U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

B7

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

[redacted]

FEB 25 2003

File: WAC-99-229-50967 Office: California Service Center Date:

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]

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
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The approval of the preference visa petition was revoked[1] by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal.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 § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

On August 23, 1999, the director approved the petition. The United States consulate in Guangzhou, China returned the petition for review by the director. The consulate expressed concern regarding the nature of the employment being generated by the commercial enterprise, referencing Forms W-2 reflecting part-time employment. Those forms are not in the record.

Upon review, the director issued a notice of intent to revoke, the bases of which were that the petitioner had failed to demonstrate that she would create the necessary, qualifying employment within two years, that her capital was placed "at-risk," or that she would be sufficiently engaged in the management of the commercial enterprise. The petitioner submitted a response. After considering the petitioner's response, the director issued a final notice of revocation for the same reasons expressed in the notice of intent to revoke.

On appeal, counsel questions the director's revocation of the petition without new adverse information. In addition, counsel asserts that the petitioner has complied with the employment creation requirements. Counsel further asserts that the petitioner's funds were not obtained through a loan, but through an advance from her husband's company, and were deposited with the commercial enterprise which has engaged in business activity. Finally, counsel notes that the petitioner is a member of the board of directors.

Section 205 of the Act provides that the Service may revoke the approval of any petition for what is deemed "good and sufficient cause." 8 C.F.R. 205.2 permits the director to revoke the approval of a petition on notice "when the necessity for the revocation comes to the attention of this Service." While counsel cites a case where revocation was permitted when new adverse evidence came to light after the approval, counsel has not cited any case law holding that the Service may not revoke the approval of a petition where, upon review of the evidence of record, the director determines that the petition was simply approved in error. "Realization that the petition was incorrectly approved is good and sufficient cause for revocation." Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) Counsel's remaining arguments will be discussed below.

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:

---

[1] On November 2, 2002, the President signed Public Law No. 107-273. Title 1, Sections 11031(b)(1) and 10031(c)(1) provide that the Service shall disregard revocations of Forms I-526 approved between January 1, 1995 and August 31, 1998. We note that the petitioner filed the instant petition on August 20, 1999, and the Service approved the petition three days later. As such, Public Law 107-273 does not affect this petition and we need not disregard the revocation.

(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, Eureka Farming Company, Inc., 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.

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.

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).

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 petition, the petitioner did not complete Part 5 regarding employment creation, but referenced the business plan. In his initial brief, counsel asserted that Eddie Loo, the assignee of an Arizona State lease of 320 acres of farmland, reassigned that lease to Eureka in consideration of $1,500,000. Counsel further asserts that Eddie Loo is the president of the general partner of Von Verde Limited Partnership (Von Verde), on behalf of which he began developing 160 of the 320 acres for citrus farming. Mr. Loo is also the president of Eureka. Counsel asserts that Eureka will create 40 full-time jobs within two years. Counsel further states, "while 160 acres of the land were previously worked on by Von Verde employees, none of the new positions to be created will involve former employees of Von Verde." Counsel does not indicate, however, how many Von Verde employees were working on the 160 acres. The petitioner failed to submit any evidence of the number of former Von Verde employees. Counsel indicated that Eureka had hired four employees and projected 16 employees by August 1999.

The petitioner did not submit any evidence regarding the four employees already hired. The petitioner did submit a business plan. The plan projects 18 employees in 1999, 21 employees in 2000, and 40 employees by 2001. The plan also provides job descriptions for farming employees, pruning employees, and irrigation workers, all of whom will purportedly work full-time 10 months per year. The plan indicates that Arizona is too hot in June and July for farm workers to work. The plan calls for nine tree planters in 1999, two tree planters in 2000 and 14 harvesting employees in 2001. While the tree planters are not included in the 40 jobs Eureka projected, the harvesting employees are. Yet, the plan does not include a job description for these workers including their year-round duties and hours. The petitioner has provided no evidence that citrus trees produce edible fruit ten months a year, although counsel has asserted lemon season can run from August to June in Arizona.

