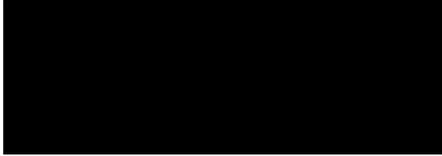


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



File: [Redacted] Office: Texas Service Center

Date: **MAR 13 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)

ON BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

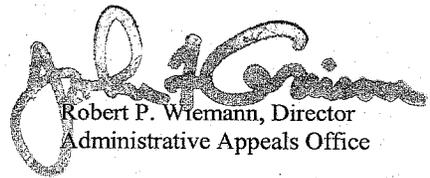
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, affirmed by the director on motion, 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 she had invested lawfully obtained funds.

On appeal, counsel argues that Congress did not intend to preclude the investment of income earned while working without authorization and that the majority of the petitioner's investment derived from foreign assets.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), 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
- (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, RugKing.com, 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.

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*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). 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*, 299 F. Supp. 2d 1025, 1034 (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).

The record, including evidence submitted initially and in response to the director's request for additional documentation, reflects that the petitioner entered the United States in 1989 on a nonimmigrant investor visa that expired in 1994. In 1989, the petitioner transferred \$330,000 to her spouse's Sun Trust Bank account, number 603900003555305, and \$83,991.26 to another of her spouse's accounts at the same bank, number 390003552527. The petitioner's spouse transferred \$235,000 of those funds to her real estate investment company Chuni Lal and purchased 359 North Dover as a personal residence for \$280,000. The following year, on August 27, 1990, the petitioner mortgaged that property for \$427,500. On May 15, 1992, the petitioner and her spouse set up a trust for the care of their children, the Soni Educational Trust. The trust purchased Lot 1, Block A of a South Fern Subdivision for \$325,000, paying \$114,541.63 at closing. On July 6, 1992, the petitioner lent \$88,765 to DAV, Inc., a company owned by her twin daughters, for the purchase of Lot 2, Block A of a South Fern Park subdivision. On July 21, 1992, the petitioner lent \$252,982.06 to AJDK, another company owned by her twin daughters, for the purchase of an unidentified piece of property in Fern Park. On January 27, 2000, the petitioner transferred \$75,000 to Chuni Lal and an additional \$63,000 to the same company on January 6, 2000.

On March 20, 2001, the petitioner established a credit line of \$125,000 with Union Bank secured by her personal residence. On April 13, 2001, the Soni Educational Trust borrowed \$215,000 secured by its own assets and the petitioner's personal guaranty.

The following funds were transferred to the petitioner's account at Sun Trust Bank, number 04133277. On April 5, 2001, \$3,298.06 was deposited in the account, allegedly from the petitioner's spouse. On April 12, 2001, \$138,749 was deposited in the petitioner's account, also allegedly from her spouse. On April 16, 2001, Chuni Lal transferred \$113,718.62 to the petitioner. On April 17, 2001, AJDK repaid the outstanding loan amount of \$199,351.40 and transferred an additional \$125,000 to the petitioner on April 18, 2001. Also on April 17, 2001, DAV repaid the balance of its loan from the petitioner, \$127,384.70. On April 19, 2001, \$53,907.26 was deposited in the petitioner's account, allegedly from her own certificates of deposit. On April 19, 2001, another \$124,000 was deposited in the petitioner's account, allegedly from First Union as loan proceeds. On April 24, 2001, the Soni Educational Trust transferred \$244,881.60 to the petitioner's account. These funds total \$1,130,290.50.

On April 19, 2001, the petitioner transferred \$745,000 from the above account to RugKing.com's saving's account at First National Bank, number 25003268. She transferred an additional \$100,000 to the same account on the same date and \$240,000 on April 24, 2001. On April 19, 2001, the petitioner transferred \$50,000 to RugKing.com's checking account at First national, number 22104020. These funds total \$1,135,000.

