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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **JAN 09 2012**

Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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).¹

The director determined that the petitioner had failed to demonstrate the lawful source of his invested funds.

On appeal, counsel submits a brief relying on unpublished decisions from this office relating to an employer's ability to pay the proffered wage in the Form I-140, Immigrant Petition for Alien Worker, context. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, none of the decisions cited by counsel address an analysis of the lawful source of invested funds. Counsel also submits new evidence that the AAO will address below. For the reasons discussed below, including a pattern of receiving large, inadequately explained gifts for investment purposes by the petitioner and a convoluted business history and path of funds for the investment, the AAO concurs with the director's ultimate conclusion that the petitioner has not credibly established the lawful source of his invested funds.

Section 203(b)(5)(A) of the Act, as amended by the 21st 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, [REDACTED] 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. [REDACTED] is investing in the [REDACTED] a USCIS designated regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No.

¹ At the time of filing the petitioner was a conditional permanent resident, having adjusted status based on an approved Form I-526, [REDACTED] supported by an investment in [REDACTED]

107-273, 116 Stat. 1758 (2002). Thus, the petitioner may rely on indirect job creation. 8 C.F.R. § 204.6(j)(4)(iii).

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'r 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 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) *aff'd* 345 F.3d 683 (9th Cir. 2003) (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.

In support of the current petition, the petitioner asserts that the invested funds derive from a gift from his brother [REDACTED] in the United Arab Emirates. Counsel initially asserted that [REDACTED] is the sole owner of [REDACTED] (a British Virgin Islands company), which is the sole owner of the British company [REDACTED] formerly known as [REDACTED]. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains the Return of Allotment of Shares for [REDACTED] listing [REDACTED] as the sole shareholder. A stock register for [REDACTED] also documents [REDACTED] ownership of that company. [REDACTED] a British solicitor, asserts that [REDACTED] holds the shares of [REDACTED] in trust for [REDACTED]. A 2006 document contains an acknowledgement by [REDACTED] that they hold the [REDACTED] Shares in trust for [REDACTED] and account to [REDACTED] for all dividends and profits. The record also contains a 2008 certificate confirming that [REDACTED] is the sole owner of [REDACTED], incorporated in the British Virgin Islands.

The record contains the April 15, 2007 Interim General Meeting Minutes for [REDACTED] proposing a £125,000 interim dividend. The record also contains the October 15, 2007 Interim General Meeting Minutes for [REDACTED] also proposing a £125,000 interim dividend. [REDACTED] signed both sets of minutes as the director. The record does not establish the relationship between [REDACTED] and the petitioner.

On March 27, 2008, [REDACTED] transferred \$525,000 to [REDACTED] account at [REDACTED]. A notice from [REDACTED] advises that they credited [REDACTED] account with \$524,990 from [REDACTED] account on March 27, 2008. On the same date, [REDACTED] transferred \$525,000 from his account at [REDACTED]. On March 24, 2008, before [REDACTED] transferred any funds to the petitioner, the petitioner transferred \$50,000 from his Wachovia account to escrow. On April 2, 2008, after receiving the funds from [REDACTED] the petitioner transferred an additional \$475,000 from his Wachovia account to escrow.

The petitioner submitted an initial letter from [REDACTED] confirming a \$525,000 gift and a second more detailed letter in which [REDACTED] asserted that the petitioner's U.S. company, [REDACTED] purchases from [REDACTED], creating an incentive for [REDACTED] to help the petitioner obtain permanent residency through a \$500,000 gift. [REDACTED] asserts that [REDACTED] purchased \$700,000 in products from [REDACTED] in 2008.²

The petitioner also submitted a statement from [REDACTED] another brother of the petitioner. [REDACTED] asserts that he sold his business to [REDACTED] for £300,000 but never asked for payment. [REDACTED] affirms that he forgave the debt to allow [REDACTED] to gift \$500,000 to the petitioner. Thus, the record, including the petitioner's prior petition,

² The Georgia Secretary of State's website, <http://corp.sos.state.ga.us/corp/soskb/Corp.asp?812970>, accessed January 4, 2012 and incorporated into the record of proceeding, indicates that [REDACTED] dissolved on July 9, 2005.

reveals a lengthy pattern of individuals claiming to have given the petitioner cash gifts in amounts between \$115,000 and \$500,000.

