

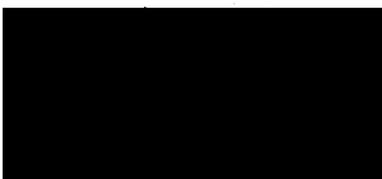


U.S. Department of Justice

Immigration and Naturalization Service

BM

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



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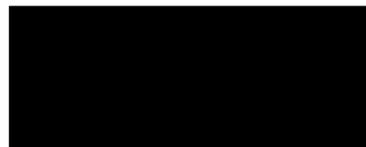
Date: JUL - 9 2001

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)

IN BEHALF OF PETITIONER:



Identifying 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
Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, reopened and affirmed by the director on her own motion, 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).

In her final decision, the director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise or that he would create the necessary employment.

On appeal, counsel argues that the new commercial enterprise could not have been established without the petitioner and that evidence previously submitted demonstrates that the petitioner's investment will create well over the required amount of jobs.

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, Legend Asia Limited Partnership (the Partnership), 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. The petitioner claims the Partnership will be financing the development of a canola oil processing facility by Matrix International (Matrix).

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 Legend Asia Limited Partnership, in which the petitioner became a limited partner on or about February 2, 1999.

The petitioner submitted an attachment to the petition listing 7 limited partners, including himself. It was also stated in the document that the General Partner holds 50 percent ownership of the Partnership and that the limited partners, as a group, will hold the remaining 50 percent. In an accompanying letter, counsel stated that the Partnership had a total of 50 units of shares available for subscription by foreign investors.

The petitioner submitted the Investment Agreement wherein he agreed to become a member of the Partnership and agreed to the capital contribution provisions. The document is signed by the petitioner on January 25, 1999. The document indicates the petitioner would be accepted into the Partnership upon signing the necessary agreements and upon receipt of his capital contribution. On February 2, 1999, the Partnership received the petitioner's funds. Finally, the record contains a Certificate of Limited Partnership for the Partnership dated January 13, 1997.

The director concluded in her initial and final decisions that the petitioner had failed to demonstrate that he had established a new commercial enterprise because he had not participated in the creation of the business as he had joined the Partnership two years after it was created.

On appeal, counsel argues:

[W]e are of the opinion that timing of inception does not and should not affect the spirit behind. Legend Asia Limited Partnership and the canola oil plant could not have been established without the full participation and investments of the investors

who would become the limited partners thereof. It would be impossible to have all the investors in place before the submissions of immigration petitions, and it would be difficult to raise the necessary funding without the petitions being all successful.

Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998) dealt with a similar situation and concluded that while the partnership in that case was "a new commercial enterprise, in that it was formed after November 29, 1990, the petitioner had no hand in its creation and was not present at its inception."

In footnote 29, Matter of Izumii further provides:

It could perhaps be argued that the date of filing of the Certificate of Limited Partnership was not the date of AELP's creation, that AELP is still in the process of being created, and that therefore the petitioner is part of the original creation of AELP. If so, the petition has been filed prematurely; the Act requires that the petitioner "has established" the commercial enterprise already. Accomplishment of a business's purposes would be too speculative if it was based on successfully attracting unidentified future investors.

Matter of Izumii is binding on the Service and the director did not err by applying it to the instant petition. Counsel's argument that it is impossible to organize a pooled investment program where the investors are all identified prior to the filing of the Certificate of Limited Partnership, is not persuasive. In addition to the problems raised in the footnote quoted above, it appears that the instant program as designed might not be able to provide eligibility for all investors. If no business activity takes place and no employment is created for several years while more investors are sought, it is not clear how the Partnership plans to obtain the removal of conditions for its initial investors.¹

In a business venture of this type, the Limited Partnership is conceived of and developed by the General Partner. The General Partner then recruits investors to serve as limited partners. In this case, counsel initially stated the Partnership intended to recruit 50 alien investors thereby assembling capitalization of \$25,000,000. However difficult, in order for all 50 alien limited partners to satisfy the "establishment" provision of § 203(b)(5) of the Act, wherein the limited partnership is presented as an original business pursuant to 8 C.F.R. 204.6(h)(1), the General Partner must complete its recruitment of those investors prior to "establishing" the Partnership. See also Matter of Izumii, supra.

¹ In this case, the petitioner has submitted the immigrant visas for five other co-investors, one of which was issued on September 10, 1997. The petitioner did not invest his own funds until February 1999. As the petitioner contributed his funds prior to filing his petition, the delay cannot be blamed on Service inaction. As of the appeal, the record contains no evidence of any construction, business activity, or employment, despite the 1997 letter to the Service requesting regional center designation asserting construction would begin in the first quarter of 1998. While another petitioner's possible ineligibility to remove conditions is not relevant to the instant petitioner's case, it demonstrates the inherently unworkable nature of this particular investment plan and undermines counsel's argument for an open-ended interpretation of "establishment."

There are additional provisions whereby investors may satisfy the establishment requirement by investing in an existing business. 8 C.F.R. 204.6(h)(2) provides that an alien investor may demonstrate that he or she has purchased an existing business, and restructured or reorganized that business, such that a new enterprise results. 8 C.F.R. 204.6(h)(3) provides that an alien investor may demonstrate that he or she has invested in and expanded an existing business with the result of a 40 percent increase in the net worth or the number of employees of that business. It would be difficult, if not impossible, for a petitioner in a limited partnership, where partners join sequentially, to satisfy either of these requirements.