The director determined that since the petitioner's spouse had worked without authorization since 1994, the funds contributed by him could not be considered lawfully obtained. In addition, the director determined that since the petitioner had been out of status since 1994, any money derived from her businesses after that date could not be considered lawfully obtained. The director affirmed these conclusions on motion.

On appeal, counsel argues that Congress only intended to preclude investments made with money derived from drug trafficking and other criminal activities. Counsel further asserts that the vast majority of the invested funds did not derive from wages earned without work authorization. While counsel requested 30 days in which to send a brief, when contacted by this office, counsel requested that the arguments articulated in her motion to reopen and/or reconsider be incorporated into the appeal.

We concur with the director that funds earned as wages while working without authorization cannot be considered lawfully obtained. Counsel provides little support for her assertion that Congress did not intend to preclude the investment of wages earned without authorization. We do not believe that Congress intended to encourage aliens to work illegally in the United States in order to accumulate their investment funds. We do not agree with the director's other conclusion, however. Work authorization is not required to invest in the United States and derive income from those investments. Thus, income other than wages acquired while residing in the United States without status can be considered lawfully obtained. That most of the invested funds did not derive from the petitioner's spouse's wages, however, is not helpful. All of the invested funds must be demonstrated to be lawfully obtained.

Moreover, the funds derived from loans on the petitioner's home and the trust property as well as the return of money lent to AJDK and DAV are still problematic. These funds all trace back to the transfer of money from Canada. While counsel asserts that the petitioner established her legitimate business interests in Canada prior to obtaining her nonimmigrant investor visa in 1989, each petition is adjudicated on the evidence of record. Without any evidence of the petitioner's business interests in Canada, we cannot conclude that the money used to purchase her residence, subsequently mortgaged to generate the remaining income, was lawfully obtained.

INVESTMENT OF CAPITAL

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Beyond the decision of the director,¹ the record does not reflect that the petitioner "invested" all of the money transferred to RugKing.com such that it was all made available to the employment-generating activity.

As stated above, the petitioner transferred \$1,085,000 to RugKing.com's First National Bank account number 25003268 and another \$50,000 to RugKing.com's First National Bank account number 22104020. On April 20, 2001, RugKing.com transferred \$63,000 from 22104020 to 25003268 and four days later the company transferred \$525,527 back to 22104020. From this account, RugKing.com spent \$328,034 on inventory in April 2001. On May 2, 2001 RugKing.com transferred \$622,473 from account number 25003268 to its account at First Union National Bank, number 009298031. It is presumed that these funds covered several checks issued on that account to rug dealers on April 27, 2001 totaling \$104,338.39. (Counsel reaches a slightly higher number by including checks issued to banks.)

In response to the director's request for additional documentation regarding the petitioner's investment, counsel asserted that the purchase of inventory through October 30, 2001 constitutes capital expenditures. Specifically, the \$321,657 documented initially plus an additional \$707,063. Counsel also refers to a "detailed summary of leasehold improvements of the property representing \$118,004.77." The petitioner submitted a summary of all checks for inventory between April and October 2001, invoices, copies of the checks themselves, and bank statements reflecting that the checks were cashed.

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*, 299 F. Supp. 2d 1025, (E.D. Calif. 2001).

The petitioner has not established that the total amount of inventory through October 2001 was paid for from capital. We note that the financial projections submitted initially project total income of \$132,400 in April 2001 alone and \$1,588,800 for the year. The bank statements for account 2000009298031 show the following deposits and checks for June through October 2001.

	Deposits and other credits	Checks	Other withdrawals/fees
June 2001	\$92,123.78	\$67,681.47	\$33,065.12
July 2001	\$150,999.36	\$134,205.94	\$27,842.12
August 2001	\$176,866.27	\$182,911.56	\$3,973.68
September 2001	\$153,558.47	\$86,608.38	\$4,014.81
October 2001	\$140,635.11	\$123,591.49	\$67,056.93

The deposits total \$714,182.99 and consist almost entirely of credits from credit card companies. Thus, they are indicative of payments from customers. As such, the record reflects that as early as June 2001, RugKing.com was generating sufficient proceeds to cover almost all of its inventory costs.