The record documents the following corporate history. In 1989, Future Products purchased membership shares in [REDACTED] as the first member of that company. In 1989, [REDACTED] became the second member. In 2003, [REDACTED] became the third member. In 1995, [REDACTED] purchased membership shares in [REDACTED] as the first member. In 1998, [REDACTED] became the second member. In 2000, [REDACTED] changed its name to [REDACTED]. In 2003, [REDACTED] purchased [REDACTED] membership interest in [REDACTED]. Thus, in 2003, [REDACTED] had membership interests in both [REDACTED] and [REDACTED]. In 2007, [REDACTED] changed its name to [REDACTED] and [REDACTED] changed its name to [REDACTED]; thus, the companies effectively exchanged names. In the same year, [REDACTED] (formerly [REDACTED]) went "dormant," leaving [REDACTED] (Formerly [REDACTED]) as the sole active company.

The petitioner submitted tax returns for [REDACTED] through 2006, covering the years before the company changed its name to [REDACTED]. The director concluded that the petitioner had not demonstrated that [REDACTED] or [REDACTED] were sufficiently profitable to account for the dividend to [REDACTED].

On appeal, the petitioner submitted the tax returns for [REDACTED] for 2007 and compiled financial statements. Counsel cites unpublished decisions by the AAO concluding that an employer petitioning for an immigrant worker can show an ability to pay that worker the proffered wage, as required under 8 C.F.R. § 204.5(g)(2), by actually paying the proffered wage. As stated above, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, unlike the regulation at 8 C.F.R. § 204.5(g)(2), the regulation at 8 C.F.R. § 204.6(j)(3) is expressly concerned not only with whether sufficient funds exist but whether the funds were lawfully acquired. Thus, decisions relating to evaluations of a company's ability to pay the proffered wage are not persuasive authority for evaluating the lawful source of invested funds.

A review of the history of [REDACTED] and [REDACTED] reveals name changes and ultimately the exchange of names. [REDACTED] the holding company for [REDACTED] (formerly [REDACTED]), is registered in a country that does not require tax returns; therefore the petitioner has not provided tax returns establishing [REDACTED] income. British Virgin Islands Business Companies Act, Part XIV, section 242(1) (2004).³ While legal, the registration of [REDACTED] in the British Virgin Islands does not require USCIS to waive the regulatory evidentiary requirements at 8 C.F.R. § 204.6(j)(3), especially evidence on that list other than tax returns. None of the financial statements for [REDACTED] prior to 2007 and [REDACTED] thereafter are audited or even reviewed and the petitioner did not submit any financial statements for [REDACTED].

In summary, the petitioner claims a history of receiving notably large, often inadequately explained cash gifts from multiple sources in multiple countries, some with no documented connection to the petitioner, but fails to document that all of these gifted funds were lawfully derived. The petitioner has never documented the path or the lawful source of the gifts supporting the previous petition, which is contained within the A-file record of proceeding. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Because the petitioner failed to document the path or lawful source of all of the funds, the petition may not be approved. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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. at 179.

As stated in the director's February 5, 2009 notice, the original subscription agreement provides for the return of the petitioner's money should USCIS deny the petition to remove conditions pursuant to section 216A of the Act. The director noted that *Izummi*, 22 I&N Dec. at 186, provides:

For the alien's money to be truly at risk, the alien cannot enter into a partnership knowing that he has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one.

Id.

In response to the director's notice, the petitioner submitted an October 7, 2008 amendment to the subscription agreement removing the redemption provision should USCIS deny the petition to remove conditions. The director did not raise the issue in the final denial.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. §§ 103.2(b)(1), (12);

Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. In order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

At the time of filing the petition, the subscription agreement contained a redemption provision. While the partnership would only redeem the money should USCIS deny the petition to remove conditions, in order for the partnership to make such an agreement, it would need to reserve the money to be available for redemption purposes. Reserved funds would not be available for employment creation. Thus, the redemption provision was disqualifying and the petitioner could not remedy this deficiency through an amendment. *Matter of Izummi*, 22 I&N Dec. at 175.

In addition, counsel initially provided an explanation of the investment, asserting that the partnership had acquired 65,776 square feet in a six story building and that the investment would fund the conversion of the building into industrial, office and retail flex space for leasing purposes. Counsel states: "Construction of the project is scheduled to break ground in January 2009, while completion of the project is scheduled for January 2012." By deciding to invest in this single project and placing prospective investment funds in escrow, the regional center created a time-sensitive project whereby a point is reached where any subsequent investments will not be made available for job creation. The record contains no evidence that this project, which may now be completed, requires additional funding. As the record lacks evidence that the construction project requires additional funding, the AAO cannot conclude that the petitioner's funds can still be made available for job creation.

In light of the above, the petitioner has not documented an investment that can be made available for job creation.

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.