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U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: [Redacted]  
WAC 04 060 53288

Office: CALIFORNIA SERVICE CENTER

Date: OCT 31 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:

[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.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California 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 or that he had met the employment creation requirements.

On appeal, counsel asserts that the director erroneously relied on an unpublished federal district court decision that is not a "precedent" decision. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not *bound* to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision, however, will be given due consideration when it is properly before the AAO, although the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, we acknowledge that the unpublished decision of a district court would necessarily have even less persuasive value.

Nevertheless, where the director chooses to follow a district court decision that has upheld the AAO's interpretation on an issue, there is no error in citing that case and the reasoning behind it. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court, *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Thus, absent a contradictory decision by a federal circuit court, a district court's decision upholding an interpretation by the AAO is persuasive authority for the director.

Furthermore, counsel's assertion that the decision cited by the director, *Kenkhuis v. INS*, No. 3:01-CV-2224-N; 2003 WL 22124059 (N.D. Tex. 2003), is contradicted by the Ninth Circuit's decision in *Spencer Enterprises, Inc. v. INS* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003) is not persuasive. In *Kenkhuis*, 2003 WL 22124059 at \*3, the court upheld the AAO's finding that a qualifying investment cannot include the reinvestment of proceeds, even for a sole proprietorship where the alien pays taxes on profits. Counsel cites *Spencer Enterprises, Inc.* and "its progeny" for the proposition that "when a taxpayer pays personal tax on 'ordinary income,' such income belongs to the taxpayer, no matter where it is stored; thus 'the investment is made from the alien's own lawfully acquired funds.'"

The circuit court decision in *Spencer Enterprises, Inc.*, 345 F. 3d at 686 provides:

In applying for an EB-5 visa, an alien entrepreneur must submit an I-526 petition and supporting documentation demonstrating that the required capital has been committed; that the investment is made from the alien's own lawfully obtained funds; and, if applicable, that the investment is being made in a targeted employment area with a high unemployment rate.

*Id.* While this paragraph includes counsel's second quote, the full paragraph does not state or imply that all proceeds on which the alien was taxed can be considered part of the alien petitioner's investment. The court noted that it only needed to decide whether any one of the grounds of denial were sufficient and found that there were sufficient credibility issues to justify the denial of the plaintiff's petition. *Id.* at 693-694. Thus, the circuit court did not reach the issue of what constitutes a qualifying investment.

The district court opinion, while addressing tax returns as they relate to the lawful source of invested funds, does not address the issue in *Kenkhuis*, the reinvestment of proceeds. *Spencer Enterprises, Inc. v. INS*, 229 F. Supp. 1025 (E.D. Calif. 2001) *aff'd* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003). Rather, the district court stated that the plaintiff in that case “failed to designate the nature of her employment for three of her four jobs and did not submit tax information for five years as the regulations require.” The court then concluded that the regulatory requirements relating to source of funds “are hypertechnical requirements to serve a valid government interest; i.e. to confirm that the funds utilized in the program are not of suspect origin.” The lawful source of the “invested” funds is a separate issue from whether the funds, lawful or not, are a qualifying investment by the petitioner. The facts in *Spencer* did not involve the reinvestment of proceeds and, as such, the court’s decision is not contrary to *Kenkhuis*.

Finally, in response to counsel’s assertion that he has been unable to locate the unpublished decision, we reiterate that, while unpublished, *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003) is available on Westlaw. As cited above, the Westlaw citation is 2003 WL 22124059 (N.D. Tex.). Counsel’s remaining assertions will be discussed below.

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> 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 is based on an investment in a business, A-1 Landscaping and Construction, Inc. (A-1), 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**

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 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).

The petitioner indicated that he was the 80 percent owner of A-1, established February 14, 1995. He claimed to have invested \$18,208.30 on February 14, 1995 and to have invested a total of \$1,580,708 as of the date of filing. On Part 4 of the petition, he indicated that the full investment consisted of assets purchased for use in the enterprise. He also indicated that he earned wages of \$5,000 per month.

The petitioner submitted his own declaration, indicating that A-1 actually existed prior to 1995 as his brother's sole proprietorship and that the petitioner "invested by reinvesting [his] wages in the business since 1991." The petitioner elaborates that he did not claim all of his wages or dividends.

