



U.S. Department of Justice  
Immigration and Naturalization Service

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**PUBLIC COPY**

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



File: WAC-97-194-50943 Office: California Service Center

Date: JAN 25 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:



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

Mary C. Mulrean, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The approved immigrant visa petition was revoked by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal.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 revoked approval of the petition finding that the petitioner failed to establish eligibility on several grounds. Relying, in part, on Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), the director found that the petitioner failed to demonstrate that the beneficiary established the new commercial enterprise as required and found that the structure of the investment had not been shown to satisfy the standards of a qualifying capital contribution in these proceedings.

On appeal, counsel for the petitioner argued, in pertinent part, that the Act does not require that the petitioner actually play a participatory role in the establishment of the commercial enterprise and that the petitioner has made a qualifying "all equity" investment of the requisite capital. Counsel further argued that the decision in Matter of Izumii is improper *ad-hoc* rule-making and, if applied, should only be applied to cases filed after its publication.

§ 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 petition for alien entrepreneur classification was filed on July 18, 1997, and was approved on September 3, 1997. The Associate Commissioner for Examinations subsequently published four binding precedent decisions relating to this classification: Matter of Soffici, I.D. 3359 (Assoc. Comm. Ex., June 30, 1998) in June of 1998, followed by Matter of Izumii, I.D. 3360 (Assoc.

Comm., Ex., July 13, 1998), Matter of Hsiung, I.D. 3361 (Assoc. Comm. Ex., July 31, 1998) and Matter of Ho, I.D. 3362 (Assoc. Comm. Ex., July 31, 1998) in July of 1998. The center director reviewed her decision in this case in light of these precedents and issued a Notice of Intent to Revoke approval affording the petitioner the opportunity to respond. After review of the petitioner's response, the center director revoked approval of the petition pursuant to 8 C.F.R. 205.2 on February 3, 1999. Counsel for the petitioner then filed the instant appeal.

The petitioner is described as a native and citizen of China residing in Hong Kong. The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition was based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to \$500,000. The petitioner stated that she is one investor, in a plan to recruit 80 investors, in [REDACTED] Limited Partnership ("VVPH") or (the "Partnership"). The general partner of VVPH is [REDACTED] ("VVL P") or (the "General Partner"). VVL P was described as a "vertically integrated citrus enterprise." Both entities were established in the State of Arizona.

#### **PRECEDENT DECISIONS**

On appeal, counsel argued that the precedent decision(s) on which the director relied was violative of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and constituted improper rule making. The argument is not persuasive.

The immigrant investor classification was first introduced into law with the Immigration Act of 1990 and the Service thereafter published the current implementing regulations for the classification following the notice and comment procedures required by the APA. Petitions seeking the benefit were not widely received for the first several years after enactment. There was a sharp rise in petition receipts starting in approximately FY 1996. The Service observed that provisions of some of these investment plans conflicted with the existing regulations. The Service identified specific fact patterns that required clarification beyond the plain language of the regulations, and ultimately published four precedent decisions as binding guidance in the adjudication of these petitions.

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. They do not represent rule-making requiring notice and comment pursuant to the provisions of the APA. The Associate Commissioner publishes precedents as deemed necessary under authority delegated by the Commissioner of the Service and by the

Attorney General. 8 C.F.R. 2.1. Precedent decisions are binding on all Service officers. 8 C.F.R. 103.3(c). The center director therefore was bound to apply the relevant precedents in adjudicating the instant petition.

Neither was it improper to apply the precedents to a petition that was filed prior to the date they were issued. The precedents interpreted the existing regulations. Those regulations were in effect prior to the filing of the instant petition and were enacted with a formal notice and comment period. Therefore, the center director acted properly in applying the findings in Matter of Izumii et al to any pertinent case before her.

Furthermore, application of the precedent decisions has been upheld by federal courts. 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. The District Court for the Western District of Washington reached a similar conclusion in an unreported decision. Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000).

