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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 20 2009  
SRC 07 094 50910

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

*John F. Grissom*

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition, which 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 an at-risk investment as the new commercial enterprise's start-up costs had not amounted to a significant percentage of the \$1,000,000 required investment.

On appeal, counsel asserts that the petitioner actually committed the necessary funds, that the director did not explain why the loan obtained by the petitioner to make his investment was insufficient and that the regulations do not require the expenditure of a significant amount of the investment as long as the company is doing business.

On February 26, 2009, the AAO advised the petitioner that the new commercial enterprise, HAK Company, Inc., was listed as "not in good standing" on the website operated by the Texas Comptroller of Accounts, <http://ecpa.cpa.state.tx.us> (accessed December 22, 2008 and incorporated into the record of proceeding). The AAO also explained that the concerns regarding whether the petitioner's investment was sufficiently "at-risk" derived from the petitioner's financial projections, which included maintaining the bulk of the invested funds in reserve accounts rather than spending those funds on capital expenditures. The AAO also questioned whether the petitioner would be creating any "new" jobs by taking over cleaning contracts maintained by Elite Facility Systems (EFS). Finally, the AAO requested recent quarterly employer returns and the company tax returns for 2006 and 2007.

In response, counsel notes that Hak Company, Inc.'s status has been reinstated in the State of Texas and submits evidence of that fact. Counsel further asserts that the petitioner's money is all at risk because the business is operational. The petitioner submits an affidavit from Hak Company, Inc.'s Vice President, [REDACTED], explaining the relationship between Hak Company, Inc. and EFS. Finally, the petitioner submits the requested quarterly employer returns and tax returns. For the reasons discussed below, the petitioner has not overcome all of our concerns.

In addition, the petitioner has not demonstrated that he has created or will create the necessary jobs. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, Hak Company, Inc., 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.

### **CAPITAL AT RISK**

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 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Matter of Ho*, 22 I&N Dec. 206, 209 (Comm'r. 1998). 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*).

*Matter of Ho*, 22 I&N Dec. at 210, 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.

Counsel has repeatedly asserted that the instant petition is easily distinguished from *Matter of Ho*, 22 I&N Dec. at 210, because the petitioner in this matter is actually conducting business. As stated in our February 26, 2009 notice, it is acknowledged that Hak Company, Inc. is doing business.

Regardless, *Matter of Ho*, 22 I&N Dec. at 210 stands for the proposition that all the funds must be at risk. *Matter of Ho* states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

*Id.*

The AAO also advised the petitioner that *Matter of Izummi*, 22 I&N Dec. 169, 189 (Comm'r. 1998), disfavors setting aside funds in passive investment "reserve" accounts. The AAO acknowledged that *Matter of Izummi*, 22 I&N Dec. at 189, involved mandatory reserve accounts, but noted that the AAO clearly expressed its concern when the "invested" funds are not placed at risk for job creation. Specifically, the AAO noted that *Matter of Izummi*, 22 I&N Dec. at 179 provides that 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. The AAO noted that the petitioner had never explained the practical difference between a holding company that does not create employment retaining the funds in reserve accounts (the factual situation in *Matter of Izummi*) and the employment generating entity storing over 80 percent of the "invested" funds in passive investment accounts. As noted by the AAO, in both situations, the funds are not contributing to job creation. While counsel's response distinguishes *Matter of Ho*, 22 I&N Dec. at 210, counsel makes no attempt to address the concerns about making the funds available for job creation and about reserve accounts raised in *Matter of Izummi*, 22 I&N Dec. at 179, 189.

Given the above considerations, we will now review the evidence. The petitioner filed the petition on February 1, 2007 based on an investment in a new commercial enterprise established on August 10, 2006. On part 3 of the petition, he indicated that he began investing on November 1, 2006 and had invested a total of \$1,000,000. On part 4 of the petition, the petitioner indicated that his investment consisted of transferring \$1,000,000 to a U.S. bank account.

The petitioner submitted evidence that the invested funds derived from a loan from Saudi Fransi Bank, secured by the petitioner's shares in [REDACTED]. The director did not contest that the petitioner transferred \$1,000,000 of his personal funds to Hak Company, Inc.'s bank account. We acknowledge that, after previously transferring smaller amounts, on December 27, 2006, the petitioner transferred the bulk of the investment, \$946,450, to Hak Company, Inc.'s checking account. Two days later, however, the company transferred \$800,000 to a certificate of deposit (CD) account and \$140,000 to a money market account.

The petitioner also submitted forecasted balance sheets for 2007, 2008 and 2009. As of the end of 2007, the petitioner projected \$66,800 in fixed assets, \$10,000 in cash and \$773,658 in "investments." By the end of 2008, the petitioner projected \$84,400 in fixed assets (an increase of only \$17,600), \$10,000 in cash and \$1,325,549 in investments. By the end of 2009, the petitioner projected fixed assets of \$102,300 (an increase of only \$17,900), \$10,000 in cash and \$2,475,368 in investments. The petitioner also submitted projected income statements for the same years forecasting a net loss of \$69,437 in 2007 and net gains thereafter. The cash flow projections

anticipate transferring \$552,891 to passive investments in 2008 and another \$1,149,819 in 2009. Thus, within the first three years of operation, the petitioner projected minimal start-up costs and few additional capital expenditures.