In its memorandum to the director, the consulate stated:

> All of the W-2s presented by the applicants showed a mean income of USD 1803.65, a sum well below the poverty line. Salaries ranged from a high of USD11,862.05 to a low of USD23.17. It appears that the only employees currently in the employ of *Eureka Farming, Inc.* are part-time employees.

The Forms W-2 referenced by the consulate are not in the record. In her notice of intent to revoke, the director stated:

> A review of the evidence indicates that the employees will be engaged in agriculture. Agricultural workers are generally hired for a particular job and are not retained as direct employees. They are agricultural workers for a reason. In this sense, the petitioner has not demonstrated how hiring agricultural workers for two years and beyond is in the business interests of the petitioner as opposed to having advised [sic] simply to meet the requirement for an immigrant benefit. As such, the Service is not convinced that the business plan is both credible and has been entered into [in] good faith.

> Moreover, the Service interprets full-time employment to mean continuous, permanent employment. Not only must a particular position last beyond a given finite project; it must be full-time all the time. In this instance, citrus farming maybe [sic] considered seasonal or intermittent at best requiring term workers to perform a particular function on the farm for a limited time or duration.

The director then concluded that the assertions in the business plan that all of the farm workers, irrigators, pruners, and harvesters would be full-time for 10 months of the year to be unsupported speculation.

In response, counsel acknowledges that some agricultural workers go from farm to farm, but argues that the Service should not make an irrebuttable presumption that all agricultural workers are seasonal, part-time workers. Counsel notes that the business plan disclosed that the vast majority of workers would not work in June and July and further notes that teachers work similar schedules. Counsel also asserts that hot weather in 1999 delayed some planting. As such, Eureka had to "deviate" from its business plan and decided to offer harvesting services for other citrus growers.

The petitioner submitted a list of 26 employees, Eureka's unemployment tax and wage report for the first quarter of 2002 reflecting that the company employed 33 employees in January, 38 in February, and 46 in March. The form includes a list of 56 employees, only 29 of whom could have worked full-time at minimum wage. The petitioner submitted 28 Forms W-4 and Forms I-9. Some of the Forms W-4 list "Yuma Citrus Harvesting" as the employer.

In her final decision, the director reiterated that agricultural work is seasonal and concluded that, even if Eureka has hired 28 employees, that does not amount to 10 employees for each of the four investors.

On appeal, counsel reiterates the arguments made in response to the notice of intent to revoke and submits evidence that one of the investors has withdrawn his petition. Counsel notes that, with only three investors, Eureka need only create 30 full-time jobs within two years of the petitioner's immigration, which has yet to occur.

While the director states that agricultural workers "are agricultural workers for a reason," it appears that the director is concerned that agricultural workers often work as independent contractors.[2] Whereas some agricultural workers may move from farm to farm as different crops produce fruit, we agree with counsel that the Service cannot presume that no farm would ever credibly create a substantial number of jobs that are continuous. The fact that the petitioner has

---

[2] This language is similar to language used to reject the claims by small construction companies developing only a few pieces of property that they will retain the services of specialty workers (such as plumbers) full-time continuously. In those cases, this office has stated that such workers are normally independent contractors for a reason. While some farms may use independent contractors for heavy harvesting periods, such decisions may legitimately be based on such factors as how long the harvesting seasons lasts.

chosen to hire direct employees instead of using contractors to comply with the regulations does not automatically render the entire business plan suspect. Nevertheless, the evidence of record provides little support for counsel's arguments to rebut the director's concerns. According to counsel the lemon season can last from August to June in Arizona. The petitioner, however, provides no evidence of that fact. It is noted that counsel now claims that Eureka is performing harvesting services for other growers. Without the contracts, we cannot determine whether those services will be seasonal. If other citrus growers contract out harvesting work, it suggests that harvesting citrus may be more seasonal than counsel acknowledges.

In addition, the petitioner submits a single tax and wage report as evidence of employment at Eureka. The report is for the first quarter of 2002. If the petitioner wants to demonstrate that her employees are not seasonal, she must demonstrate evidence of their employment for more than three months. It is noted that the quarterly wages for these employees in the aggregate is $166,702.74. If this level of employment were maintained for ten months, the annual wages would amount to $555,675.80. Yet, Eureka's 2001 tax return reflects wages of only $198,377. Thus, while counsel may be correct that agricultural work does not have to be seasonal, the record does not establish that, in this case, it is not seasonal. As agricultural work is often seasonal, we do not find it unreasonable to question whether Eureka's workers will be seasonal without evidence of full-time, year round (or 10 month) employment opportunities.

