



U.S. Department of Justice  
Immigration and Naturalization Service

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



File: [Redacted] Office: Vermont Service Center

Date: FEB 12 2001

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:



PUBLIC COPY

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 employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on March 8, 1999. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be remanded for further consideration.

The appeal was filed on March 30, 1999, 22 days after the decision was rendered. According to the pertinent regulations, the appeal was not timely filed. 8 C.F.R. 205.2(d) states that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The notice of revocation erroneously stated that the petitioner could file an appeal within 30 days. Nevertheless, the director's error does not supersede the pertinent regulations.

8 C.F.R. 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. 103.5(a)(2), or the requirements of a motion to reconsider as described in 8 C.F.R. 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a)(2) requires that a motion to reopen state the new facts to be proved at the reopened proceeding; and be supported by affidavits or other documentary evidence. Review of the record indicates that the appeal is not supported with any new documentation not previously considered by the director.

8 C.F.R. 103.5(a)(3) requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or service policy. Such a motion must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Review of the record indicates that the appeal may meet this requirement.

According to 8 C.F.R. 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. Because, in this case, the disputed decision was rendered by the director, the AAU has no jurisdiction over this motion and the case must be remanded to the director for a decision pursuant to the regulations governing motions to reconsider.

It is noted for the record that the petitioner claims to have met the employment creation requirements through an investment in a

troubled business. While the director determined the petitioner had not established that her investment was made available to the alleged troubled business, the director and counsel both discuss this issue as it relates to the establishment of a new commercial enterprise.

Whether the petitioner invested in a troubled business is not relevant to whether the petitioner created a new commercial enterprise. In order to establish a new commercial enterprise through an investment in an existing business, troubled or not, the petitioner would still need to demonstrate a restructuring, reorganization, or expansion of net worth or employment of the new commercial enterprise.<sup>1</sup> Whether the petitioner invested in a troubled business is only relevant to the employment creation requirement. With regard to the employment-creation requirement, the director would need to discuss whether the new commercial enterprise as a whole is a troubled business. A healthy business with a troubled subsidiary would not be able to rely on employment preservation. The regulations provide that a petitioner may only rely on employment preservation when "the new commercial enterprise has been established through a capital investment in a troubled business." 8 C.F.R. 204.6(j)(ii). Therefore, if the new commercial enterprise itself is not a troubled business, a petitioner must demonstrate employment-creation, not merely preservation.

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing. In the event that a new decision is rendered which is adverse to the petitioner, the decision is to be certified to the Associate Commissioner for Examinations for review.

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<sup>1</sup> The regulations do mention troubled business with regard to the establishment of a new commercial enterprise but only to permit a petitioner to establish any employment-creation beyond the expansion through the preservation of jobs. 8 C.F.R. 204.6(h)(3).