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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

JUL 08 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]

PUBLIC COPY

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, 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 a qualifying investment of lawfully obtained funds.

On appeal, counsel argued that the director did not explain why the evidence was deficient, used "canned paragraphs" that did not relate to the facts of the case, abused her discretion in concluding that the petitioner's income was insufficient to account for living expenses and a $500,000 investment, and incorrectly concluded that the petitioner's personal guaranty on the company lease was not a qualifying investment. Counsel asserted that she would send a brief and/or evidence within 30 days. Counsel dated the appeal September 6, 2002. On February 12, 2003, this office advised counsel that we had received no additional submissions. As of this date, we still have received nothing further. The appeal will be adjudicated on the evidence of record.

As will be discussed in more detail below, we find that the director adequately explained how the evidence was insufficient to establish the petitioner's eligibility. While the director began by quoting the law, regulations, and precedent decisions and subsequently discussed the chronology of the case, the final two pages of her decision include an in-depth discussion of the deficiencies in the record. Further, the director referenced precedent decisions as part of her discussion of the eligibility requirements for the classification sought. Since the eligibility requirements are the same for every petitioner seeking this classification, we do not find the use of so-called "canned paragraphs" to discuss those requirements to be problematic. Nor do we find that the director is precluded from discussing the general requirements as clarified by the precedent decisions where the facts before her are not identical to those in the precedent decisions. Counsel's remaining arguments will be discussed below.

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
>
> (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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

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

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
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> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
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> (ii) In the case of a high unemployment area:
>
> > (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
> >
> > (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

Initially, the petitioner claimed that he had invested in a business, J.D.A. Sportswear, Inc., located within a targeted employment area. The petitioner listed the address as 71-13 60th Lane, Ridgewood, New York. The petitioner identified the county as "Queens." In her request for additional documentation, the director requested evidence that J.D.A. Sportswear was located in a targeted area. In response, counsel stated that after the attacks that occurred in New York on September 11, 2001, "the NYC unemployment rate has risen to 8.5 percent, which exceeds the national average of 4.8 by more than 150%."

The director did not contest this issue in her final decision. As this issue bears on the minimum investment amount, however, we must address this issue first. As stated above, the petitioner must establish that the enterprise was located in a targeted employment area at the time of investment and that the area remained a targeted area at the time of filing. That unemployment may have increased after the date of filing is irrelevant.

The record does not establish that New York City had a sufficiently high unemployment rate in February 1995,[1] when the petitioner allegedly began investing, or in August 2001,[2] when the petition was filed. Moreover, while New York State has designated the Department of Economic Development to designate subdivisions of metropolitan statistical areas as targeted employment areas, the petitioner did not submit a letter from this department designating Queens as a targeted employment area in February 1995 or August 2001.

In light of the above, we conclude that the minimum investment amount 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.

* * *

[1] According to the statistics provided on the Bureau of Labor Statistics' website, the national unemployment rate in February 1995 was 5.4 percent. One hundred fifty percent of 5.4 is 8.1. The same site reveals that the unemployment rate for New York City was only 7.8 percent during the same month.

[2] According to the statistics provided on the Bureau of Labor Statistics' website, the national unemployment rate in August 2001 was 4.9 percent. One hundred fifty percent of 4.9 is 7.4. The same site reveals that the unemployment rate for New York City was only 5.9 percent during the same month.

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.