Moreover, a business plan should project employment based on the needs of the company, not based on the number of employees required to satisfy the investor program. While we concur that the withdrawal of one investor may reduce the total number of employees needed for the remaining investors to qualify for the investor visa, the reduction of projected employment from 40 to 30 employees after the withdrawal of an investor raises questions regarding the credibility of the initial plan. In addition, counsel has conceded that Eureka had to "deviate" from its business plan because new trees could not be planted on schedule due to hot weather. Counsel asserts that Eureka decided to provide harvesting services for other growers instead. Yet, the petitioner did not submit a revised business plan. As such, we cannot evaluate how Eureka's "deviation" from the business plan will affect the employment projections in the initial plan. Moreover, the petitioner has not submitted any evidence regarding the harvesting services, such as contracts with other growers. The petitioner has also failed to establish how this part of Eureka was organized. If Eureka simply took over the harvesting services of another harvesting company, such as Yuma Citrus Harvesting (the employer listed on several of the Forms W-4), none of those jobs are "new." See Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998)(holding that a petitioner cannot cause a net loss of jobs).

Finally, the issue of "new" employees raises another concern. Initially, counsel asserted that Eureka is a new business separate from Von Verde. Yet, counsel acknowledges that Von Verde employees previously worked on 160 of the 320 acres leased by Eureka. While counsel asserted "none of the new positions to be created will include former employees of Von Verde," the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has failed to provide evidence regarding the number and identity of the Von Verde employees. As such, the petitioner has not established how many Von Verde employees worked on the 160

acres or who they were. Even if Eureka replaced the Von Verde employees with other workers, such a replacement does not create any new jobs. Counsel concedes, in fact urges, that the Service recognize that a single full-time position might be filled by several workers over time since there is significant turnover among agricultural workers. We agree with Counsel. Thus, simply replacing Von Verde's employees with workers who have not previously worked for Von Verde does not create any new jobs.

In light of the above, without evidence of how many Von Verde employees worked on the 160 partially planted acres leased by Eureka, we cannot determine how many of the 51 Eureka employees projected for 2003 in the initial plan are filling "new" jobs.

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:
>
> > (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.

Initially, the petitioner submitted evidence that on August 8, 1999, her husband transferred $500,000 from his account 043-484-9-201886-8 in Hong Kong to Eureka, account 235-293815 at Bank of America. The petitioner also submitted withdrawal and deposit slips indicating that Gold Arch Real Estate Development Company, Ltd., transferred $630,000 to the spouses' account 043-484-9-201886-8 on May 26, 1999. As evidence of the nature of the latter transaction, the petitioner submitted evidence that her husband is the deputy general manager of Gold Arch, that his contract provided for a salary of RMB 15,000 per month and a bonus of 5 percent of post-tax profits on each project, and that on May 18, 1999 the board of directors of Gold Arch agreed to pay him an advance bonus out of declared dividends. While the petitioner submitted an auditor's report for March 31, 1998 showing net profits of RMB 107,860,393.26, the petitioner did not submit the certified tax returns for Gold Arch or for her spouse.

In her notice of intent to revoke, the director cited Matter of Hsiung, supra, for the proposition that the assets securing a promissory note must have been placed at risk. The director determined that the advance constituted a "risk-free" loan which "does not appear to be amenable to United States seizure." Curiously, while characterizing the advance as a loan, the director then expressed concern that there is no provision to repay the advance "in the event that the spouse is terminated from the Chinese company."

