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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B7

FILE: [redacted] SRC 05 015 50405 Office: TEXAS SERVICE CENTER Date: OCT 07 2005

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and 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 asserts that the evidence demonstrates that the funds invested derive from the sale of his property in Spain. The petitioner also requests oral argument before the AAO. Oral argument is limited to cases in which cause is shown. A petitioner must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied.

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 petition was filed after November 2, 2002, the petitioner 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, ABC Farma, Inc., located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $500,000.

INVESTMENT OF CAPITAL

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien

entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient inFarmation 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 inFarmation and sufficient inFarmation 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 claimed on the petition to have invested $120,000 on July 10, 2003 and a total of $520,360 as of the date of filing. He indicated that the investment included $230,000 cash in the company's bank account and $301,318 in assets purchased for use in the business. The business plan included an investment schedule that reflected the following investments already made:

July-03	$10,000
July-03	$2,500
July-03	$2,500
August-03	$105,000
May-04	$206,318
July-04	$94,042
August-04	$100,000

The petitioner submitted 11 checks issued by him to ABC Farma for $10,000 each dated between July 21, 2004 and October 17, 2004, for an aggregate of $110,000. The petitioner submitted personal and business bank statements documenting the deposit of eight of those checks into ABC Farma's checking account and an additional transfer of $105,000 from the petitioner's personal account to ABC Farma. While the statements also reflect two deposits into ABC Farma's checking account of $2,500 each, the source of those deposits is not documented.

In addition, the petitioner submitted the closing statements for his purchase of [redacted] for $94,042. The petitioner financed $72,000 of the total purchase price, but did not submit the security agreement for this mortgage. The record includes the warranty deed whereby the petitioner granted the same property to ABC Farma.

The petitioner also submitted a letter from [redacted] indicates that the petitioner purchased the U.S. affiliate, along with the exclusive rights to sell the Spanish company's products in the United States and Canada, for $206,318.16, $21,000 of which the petitioner had paid. The agreement for the exclusive rights indicates that Dicoserma, S.L. can terminate the agreement if the petitioner does not purchase $100,000 of products in the first year and $200,000 of products each year thereafter. Finally, the petitioner submitted several invoices for the purchase of products from Dicoserma, S.L.

On November 8, 2004, the director advised the petitioner that the mere transfer of money to a company whereby he was the sole owner was not evidence that the funds were at risk. The director also requested the security agreements for any loans used to finance any of the petitioner's investment.

In response, the petitioner claimed to have invested $220,000 in cash, $210,000 in merchandise and $92,000 in real property. The petitioner asserted that all of the funds deposited with ABC Farma were at risk. The petitioner noted the large inventory purchased and the high accounts receivable numbers reflected on the Schedule L of its 2004 tax return. Regarding the financing of purchases from Dicoserma, S.L. and the real property, the petitioner states:

> I . . . must pay back the amount invested in merchandise to Dicoserma SL, one of my vendors as you can see in the supplier agreement attached with my petition received by you on October 21, 2004. In order to do that I am paying taxes to the IRS three times, first when my company makes profit, second when my company pays me dividends and a third time when my company pays me a salary.
>
> The same happens with the amount invested in the building because I . . . am paying a mortgage for the building that is a property of my company. I am paying tax three times (on

> corporation profits, dividends and wages) and I cannot discount the interest paid because it is a property of the company.

The petitioner submits ABC Farma's 2004 U.S. Corporation Income Tax Return, Form 1120, including Schedule L. While ABC Farma did not claim to have paid any interest, as would be expected if it was paying the mortgage, it did claim to have paid $7,034 in rent, which is unexplained if it owns the property where it is located. On Schedule L, ABC Farma indicated that its equity at the end of the year included $10,000 in stock and $540,454.42 in additional paid-in-capital. The total assets of the company at the end of the year were worth $575,618.99. The petitioner also submitted a mortgage statement issued to him personally.

In her final decision, the director appears to still be questioning whether the invested funds are sufficiently at risk. In addition, noting the petitioner's failure to submit the requested security agreements, the director concluded that the petitioner had not established that the property purchase was a qualifying investment. The petitioner does not address this issue on appeal other than to assert that the director failed to read all of the evidence submitted.

Regarding whether the cash transferred to ABC Farma was sufficiently at risk, it is important to review the relevant regulations and case law. The regulations provide that a 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.

Matter of Ho, 22 I&N Dec. 206, 210 (Comm. 1998), states:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003)(citing *Matter of Ho*). In this matter, however, the petitioner has amply demonstrated the undertaking of business activity. The bulk of funds transferred to ABC Farma have not remained untouched in an account and do not appear to have been utilized for an unrelated passive investment. Rather, at the end of 2004, only $29,578.36 remained in cash, while the business claimed an additional $546,040.63 in assets ($575,618.99 in total assets minus $29,578.36 in cash). ABC Farma was also in the process of importing significant amounts of inventory. Thus, it does not appear that ABC Farma has been grossly overcapitalized such that the invested capital is not at risk. As such, we withdraw the director's concerns regarding whether the funds transferred to ABC Farma were sufficiently at risk. To hold otherwise would render it impossible for any sole owner to establish eligibility.

