



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



PUBLIC COPY

File:  Office: Texas Service Center

Date:

FEB 12 2001

IN RE: Petitioner: 

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

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

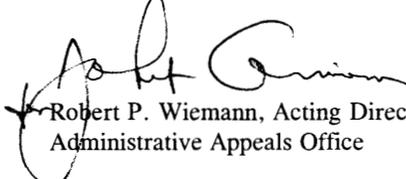
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise or that he had invested the required amount of lawfully obtained capital.

On appeal, counsel does not challenge the director's assessment of the facts or the interpretation of the four precedent decisions issued by the Administrative Appeals Office. The sole argument is that because the petitioner was in the planning stages of his investment prior to the issuance of the precedent decisions, the Service should not rely on the precedents when adjudicating his petition. Therefore, this decision will first review the director's application of the law, regulations and precedent decisions and subsequently address concerns regarding the director's reliance on the precedents.

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 petitioner indicates that the petition is based on an investment in [REDACTED], a new commercial enterprise which will create employment in targeted employment areas for which the required amount of capital investment has been adjusted downward to \$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.

The cover letter for the petition asserted that the entire \$500,000 had been contributed. As evidence of this assertion, the petitioner submitted the Partnership Agreement for [REDACTED] L.P., the petitioner's subscription agreement, promissory note and a "collateral contingent bill of sale." The petitioner also submitted a wire transfer receipt indicating that the petitioner transferred \$120,000 into counsel's account. The subscription agreement states that the petitioner "commits" a total of \$500,000 to the partnership. However, the agreement only obligates the petitioner to pay in cash an initial \$100,000. Regarding the remaining investment, the agreement provides:

The balance of said capital investment USD \$400,000 is hereby pledged and collateralized by investor's assets hithertofore by an irrevocable assignment and has been preapproved by the General Partner.

The promissory note does not provide for any periodic installments, and merely states that the note is due on demand "but in no case later than 24 months (2 years) from the Date of Admission to the Partnership" The note further provides:

This note is secured by a (1) All rights, title and interest in any Cash or Property Distributions made or to be made from the Partnership to the Investor as a discretionary Distribution after Operations of the Partnership have commenced; (2) Bill of Sale to all Personal Property held, acquired or after acquired, held in the possession of the Investor and located in the United States, its Territories, or any other jurisdiction; (3) Garnership Interest of 75% of any and all Income, Gain, or Distribution from Sources Other than the Partnership.

The "collateral contingent bill of sale" provides that the petitioner:

hereby sell[s], assign[s], and transfer[s] to American Amalgamated Investors, L.P. (the "Buyer") . . . such sale, assignment, and transfer to be contingent upon certain terms hereafter described, the following property:

All personal jewelry and adornments now owned and hereinafter acquired;

All Stocks, Bonds, Notes, and Securities of any denomination now owned and hereinafter acquired;

All Bank Accounts holding Cash and Currencies, no matter what the denomination, such as are now owned and are hereinafter acquired;

All Motor Vehicles registered in my name, no matter of which jurisdiction of registration, such are now owned and are hereinafter acquired;

All Personal Vehicles, such as Aircraft, Boats and Vessels, in my name by registration or otherwise, such as are now owned and are hereinafter acquired;

My personal Garnishment Order which is hereby stipulated by this Contingent Bill of Sale: 75% of any future, including but not limited to, Monies, Net Income, Salaries, Wages, Capital Gain distributions, Interest Income, Principal Distributions, that I might derive from any U.S. or Foreign Source whatsoever, in whatever denomination, in whatever Currency. . . .

The above property is conveyed as Security and Collateral for a certain Demand Promissory Note, and buy [sic] the terms of this Contingent Bill of Sale, should INVESTOR/SUBSCRIBER (SELLER) default on any provision of such Promissory Note, and is notified of such by the General Partner of the Partnership (BUYER), in writing, no sooner than 30 days after such default and cure period has elapsed, the above property is deemed to be sold on an "AS IS" basis to the Note Holder.

