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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

[redacted] Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: WAC-99-222-51764 Office: California Service Center Date: MAY 30 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:

[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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 demonstrate that he had established a new commercial enterprise, that his funds derived from a lawful source, or that he would create the necessary jobs.

On appeal, counsel argues that the petitioner expanded an existing business by 40 percent, that he obtained his funds through a gift from his mother, and that the business plan and success of the business sufficiently demonstrated the petitioner's ability to hire the required number of employees.

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
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> (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, [redacted] 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.

ESTABLISHMENT OF A 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

(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).

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 at issue here is Tofasco of America, Inc. (Tofasco), of which the petitioner is a shareholder.

[redacted], Inc. was incorporated on June 16, 1993, and was owned 100% by [redacted] until 1998. On March 31, 1998, the petitioner purchased 250 shares of [redacted] stock for $25,000, and between January 15, 1999 and January 20, 1999, the petitioner transferred $1,199,952 to [redacted] in exchange for 12,000 shares. The petitioner submitted unaudited balance sheets reflecting that [redacted] had a net worth of $278,557.31 as of December 31, 1998 and $1,290,690.09 as of December 31, 1999.

The director concluded the unaudited balance sheets could not establish an increase of 40 percent. On appeal, counsel submits audited balance sheets which reflect the same numbers. In light of the information submitted on appeal, it appears that in 1999 the petitioner invested over $1,000,000 which increased the net worth of an existing business by 40 percent. As such, the petitioner has demonstrated that he established a new commercial enterprise.

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, 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. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)

In support of the petition, the petitioner indicated his mother had sold property and gifted $1,200,000 to him. The petitioner submitted an uncertified translation of a "certification" purportedly confirming the sale of property in China for "$12,032,000" by [redacted]

The director, without any citation to Chinese law, alleged that communist countries do not permit the ownership or sale of property. Thus, the director concluded that the petitioner must support his "contrary stipulation" with "credible, verifiable and independent proof and/or evidence."

On appeal, counsel notes that China does permit the purchase and sale of land rights, if not the outright ownership of land. The petitioner submits the Chinese Language documents and certified translations reflecting that [redacted] purchased land rights to 51.2 Chinese acres for ¥53,760 in 1979 and sold her rights back to the government in May of 1998 for ¥12,032,000. The petitioner also submitted the Chinese Language document and certified translation of a gift agreement whereby Ms. [redacted] agreed to gift $1,200,000 to the petitioner. Finally, the petitioner submitted certifications of his relationship to Ms. [redacted] and an affidavit from a translator confirming that the Chinese equivalent of "Bea-Yu" and "Bi-Yu" is the same.

While an uncertified translation of a foreign language document not in the record is insufficient evidence according to 103.2(a)(3), the petitioner has now submitted both certified translations as well as the original Chinese language documents regarding Ms. [redacted] sale of property. The

director's assertion that an individual cannot own property in any communist country appears overly broad and is completely unsupported by the record. If the director had specific adverse information regarding property ownership laws in China, she should have provided such evidence to the petitioner in accordance with 8[redacted] 103.2(a)(16)(i), affording an opportunity for the petitioner to rebut such evidence. At the very least, if this were the only issue and the director was concerned that the evidence in the record did not support the sale of property rights in China, she should have requested additional evidence that the sale complied with Chinese property law. As the petition was denied on other, acceptable grounds which the petitioner has not overcome, however, the director's omission does not warrant a complete reversal of her decision. As the petitioner has adequately addressed this issue on appeal, a remand for the purpose of requesting additional evidence is similarly not warranted.

While the petitioner has overcome the director's concerns, the path of the funds is still not clearly documented.[1] The record contains no transactional documents, such as wire transfer receipts, cancelled checks, or at least bank statements reflecting the transfer of funds from Ms[redacted] to the petitioner's account from which he wired money to [redacted].

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:
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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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[1] An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

> *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.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

On the Form I-526 the petitioner indicated there were two employees at the time he made his investment and at the time of filing and that he would create eight additional 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 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.

The petitioner submitted a business plan reflecting the following projected employment:

(1) One Accountant will be hired in October 1999.

(2) One Warehouse Staff and one Sales will be hired in December 1999.

(3) One Secretary will be hired in March 2000.

(4) One Warehouse Staff will be hired in May 2000.

(5) One Sales will be hired in July 2000.

(6) One Sales will be hired in October 2000.

(7) One Administrative Assistant will be hired in January 2001.

The director concluded the business plan was insufficient. On appeal, counsel asserts the petitioner has already hired two additional employees and that the petitioner's investment was used to purchase a warehouse for the business. The petitioner submits Forms 941 and Employer's Quarterly Wage and Withholding Reports for the first three quarters of 1999 reflecting an increase to four employees for August and September 1999. Finally, the petitioner submits an updated employment plan reflecting a total of 10 projected employees other than the petitioner.

The business plan does not adequately explain how the petitioner's investment will lead to the creation of 10 jobs. First, where a petitioner expands an existing business, he must create 10 new jobs that did not exist prior to the petitioner's investment. On the Form I-526, the petitioner indicated that Tofasco had two employees at the time the petitioner made his investment and that he would create only eight additional jobs. Both the business plan and the updated employment plan call for only 10 jobs total. Therefore, the petitioner does not even claim that his investment will create 10 new jobs in the next two years.

Further, the business plan does not explain how the petitioner's investment will be used to create additional employment. The business plan does not indicate the capital expenses for which the petitioner's investment will be used. On appeal, the petitioner submits the closing statement for a piece of property purchased by [redacted] for $2,163,569, $1,000,000 of which was financed, in 1999. Counsel asserts this property will be used as a warehouse by Tofasco. The assertions of

counsel, however, do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of [redacted], 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain any evidence that the property purchased contains a warehouse or that it is being used as such by [redacted]. A passive real estate deal by the corporation is not an employment-generating activity.

Finally, the record does not contain Forms I-9 or payroll records reflecting whether or not the new employees are qualifying, full-time employees. In light of the above, the petitioner has not established that it is reasonable to conclude that he will meet the employment-creation requirement.[2]

CAPITAL AT RISK

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.
>
> *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)(2) states:

> 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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[2] In light of the petitioner's consistent claim that his investment will only create eight new jobs, any new petition or motion claiming the petitioner will actually create 10 new jobs would need to resolve this inconsistency with independent objective evidence. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

(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.

Beyond the director's decision, the petitioner has not established that all of his funds are at risk and were made available for employment-generating activities. 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, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998)). It is acknowledged that, unlike the petitioner in Matter of Ho, this petitioner has an operating business. Regardless, the case 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.

As stated above, the business plan does not provide an explanation for how the petitioner's funds will be used to generate employment. While counsel claims the funds were used towards the purchase of the warehouse, none of the closing or tax documents submitted indicate that the property purchased included a warehouse or that [redacted] is employing people at the location as opposed to renting the property to another business or individual.

In light of the above, the petitioner has not established that his funds were used for employment-generating activities as opposed to a passive real estate deal.

CLOSING

Based on the information submitted, it is apparent that the petitioner transferred over $1,000,000 into a successful commercial enterprise, expanding the net worth of the enterprise by more than 40 percent. The record, however, contains insufficient documentation to establish that the petitioner meets the minimum eligibility requirements for this visa classification.

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.