

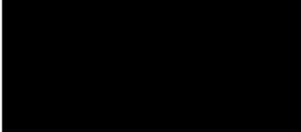


BM

U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

APR 30 2001

File: [Redacted]

Office: Texas Service Center

Date:

IN RE: Petitioner: [Redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:



Identification 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 which 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 which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The approved preference visa petition was revoked by the Director, Texas Service Center. The director reopened the matter on Service motion, affirmed the revocation, and forwarded the petition to the Associate Commissioner for Examinations. The director's decision will be reviewed on certification and affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

Upon review of the approved petition, the director determined that the petitioner had failed to demonstrate that he had made a qualifying investment or that he would meet the employment-creation requirement.

On appeal, counsel argues that the director improperly reviewed the petition under new "rules" developed after the petition was approved.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [REDACTED] Capital Corporation [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.

**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.

(Emphasis added). 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.

(Emphasis added.) On the Form I-526, the petitioner claimed to have invested the entire \$1,000,000 already. The petitioner submitted the certificate of incorporation indicating the corporation is authorized to issue 2,000 shares, no par value, and 100,000 capital (crossed out and changed to \$1,000,000.) The petitioner also submitted the Unanimous Written Consent of the Board dated November 18, 1996 resolving to issue 20,000 shares to the petitioner for undisclosed consideration, a stock certificate indicating the corporation is authorized to issue 1,000,000 shares and verifying the petitioner's ownership of 20,000 shares. The petitioner submitted materials regarding his various construction and development projects, including several mortgages secured by the assets of the corporation.

In his initial brief dated February 18, 1997, counsel stated:

Furthermore, [REDACTED] Capital Corporation is contemplating purchasing [sic] of additional 25,000 sq. feet of commercial land located between Venture Dr. and Interstate Highway 35 in Norman, Oklahoma for the purpose of developing a commercial warehouse to be leased by Belmont Capital Corporation. Belmont Capital Corporation is planning to invest at least \$225,000 in this project and will seek an additional \$525,000 of financing from First Fidelity Bank, N.A. Oklahoma. Please see letter from [REDACTED] Executive Vice President.  
EXHIBIT NO. 12.

(Emphasis in original.) Exhibit 12 consists of a December 17, 1996 letter from Mr. [REDACTED] offering to finance the construction of single family dwellings for resale. Exhibit 38 consists of another December 17, 1996 letter from Mr. [REDACTED] offering to finance the construction of a commercial warehouse to be located between Venture Drive and Interstate Highway 35 in Norman, Oklahoma. On the letter, however, is the following handwritten notation:

1/26/97 Do submit. This project did not go thru [sic]. However, use as evidence of anticipated investment w/o disclosing the unsuccessful disposition.

This notation, suggesting a desire to withhold material information from the Service and misrepresent the facts, severely diminishes the petitioner's overall credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of

the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). Furthermore, as provided in 8 C.F.R. 292.3 and 8 C.F.R. 3.102(c), an attorney who knowingly or with reckless disregard makes a false statement of material fact, or willfully misleads, misinforms, threatens or deceives any person (including a party to the case or an officer or employee of the Department of Justice) is subject to discipline by the Board of Immigration Appeals.

On February 25, 1997, the director requested additional evidence. In response, counsel asserted the petitioner had invested approximately \$329,000 in cash and \$725,000 "in additional properties via debt financing." Counsel asserted the cash invested originated from the petitioner's brother-in-law's corporate accounts as repayment for a 1981 loan from the petitioner's wife. Finally, counsel claimed \$80,000 of the petitioner's cash investment was obtained by a loan from the petitioner's brother-in-law. The petitioner submitted corporate checks issued to Belmont.

Despite counsel's admission that the vast majority of the petitioner's claimed investment was financed and the credibility issue discussed above, the director approved the petition.

Upon review of the approved petition, the director issued a notice of intent to revoke on August 3, 1999, noting that majority of the petitioner's "investment" was really mortgages secured by the assets of the corporation and that \$80,000 of the cash invested was borrowed by the petitioner's wife.

In response, the petitioner submitted previously submitted documentation as well as several balance sheets for Belmont and Belmont's 1998 tax return. The tax return reflects \$2,000 in stock, \$338,000 in additional paid-in capital, and \$103,386 in stockholder loans. The February 28, 1999 balance sheet reflects a negative \$145,434.68 value for capital stock and paid-in capital of \$462,750. Neither counsel, the accountant, nor the petitioner, provide any explanation for the negative capital stock value. The March 31, 1999 balance sheet reflects no stock and \$338,832 paid-in capital. The May 31, 1999 balance sheet reflects no stock and \$437,316 paid-in capital.

On October 7, 1999, the director asserted the petitioner had failed to respond and revoked the petition. On November 29, 1999, the petitioner filed an untimely appeal. On December 6, 1999, the director reopened the matter on a Service motion, considered the petitioner's response, and revoked the petition. Subsequently, counsel resubmitted his appellate brief. All of the director's decisions cited Service regulations and four precedent decisions issued by the Administrative Appeals Office after the approval of the instant petition.

On appeal, counsel spends several pages of his brief asserting the director inappropriately applied the precedent decisions retroactively and violated the Administrative Procedures Act. With regard to whether the petitioner actually made a qualifying investment, counsel merely states the petitioner is actively in the process of investing the required \$1,000,000 and submitted "substantial, significant, and convincing evidence," which resulted in the director's initial approval.

First, counsel's arguments that the director inappropriately relied upon precedent decisions in revoking the instant petition are not persuasive. Counsel asserts that the precedent decisions violated the Administrative Procedures Act by creating new rules and that any new rules should not be applied retroactively.

