be tax deductible as an expense of the company. The record contains no evidence of expenses incurred for renovations prior to 2005. Thus, the record is consistent with counsel's assertion that Green Hill Farm was not required to file an income tax return in 2003 and 2004.

Nevertheless, the original business plan called for the purchase of several horses in 2005 and the new business plan suggested at least one employee had already been hired. As noted by the director, however, the petitioner has not submitted quarterly wage and withholding reports documenting the employment of any employees in 2005. Where certain actions in the business plan should have already occurred, the absence of evidence that these actions have occurred raises concerns as to the credibility of the plan as a whole.

In light of the above, the petitioner has not established that it is likely that she will create at least ten jobs in 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.