The additional argument that some similar immigrant investor petitions were approved by the Service prior to the precedents being issued is immaterial to the director's findings in the instant case. The Service is not bound to treat acknowledged past errors as binding. See Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327 (9th Cir. 1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517-518 (1994); Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987). In the same manner, the AAO is not bound by past unpublished appellate decisions which may have been issued in error. Nor are Service officers inexorably bound by internal memoranda or by written responses to inquiries from the legal community. The legal opinions from the Service's Office of General Counsel cited by counsel are opinions prepared at the request of the Associate Commissioner to assist in developing adjudicatory policy. The publication of a precedent decision in a subject area supersedes any previous non-binding guidance in that subject area and represents the Service's final interpretation of the regulations pertaining to the facts presented. See 8 C.F.R. 103.3(c).

The further argument that any corrections to adjudicative decision making was improper or that an administrative agency is bound by past erroneous decisions is not tenable. That is simply the process by which any administrative agency inevitably performs its function over time. See National Labor Relations Bd. v. Seven-up Bottling Co. of Miami, 344 U.S. 344, 349 (1953). For these reasons, it is reiterated that the four pertinent precedent decisions issued by the Associate Commissioner were properly issued and the center director was correct in relying on those decisions.

Therefore, counsel has failed to sustain his argument that the director's decision should be reversed because the precedents on which the director relied were unlawful, improperly issued, and may not be applied "retroactively."

**ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE**

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

- (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 C.F.R. 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 C.F.R. 204.6(j)(4)(ii).

The first issue is whether the petitioner "established" VVPH as the new commercial enterprise within the meaning of the Act.

On appeal, counsel argued that VVLP had made extensive presentations to the California Service Center and senior INS personnel regarding the nature of the investment plan from 1993 through 1995 and that its previous petitions had been approved. Counsel stated that VVLP relied on the Service's action in not taking the wording of the statute literally, as it pertains to "establishment," and accepting the sequential enrollment of investors. Counsel argued that nowhere in the regulations does the Service require that a petitioner must have played a participatory role in the establishment of the new commercial enterprise. Counsel cited 8 C.F.R. 204.6(g)(1), relating to multiple investors, and argued:

**"The establishment"** (emphasis added) of a new commercial enterprise may be used as the basis of a petition, not

that each investor in a multiple investor enterprise must have "participated in the establishment" of the enterprise.

Counsel further argued:

Because the business reality is that it is virtually impossible for businesses who put together pooled investments such as a limited partnership to first secure a pool of investors committed to go forward with an investment before establishing the business entity itself, the Service has interpreted the "has established" requirement flexibly and concluded that an investor meets this requirement and can thus qualify for alien entrepreneur classification even though he/she is joining a new commercial enterprise after its actual initial establishment as a business entity.

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Von Verde is not relying only on the opinions of "a few Service officials" as stated in the Izumii decision, but established practice, policy, INS memoranda, and assurances made and issued by the most senior INS officials charged with implementing the law. Von Verde has also relied specifically on INS clearances in 1994, and again in 1995 after exhaustive reviews of the project as a whole...

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First of all, the "establishment" aspects of the Izumii decision is [sic] so inconsistent with the INS's previously expressed interpretation of law and its own regulations and the CSC's action in never raising the establishment issue...that it is not only arbitrary and capricious but violative of the Administrative Procedure Act...

Secondly, Izumii does not bind the INS to conclude that a Von Verde petitioner such as Ms. Poon has failed to meet the "establishment" requirement for purposes of EB-5 classification as this new interpretation can be applied, if the Service insists on standing behind this interpretation, only on a prospective basis to cases filed after the publication date of the Izumii decision. As a matter of basic fairness it most certainly should not be applied to a case such as Ms Poon's...

Documentation of counsel's statements regarding past adjudicative practice of petitions filed by VVLP in 1994 and 1995 and assurances

of INS officials are not part of the instant record. Nevertheless, as conceded by counsel and as discussed in the preceding section, the plain language of § 203(b)(5)(A)(i) of the Act states that a petitioner must show that he or she is seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise that the alien **has established**. (emphasis added.) In Matter of Izumii, supra, this language was affirmed by stating that "in order for a petitioner to be considered to have established an original business, he or she must have had a hand in its actual creation."