The record contains additional evidence revealing that a large sum of the invested capital did not go towards the purchase of inventory or start-up costs. The petitioner submitted closing documents for 2720 25th Street in Sanford, Florida. RugKing.com purchased this property on May 15, 2001 for \$380,000 cash. RugKing.com paid for this property with checks from First Union account 2000009298170. That account received money transfers of \$520,000 on May 2, 2001 and \$160,000 on May 3, 2001. We note that \$520,000 was debited from account 2000009298031 on May 2, 2001. The latter account is the one into which the petitioner's invested funds were ultimately transferred per the discussion above. Thus, the funds used to purchase 2720 25th Street appear to have derived from the petitioner's invested capital. The appraisal for this property indicates that it "was recently purchased, renovated and leased to Cyber High School, a charter school under contract with the Seminole County School Board." The \$118,004.77 in leasehold improvements referenced by counsel refer to improvements made to the Cyber High School property. All but \$2,200 of these costs were paid between June and October 2001, the same period during which counsel claims the payments for inventory were paid from capital. The checks for these improvements were all made from First Union account number 2000009298031, the same account from which the payments for RugKing.com inventory were made.

In addition, the petitioner submitted RugKing.com's balance sheet as of July 2, 2002. The balance sheet reflects that in addition to the 25th Street property,² RugKing.com also owns an additional \$699,684 worth of land referenced as "land 427."

² The property is referenced as the 25th Street skating rink on the balance sheet but includes the same value of the property and the leasehold improvements as the Cyber High School property.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998). While the facts of that case were different from those at issue in the instant petition, the case stands for the proposition that the funds must relate to the employment generating activities on which the petition is based. A petitioner cannot meet the investment and employment requirements separately. The record contains no evidence that leasing the 25th Street property to Cyber High School or the investment in land 427 generates any employment. Thus, any of the petitioner's capital that was used towards these passive, non-employment-generating activities cannot be considered part of the petitioner's qualifying investment.

Finally, we note that the balance sheet as of July 2, 2002 also reflects that the petitioner withdrew \$53,577 of her capital, leaving the balance of capital at \$949,317.45, less than the requisite \$1,000,000.

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:

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.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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*, (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 her investment will create the required number of 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.

Id. at 213.

The petitioner initially claimed that RugKing.com employed 11 employees. She submitted a list of employees and Forms I-9. The director requested Forms W-2 for the employees. In response, The petitioner submitted additional Forms I-9, Forms W-2, wage and withholding reports, and payroll journals.

The wage and withholding report for the first quarter of 2002 reflects that RugKing.com employed nine workers in January and February and ten in March. The list of employees includes 11 individuals, only four of whom could have worked full-time at minimum wage. Earlier wage and withholding statements contain similar information. The payroll journals reflecting payments made June 21, 2002 and June 28, 2002 reflect 10 employees, but not all ten could have worked full-time at minimum wage. The record reflects a total of 326.75 hours during the first weekly period and a total of 357 regular hours worked during the second period. The payroll records do not reflect the number of hours worked for each individual. While the second period could account for ten employees working at least 35 hours, if some employee worked a full 40 hours, then not all of the ten might be working at least 35 hours. Since the payroll records include 3.5 hours of overtime, at least one employee must have worked at least 40 hours regular time in order for the remaining time worked to constitute overtime. Thus, 357 hours may not account for ten full-time employees in this case. As stated above, not all employees earned sufficient wages to account for full-time employment at minimum wage. The overtime wages were \$10.50 per hour. Assuming time and a half wages for overtime, at least some employees are earning more than minimum wage, \$7 per hour. Thus, even some of the employees whose wages are sufficient to account for full-time employment at minimum wage may be working less than full-time if they are earning more than minimum wage.

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.