Due to the inherent nature of a limited partnership, no individual partner or partners purchase the business in its entirety and therefore could not satisfy the establishment requirement under 8 C.F.R. 204.6(h)(2). Additionally, merely adding investment capital to an existing business would not result in any restructuring or reorganizing of the business. If the business were restructured or reorganized so that a new business resulted, it would negate the business plan of any existing investors.

On the Form I-526, the petitioner indicated that the net worth of the Partnership was \$3,000,000 prior to his investment and \$3,500,000 after his investment. Thus, the petitioner's investment did not increase the net worth of the Partnership by 40 percent. Finally, there is no indication the petitioner's investment had created any employment by the time of filing. Thus, the petitioner had not increased employment by 40 percent at the time of filing.

In light of the above, we concur with the director that the petitioner has not demonstrated that he established a new commercial enterprise.

CAPITAL AT RISK

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 regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This

petitioner's de minimus action of signing a lease agreement, without more, is not enough.

...

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

Beyond the decision of the director,² review of the record reveals that the petition was not initially supported with any documentation of business activity. There is no evidence Matrix owns the property on which the canola processing plant will allegedly be built. While the record contains a few letters expressing interest in supplying or exporting canola oil, the record contains no agreements with these companies. In fact, the record does not even contain an agreement between Matrix and the Partnership.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, supra, at 7. At the time of filing, the petitioner had not established that any money contributed to the proposed business was at risk.

EMPLOYMENT CREATION

Regarding regional centers, 8 CFR 204.6(j)(4)(iii) states:

To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

8 CFR 204.6(m)(7) states, in pertinent part:

² An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

Regarding indirect job creation, 8 CFR 204.6(m)(7)(ii) states:

To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

Regarding direct job 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.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, supra, at 19 (finding this construction not to be an abuse of discretion).

The petitioner does not claim and the record does not indicate that the Partnership has generated any employment. 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 petitioner submitted a business plan for Matrix indicating the canola processing plant would require 90 direct employees and would create 324 indirect jobs. The business plan includes a chart reflecting only "preoperational" employees for two years during the construction of the

plant, with 90 factory workers to be hired in the third year. By the fifth year, the plan projects 639 "direct" employees and 1,099 indirect jobs. The 639 jobs include 40 construction workers, three insurance positions, four architects/engineers, seven sales and marketing positions, five legal positions, 90 factory workers, 450 farm workers, and 40 transportation workers.

In her initial decision, the director concluded the business plan was not comprehensive enough to indicate that the petitioner would create the necessary direct job creation. Counsel filed a motion noting that the petitioner had invested in a regional center. The petitioner submitted the previously submitted letter designating Matrix as a regional center and the September 18, 1997 letter to the Service requesting designation as a regional center reflecting that the canola plant would be "implemented" by Matrix and the Partnership.

The director rejected the petitioner's motion as untimely, but reopened the matter on her own motion. In her final decision, the director concluded that the petitioner had failed to provide methodologies supporting his claim of indirect job creation.

On appeal, counsel refers to the above mentioned chart and asserts the plant will require 14 investors initially and 40 investors total to complete the project, requiring the establishment of only 400 jobs.

As stated by the director, the petitioner has not provided any methodologies to explain how he calculated 1,099 indirect jobs. Regardless, many of the "direct" jobs claimed on the chart are actually indirect jobs. The Senate Report July 23, 1992, states:

The Committee intends that in implementing this provision, the Immigration and Naturalization Service will allow immigrants participating in the pilot program to credit not only those jobs which they create directly, but also those which may be created indirectly such as through contract, subcontract, or export revenues benefiting the general economy.

While the 90 factory workers will likely be employees of Matrix, it does not appear that the vast majority of the remaining employees, most notably the hundreds of farm workers, will be direct employees of either Matrix or the Partnership. To allow a petitioner to continue calculating indirect jobs upon indirect jobs indefinitely would negate the requirement for a petitioner to demonstrate indirect job creation by reasonable methodologies. Thus, the claim that the petitioner will create 1,099 indirect jobs is not reasonable as it appears to be calculated by applying some unknown multiplier to a number which already represents indirect job creation.

Moreover, the record strongly suggests that none of the employees projected will be direct employees of the Partnership. Thus, arguably, the 90 factory jobs are merely indirect jobs, and any jobs indirectly resulting from those jobs cannot be credited to the petitioner.

Even if we accepted that the petitioner will ultimately create 639 jobs, whether directly or indirectly, there is no evidence that the petitioner will create a sufficient number of full-time continuous jobs within two years. As the petitioner is the seventh investor and no agreement to

allocate employees has been submitted, the petitioner must demonstrate the creation of at least 70 continuous jobs within two years. The plan calls for few, if any, continuous employees in the first two years of the project. Specifically, the plan calls for only temporary employees in "year 1" and "year 2;" the 80 construction workers are presumably subcontractors working on an as-needed basis. While the pilot program allows a petitioner to rely on indirect job creation, those jobs must still be full-time continuous jobs. As it is not known when construction will begin and the initial employees will mostly be temporary employees, the petitioner has not demonstrated that it is reasonable to conclude that any full-time continuous employment will occur within the two year period as required.

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.