The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. See generally *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

The commercial enterprise in *De Jong* was a corporation, as is the new commercial enterprise in the matter before us. While A-1 may be a Chapter S corporation, whereby the shareholders pay taxes on the proceeds, a reinvestment of proceeds is simply not an infusion of new capital into a business. Unlike a sole proprietor, the assets of an S corporation's shareholders are not at risk and cannot normally be seized by a creditor. While the petitioner paid taxes on a percentage of profits over several years, as will be detailed below, that money constituted the bulk of his personal income. As such, it is not credible that none of that money was spent on personal living expenses, and, thus, was not reinvested into the business.

As discussed above, a federal court, in an unpublished decision, has upheld our interpretation of "invest" as applied to a sole proprietorship. In *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003), the court stated:

The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing Mirriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. [redacted] 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

*Id.* at 4-6. While not binding on us, it reinforces the interpretation this office has applied in the past. We choose to follow the court's reasoning in this matter as well. As the petitioner's investment claim rests on his assertion that he failed to remove his dividends, we uphold the director's rejection of that claim for the reasons discussed above.

Moreover, if the petitioner's dividends were actually made available to A-1, those funds should be reflected in A-1's equity. We will not presume that all of A-1 assets derive from the petitioner's dividends, especially where the financial documents in the record reflect that the corporation has acquired funds in other ways, such as bank loans. The financial documents, including the petitioner's personal tax returns, A-1's corporate tax returns, including Schedule L, and the reviewed financial statements will be analyzed below.

A-1 was incorporated in 1995. Its corporate tax returns for that year reflect an infusion of \$500 in stock and no additional paid in capital. The petitioner's Schedule K-1 for that year reflects his interest as 33.34 percent, thus the petitioner has not demonstrated that he can be credited with the full \$500. The stock in A-1 remains at \$500 through 2003, the last year for which the petitioner submitted tax returns. The corporate tax returns and reviewed financial statements for 1996 through 2003 differ in the amount of additional paid-in-capital. Those numbers follow:

Year	Tax Return (year end)	Reviewed Statements	
	Paid-in-capital	Stock	Paid-in-capital
1996	\$0	\$500	\$2,760
1997	\$0	\$500	\$2,760
1998	\$0	\$3,260	\$0
1999	\$0	\$3,260	\$0
2000	\$234,200	\$500	\$236,960
2001	\$234,200	\$500	\$236,960
2002	\$234,200	\$500	\$236,960
2003	\$234,200	\$500	\$236,960

The increase in paid-in-capital in 2000 resulted from the conversion of a \$184,200 shareholder loan to equity, according to the reviewed statements. Accepting these numbers and assuming that the petitioner is responsible for all of the stock and additional paid in capital, the Schedules L and balance sheets reflect an investment of no more than \$237,460 (\$500 in stock plus \$236,960 paid-in-capital), far less than the \$1,000,000 required.

It is the petitioner's position that the retained earnings should be considered. As noted by the director, the tax returns reflect negative retained earnings in 2003. Moreover, as also noted by the director, reviewed financial statements have far less evidentiary weight than audited financial statements.

Even if we were to consider the tax returns and reviewed statements, the retained earnings are reflected on these documents as follows:

Year	Tax Returns (year end)	Reviewed Statements
1995	\$44,108 (from 1996 Schedule L)	Not provided
1996	\$48,875	\$168,831
1997	\$80,255	\$282,399
1998	\$46,747	\$426,595
1999	(\$192,920)	\$204,527
2000	(\$63,170)	\$9,880
2001	(\$80,185)	\$189,486
2002	(\$136,653)	\$337,157
2003	(\$59,930)	\$395,501

Despite the director's concern over the discrepancy between the statements and the tax returns, the petitioner provides no explanation for the significantly different numbers for the same date on appeal. Even accepting the positive numbers from the reviewed statements, we note that retained earnings are cumulative. Thus, these numbers reflect that A-1 retained no more than \$395,501, far less than the \$1,000,000 required investment.