Finally, the record contains Hak Company, Inc.'s bylaws, which, according to Article 8.03, allow for reserve accounts for meeting contingencies, equalizing dividends, repairing and maintaining any property of the corporation "or for such other purposes as the Directors shall deem conducive to the best interests of the corporation." The directors may also modify or abolish any such reserve in the manner in which it was created. Thus, it would appear that if the reserve account was created from investor funds, it could be abolished at any time through the return of those funds to the investor.

On June 19, 2007, the director requested evidence that the full \$1,000,000 had been placed at risk. In response, counsel asserts that the \$1,000,000 was actually committed to Hak Company, Inc., that the petitioner forfeits his collateral on the loan if he fails to repay the loan and that Hak Company, Inc. incurred \$250,000 in expenses between January 2007 and July 2007. The petitioner submitted numerous invoices for expenses.

The director concluded that the invoices totaled \$167,062, which was not a significant amount of the \$1,000,000 investment.

On appeal, counsel reiterates that the petitioner actually committed the requisite \$1,000,000 and asserts that the director failed to explain why the loan used to finance the investment was problematic and that an expenditure of a "significant" amount of the investment is not required if the company is doing business.

The director never asserted that the petitioner's use of a personal loan secured by his personal assets was problematic. We acknowledge that the petitioner's personal assets sufficiently secure the loan. The concern is, as stated in our February 26, 2009 notice, that a large portion of the investment is projected to sit idle in passive investment accounts for the full conditional period. The business plan and the projections do not suggest that the petitioner has irrevocably committed these funds to an expansion or other capital expenditures or even anticipates such costs. As implied in our February 26, 2009 notice, we see no practical difference between the facts in *Matter of Izummi*, 22 I&N Dec. at 189, where funds were set aside in reserve accounts maintained by a holding company, and the passive investment of the majority of the invested funds by the employment generating entity itself where there exists no commitment to use those funds for future capital expenditures.

Excess funds that grossly overcapitalize a company cannot be considered at risk for the purpose of job creation. Given the projections in the forecasted balance sheet, even if Hak Company, Inc. should fail utterly by 2009 and be unable to contribute the \$551,891 and \$1,149,819 to investments as anticipated in the forecasted cash flow statements, the petitioner would walk away with almost \$800,000 from the passive investments that were never made available for job creation. Thus, the full \$1,000,000 transferred to Hak Company, Inc. cannot be said to be at risk.

**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:

*Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

\* \* \*

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

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

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

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs.

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 U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition’s products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business’s organizational structure and its personnel’s experience. It should explain the business’s staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

On the Form I-526 petition, the petitioner indicated that he had created three positions and would create an additional 40. In a personal affidavit, the petitioner asserted that he would create 42 positions, identified as an office manager, two sales representatives, 34 residential cleaning crew members and five commercial cleaning crew members, within the first year of operations. The petitioner then specified that over 40 of the new positions would be full-time. The petitioner submitted a business plan indicating the management of the company would include the petitioner, and [REDACTED] who would work as an independent contractor. The only qualifying employee on the management team is [REDACTED] as the petitioner cannot include himself or independent contractors. 8 C.F.R. § 204.6(e) (definitions of employee and qualifying employee, quoted above). The organizational chart included in the plan calls for a president, vice president, an operations manager, an administrative assistant, a sales manager, a supervisor and two cleaning

personnel teams. The petitioner also provided a list of job descriptions for the office manager, crew supervisor, residential crew members, commercial crew members and sales representative but no anticipated dates of hire.

On appeal, counsel asserts that Hak Company, Inc. has 21 active employees. As noted in our February 26, 2009 notice, the payroll records submitted for June 8, 2007 through June 22, 2007 reflect 13 paid employees and eight active unpaid employees. Of the paid employees, only one worked full-time in addition to the three salaried employees. The AAO requested recent quarterly employer returns.

In response, counsel asserts that the business plan and personal affidavit meet at the requirements for a business plan set forth in *Matter of Ho*, 22 I&N Dec. at 213. The petitioner submits payroll records and quarterly employer returns for the first three quarters of 2008 and payroll records for the fourth quarter of 2008. One set of payroll records lists the quarterly hours for each employee not on salary. Full-time employment (at least 35 hours per week) multiplied by 13 (the number of weeks in a quarter) amounts to at least 455 hours per quarter. The number of salaried and hourly employees working full-time was four<sup>1</sup> in the first quarter, four in the second quarter, six in the third quarter and five in the fourth quarter.

As the petitioner has demonstrated the creation of no more than five consistently full-time positions at Hak Company, Inc. after two years of operations, the business plan projecting the employment of 42 employees after only one year of operations cannot be considered credible. Thus, the petitioner has not demonstrated the creation of at least 10 full-time positions and has not submitted a credible business plan.

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.

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<sup>1</sup> The payroll records reflect another salaried employee, but his quarterly wages, \$1,800, cannot account for full-time employment (at least 35 hours per week) at minimum wage (\$5.85 per hour at the time according to [www.dol.gov/ESA/minwage/chart.htm](http://www.dol.gov/ESA/minwage/chart.htm), accessed April 9, 2009 and incorporated into the record of proceedings) for 13 weeks (\$2,661.75).