U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: [redacted] Office: Texas Service Center Date: JAN 10 2001

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 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 establish an investment of $1,000,000 of his own funds derived from a lawful source.

On appeal counsel asserts that the director ignored evidence in the record and failed to give adequate notice to the petitioner that audited financial reports were necessary. While counsel also asserts that he will provide additional documentation, as of this date, over a year and a half later, the record contains no additional documentation.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) 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
>
> (iii) 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 NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

8 C.F.R. 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise listed on the petition is [redacted], LLC, in which the petitioner became the sole shareholder on December 12, 1997.

In a letter submitted with the petition, the petitioner asserts that [redacted] is an investment/management company which manages nine jewelry stores all owned solely by the petitioner.

The director concluded, without discussion, that the petitioner had established a new commercial enterprise. However, review of the record reveals that this issue warrants analysis as a discussion of the other requirements is meaningless unless the new commercial enterprise has been clearly identified.

While the definition of commercial enterprise includes holding companies and their wholly owned subsidiaries, the record does not indicate that Kulfer Investments is a holding company. The petitioner submitted his own list of [redacted] assets, including the assets of several of his stores. However, the "subsidiary" stores are all owned wholly or in part by the petitioner. If we were to consider only [redacted] Investments as the new commercial enterprise, it would be to the detriment of the petitioner, as there is no evidence of any investment into [redacted] Investments or any evidence that [redacted] Investments has any employees.

In light of the fact that the petitioner owns at least nine corporations, this decision will consider those corporations to determine whether the petitioner qualifies as an alien entrepreneur.

The petitioner incorporated [redacted] Inc. on August 31, 1995; [redacted], Inc. on January 23, 1995; [redacted], Inc. on November 6, 1997; [redacted] on September 13, 1994; and [redacted] on August 29, 1997. All of these stores appear to meet the definition of new commercial enterprise.

In contrast, while [redacted] Inc. were all incorporated by the petitioner after November 29, 1990; all of them acquired their places of business through a lease assignment. At least some of the assignors were engaged in the jewelry business. It is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10. The record simply does not contain enough documentation to determine whether these four corporations were simply purchasing existing businesses. If that were, in fact, the case, the petitioner would need to demonstrate that he either reorganized the business, expanded it 40%, or purchased a troubled business. The petitioner has not submitted any evidence regarding the preexisting businesses which would permit an analysis of whether or not the petitioner reorganized or expanded those businesses or whether they were previously troubled businesses.

In light of the above, the petitioner has only established that five of his corporations meet the definition of new commercial enterprise.

INVESTMENT OF CAPITAL

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.

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

On the petition, the petitioner claims to have invested $1,485,000 into [redacted] Investments, Inc. on December 17, 1997. The petitioner claimed to have personally purchased $1,210,000 of inventory for his stores. The petitioner submitted stock certificates and an unaudited balance sheet purporting to list the assets of [redacted] Investments. In response to a request for additional information, the petitioner submitted corporate bank statements and tax returns, a new unaudited balance sheet for [redacted] Investments alleging a net worth of $1,850,000, an unsupported list of his alleged investment into each corporation, and several of the stores's leases.

In a letter submitted with the petition, the petitioner stated:

> Once the formation of the enterprise was completed in December 1997, the implementation of our business plan began in earnest, as did the purchasing and installation of equipment and negotiation of agreements with various locations, with plans to continue purchases and expansion for the next several years.

While not explicitly addressed by the director, the petitioner has not documented any investment into any business after December 1997. The individual corporations were all operational well before that point. Therefore, the petitioner's statement is a misrepresentation of the facts and does nothing to clarify how the record establishes his eligibility.

The director acknowledged that the businesses were operational and that significant money had been placed in them, but concluded that the documents did not trace the money back to the petitioner. Counsel argues that the director did not give sufficient notice that audited financial statements were necessary.

Balance sheets, audited or unaudited, are not listed in the regulations as acceptable documentation of investment. While audited balance sheets are useful in documenting the net worth of

a business, even audited balance sheets do not trace the capital of a business to its source. The director's request for additional documentation quoted the regulations cited above regarding the types of evidence the petitioner should submit.

In response, the petitioner chose to submit little of the requested documentation and relied instead on his own self-serving balance sheets. Moreover, the balance sheets submitted conflict with the rest of the record. While the balance sheets include the assets of the petitioner's corporations as those of [redacted] Investments, the record contains no evidence that [redacted] Investments owns those stores. As such, the director did not err in concluding that the balance sheets were insufficient.