The argument that the decision is impermissibly inconsistent with past Service interpretation is not persuasive. The fact that previously filed petitions of the General Partner were approved in error, does not bind the Service to keep repeating that error. The Service, or any administrative agency, is not bound to treat acknowledged past errors as binding. See Chief Probation Officers of Cal. v. Shalala, supra; Thomas Jefferson Univ. v. Shalala, supra; Sussex Engineering, Ltd. v. Montgomery, supra.

As discussed in the preceding section, the argument that the Service cannot apply the precedent retroactively is not persuasive. To the contrary, the proper remedy of past erroneous approval of visa petitions is to assure that only those lawfully eligible for an immigration benefit receive that benefit. The Act, however, allows for rescission of adjustment of status only within five years of adjustment. § 246 of the Act, 8 U.S.C. 1256. Therefore, the only available remedy is to correct the past error with those cases still pending.

Counsel's explanation of VVLP's reliance on past Service practice is acknowledged. However, the argument that the Service should continue a practice that is in violation of the plain language of the Act as a remedy for the petitioner's reliance on the alleged past practice is without merit.

The new commercial enterprise at issue here is VVPH. VVPH was established on February 9, 1996. The petitioner did not execute the "subscription agreement" and "secured promissory note" until June 27, 1997. Therefore, it cannot be said that the petitioner had any hand in the creation of VVPH and thereby did not establish a new commercial enterprise within the meaning of the Act.

#### **QUALIFYING 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. All capital shall be valued at fair market value in United States dollars.

*Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

*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.

Counsel asserted that the petitioner has made an investment of \$500,000 in the form of a \$250,000 cash deposit and transfer of "one unit" of an entity called Ranch 1100 valued at \$250,000. The purchase of the unit of Ranch 1100 was financed by a promissory note with the seller.

The director concluded that the transfer of the unit of interest secured by a promissory note did not constitute a qualifying contribution of capital. The director noted that, pursuant to Matter of Izumii, payments on a promissory note must be substantially complete within the two-year period of conditional residence. The director rejected the payment schedule of the petitioner's promissory note of two annual payments of \$20,000 and a final balloon payment of \$190,000 which would not commence until two years after approval of the petition. The director also found that a redemption clause in the investment agreement was disqualifying pursuant to the findings in Izumii. The director also found that the petitioner had not adequately established the fair market value of the unit of interest in Ranch 1100 as required by 8 C.F.R. 204.6(e).

On appeal, counsel asserted that the unit interest in Ranch 1100 was a transfer of tangible property qualifying as a capital contribution. Counsel then argued that the schedule of payments was not disqualifying:

...the CSC demonstrated its total confusion and inability to grasp the difference between an "equity" investment and a "debt" investment.

Counsel argued that the full \$500,000 of capital was at risk in the new commercial enterprise and that the schedule of payments is irrelevant.

Counsel further argued that there is no redemption agreement in its partnership agreement with "Class C" investors, such as the petitioner. Counsel further argued that an appraisal was submitted valuing the land held by Ranch 1100 at \$8.2 million adequately establishing its fair market value.

#### Ranch 1100

Counsel asserted that the petitioner purchased a unit of interest in Ranch 1100 valued at \$250,000, transferred that unit to VVPH, and that that transaction constitutes a qualifying investment of capital. The argument is not persuasive.

Ranch 1100 is an entity operating approximately 900 acres of agricultural land in Yuma County, Arizona. An appraisal of the land was submitted reflecting a valuation of approximately \$8.2 million. To support the petition, the petitioner submitted copies of the Contract for Sale of the unit, the Secured Promissory Note, and a certificate reflecting the petitioner's ownership of one of thirty-five "units" of Ranch 1100, an Arizona General Partnership. It was stated that the seller was an individual, [REDACTED] who holds 49 percent interest in the partnership. It was further stated that VVLP is the principal owner, thereby indicating that VVLP holds the remaining 51 percent.

Counsel essentially argued that the investment of one unit of interest in Ranch 1100 is an investment of tangible property rather than indebtedness secured by assets owned by the alien entrepreneur. Counsel therefore contends that the findings in Matter of Izumii relating to indebtedness are not applicable.