On the petition, the petitioner indicated that he had invested $85,749 initially on February 15, 1995. The petitioner did not indicate on the petition his total investment. On Part Four, the petitioner indicated that the enterprise had $30,000 in cash, $122,492.51 in supplies, equipment and services, and $606,668 in financing. He further indicated that the net income of the company was $452,179 in 1995 and $1,079,476 in 2000. He also indicated that the net worth of the company had increased from $500,000 to $1,000,000 during that time. In her cover letter, counsel asserts that the $500,000 allegedly invested was "secured by personal funds and personal indebtedness of the applicant." Counsel claimed the following evidence demonstrated the petitioner's investment:

A. Lease with Green Tree Vendors for computers, Showing Personal Indebtedness of the applicant $5,969.88

B. Lease for Property $549,840.00

C. Invoices for Service from Mingis $149,905.10

D. Invoice from Precision Interconnect $19,308.12

E. Invoices from Efficient Devices $38,311.89

F. W. Grove Sales Inc. $13,081.60

G. Myrtle Hardware. $10,892.43

H. Manis Fuel Oil Corp. (for sales and service) $31,702.59

I. Notarized Letter from Mingis Equipment proving personal indebtedness for purchase of sewing equipment in the amount of . . $31,550.00

J. Metro Time Clocks $1,353

K. Forest Builders supply $143.92

L. T. W. an[d] Son Knitting Mill $28,150.00

Total $880,208.53

The lease with Green Tree Vendors is dated October 23, 1998, three years after the company was operational, calls for 36 monthly payments of $165.83 and is signed by the petitioner in his capacity as President. Under his signature is a personal guaranty section that is not signed, although it appears that a signature may have been removed prior to photocopying the lease.

The five-year real property lease between the landlord and the petitioner is dated April 1, 1995 and calls for rent of $42,000 the first year, $45,600 the second year, $49,200 the third year, $52,800 the fourth year, and $56,400 the fifth year.

The Mingis and Efficient Devices invoices span consistently from 1995 through 2000 and, thus, appear to represent normal operating costs incurred on a regular basis. The Precision Interconnect "invoice" is actually a proposal dated October 15, 1998. While the petitioner signed his acceptance on October 16, 1998, he did not indicate whether he was selecting the outright purchase option or the lease/purchase option. Four of the W. Grove invoices are from 1995, the remaining invoices are from 1996, 1997 and 1999. The invoices from Myrtle Hardware, Manis Fuel Oil Company, Metro Time Clocks, Forest Builders Supply (Ace Hardware), and T.W. and Son Knitting Mill are all from 1995.

As evidence of the credit with Mingis Equipment, Inc., the petitioner submitted a June 4, 1996 affidavit from an individual at Mingis Equipment attesting to the credit extended to the petitioner "as the owner of JDA SPORTSWEAR for purchasing some sewing equipment worth $31,550.00." According to the affidavit, the petitioner agreed to repay the funds by December 31, 1996. It is not clear that this amount is above and beyond the amount represented by the Mingis invoices, which cover 1996 as well as other years.

In response to the director's request for additional evidence, counsel asserted that the petitioner's investment was only $614,756.39. In her summary, counsel reduced the amount for the equipment lease from $549,840 to $303,840 and omitted the invoices from Precision Interconnect and Forest Builders. Further, counsel asserts that the petitioner's investment will surpass $1,000,000 when he purchases "this building" within the following two years.

The director noted that the five year lease only totaled $246,000 over its five year period (we reach $236,000.) The director concluded that the petitioner had not demonstrated that he personally was paying the rent.

On appeal, counsel asserts that, at the time of filing, six years had passed since the petitioner entered into the lease and that the petitioner has paid additional rent since that time. Counsel further asserts that the contract for the petitioner's house was submitted as evidence that the petitioner's personal property secured the lease.

We find the director's concerns to be valid. A lease is not a loan. The payment of rent is an operating expense generally paid from proceeds and deducted from gross profits when calculating net profit. While some of the initial rent may be considered a start-up expense paid from capital, once the company is operational and earning profits, its own payment of rent from proceeds cannot be considered the petitioner's personal investment. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958).

