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U.S. Department of Justice

Immigration and Naturalization Service

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

Public Copy



File: [Redacted]

Office: Vermont Service Center

Date: MAY 17 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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The approved preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal.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).

On March 4, 1998, the director approved the petition.

After further review, the director issued a notice of intent to revoke on March 24, 1999, which was apparently reissued in error on June 22, 1999. After considering the petitioner's response, the director determined that the petitioner had failed to demonstrate that he had made a qualifying investment of lawfully obtained funds or that he would create the necessary employment.

On appeal, counsel argues the director failed to consider all the evidence and unfairly relied on precedent decisions issued by the Administrative Appeals Office (AAO) after the instant petition was approved.

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 record indicates that the petition is based on an investment in a business, ██████████ Company, Ltd., 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.

RETROACTIVE APPLICATION OF PRECEDENT DECISIONS

In his decision, the director stated that the petition was reviewed in accordance with the four 1998 precedent decisions issued by the Administrative Appeals Office (AAO). Counsel asserts that the petition had already been approved prior to the issuance of those decisions, and the "retroactive" application of those decisions is improper.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. See R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000); Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Wash. Sept. 14, 2000); Spencer Enterprises, Inc. v. United States, Case No. CIV-F-99-6117 (E.D. Calif. 2001); but cf. Chang v. United States, Case No. CV-99-10518 (C.D. Calif. 2001) (holding that the precedent decisions did not constitute legislative rule making but remanding for a consideration of hardship claims at the removal of conditions stage.) Under any proper reading of the language of the regulations, this petitioner is not eligible for classification as an alien entrepreneur.

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:

(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.

In support of the initial petition, the petitioner submitted an uncanceled check issued by the petitioner to [REDACTED] dated November 10, 1997, a June 27, 1997 letter from Merrill Lynch indicating the petitioner had an account worth \$538,544 as of that date, and a business plan indicating the total start-up costs would amount to \$55,000 and expenses for the first year would amount to an additional \$450,917.50.

On November 19, 1997, the director requested additional evidence of the petitioner's investment.

In response, the petitioner submitted the articles of incorporation for [REDACTED] indicating the corporation was authorized to issue 200

no par value shares; a stock certificate issued by [REDACTED] to the petitioner for 200 shares on October 6, 1997, a January 29, 1998 bank letter indicating [REDACTED] maintained three bank accounts, a receipt for the January 27, 1998 transfer of \$400,000 from the petitioner, Merrill Lynch account [REDACTED], to [REDACTED] account number [REDACTED] a deposit slip reflecting a deposit of \$100,000 into account [REDACTED] dated November 6, 1997; and invoices, only one of which is dated prior to the date of filing.

The director approved the petition on March 4, 1998. Upon review of the petition, however, the director determined the record did not support the petitioner's eligibility. On March 24, 1999, the director issued a notice of intent to revoke. In his notice, the director contended the record did not reflect that the \$100,000 check from the petitioner was actually deposited, that the invoices were not supported with cancelled checks, and that the record did not reflect the disposition of the deposited funds.

In response, counsel asserted the instant case is distinguishable from the precedent decisions cited by the director, that the issue of the petitioner's investment was previously raised in the request for additional evidence and resolved, and that the record did contain evidence that the \$500,000 was actually deposited with [REDACTED]. The petitioner resubmitted the previously submitted documents as well as bank statements for Selency.

In his final decision, the director concluded that the record still failed to resolve the ultimate destination of the invested funds, that the bank statements demonstrated a passive investment of \$250,000 in "Vista Funds," and that the final \$400,000 was invested after the director's original request for additional evidence (possibly prompted by the director's request).

On appeal, counsel argues that the director ignored evidence in the record, that the bank statements support the invoices, and that the petitioner's investment of \$250,000 is irrelevant to the adjudication of the petition as "the enterprise should have the freedom in maintaining account(s) that earn higher dividends or interest than normal checking account [sic], when such funds are not immediately expended." The petitioner resubmits previously submitted documents, highlighting one invoice and two bank statements with check debits totalling the invoice amount.