Contrary to counsel's assertion, published precedent decisions represent the Service's interpretation of the statute and the regulations and are used to provide guidance in the administration of the Act. The four decisions did not create new standards or new rules.

In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court concluded that the AAO precedent decisions did not involve rule making. Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.)

Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. Therefore, the director properly relied on the precedent decisions in the adjudication of this petition.

Regardless, the plain language of the regulations expressly provides that indebtedness secured in whole or in part by the assets of the new commercial enterprise cannot be considered an investment. See 8 C.F.R. 204.6(e) (definition of capital) quoted and highlighted above. Thus, the petition was clearly approved in error as more than half of the petitioner's claimed investment consisted of mortgages secured by the assets of the corporation. While the director may have cited the precedent decisions, the petitioner is clearly ineligible under any reading of the regulations.

In addition, the regulations also provide that a petitioner may not include any loans to the new commercial enterprise as part of his investment. 8 C.F.R. 204.6(e) (definition of invest.) Thus, the shareholder loan of \$103,386 reflected on the tax returns cannot be considered part of the petitioner's investment.

Counsel's reference to "substantial, significant, and convincing evidence" is not supported by the record. Even if we accepted the unaudited and suspect balance sheets and the petitioner's claim that the contributions of the corporations allegedly owned by his brother-in-law represent an investment of the petitioner's personal funds, the petitioner had invested less than \$400,000 at the time of filing. Moreover, the unexplained negative stock values on the balance sheet and the credibility issue discussed above all diminish the credibility of the remaining evidence.

While the petitioner initially claimed to have invested the entire \$1,000,000 at the time of filing, counsel now appears to be arguing that the petitioner is merely "actively in the process" of investing \$1,000,000. While a petitioner need not have invested the entire amount by the time of filing, the petitioner must demonstrate that the full amount is committed to the business. This requirement is reflected in the regulations which were in effect at the time the petitioner filed his petition. See 8 C.F.R. 204.6(j)(2) quoted and highlighted above. The petitioner has not demonstrated that he has a legally enforceable, secured obligation to invest the balance of the required \$1,000,000.

Finally, the projects documented initially do not appear to all be development projects. The "Venture Project" involved the purchase of a warehouse, already occupied by a tenant, and an assumption of the landlord responsibilities. This is not an employment-creating investment, but a passive real estate investment.

In light of the above, we concur with the director that the petitioner has failed to demonstrate a qualifying investment according to the law and regulations in effect at the time the petitioner filed his petition.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

*Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

*Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.



In support of the petition, the petitioner submitted employment contracts, Forms W-4, and Forms I-9 documenting two employees. The petitioner also submitted an application for employer identification number dated December 18, 1996, indicating the corporation expected to maintain no more than three employees in the next 12 months.

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.

In his notice of intent to revoke, the director noted the petitioner had not hired 10 employees and had not submitted a business plan. In response, counsel once again asserts that the precedent decisions upon which the director relied were improperly applied retroactively. Counsel also insists a comprehensive

business plan was submitted. The petitioner submitted State Employer's Quarterly Contribution Reports for the first two quarters of 1999, and the final three quarters of 1998. The reports reflect between 10 and 11 employees other than the petitioner and his wife. The petitioner did not submit Forms I-9 or W-4 for these newly hired employees.

The director concluded the salaries provided did not indicate more than eight of the employees worked full-time and that a comprehensive business plan was never submitted.

On appeal, counsel reiterates that not all ten employees need to be hired by the time of filing and that the petitioner submitted a sufficient business plan.

It remains, the petitioner has submitted Forms W-4 and I-9 for two employees only. The petitioner submitted no evidence that the quarterly reports were ever filed with the state. Given the credibility issues discussed above, the submission of a completed form without evidence it was filed with the state is insufficient. The record does not contain a business plan, comprehensive or otherwise. The list of exhibits included with the original petition also fails to indicate that a business plan was submitted. Counsel's initial brief submitted with the petition fails to even address employment creation. Thus, even if we were to accept that the quarterly report reflected eight full-time employees, the petitioner has not established that he will create 10 full-time jobs.

### CONCLUSION

Counsel objects strenuously to the director's decision on the basis that the petition was previously approved, was revoked based on decisions decided after the approval, and that the petitioner's case and those of his family were mishandled by the Service, which caused the reevaluation of the petition in the first place.

First, Section 205 of the Act specifically provides that a petition approved in error may be revoked. Therefore, the law provides the director the authority to reevaluate approved petitions. A petitioner cannot simply challenge a revocation solely on the basis that it was previously approved. Every revocation, by definition, involves the reevaluation of a previously approved petition.

Second, as stated above, the precedent decisions merely interpreted regulations which were in effect at the time the petition was filed and adjudicated. The decisions did not constitute new "rules," and, thus, no retroactively application of rules took place in this case. Regardless, as explained above, the petitioner is clearly ineligible based on the plain language of the regulations. While



the director may have cited precedent decisions in support of his decision, the plain and unambiguous language in the regulations alone would have supported his decision.

Finally, whether or not the adjustment applications of the petitioner and his family were mishandled is not relevant to the adjudication of the petition. The director did not act improperly by reevaluating the underlying petition upon receipt of the petitioner's adjustment application. The law provides the director the authority to revoke up until such time as the petitioner's adjustment of status is completed. See Matter of Vilos, 12 I&N Dec. 61, 64 (BIA 1967). Thus, the director committed no error.

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. Accordingly, the decision of the director will be affirmed and the revocation will stand.

**ORDER:** The revocation stands. The director's decision of December 6, 1999 is affirmed.