While the lease was entered by the petitioner personally, it is not clear that his assets secure its payment. The record reveals that the petitioner's house is heavily mortgaged. It is not clear that the landlord for the location where the enterprise operates would be able to seize the petitioner's house should the enterprise default on the lease. Moreover, the petitioner entered into the lease two years before buying the house. The lease does not identify any particular assets owned by the petitioner as security. Thus, even if we considered the lease as a loan, it is not adequately secured as set forth in *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998).[3]

Similarly, many of the invoices are dated after 1995 and appear to represent the payment of normal operating expenses by the company itself. The regulations specifically state that an investment is a *contribution* of capital by the petitioner, and not simply a total of all expenses paid by the enterprise regardless of how it obtained those funds. The definition of "invest" in the regulations quoted above does not include the enterprise's payment of normal operating expenses or even the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) for the proposition that the reinvestment of proceeds cannot be considered capital. 8 C.F.R. § 204.6(j)(2)(ii) permits evidence, such as invoices, of the purchase of assets *for* (not by) the enterprise. The implication of this provision is that the purchase must be by the petitioner or at least made with the capital he contributed.

The tax returns submitted for the corporation are consistent with our conclusion that the petitioner's capital investment is far less that $1,000,000 or even $500,000. In 1995, the corporate tax return, schedule L, reflects $10,000 in stock and no additional paid-in-capital at the end of the year. The return also reflects gross income of $505,769 and loans of $47,550. Thus, the corporation had funds available to it even in 1995 that did not originate from the petitioner. We note that the corporation has never amortized any start-up expenses on Form 4562. The tax returns through 1999 reflect no increase in stock or any additional paid-in-capital. Thus, the tax returns reflect only a $10,000 investment by the petitioner.

In light of the above, the petitioner has not demonstrated a $1,000,000 investment or even a $500,000 investment. While counsel asserted in response to the director's request for additional documentation that the petitioner's investment would increase when he purchased a building (presumably the building in which the business operates), the record contains no evidence that the petitioner had already fully committed those funds at the time of filing the petition. For example, the petitioner had not entered into an irrevocable contract to buy the property. Thus, we cannot consider his alleged "intent to invest" as part of his qualifying investment.

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[3] That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. *Matter of Hsiung*, 22 I&N Dec. 201, 203-204 (Comm. 1998) Otherwise, the note is meaningless.

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;
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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;
> >
> > (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*, 229 F. Supp. 2d 1025, 1040 (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 stated by the director, the petitioner submitted his personal tax returns reflecting income of $37,664 in 2000, $27,794 in 1999, $83,505 in 1998, $140,364 in 1997, $67,383 in 1996, and $33,511 in 1995. The director concluded that this income was insufficient to account for the petitioner's personal living expenses and the accumulation of $500,000.

On appeal, counsel asserts that the petitioner's wife owns her own business, that the petitioner owns investment property, and that the petitioner's son contributes to the household. Counsel

argues that the director abused her discretion by "unilaterally" deciding that the petitioner's income was insufficient to support a household.

The director did not conclude that the petitioner could not support his family. The director questioned whether the petitioner could accumulate $500,000 in addition to supporting his family. Moreover, the personal tax returns submitted are joint returns and include the income from the petitioner's wife and his own investment income. Thus, counsel's implication that the tax returns do not represent the petitioner's total income is not persuasive. The record contains no evidence of the income of the petitioner's son. It remains that the petitioner's household income since 1995, including that of his wife, totals $390,221. Thus, even if we were to assume that the petitioner had no living expenses, which is not credible, he still could not have accumulated $500,000.

While not discussed by the director, the petitioner also submitted affidavits from [redacted] and [redacted] Mr. [redacted] stated that on July 25, 1995, he loaned the petitioner $6,000 in cash and two sewing machines worth $2,200 which the petitioner promised to repay by July 25, 1996. Mr. [redacted] stated that he loaned the petitioner $10,000 on July 25, 1995 to be repaid July 25, 1996. As the petitioner had to repay both loans during the time he allegedly accumulated the $500,000 allegedly invested, the loans do not represent additional income beyond the income reflected on his tax returns between 1995 and 2000.

Regardless, as discussed above, the petitioner has not demonstrated that he personally contributed more than $10,000 to the business. The petitioner cannot demonstrate the source of capital he never contributed.

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.