Of the requested documents, the petitioner submitted corporate bank statements and stock certificates. As discussed in more detail below, the stock certificates do not document an investment of $1,000,000. The corporate bank statements in and of themselves provide no evidence of investment. The bank statements do not indicate that any of the credits to those accounts came from the petitioner. The petitioner has failed to submit cancelled checks and his personal bank statements as evidence that any money going into the corporate accounts originated from the petitioner.

The petitioner also submitted corporate tax returns. However, not only do the tax returns fail to reveal an investment of $1,000,000, they reflect that much of the money transferred to the businesses was actually loaned to the businesses. Specifically, the tax returns (Schedule L) reveal the following shareholder loans:

Start of 1997	End of 1997	Corporation
$0	$69,970	[redacted]
$60,000	$34,000	
$71,000	$36,000	
$5,000	$0	
$0	$18,000	
$0	$62,000	

The tax returns (Schedules L and K-1) and stock certificates reveal significantly less capital contribution than loans: $1,000 to [redacted], $1,000 to A-1 [redacted] ($2,375 according to the stock certificate), $750 to Gold Island, Inc., $750 to [redacted] Jewelers, $600 to [redacted], $10,000 to [redacted], $0 to [redacted] ($1,000 according to the stock certificate), and $1,000 to [redacted].

While the listed amount of capital stock does not preclude the investment of additional money, it does not establish any investment above that amount. The petitioner claims to have purchased $1,200,000 of inventory for his businesses but has

provided absolutely no documentation of these purchases, such as cancelled checks from his personal account.

Without cancelled checks, it is not possible to determine whether the petitioner or the corporations purchased the inventory. A corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). See generally, Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

In light of the above, the petitioner has not established that he invested $1,000,000 into his stores.

SOURCE OF FUNDS

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 petitioner 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, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31,1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Matter of Izumii, supra, at 26. 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).

In support of the petition, the petitioner did not address the source of his funds. In response to the director's request for additional evidence, the petitioner submitted the corporations Federal Taxpayer Identification Numbers and the corporate tax returns to indicate the businesses themselves are conducting a lawful business. The petitioner also submitted his personal tax returns for 1997 only, documenting an income of $125,000.

That the corporations are conducting a lawful business is simply not relevant to determining the source of the money invested into those businesses. The petitioner must trace the money invested in those businesses back to himself and document that he obtained that money lawfully. The petitioner's 1997 tax returns documented an income of only $125,000. The petitioner failed to submit five years of tax returns as required by the regulations. The record, therefore, does not establish that the petitioner has ever had $1,000,000 separate from the assets of the businesses to invest into those businesses.

Finally, the petitioner indicated on the petition that he has worked in the United States without authorization. Any money earned while working without authorization cannot be considered lawfully obtained.

SOURCE OF OTHER FUNDS

8 C.F.R. 204.6(g)(1) states, in pertinent part:

> The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.**

The Schedules K-1 for A-1 Sales and Marketing and indicate that the petitioner is not the sole shareholder of those corporations. owns 25% of and Marketing and The petitioner has not established that any money invested by Mr. was lawfully obtained by

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

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.

8 C.F.R. 204.6(e) states, in pertinent part:

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
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> *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.

Finally, 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.

While the director conceded that the petitioner had created 10 new jobs, we do not agree. On the petition, the petitioner claimed to employ eight employees. However, he also indicated that at the time of his investment, there were already eight employees. Yet, he still claims a net gain of eight employees. In response to the director's request for additional documentation, counsel claimed the petitioner had "created" nine jobs and submitted nine Form I-9s. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as pay stubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full time employment in the United States. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 8.

Moreover, the petitioner has not established the number of jobs prior to his investment. The petitioner must show a net gain of 10 new jobs. See Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) at 5. As stated above, four of the petitioner's stores were acquired by assignment. The petitioner has not established how many employees were working full-time at those stores prior to his acquisition. Therefore, he has not demonstrated any net gain in employment.

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 the Service 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, supra. Elaborating on the contents of an acceptable business plan, the decision 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. at 9.

The Business Plan submitted by the petitioner merely asserts that [redacted] Investments will be acquiring new stores and hiring additional employees. The plan does not provide a specific timetable for opening the stores, does not identify the sites for those stores, and does not specify the precise staffing requirements of those stores. As such, the plan does not meet the requirements set forth in Matter of Ho, supra.

In light of the above, the petitioner has failed to establish that his investment has created or will create 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. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.