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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]

File: WAC-00-264-54378 Office: California Service Center Date: FEB 25 2003

IN RE: Petitioner: [redacted]

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

IN BEHALF OF PETITIONER:

[redacted]

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 that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Elizabeth Hayward

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and 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).

The director determined that the petitioner had failed to demonstrate that he had fully committed the requisite investment amount.

On appeal, counsel argues that the petitioner is actively in the process of investing the requisite investment amount.

Section 203(b)(5)(A) of the Act, as amended, 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
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> (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, Western Superior Technology, 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.

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.
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> * * *
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> *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 indicated that he invested $203,465 on May 24, 2000 and had invested a total of $383,465 as of the date of filing, September 13, 2000. In his initial brief, counsel asserted that the petitioner was "actively in the process of investing the required amount of capital ($1,000,000)." Initially, the petitioner submitted a Union Bank of California statement

reflecting that Western Superior Technology, Inc. received a $200,000 wire transfer on May 24, 2000 from an unknown source and a Wire Transfer Activity notification from the same bank reflecting that Western Superior Technology, Inc. received a $180,000 wire transfer from the petitioner on August 3, 2000.

The initial business plan indicated that the petitioner intended to negotiate with patent holders Apex Digital and L.A. Sounds for licensing to manufacture DVD players and DVD products. The petitioner submitted a lease agreement for manufacture space from Apex Digital.

On February 5, 2001, the director requested evidence that the full requisite investment amount had been invested, used for the commercial enterprise, and placed at risk. The director noted that "evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that you are actively in the process of investing."

In response, the petitioner submitted Wire Transfer Activity notifications from Union Bank of California reflecting that the petitioner was the source of the May 24, 2000 wire transfer and another $200,000 wire transfer on November 3, 2000. An August bank statement reflects that only $3,465.50 of the $200,000 May transfer remained in the bank account as of August 1, 2000 and $170,000 of the $180,000 transferred on August 3 was paid to a single source represented by check 1006, cashed August 10, 2000. The November bank statement reflects that the $200,000 transferred to the corporation on November 3, 2000 was withdrawn as a "miscellaneous bank originated item" on November 14, 2000. A November bank statement for a money market account at the same bank indicates that the $200,000 was used to open this account. The petitioner also submitted stock certificates and notices of transactions reflecting that the petitioner received shares of stock for each transfer.

As evidence of business expenses, the petitioner submitted a bill of sale whereby Western Superior Technology purchased $15,380 of equipment from United Delta, Inc. on January 5, 2001. On February 12, 2001, Western Superior Technology also entered a consignment agreement with United Delta, Inc. whereby Western Superior Technology agreed to display and use its best efforts to sell United Delta's merchandise. The petitioner submitted a February 13, 2001 cancelled check issued to United Delta, Inc. for $150,000.

The petitioner also submitted a revised business plan, indicating that the petitioner had decided to purchase equipment and inventory from United Delta, Inc. The revised plan further indicates that the petitioner had assumed the balance of United Delta's lease. In addition, the plan reflects that the petitioner's investment to date has been applied to establishing the corporation and leasing a facility, hiring workers, purchasing equipment and inventory, paying taxes, and miscellaneous administration and production costs. The capital funds investment section concludes, "additional funding will be wired in from Investor's overseas accounts in the second fiscal year (2001) when major acquisition of materials and more front-line productions workers are hired."

The director concluded that the petitioner had not invested the full $1,000,000 required and had not demonstrated that the remaining funds were fully committed to the corporation. On appeal,

counsel asserts that the director's decision is contrary to the regulations and the precedent decisions cited and that the petitioner is actively in the process of investing. Counsel asserts that the petition should be approved so that the petitioner can complete his investment within the two-year conditional period.

We do not find that the director's decision was contrary to the regulations. As quoted above, the regulations require that even when a petitioner is actively in the process of investing, the full investment amount must be committed to the new commercial enterprise. The record reflects that, at the time of filing, the petitioner had only transferred $380,000 to the new commercial enterprise. While the petitioner subsequently transferred an additional $200,000, it is not clear that these funds were irrevocably committed to the new business at the time of filing. Moreover, the record contains no evidence that the remaining $420,000 are in an irrevocable escrow account or that the petitioner has issued a secured promissory note to the commercial enterprise for the remaining funds meeting the requirements set forth in *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998) and *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998). Counsel asserts that these cases are not relevant to the instant petition because, unlike the present petition, they involve an unsecured promise to pay the corporation. Unsecured promissory notes were found to be insufficient evidence of being actively in the process of investing in those two cases. In the instant petition, the petitioner has not even executed a legally binding promise to pay the new commercial enterprise. An unsecured promissory note is more of a commitment than the vague language in the business plan which discusses the petitioner's "intent" to infuse an unspecified amount of additional capital on an unspecified date. As an unsecured promissory note is insufficient evidence that an alien is actively in the process of investing, we conclude that the petitioner's even more minimal commitment to the new commercial enterprise is also insufficient.

Moreover, it is not clear that all of the funds transferred to Western Superior Technology were used for capital expenditures. The record contains no evidence regarding where the initial funds were ultimately transferred or the payee for the $170,000 check cashed on August 10, 2000. The record reflects that the petitioner did not enter into any agreements with United Delta until January 2001. Prior to that, Western Superior Technology's only commitment appears to have been the $2,000 monthly lease with Apex Digital. Thus, the lack of explanation for the disappearance of the initial $200,000 and the $170,000 check raises concerns regarding whether the full $580,000 transferred to Western Superior Technology all went towards legitimate business expenses.