In response, counsel categorized the director's concerns as a source of funds issue. Counsel notes that the regulations do not require that a petitioner have accumulated her investment funds from her own earnings. He notes that the spouse signed an affidavit confirming that the petitioner has access to his money. Counsel further asserts that the "advance" was not a loan, but would be deducted from the spouse's final bonus when payable. Counsel also distinguishes Matter of Hsiung, noting that the petitioner's investment in that case constituted some cash and a promissory note for the remaining cash. The promissory note in that case was unsecured. Counsel notes that in the instant petition, the petitioner has invested $500,000 cash. Counsel concludes that the director should not have characterized the cash as indebtedness "just because [she] subjectively feels that the employer of [the petitioner's] husband has not received adequate assurances that [he] will continue to be a satisfactory employee and thus may not fulfill the conditions of his bonus."

In her final decision, the director summarizes counsel's arguments and concludes that should the petitioner's spouse "fail to meet his employment obligation, the capital investment would be null and void and the overseas company could possibly reacquire the funds and/or the collateral made against those funds." Thus, the director concluded that the "loan" was not secured with assets amenable to United States seizure.

We do not agree with all of counsel's statements. For example, if a petitioner borrows money from a third person and invests "cash," the petitioner is investing indebtedness for the purposes of the investor program. If indebtedness only covered promises to pay the new commercial enterprise then the regulations would be meaningless since they require that indebtedness not be secured by the assets of the business.

Nevertheless, the record contains no evidence that the advance was a loan. As the director herself concedes, neither the board resolution authorizing the advance nor the spouse's employment contract call for him to repay the advance under any circumstances. It can only be assumed that the board was aware of the spouse's intent to end his employment, as his explanation for requesting the advance was to emigrate to the United States. Despite this candor, the board authorized the advance with no repayment conditions.

The director failed to adequately explain her concerns regarding amenability to seizure by U.S. loan holders. The cash is already deposited with Eureka. Thus, there is no asset Eureka would need to seize to realize the promised investment. Even if we characterized the advance as a loan, the loan holder is Gold Arch. Thus, the issue would be whether Gold Arch can seize the spouse's assets, not a U.S. loan holder.

While we do not concur with the director's concerns on this issue, we do note that the petitioner did not transfer any money to Eureka until August 9, 1999. At that time, Eureka had already purchased the lease from Von Verde for $1,500,000 with previous investors' funds. The purchase agreement for the lease assignment includes $1,200,000 for the improved 160 acres and $100,000 for the barren acres plus $200,000 for cultural costs for those acres for 1999. Moreover, while Eureka's uncertified 2001 tax return reflects $2,000,000 in capital, little cash, and $2,099,063 in assets, the land, buildings, and other depreciable assets amount to only

$1,366,500. The remaining assets constitute accounts receivable, employee advances, and "capitalized grove care" of $292,480. As normal operating expenses are paid from income, it is not clear how the petitioner's funds were used for capital expenditures. The tax return did not include Form 4562 on which a corporation may amortize its capital start-up costs. In light of the above, the petitioner has not documented how her funds were used for capital expenditures.

Moreover, it is not even clear how the $1,500,000 transferred to Von Verde for the lease assignment will be used for employment creation or even that it represents the fair market value for that lease. Counsel describes the transaction as the purchase of a passive asset. The facts, however, do not support that characterization. Eddie Loo, as the president of Von Verde, was already developing the 320 acres into citrus farmland, although 160 acres remained barren. The petitioner has not explained how the full $1,500,000 transferred to Von Verde will create jobs on the 320 acres still operated by Von Verde as only $200,000 of the $1,500,000 will go towards cultural costs for 1999. It is significant that Mr. Loo is also the president of Eureka. Thus, the lease assignment was not an arms-length transaction.

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

her burden of establishing that the funds are her 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).

As discussed above, the petitioner has traced her investment funds originating from Gold Arch through her spouse to Eureka. While we do not agree with the director's characterization of this transaction as a loan, the record is absent sufficient evidence regarding the nature of the transaction. Specifically, the record does not adequately establish that Gold Arch is a legitimate, operational company and that the spouse paid all necessary taxes on his advance. Specifically, the petitioner did not submit the certified tax returns of Gold Arch or of her husband. Initially, counsel argued that the regulations do not require a petitioner to submit her own tax returns. While it is true that the regulations only require tax returns "as applicable" it is not persuasive to argue that, as in this case, when the investment funds derived from income, even a spouse's income, that the income tax return of the individual who earned the money is not applicable.