Moreover, the statements of cash flows included in the reviewed statements do not reflect that the petitioner failed to remove his dividends. Those numbers are as follows (shareholder loans not converted to equity are not included):

<u>Year</u>	<u>Dividends Paid</u>	<u>Cash Flows from Financing Activities</u>
1996	\$0	\$2,760
1997	\$31,002	\$0
1998	\$96,665	\$0
1999	\$136,914	\$0
2000	\$79,841	\$50,000 plus conversion of a \$172,263 shareholder loan
2001	\$57,683	\$0
2002	\$133,003	\$0
2003	\$236,887	\$0

As the cash flow statements reflect the deduction of dividends, they should also reflect an increase from investment if the petitioner did not, in fact, remove the dividends. An increase in cash from investment is only reflected in 1996 and 2000, totaling \$225,023. Once again, even if we were to conclude that this entire amount derived from the petitioner, this amount is far below the requisite investment of \$1,000,000. As quoted above, the definition of invest excludes loans to the corporation. As such, the shareholder loans in 2002 and 2003 cannot be considered, as they had not been converted to equity prior to the date of filing or even subsequently.

Similarly, the statements of stockholders' equity also deduct the dividends paid. Even including the retained earnings, the statement for 2002 and 2003 reflects a total stockholders' equity of \$632,961 as of the end of 2003, considerably less than the \$1,000,000 required.

Finally, the petitioner's total income over the relevant years reflects that the dividends represented the bulk of his family's income. The petitioner's income is reflected on his tax returns, filed jointly with his wife and listing one child, and is listed below. The source of the S-Corporation income is taken from the petitioner's Schedules E. In years where the petitioner submitted no Forms W-2, every year except 1996, we cannot discern the source of the wages. We note that, according to the Schedules B, much of the interest listed below under "other income" also derived from A-1.

<u>Year</u>	<u>Wages</u>	<u>S-Corp income</u>	<u>Other income</u>
1995	\$15,240 (no W-2)	\$15,336 (from A-1)	\$15
1996	\$19,000 (from A-1)	\$4,208 (\$2,059 from A-1)	\$373
1997	\$37,400 (no W-2)	\$48,853 (from A-1)	\$215
1998	\$61,000 (no W-2)	\$36,916 (\$24,794 from A-1)	\$2,096
1999	\$39,000 (no W-2)	(\$40,428)	\$4,508
2000	\$0	\$115,211 (\$102,275 from A-1)	\$941
2001	\$27,000 (no W-2)	\$21,654 (\$16,489 from A-1)	\$14,778
2002	\$46,640 (no W-2)	\$75,809 (\$72,735 from A-1)	\$154

The above numbers reflect that the petitioner's income ranged from \$30,591 to \$116,152. Such income does not explain how the petitioner managed to reinvest \$1,000,000 in dividends while supporting a family,

especially as the dividends from A-1 only total \$282,541. Even if the petitioner did not claim all of his wages, which would result in almost no income for personal expenses, the wages amount to only another \$245,280. Thus, assuming that the petitioner received no wages or dividends, those amounts could account for only \$527,821, little more than half of the requisite \$1,000,000. Regardless, it is not credible that the petitioner lived for eight years on the minimal interest income listed above.

In summary, it is the position of this office that the reinvestment of proceeds is not a contribution of capital, as required under the definition of "invest." Moreover, even considering the retained earnings and dividends paid, the numbers do not support the petitioner's claim to have invested \$1,000,000.

### 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 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).

On appeal, counsel does not address the director's conclusion that the record lacks evidence of the lawful source of \$1,000,000 in invested funds. As the record does not reflect the investment of \$1,000,000 for the reasons discussed above, the source of such funds cannot be discerned.

### **EMPLOYMENT CREATION**

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

*Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

**Full-Time Employment Defined** – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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

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

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 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 director concluded that the Forms I-9 were not supported by documentation establishing the qualifying nature of the petitioner’s employees. Counsel does not address this concern on appeal.

Moreover, Forms I-9 cannot establish that the individuals are actually employed by the new commercial enterprise or that they work full-time. *Id.* at 212. While the petitioner submitted quarterly federal tax returns reporting up to 30 employees, the record does not reflect how many of those employees worked full-time.

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.