The record is not clear that the source of the \$100,000 deposited in [REDACTED] account on November 6, 1997 is the petitioner's personal check. The check is dated November 10, 1997, several days after the deposit, and is not cancelled. Regardless, a petitioner must do more than merely demonstrate the transfer of funds to the commercial enterprise.

Significantly, the articles of incorporation provide that the business was formed for the purpose of manufacturing and:

To acquire by purchase, subscription, underwriting or otherwise, and to own, hold for investment, or otherwise, and to use sell assign, transfer, mortgage, pledge, exchange or otherwise dispose of real and personal property of every sort and description and wheresoever situated, including shares of stock.

The passive investment in real estate and securities is not an employment-creating activity. As stated above, the estimated start-up costs of the employment-generating activity is only \$55,000. While the petitioner may have deposited \$500,000 in corporate accounts, there is no clear indication the corporation will require anywhere close to that amount of money for capital expenses.

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 Izumii, Int. Dec. 3360 (Assoc. Comm., Ex., July 13, 1998). We concur with the director that the withdrawal of half of the required investment, \$250,000, to be placed in Vista Funds, a non employment-generating activity, strongly indicates the petitioner has not made the full \$250,000 available for employment-generating activities. In addition, the early bank statements reflect numerous automatic teller machine withdrawals. The record does not reflect that these funds were withdrawn for business purposes.

Where a company is grossly overcapitalized, we cannot conclude that the full amount contributed is at risk. Arguably, this case can be distinguished from Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998), in that the petitioner had begun purchasing equipment for the business when the petition was filed. A petitioner, however, must invest the full \$500,000 and create 10 jobs. A petitioner who invests exactly \$500,000 but selects a business that cannot create 10 full-time positions without more money does not qualify for immigrant-investor classification. Similarly, a petitioner who selects a business that can create 10 full-time positions with only \$100,000 does not qualify unless he demonstrates that the remaining \$400,000 are already irrevocably committed to further employment-creating activities. In the instant case, the record does not establish that the \$250,000 will be used for employment-generating activities.

Furthermore, as stated by the director, 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 Matter of Katiqbak, 14 I&N Dec. 45, 49 (Comm. 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 Service requirements. See Matter of Izumii, supra, at 7.

At the time of filing, the petitioner had transferred no more than \$100,000 to the new commercial enterprise. On appeal, counsel asserts that:

A sum of additional \$400,000 was transferred from the petitioner/investor's Merrill Lynch Account ([REDACTED]) to the new commercial enterprise, [REDACTED] Chase Manhattan Bank Account ([REDACTED]). This transfer was not promoted by the Notice of Action as alleged by the Service. The transfer was made as part of the initial investment as indicated in the business plan and the Service was then satisfied with this additional evidence prior to its approval.

Counsel's argument is not persuasive. The business plan merely provides that the petitioner's investment will include the start-up costs of \$55,000 and the expected expenses for the business in the first twelve months, \$450,917.50, less \$93,000 of income. Even if the plan did call for a specific infusion of cash by a certain date, the business plan would constitute, at most, an intent to invest, and not a binding commitment to invest. As quoted above, 204.6(j)(2) requires more than a mere intent to invest. Although the chronology strongly suggests the petitioner transferred the remaining \$400,000 to [REDACTED] in response to the director's inquiry - the transfer was made less than two months after the director issued the request for additional evidence and one month prior to submitting a response - the petitioner's motivation is not decisive. It remains, the petitioner had not invested or committed \$500,000 to Selency at the time of filing. Based on this issue alone, the petition was clearly approved in error and the director quite properly revoked the approval.¹

Finally, any funds transferred to the commercial enterprise must qualify as "capital," which cannot include a debt arrangement with the new commercial enterprise. 8 C.F.R. 204.6(e) (definition of capital). Thus, a petitioner who provides a shareholder loan to the corporation has not invested capital. The only stock certificate in the record was issued to the petitioner on October

¹ Counsel's argument that the director's issuance of a request for additional evidence prior to the approval somehow implies an "investigation" of the facts and proper adjudication of the petition is not persuasive. The petitioner submitted very little documentation at the time of filing, precluding any examination of the facts prior to his response to the request for additional evidence.