The "tangible property" constituting the petitioner's claimed investment, represented by the certificate of one unit of interest in Ranch 1100, was "purchased" with an unsecured promissory note with no money down and no payments due for two years. The record reflects that 35 such units have been or will be sold to petitioners and those units "invested" in VVPH.

As noted by the director, this is not an arms-length transaction. While counsel stresses the sale was concluded by Mr. [REDACTED], as an individual, the role of VVLP, as principal shareholder in Ranch 1100, is not reflected in the documentation of the sale.<sup>1</sup>

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<sup>1</sup> It is noted that section 8.1(a)(xiv) of the Agreement of Limited Partnership of VVHP, regarding redemption, contains the authority to "cancel any outstanding Secured Capital Contribution

Contrary to counsel's argument, rather than constituting an "equity investment," the transaction more closely resembles a debt arrangement between the petitioner and Ranch 1100 whose principal shareholder is VVLP. As a debt arrangement, the regulations and the findings in the precedent decisions are clearly applicable.

For a promissory note to constitute capital, it must be secured by assets belonging to the petitioner. 8 C.F.R. 204.6(e) (definition of "capital"). In addition, the assets must be specifically identified as securing the note, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, and the assets must be fully amenable to seizure by a U.S. note holder. Matter of Hsiung, supra. Pursuant to Matter of Izumii, a petitioner must substantially complete payments on the promissory note prior to the expiration of the two-year conditional period of permanent residence in order for the promissory note to be considered a qualifying contribution of capital. See 8 C.F.R. 216.6(a)(4)(iii).

After careful review of the record, the director's finding that the unsecured promissory note and the schedule of payments are disqualifying is affirmed.

#### Fair Market Value

In addition, the promissory note does not meet the definition of "capital." Even if it did, the regulations at 8 C.F.R. 204.6(e) further provide that all capital must be valued at fair market value in U.S. dollars. Contrary to some of the discussion in the record, the documentation indicates that the petitioner purchased an interest in [REDACTED] as an entity, not a specific interest in a certain plot of agricultural land. The petitioner did not submit documentation of the financial status of [REDACTED], such as its tax returns or its financial records. There is no evidence of its debt, liabilities, or liens on its assets. A valuation of its total land holding, as its principal asset, is not sufficient to determine the value of an interest in the entity known as Ranch 1100. Therefore, the fair market value of one unit of interest in Ranch 1100 cannot be determined.

#### Redemption Agreement

Counsel argued that the redemption provision found at section 8.1(a)(xiv) of the partnership agreement is not applicable to the instant petitioner, a "Class C" subscriber.

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Note that otherwise would be due in respect of such Unit." This authority reflects that both VVLP and VVHP are interested parties in the sale of the units in Ranch 1100.

However, that provision states that the General Partner may redeem the interest "from any Limited Partner in its discretion." The clause contains no stated restriction regarding the class of membership of the limited partner. Therefore, counsel's argument is not persuasive.

As stated in Matter of Izumii, supra, an alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can she be assured that she will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of the cash payments under a promissory note, an alien investor may not enter into any agreement granting her the right to sell her interest back to the partnership.

The petitioner here has already entered into such an agreement. It is noted that the redemption provision in the VVPH partnership agreement may be distinguished from the provisions of the redemption agreement found in Izumii. The limited partner may not compel the general partner to buy back his or her interest. However, the general partner may purchase that interest at any time at a price "fixed by the General Partner in its sole discretion." This agreement demonstrates that the petitioner's investment is not at-risk as contemplated by the regulations.

#### Cash

The remainder of the petitioner's investment is a claimed cash transfer of \$250,000. In support of this claim, the petitioner furnished an Application for Funds Transfer from the Ka Wah Bank Ltd. (location not identified) and a copy of a wire transfer from the Bank of America, Yuma, Arizona.

The Application for Funds Transfer was executed on an account of [REDACTED] Ltd., a Hong Kong company partially owned by the petitioner's spouse. A corporation is a separate and distinct legal entity from its owners or stockholders, regardless of the number of shareholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; AG 1958). Accordingly, any assets transferred from Engloway Investments, Ltd. cannot be considered an investment of personal assets of the petitioner.

