PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B7

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: JUL 17 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:

[redacted]

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 argues that any confusion regarding the petitioner's investment results from the petitioner's difficulties in acquiring an uncontested trade name for his business. Counsel requests oral argument to further discuss this issue. Oral argument is limited to cases in which cause is shown. A petitioner or his counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. The record contains adequate documentation regarding the petitioner's attempts to secure a trade name for his business. Further, as will be discussed in more detail below, counsel has not adequately explained how this issue is related to the director's concern that the record lacks evidence of a qualifying investment by the petitioner. Therefore, the petitioner's request for oral argument is denied.

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).

The record indicates that the petition is based on an investment in a business, GZR Jewelry, Inc., doing business as Sibella Silver. The petitioner has established that Sibella Silver is 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.

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.

On the petition, the petitioner claimed an initial investment of $573,923 on March 15, 2000 and a total investment of $731,741. The petitioner also listed $731,741 on part 4 of the petition as the new commercial enterprise's net worth as of the date of filing. The petitioner did not submit any transactional evidence, such as a wire transfer, credit advice, or cancelled check reflecting an initial transfer of $573,923 on or about March 15, 2000 or transfers totaling $731,741. Rather, initially and in response to the director's request for additional documentation that specifically requested evidence tracing the path of funds from the petitioner to the new commercial enterprise, the petitioner relies on stock certificates, an appraisal letter confirming the validity of lists of inventory and equipment, invoices, financial statements, and tax returns.

The director concluded that the individual attesting to the list of inventory and equipment had not explained her qualifications to perform an appraisal and that the record did not establish how the inventory was purchased. On appeal, counsel asserts that the director's confusion results from the petitioner's difficulties in securing a trade name.

We do not find counsel's appellate arguments regarding trade names to be persuasive. The petition is based on an investment in [redacted] doing business as [redacted] in St. Thomas. [redacted] was incorporated on October 7, 1999 and leased its premises on July 1, 2001. On September 17, 2001 [redacted] received a Certificate of Registration of Trade Name for [redacted]

The petitioner owns or has owned at least three other jewelry businesses: [redacted] organized on July 24, 1985 and doing business as [redacted] in St. Thomas; [redacted] incorporated on November 15, 1995 and doing business as [redacted] Naples, Florida; and [redacted] incorporated on May 4, 1998. In response to the director's request for additional documentation, counsel asserted that the petitioner merged [redacted] with [redacted] in 2000 and that [redacted] did business "at the local Naples Coastland Center Mall in the years 1998-2001, at which time the lease expired and the inventory was distributed back to the shareholders." In this letter, counsel further asserts that the petitioner closed both stores in Florida because they were difficult to manage from the Virgin Islands. Finally, counsel alleges that inventory distributed back to the shareholders was subsequently invested into GZR Jewelry, Inc..

According to its tax returns, [redacted] was an S-Corporation. In 1999, [redacted] claimed to own 100 percent of [redacted] The Schedules K-1 for [redacted] reflect that its shareholders from 1998 through 2000 were the petitioner, his wife, and [redacted] Yet, in 1999 and 2000, [redacted] also an S-Corporation, indicated on its own tax return that it owned 100 percent of [redacted] and attached Schedules K-1 from the petitioner, his wife, and [redacted] If the two corporations "merged" as claimed by counsel, they did not end at the same time. [redacted]

2001 tax return is marked as its final return while Inc.'s tax return for the year ending September 27, 2000 is marked as its final return.

Despite these inconsistencies, the director's decision is not based on an inability to understand the documentation relating to these other corporations. Rather, the director noted the lack of evidence of how the new commercial enterprise claimed on the petition obtained its inventory and equipment.

On appeal, the petitioner submits an October 13, 2000 letter from the law firm representing The demanding that cease and desist from manufacturing and selling rings under the name. We note that continued to operate through the end of 2001, earning gross receipts of $42,356 that year. Thus, the petitioner's ultimate abandonment of the name does not appear related to whether or not he invested at least $500,000 into

Potentially more relevant to the new commercial enterprise, the petitioner also submitted evidence of several attempts to select a trade name in early 2001 and an initial rejection of articles of incorporation in December 1999. Counsel asserts that "these multiple rejections of corporate names and trademark names resulted in a hesitancy on behalf of the [petitioner] to continuously modify checkbooks, business receipts, etc. until he was absolutely certain that the corporate name and trademark name would be viable."

The record does not establish that the attempts to select a trade name in early 2001 were being conducted for As stated above . was still operational in 2001 and needed to develop a new trade name. Regardless, it is not clear how the failure to select a trade name precluded the petitioner from opening a bank account in the name of the corporation itself. The record reflects that on February 8, 2000, the new commercial enterprise claimed on the petition obtained acknowledgement of its articles of incorporation filed on October 7, 1999. This acknowledgement occurred over one month prior to the date of the initial investment as claimed on the petition. Thus, the petitioner had plenty of time to open a bank account in the name of

Of more concern, however, is counsel's next assertion: "As a result, the [petitioner] has continued to advance some of the business operational acquisitions directly from his existing corporation, as shareholder withdrawals from his existing corporation and shareholder loans to the new corporation."

The record does contain some, albeit inconsistent, evidence that and (doing business as contributed to According to the petitioner's final Schedule K-1 for filed for 2001, that corporation distributed $220,417 in property to the petitioner. According to tax returns, however, the petitioner had already contributed $1,000 in capital and $520,333 in shareholder loans by the end of 2000.

