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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.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

JUL 03 2003

File: [redacted] Office: Texas Service Center Date:

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:

[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 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, who affirmed his decision on motion. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted. The decision of the AAO will be withdrawn, and the petition will be approved.

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 argued 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.

In its decision, the AAO found that the petitioner was not relying on wages earned without authorization, but concluded that while the petitioner had traced the majority of her investment back to Canada, she had not provided evidence of her business interests in Canada. The AAO also raised concerns regarding the nature of the petitioner's investment, concluding that the record indicated that the commercial enterprise had purchased two pieces of property as passive investment deals.

On motion, counsel argues that the Bureau's regulations regarding the lawful source of a petitioner's investment are illegal. Nevertheless, the petitioner submits evidence of the petitioner's business interests in Canada. In addition, counsel asserts that the real estate investments are related to the employment-generating enterprise.

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 [redacted] 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:
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> > (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;
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> > (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.

As stated in our last decision, 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. 201, 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).

Regarding counsel's arguments that the regulations and precedent decisions are illegal in that they go beyond the intent of the law, we note that a federal court has found that 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). Counsel has not provided evidence of any federal court decision finding either the regulations on this issue or the precedent decisions' interpretation of those regulations to be improper. As such, we are bound by our regulations and the precedent decisions.

In addition, counsel's argument that a petitioner need not submit all of the documentation listed in the regulation if she submits at least one of the items is not persuasive. The regulations state that the evidence is required "as applicable." If a petitioner obtained her funds from more than one source, obviously more than one of the items will be "applicable."

While counsel's arguments are not persuasive, the new documentation submitted on motion is sufficient to address the concerns set forth in our last decision. As stated in our last decision, the petitioner had adequately traced the source of her funds through business investments in the United States back to Canada. We concluded, however:

> 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.

On motion, the petitioner has now submitted evidence of her business interests in Canada and the sale of those interests. Thus, the petitioner has overcome our legitimate concerns.

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:

> (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;
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> (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.

The most significant concern on this issue was that a large sum of the invested capital did not go towards the purchase of initial inventory or start-up costs. Specifically, the petitioner submitted closing documents for [redacted] in Sanford, Florida. [redacted] purchased this property on May 15, 2001 for $380,000 cash. We acknowledged that the funds used to purchase 2720 25th Street appear to have derived from the petitioner's invested capital. The appraisal for this property, however, 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. We further noted that [redacted] July 2, 2002 balance sheet reflects that in addition to the [redacted] property [redacted] also owns an additional $699,684 worth of land referenced as "land 427." In a footnote, we noted that the [redacted] property was referenced as a skating rink.

As stated in our previous decision, 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. We concluded that the record contained no evidence that leasing the [redacted] property to Cyber High School or 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.

On motion, counsel notes that the "land 427" property was beyond the petitioner's $1,000,000 investment and, thus, was not discussed in previously submitted exhibits.[1] The petitioner submits evidence that as early as June 14, 2002, [redacted] was negotiating for improvements to "land 427" for use as a warehouse. In addition, counsel asserts that [redacted] always intended to use [redacted] as a warehouse and was merely leasing the property until the warehouse was needed. Counsel asserts that Cyber High School lost its charter in August 2001 and that the property is now in use as a warehouse. The petitioner submits evidence that the school lost its charter.[2]

We note that we have never challenged the legitimacy of [redacted] as an operational business. The record as a whole establishes that [redacted] is a growing, successful business with substantial capital. While not decisive, the petitioner has a long history of successful investments. The law, regulations, and precedent decisions only require that the funds be committed at the time of filing, not that they be in use as intended at that time. RugKing.com had already purchased [redacted] at the time of filing and the business itself was fully operational. Thus, we have no concerns that the full investment was not at risk at the time of filing. The petitioner's motion credibly and consistently addresses what we still conclude were legitimate concerns at the time of our last decision. In light of the above, we find that the petitioner has adequately established a qualifying investment.

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[1] The only reason that this office considered the "land 427" property in our last decision was because we were unable to conclude that all of the $1,000,000 investment claimed could qualify as such.

[2] The petitioner did not address our concern that the balance sheet referred to the [redacted] property as a skating rink. In the interest of avoiding more correspondence, we performed a search of the Internet. That search revealed that [redacted] used to occupy [redacted] Street but that it no longer exists. Its phone number now belongs to another entity at a different address. The Yellow Pages for the Orlando area, including Sanford, have no listing for [redacted] or any other rink at that address.

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:

> *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*, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

In our initial decision, we concluded that while the petitioner had documented 11 employees, she had not documented that at least 10 of them worked full-time. On appeal, counsel asserts that has 10 full-time positions but that frequent turnover is responsible for the lack of evidence showing that all employees have worked full-time. Counsel argues that the new definition of "full-time" precludes the Bureau from requiring full-time employment from any specific employee.

It is not our contention that the new commercial enterprise must maintain the same 10 employees throughout the conditional period. We agree that only the positions need to be full-time, and that the petitioner need not submit evidence of full-time quarterly wages for an employee who was terminated during that quarter. Nevertheless, nothing about the new law changes our concern that the total hours, regardless of who worked them, cannot account for ten full-time employees.

Despite our continued concern that the petitioner has not yet documented 10 full-time positions, the petitioner need only establish that it is reasonable that he will do so in the next two years. Given the growth of the business and the reasonable predictions in the business plan, we find that it is reasonable to conclude that the business will require 10 full-time employees within the next two years. We note, however, that it will be the petitioner's burden to demonstrate this employment at the removal of condition stage.

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 now met that burden.

ORDER: The decision of March 13, 2003 is withdrawn, and the petition is approved.