In order for a promissory note to be considered an investment, 8 C.F.R. 204.6(j)(v) requires that the note be secured by the petitioner's personal assets. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998), clarifies this requirement, providing that the petitioner must establish ownership of the assets, that the assets are in fact securing the note, that the security interest has been perfected or recorded according to local law, and that the assets are amenable to seizure by a U.S. note holder. Furthermore, the petitioner must show that the assets have

sufficient fair market value to secure the amount of the note, considering the assessed value of the assets and the estimated cost of seizing the assets. Id. at 3-5.

As noted by the director, the contingent bill of sale fails to identify specific assets owned by the petitioner and the petitioner failed to submit any documentation demonstrating ownership of the listed types of assets other than bank statements documenting balances of \$197,454.23 and \$143,880.91, and a real estate appraisal for property worth 750,705 dinars or \$1,055,101. The director concluded that the petitioner's assets had not been placed at risk as collateral for the loan.

The brief submitted on appeal does not argue that the director incorrectly concluded that the petitioner failed to establish the above factors. The argument that the director should not have relied on Matter of Hsiung will be discussed below.

It remains, the petitioner has not established that the note is adequately secured by his assets which are amenable to seizure. As the note is not adequately secured, it does not constitute capital.

The Offering provides that the investment funds "will initially be held in an escrow account in the name of the Partnership at their bank established for such purpose by the [REDACTED] [REDACTED]." The offering further provides, "The entire investment amount will be disbursed to the Partnership by the [REDACTED] Inc., upon acceptance of the Subscription Agreement by the General Partner." However, as stated above, the wire transfer notice shows the \$120,000 was transferred to counsel's personal account. The petitioner has not provided any documentation to demonstrate that counsel subsequently transferred \$100,000 to an escrow account in the Partnership's name. It remains, the petitioner has not demonstrated that he has contributed any capital to the Partnership.

The director further concluded that the petitioner had not demonstrated that any Partnership funds had been made available to the job-creating enterprise. The Partnership Agreement provides that its purpose is to create operating companies that will create employment in exchange for venture capital investment. The business plan provides that the first operating company already identified is [REDACTED] Inc. (CFSI). In support of the petition, the petitioner submitted the articles of incorporation for CFSI and the July 1998 agreement by which CFSI purchased [REDACTED] for \$1,250,000 worth of shares in CFSI and a \$900,000 purchase money mortgage.

The director noted that the record did not contain an operating or other agreement outlining the financial obligations of the

Partnership to any of the operating businesses. The articles of incorporation for CFSI indicate that [REDACTED] (President and CEO of [REDACTED], Inc., the General Partner of the Partnership) is the registered agent of the corporation. In addition, [REDACTED] (the General Director of the General Partner) signed the purchase agreement in behalf of CFSI. However, the record reveals no formal, legal or otherwise enforceable agreement between the Partnership and CFSI. Furthermore, as CFSI purchased its business through an award of stock and a mortgage, the record does not establish that any of the Limited Partners' funds have been committed to this business.

In addition, 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 Izumi, Int. Dec. 3360 (Assoc. Comm., Examinations, July 13, 1998). The petitioner has not demonstrated that any of his funds have been made available to the operating business.

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.



In support of the petition, the petitioner submitted the following: his resume which reflects employment as a mechanical engineer and management of [REDACTED] Company, a Jordanian company, an employment letter from [REDACTED] confirming the petitioner's monthly salary of \$2,800, tax returns for 1994 through 1997 reflecting annual income of \$29,896, \$19,574, \$22,746, and \$25,818, bank account statements reflecting balances totaling \$341,335.14, and land appraisals for property worth \$1,055,101.

The petitioner's income as reflected on the tax returns cannot account for the petitioner's ownership of large bank accounts and valuable property. The petitioner has not established that these assets were lawfully obtained.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of *engaging in a new commercial enterprise . . . which the alien has established*" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United

States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is [REDACTED] in which the petitioner allegedly became a limited partner on February 15, 1999.

The director correctly concluded that since the petitioner was unable to demonstrate that he had invested any funds in the Partnership he was unable to demonstrate that he had established what is claimed to be the new commercial enterprise.

Moreover, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

The purchase agreement indicates CFSI purchased an existing business. Therefore, the petitioner would need to demonstrate the necessary reorganization, restructuring, or expansion as provided in 8 C.F.R. 204.6(h). The record does not contain the balance sheets indicating the net worth of [REDACTED] before the purchase and CFSI at the time of filing. The petitioner also failed to submit any payroll documentation reflecting the number of employees before the purchase and at the time of filing. Finally, the record contains no evidence that CFSI restructured or reorganized [REDACTED].