On appeal, the petitioner submits checks issued by [redacted] to [redacted] in 2001 amounting to $79,500 and to [redacted] during the same year for $6,091. According to the 2001 tax return for [redacted] however, that company only distributed $15,000 to the petitioner that year. Any investment made by [redacted] cannot necessarily be considered the petitioner's personal investment. If [redacted] is simply an extension of [redacted] formed in 1985, then it is not clear that the new commercial enterprise qualifies as "new," defined in the regulations as established after November 29, 1990. 8 C.F.R.§ 204.6(e).[1]

The evidence is less clear that [redacted] contributed any funds to [redacted] In 1999, that corporation's additional paid-in-capital decreased from $1,139,907 to $450,420. The petitioner's Schedule K-1, however, does not reflect that he received a dividend or other distribution from the corporation. In 2000, its final year, [redacted] Inc.'s inventory decreased from $307,934 to zero without any income from sales. Once again, however, the petitioner's Schedule K-1 reflects no dividends or distributions.

Even if we credit the petitioner as the source of the funds transferred to [redacted] the record does not establish that those funds were invested as defined in the regulations quoted above. The record supports counsel's characterization of the capital funds being loaned to [redacted] The tax returns for [redacted] reflect a consistent $1,000 in paid-in-capital from 1999 through 2001. Shareholder loans, however, increased from zero in 1999 to $520,553 at the end of 2000 and to $690,533 at the end of 2001. The unaudited balance sheets reflect the same numbers. On appeal, the petitioner provides the loan documents themselves, further confirmation that any money transferred from the petitioner to [redacted] was a loan, not an investment. Specifically, in October 2001, [redacted] executed a promissory note to pay the petitioner $600,000. On March 20, 2003, [redacted] executed a second promissory note to pay the petitioner $100,000.

As quoted above, 8 C.F.R. § 204.6(e)(definition of invest) provides that *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.* Thus, whatever the petitioner's reasons for lending money to the new commercial enterprise, those loans cannot be considered part of a qualifying investment according to the plain language of the regulations.

We acknowledge that the record contains evidence of [redacted] assets. A corporation, however, has many ways to acquire assets other than through a capital investment meeting the requirements of this program. Thus, as implied by the director, examining the company's assets without additional information as to how the company acquired those assets is not helpful. While net worth, also known as owner's equity, can be a more accurate reflection of a shareholder's contributions, net worth can also increase due to retained earnings. Reinvesting

---

[1] The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) removes the requirement that the petitioner personally establish the new commercial enterprise but does not remove the requirement that the enterprise be a "new" one.

the proceeds of the business is not a qualifying investment. *See generally De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003). Regardless, the record does not support the petitioner's claim on part 4 of the petition that the net worth of the new commercial enterprise was $731,741 (the same amount as his claimed investment). The balance sheet for December 31, 2001 indicates $734,017 in assets. On appeal, counsel asserts that these assets are indicative of the petitioner's "shareholder's equity." Owner's equity, also known as net worth, equals assets minus liabilities. Barron's Dictionary of Accounting Terms 295, 316 (3rd ed. 2000). The company's liabilities, including the $690,533 loan from the petitioner, equaled $692,809. Thus, the net worth of the company was only $41,208, far less than the $734,017 claimed by counsel or the $731,741 claimed by the petitioner on the petition filed less than six months later.

In light of the above, we concur with the director that the petitioner has not demonstrated a qualifying investment.

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*, 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).

Initially, the petitioner submitted no evidence regarding the source of his alleged investment. In response to the director's request for additional documentation, counsel asserted that the petitioner began investing in the United States in 1987 with a $112,000 investment into [redacted] Counsel further asserted that the petitioner eventually received inventory as a distribution from his other corporations and reinvested that inventory into [redacted] The petitioner submitted tax returns for his three other companies and his personal tax returns. The director concluded that the petitioner's income: $60,372 in 1991, $65,634 in 1992, $81,589 in 1993, $89,545 in 1994, $109,746 in 1995, $97,729 in 1996, $64,117 in 1997, $119,953 in 1998, $63,802 in 1999, $122,764 in 2000, and $107,904 in 2001. On appeal, counsel asserts that the petitioner withdrew funds from his other corporations and loaned them to the new commercial enterprise. As stated above, the petitioner submitted several invoices and checks drawn on the account of [redacted]

We concur that the petitioner's personal tax returns may not reflect sufficient income to account for the accumulation of $700,000. Nevertheless, the record reflects that the funds allegedly invested into [redacted] derived from [redacted] and [redacted] As these funds cannot be considered part of the petitioner's qualifying investment for the reasons discussed above, the issue of whether his income can account for the accumulation of $700,000 is of little consequence. As stated above, however, the petitioner's failure to list any distributions or dividends on his 1999 and 2000 Schedules K-1 for [redacted] raises questions regarding whether he has paid the necessary taxes on any income from this corporation. Funds acquired through failure to pay taxes cannot be considered lawfully acquired.

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

 [redacted]

> (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*, 229 F.Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs in the targeted employment area. The initial business plan states that the company plans to add a "service center" in Tamarac, Florida, where it will expand its staff. The petitioner has not established that Tamarac, Florida is a targeted employment area. In order to qualify for the minimum investment amount of $500,000, the petitioner must establish that he will create at least 10 jobs in the targeted employment area. *See Matter of Izummi, supra*. In addition, the petitioner was already operating a jewelry related business in St. Thomas. As discussed above, it is not clear that [redacted] is an entirely separate business. Any reassignment of employees from [redacted] cannot be considered the creation of new jobs.

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.