In addition, we find that *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998), the only decision cited by the director in support of his analysis of the facts, is very applicable to the instant petition. As quoted above, the regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Id.* at 209. 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*).

Matter of Ho, *supra*, provides:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

Id. at 210. It is acknowledged that, unlike the petitioner in *Matter of Ho*, this petitioner appears to have already hired employees at the time of filing. Regardless, the case stands for the proposition that all the funds must be at risk. *Matter of Ho* further provides:

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

Id. at 210. Review of the record reveals that the petition was not initially supported with any documentation of business activity other than a lease with Apex Digital and some evidence of employment. A mere commercial lease was deemed insufficient in *Matter of Ho*. The fact that the petitioner appears to have abandoned his negotiations with Apex and has now assumed a lease, purchased equipment, and is displaying merchandise on assignment from United Delta, Inc. bolsters the conclusion that the lease with Apex did not commit the petitioner or his funds.

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 Katigbak*, 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 Izummi*, *supra*, at 175. At the time of filing, the petitioner had not established that all of the money contributed to the business was at risk. While the business plan calls for additional capital investment, the plan fails to specify what capital expenses the business will incur other than to assert that the investment will occur in 2001 "when major acquisition of materials and more front-line production workers are hired." While growth costs are legitimate capital expenses, the purchase of inventory, raw materials, and the payment of wages are normal operating expenses paid from proceeds once the company is operational. The record is not persuasive that the expansion of employment and materials will require a capital expenditure of the remaining $420,000. Moreover, the record does not establish that the $200,000 placed in a money market account was used for capital expenses or is otherwise at risk.

In light of the above, the petitioner has not demonstrated that he has fully committed the full $1,000,000 and that these funds are sufficiently at risk.

SOURCE OF FUNDS

Beyond the decision of the director,[1] 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:
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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*, *supra*, at 210-211; *Matter of Izummi*, *supra*, at 195. 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)(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).

Initially, the petitioner submitted evidence of two savings deposit accounts in China reflecting balances of RMB 415,000 (approximately $48,824) and RMB 420,000 (approximately $49,412), both deposited December 23, 1999. The petitioner also submitted several pages representing his stock transaction activities during June 1999. The translation asserts that the "total amount" is

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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 Enterprises, Inc. v. United States,* CIV-F-99-6117 29, (E.D. Calif. 2001).

RMB 31,793,126.97, or $3,853,712.20. Without a complete translation, we cannot determine whether that number represents the final balance, or the total of all transactions, which may include the use of funds more than once, as funds are used to buy, are recovered in a sale, and used to buy again. Thus, the translation does not establish that the petitioner has a balance of almost $4 million in stock.

Moreover, the petitioner must establish not only that he has accumulated funds, but also how he accumulated such funds. Initially, the petitioner submitted his resume and certifications that he served as director of the China Audio Industry Society, vice chairman of the Zhenjiang City Foreign Investment Enterprises Association, vice chairman of the China Society of Electronics, and standing director of the Jiangsu Merchandise Brand Name Promotion Committee. The earliest certificate is dated April 1997.

In response to the director's request for additional documentation, the petitioner submitted a 1999 annual report for Hongtu High-Technology Co., Ltd. reflecting that the petitioner owned 1600 shares in this company and served as vice president. The petitioner's resume indicates he assumed this position in 1998. Finally, the petitioner submitted a personal income receipt reflecting that he paid RMB 334,442.20 (approximately $39,346) in taxes on a bonus in 2000. The receipt reflects that the tax rate was 20 percent. Thus, the petitioner's bonus must have been approximately $196,730.

An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is insufficient documentation of source of funds. *Matter of Ho, supra*, at 211. A single tax receipt is not indicative of the petitioner's income over the past five years as required by the regulations. The certificates specifying the petitioner's position as director and chairman for several associations do not provide evidence of the petitioner's income during that time. In light of the above, the petitioner has not established that he has accumulated $1,000,000 or, if he has, that the funds derive from a lawful source.

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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> * * *
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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.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, *supra*, at 19 (finding this construction not to be an abuse of discretion).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs. Initially, the petitioner submitted payroll records and Forms I-9 for five employees.

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.

Id. at 213.

The petitioner submitted a business plan predicting 20 production workers, engineers and technicians, one sales manager, one to two marketing employees, three to four sales associates, two accounting and billing employees, two warehouse and shipping employees, and two general support clerks. The plan, however, does not provide job descriptions or a timetable for hiring these employees.

In response to the director's request for additional documentation, the petitioner submitted, in April 2001, a revised business plan indicating that two workers and one manager "are to be hired" no later than August 2000 and three to five additional workers "will be hired" no later than June 2001. These employees would begin installation of a new assembly line. Finally, 10 to 20 frontline workers, including first line supervisors, would be hired no later than April 2002, after the installation of the new assembly line.

The director did not raise this issue in his final decision. On appeal, counsel asserts that the petitioner's inability to obtain an immigrant visa has delayed the employment creation at the company.

The only documented business expenses, other than wages, is the purchase of equipment from United Delta. The record also reflects that United Delta consigned equipment to the new commercial enterprise for sale. The record contains no evidence that the business has contracted for a new assembly line. Without evidence that the petitioner has committed to adding an assembly line, the business plan does not credibly explain the need to double the company's workforce that has satisfied the company's needs for two years as of the date of appeal.

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.