MANAGEMENT

8 C.F.R. 204.6(j)(5) states:

> To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:
>
> (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
>
> (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
>
> (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

Initially, the petitioner submitted the Articles of Incorporation which list her as an initial director. The petitioner also submitted the Minutes of the First Meeting of Shareholders and Directors. At that meeting, Eddie Loo was elected president and the board ratified the purchase of the lease assignment.

The director noted that the purchase agreement for the lease assignment indicates Eureka agreed to employ a consultant firm (potentially Von Verde, according to the contract) as the farm operation manager. The compensation for these services was set at $50,000. The director concluded that this agreement along with the petitioner's residence outside Arizona and failure to demonstrate experience managing a farm indicated that the petitioner was "more of a titular figurehead rather than an actual manager of the new commercial enterprise."

In response, counsel notes that the petitioner is a director and that the regulations do not require an investor to be involved in the day to day management of the business. Finally, counsel notes that the director of a corporation need not live near the business and that, even if the petitioner wished to do so, she has not yet been issued an immigrant visa.

In her final decision, the director concluded that the record did not establish that the petitioner had been involved with the management of the corporation since the initial meetings.

On appeal, the petitioner submits the minutes of teleconference board of directors meetings where the investors made business inquiries of Eddie Loo.

As noted by counsel, the regulations provide that evidence of serving on the board of directors is acceptable evidence of management. As the petitioner has demonstrated that she is a director, she has met her burden according to the regulations. That said, we share the director's discomfort with the situation. The record strongly suggests that Eureka was created as a shell corporation to funnel the petitioner's passive investment into Von Verde. Eddie Loo was managing the property under Von Verde. He continues to do so as the president of Eureka and as the president of Von Verde which is now the managing consultant. To serve as a director for a shell corporation which itself is making a passive investment is questionable.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Beyond the decision of the director,[3] we conclude that the petitioner has not created 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.)

---

[3] 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).

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 she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise at issue here is Eureka, of which the petitioner is an incorporator and initial director.

However, 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. In his initial brief, counsel argues at length that the instant situation can be distinguished from Matter of Soffici. Counsel's arguments are not persuasive.

Counsel notes that Matter of Soffici involved the purchase of an existing, active business. In that case, the petitioner formed a new corporation which then purchased an operational hotel. Counsel argues that, in this case, the petitioner purchased a passive asset, a lease assignment of 320 acres, 160 of which were barren.

Whether or not the acres assigned to Eureka were already producing fruit and being harvested, they were being irrigated, planted with citrus trees, and tended. Von Verde employees were working at least 160 acres of the 320 assigned to Eureka. As acknowledged by counsel, Eddie Loo, as the president of Von Verde, was already in the process of developing this land, but needed additional financing. Thus, he assigned the 320 acres to Eureka for $1,500,000, $200,000 of which would pay for future cultural care of the barren acres, with the provision that Eureka would hire a management company, possibly Von Verde. As the compensation for the management company was decided in the sales contract ($50,000) and the purchase price included funds for future care, it appears that Von Verde was the presumed management company. Thus, the reality is that the 320 acres were already being developed by Mr. Loo

through Von Verde. When Eureka purchased the lease assignment, nothing changed. Mr. Loo was still operating the land as president of Eureka and as president of the management company. Thus, Eureka appears to be a shell company formed for the purpose of financing one of the projects already under development by an existing company, Von Verde. The petitioner has not initiated any business activities that were not in progress prior to the formation of Eureka.[4] In light of the above, especially considering Mr. Loo's service for both Eureka and Von Verde, we do not find that the petitioner has any more of a claim to have created a new commercial enterprise than the petitioner in Matter of Soffici.

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.

---

[4] As stated above, in response to the intent to revoke, counsel conceded that Eureka has had to deviate from its initial plan and incorporate harvesting services for other growers in order to create employment. Several of the Forms W-4 list the employment as Yuma Citrus Harvesting, a known subsidiary of Von Verde. As such, it appears that the harvesting services may also be simply the assumption of business activities formerly performed by Von Verde and its subsidiaries.