6, 1997, before either deposit into [REDACTED] account. The record does not contain audited balance sheets for [REDACTED] or tax returns certified by the Internal Revenue Service. Therefore, it is not clear that the funds transferred to [REDACTED] by the petitioner constituted a stock purchase or paid-in-capital.

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 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, supra, at 6; Matter of Izumii, supra, 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. 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).

In support of the petition, the petitioner submitted a June 27, 1997 letter from Merrill Lynch indicating the petitioner had an account worth \$538,544 as of that date and a check issued on

another of the petitioner's accounts to [REDACTED] on November 10, 1997.

In response to the director's request for additional documentation, the petitioner submitted a personal letter from the petitioner's father agreeing to give her \$500,000 as a gift.

In the notice of intent to revoke, the director noted that the record contained no evidence of funds being transferred to the petitioner or of how the petitioner's father obtained his funds.

In response, the petitioner submitted a wire transfer receipt documenting the transfer of \$495,000 from the petitioner's father, account number [REDACTED], to the petitioner, account number [REDACTED] on June 18, 1997, and a statement for account number [REDACTED] reflecting a balance of \$5,134.68 on December 24, 1997.

The director concluded the evidence still failed to reveal the source of the petitioner's funds.

On appeal, counsel notes that the director failed to acknowledge the evidence that \$495,000 was transferred to the petitioner from her father. Counsel submits evidence from the Lion Group and a deposit notification demonstrating the source of the petitioner's father's funds.

Viewing the record as a whole, the petitioner has now established the lawful source of his funds.

EMPLOYMENT CREATION

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.

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.

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.

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, 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.

On the Form I-526, the petitioner claimed to have created 12 jobs. In support of the petition, the petitioner submitted a business plan which asserted that [REDACTED] would create 12 jobs within a year, and had hired only three.

In response to the director's request for additional evidence, the petitioner simply resubmitted the business plan.

In the notice of intent to revoke, the director concluded the business plan was insufficient. In response, the petitioner once again submitted the same business plan as well as payroll records reflecting three full-time employees as of January 30, 1998, and Forms 941, all unsigned, for all four quarters of 1998. The Forms 941 reflect four employees in the first quarter of 1998, seven employees in the second quarter of 1998, eight employees in the third quarter of 1998 (five of whom earned less than \$900 during the quarter), and five employees for the last quarter of 1998.

The director concluded the total wages paid by [REDACTED] had actually decreased and that the petitioner's business plan was still insufficient.

On appeal, counsel asserts the petitioner's petition is distinguishable from Matter of Ho, that the record reflects that the petitioner has had up to eight employees at one time, and that the business plan sufficiently establishes the need for 12 full-time employees. Counsel asserts the projected hiring dates in the business plan could not be met due to the revocation of the petition.

Matter of Ho sets forth the requirements for any acceptable business plan, regardless of how the petitioner structures his

investment. Employment creation is an entirely separate requirement from the investment provisions, and whether or not the petitioner's investment arrangement is different from that in Matter of Ho is simply not relevant to the business plan requirements set forth in Matter of Ho for any case where the 10 jobs have not yet been created.

Contrary to counsel's assertion, the record does not reflect that Selency had eight full-time employees all working at one time. The only quarter reflecting eight employees was the third quarter of 1998. As stated above five of those employees earned less than \$900 for the entire quarter, suggesting that they were either not working full-time or did not work the full quarter. Finally, counsel's claim that the employment projections were not met because the petition was revoked is unconvincing. The employees were all to be hired by October 1, 1998. The notice of intent to revoke was not issued until March 24, 1999.

As acknowledged by the director, the petitioner's business plan includes job descriptions and projected hiring dates. The plan does not, however, detail any contracts, or even negotiations, for the sale of the petitioner's final product. The plan also contains little detail about the manufacturing process or an analysis of why twelve employees will be required. As such, the employment projections appear to be mere speculation. In light of the fact that the employment projections in the plan were not met, the credibility of the plan is further reduced.

In light of the above, the petitioner has not demonstrated that [REDACTED] can be reasonably expected to create 12 full-time jobs.

CONCLUSION

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.