Beyond the decision of the director, it is noted that the petitioner will not be engaging in the management of the enterprise. 8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the ULPA, he is sufficiently engaged in the management of the partnership. Article VIII of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the Florida Revised Uniform Limited Partnership Act. However, under Article XV of the Partnership Agreement, all limited partners irrevocably appoint the General Partner as his or her attorney-in-fact, with full power of substitution. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Article VIII, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA. As such, the petitioner is a purely passive investor.

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.

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs.

The record does not reveal that the identified operating business has hired any employees. 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.

The business plan submitted indicates that in the first two years, the operating business will employ 120 employees. However, the plan does not adequately explain the corporation's staffing requirements or provide job descriptions for all positions.

RETROACTIVE APPLICATION OF PRECEDENT DECISIONS

In his decision, the director stated that the petition was reviewed in accordance with the four 1998 precedent decisions issued by the

Administrative Appeals Office (AAO). The director cited 8 C.F.R. 103.3(c) which provides:

Service precedent decisions. In addition to Attorney General and Board decisions referred to in §3.1(g) of this chapter, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, *they are binding on all Service employees in the administration of the Act.* (Emphasis added.)

Despite the clear language of the regulations, the appellate brief argues that the AAO precedent decisions are not binding on Service employees where there is a hardship to the petitioner and that the petitioner relied on "the Regulations which were in existence at the time the initial steps were taken." The brief cites Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978) as well as other federal cases in support of his argument that the retroactive application of law is disfavored.

Counsel's argument that the director "retroactively" applied the precedent decisions in his decision is both factually and legally wrong. The AAO published Matter of Soffici, *supra* on June 30, 1998, Matter of Izumii, *supra* on July 13, 1998, Matter of Hsiung, *supra* on July 31, 1998, and Matter of Ho, *supra*, on July 31, 1998. While Mr. [REDACTED] incorporated CFSI on May 15, 1998, and CFSI purchased [REDACTED] in July 1998, the Partnership was not established until February 15, 1999. While the petitioner wired \$125,000 to counsel on July 20, 1998, the petitioner did not sign the subscription agreement and promissory note until February 15, 1999. The petitioner filed his petition on March 31, 1999. As such, the petitioner had not committed himself to the Partnership or placed any money at risk when the AAO issued the above precedent decisions.

Even if the petitioner had irrevocably committed himself to his investment prior to the publication of the precedent decisions, those decisions did not contain any new rules. Counsel's reliance on Ruangswang is misplaced. In Ruangswang, the court reviewed a situation where the Board of Immigration Appeals had overruled a previous standard in a previous precedent. The resulting new precedent dramatically changed the standards under which the petition in question would be adjudicated. Specifically, the Board substituted an objective standard for the previous subjective standard of "substantial investment."

In contrast, the AAO precedent decisions were simply interpreting the published regulations on which the petitioner claims to have relied. 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 distinguished Ruangswang and concluded that the AAO precedent decisions did not involve rule making.

The provision at issue in Ruangswang contained "objective criteria (a \$10,000 investment, and one year's experience or qualified training), which the petitioner had clearly met. There "simply [was] no room for the agency to interpret the regulation so as to add another requirement." [Citation omitted.] By contrast, in applying the precedent decisions here, the INS did not add any requirement. R.L. Investment Limited Partners, supra.

The court further found that the plaintiff had not demonstrated any hardship as the petitioner in that case still had his \$500,000. The petitioner of the instant petition has likewise not demonstrated any hardship to himself. As the record does not reveal that the assignment of his world-wide assets is enforceable should he fail to pay the additional \$400,000, the petitioner has not demonstrated that he has committed his own personal funds. Moreover, the offering provides for the return of the "investment" in the event the petition is denied.

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. The decisions did not impose additional requirements beyond those already set forth by the regulations. Under any proper reading of the language of the regulations, this petitioner is not eligible for classification as an alien entrepreneur.



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 petition will be denied.

ORDER: The appeal is dismissed.