The wire transfer notice only indicates a transfer of \$250,000 "originated" by the petitioner. The transfer notice identifies the "payee bank info" only with an account number. There is no evidence that the originating bank account belonged to the petitioner. In addition, the notice states that a \$15 fee was deducted from the \$250,000. While arguably a relatively

insignificant amount, the resulting transfer of \$249,985 is less than the minimum required amount.

For these reasons, the petitioner has failed to establish adequately that she invested \$250,000 cash of her personal assets into VVPH as claimed.

#### **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.

To demonstrate the source of the petitioner's funds, documentation was submitted relating to companies held, in whole or in part, by her spouse, joint bank account balances, and documentation of real property holdings in Hong Kong. The petitioner also submitted verifications of having no criminal record in Hong Kong.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, supra, at 6; Matter of Izumii, supra, at 26. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. Matter of Izumii, supra, at 26. Simply going on record

without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner failed to submit copies of her tax returns for the five years preceding filing. This documentation is required by the above regulation. The financial status of a company does not determine the income of its shareholders. Nor does documentation of foreign real property holdings show the source of any funds invested in a United States enterprise. Therefore, it must be concluded that the petitioner has failed to establish the source of the capital she claims was invested into VVPH and thereby failed to establish its lawful source.

Furthermore, in the case of a new commercial enterprise involving multiple investors, it is incumbent on each petitioner to identify the source of all investment capital and demonstrate that it has been obtained by lawful means.

8 C.F.R. 204.6(g)(1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.** (Emphasis added.)

Based on the petitioner's assertions, VVPH has 80 investors. The petitioner bears the burden to identify the source of investment capital from all of these investors and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition. There is no evidence identifying the source of the investment capital of the other alien investors or of the General Partner. The petitioner therefore failed to meet the requirements of 8 C.F.R. 204.6(g)(1) and the petition may not be approved on this basis as well.

#### **THE EMPLOYMENT-CREATION REQUIREMENT**

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(g) deals with multiple investors and states, in pertinent part:

(1) The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time employees.

(2) 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.

The record indicates 80 alien investors in VVPH. This number of investors necessitates the creation of at least 800 permanent full-time positions for eligible United States workers. In a document describing the scope of VVLP's business dated October 18, 1995, a projection of 1997 employment was submitted. The projection was for a total of 900 workers with 130 employed at the packing house, 700 employed in harvesting, and 40 employed in support roles.

There is no evidence that the harvesting of lemons in south-western Arizona is a year-round occupation. Most agricultural labor employed in harvesting and packing of crops is seasonal. Therefore, there is no evidence that the 700 projected harvesters or the 130 projected packers would be year-round employees. It is noted that combining part-time or seasonal positions to estimate the "full time equivalent" of employment is not an acceptable

method of calculating job creation. 8 C.F.R. 204.6(e) (definition of "full-time employment"). Accordingly, it must be concluded that the petitioner has failed to establish that the requisite employment creation would occur as a result of the proposed investment of the petitioner or her fellow limited partners.

#### MANAGEMENT

8 C.F.R. 204.6(j) (5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

On review of the record, it must be concluded 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 Uniform Limited Partnership Act ("ULPA") he or she is sufficiently engaged in the management of the partnership. In this case, section 8.2 of the Partnership Agreement purports to grant the Limited Partners the normal rights of a limited partner under the ULPA. Under Section 12.1 of the Partnership Agreement, however, all limited partners irrevocably appoint the General Partner as their attorney-in-fact and agent with full power and authority to place and stand to execute, acknowledge and deliver and to file or record in any appropriate public office any certificate or other instrument necessary for the Partnership or any amendments to the Partnership Agreement. 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 Section 8.2, 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 and is not engaged in the management of the enterprise.

### **CONCLUSION**

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because she has failed to establish a qualifying capital investment of the requisite amount, has failed to demonstrate that she has established a new commercial enterprise, has failed to show that she has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of her investment capital and show that it was obtained through lawful means, has failed to demonstrate that the investment will result in the requisite employment creation, and has failed to demonstrate that she would be involved in the management of the new commercial enterprise. For these reasons, the petitioner has failed to establish eligibility for immigrant entrepreneur classification under § 203(b)(5) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.