We agree with the director, however, that the petitioner's failure to submit the requested security agreements, both for the $72,000 loan for the purchase of the property and the $185,318.16[1] owed to Dicoserma, S.L. Assuming the petitioner is personally paying these loans, and the record does not contain checks issued by the petitioner to either the lending bank or Dicoserma, S.L., we can only consider those amounts already paid as

[1] The total purchase price, $206,318.16, minus the amount paid, $21,000.

of the date of filing. We cannot consider the loans themselves without evidence that ABC Farma's assets do not form any part of the security for these loans. *See* 8 C.F.R. § 204.6(e)(definition of capital).

As we cannot consider the loans for the reasons discussed in the preceding paragraph, we will consider whether the remaining evidence establishes a sufficient investment. We acknowledge at the outset that the Schedule L for 2004 reflects $10,000 in capital and $540,454.42 in additional paid-in-capital, with no loans from shareholders. Thus, if the petitioner were able to demonstrate contributions to ABC Farma in that amount, we would accept that the contributions constitute an equity investment.

As stated above, the petitioner submitted 11 checks totaling $110,000 issued to ABC Farma. While all of the deposit slips submitted with those checks indicate they were deposited into account [redacted] the statements for that account, which cover July through October 2004, only supports the deposit of eight of the eleven checks. The bank statements also document the electronic transfer of $105,000 from the petitioner's own account to ABC Farma. The source of the two $2,500 deposits is not documented in the record. Even if we did not question the deposit of the three $10,000 checks not reflected as deposited on the bank statements or the source of the $2,500 deposits, the transactional documents establish an investment of no more than $220,000.

Regarding the petitioner's purchase of real property for the business, we cannot consider the full $94,042.08 for the reasons discussed above. Rather, we can only consider the $22,042.08 not financed, assuming those funds were paid directly by the petitioner, and did not come from the $220,000 already transferred to ABC Farma.

Regarding the purchase of the Dicoserma, S.L. affiliate, once again, we can only consider that portion of the purchase price not financed. As stated above, the down payment to Dicoserma, S.L. was $21,000. As with the money paid for the real property, however, the petitioner would need to establish that those funds were paid directly by the petitioner and not out of the $220,000 already transferred to ABC Farma in order for us to consider those funds in addition to those transferred to ABC Farma.

Regarding the invoices submitted, the petitioner has not established who paid those costs. Once again, if ABC Farma purchased inventory with the $220,000 already contributed by the petitioner or on credit, as suggested by the large accounts payable ($174,698.11 at the end of 2004), the petitioner cannot be credited with those amounts in addition to $220,000 transferred to ABC Farma. The eventual payment of accounts payable by ABC Farma from its proceeds is a normal operating cost, and not a capital investment by the petitioner.

In light of the above, the petitioner has established, at best, an investment of $220,000 in cash, $22,042.08 towards real property and $21,000 towards the purchase of the Dicoserma, S.L. affiliate. These amounts total only $263,042.08, $236,957.92 less than the full $500,000 required. While a petitioner need only be actively in the process of investing the full $500,000, the petitioner has not demonstrated that he has the remaining $236,957.92 available for investment. The presumption that the petitioner will earn enough in salary and dividends to invest this sum is highly speculative.

For the reasons expressed in this decision, we concur with the director that the petitioner has not demonstrated a sufficient 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:
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> (i) Foreign business registration records;
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> (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;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (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 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).

As stated above, initially the petitioner submitted evidence that traced, at best, $220,000 from the petitioner to ABC Farma. The petitioner, however, failed to submit any evidence as to how he had accumulated those funds. Thus, on November 8, 2004, the director requested evidence as to the source of the transferred funds. She specifically noted that when the funds were derived from an occupation, *Matter of Ho*, 22 I&N Dec. at 210-211, required evidence that the petitioner was actually engaged in that occupation.

In response, the petitioner submitted a contract whereby [redacted] agreed to sell property located at No[redacted] for [redacted]une 1, 2003. The full purchase price, however, includes fees not paid to the seller. The actual amount paid to the seller was 318,536 €, or $375,108.[2] The petitioner also submitted a certificate issued by the landlord in May 2003 identifying the

[2] According the U.S. dollar / Euro exchange rate for June 1, 2003 according to www.oanda.com.

petitioner as the owner of that property as well as evidence identifying the petitioner as the payer of property taxes on that property.

The director concluded that the above evidence did not establish that the petitioner sold his own property. On appeal, the petitioner asserts that [redacted] is his wife, as is demonstrated through the records pertaining to his nonimmigrant visa.

The nonimmigrant visa documents are not part of this record of proceeding. The record before us does not contain the petitioner's marriage certificate. Even if we accepted that the documents suggesting the petitioner's ownership in the property sold by [redacted] were sufficient, the petitioner has still not established the lawful source of his funds.

The sale of an asset is not sufficient evidence of the source of the invested funds. To hold otherwise would result in the untenable position whereby the proceeds from the sale of an asset purchased with unlawfully obtained funds would be considered lawfully obtained. The petitioner must still establish how he obtained the asset sold. In other words, the petitioner must establish how he accumulated the funds to purchase the asset, in this case a house, in the first place. The record is absent any evidence regarding the petitioner's lawful income in Spain.

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:
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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.

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), *aff'd.* 345 F.3d 683 (9th Cir. 2003)(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 *new* jobs. We acknowledge the submission of a detailed and credible business plan. The petitioner, however, appears to have purchased an operational business from Dicoserma, S.L. The record is absent evidence regarding the number of employees at Dicoserma's affiliate prior to the sale of that business to the petitioner. Thus, we cannot determine whether the business plan projects the creation of 10 *new* jobs.

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.