



B1

U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

File: [Redacted]

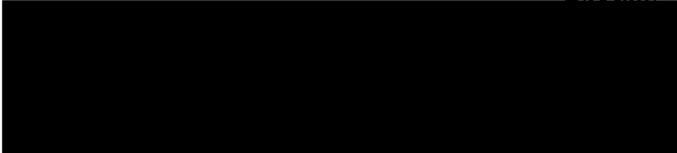
Office: Texas Service Center

Date: JUL 6 2001

IN RE: Petitioner: [Redacted]

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

IN BEHALF OF PETITIONER:



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, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The preference immigrant visa petition was denied by the Director, Texas Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

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 she had established a new commercial enterprise or that she had placed the necessary capital at risk.

On appeal, prior counsel, who represented the petitioner until October 2000, argued the petitioner established a new commercial enterprise by expanding an existing business by more than 40 percent and that the petitioner had invested \$1,800,000, all of which was placed at risk. The petitioner's current attorney inquired into the status of the case and requested a final decision.

The Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, dismissed the appeal, concluding that the petitioner had not demonstrated that she had expanded an existing business, that her funds had been placed at risk and made fully available to the employment-creating entity, or that the remaining funds were obtained from a lawful source.

On motion, counsel submits substantial documentation addressing the concerns set forth in our previous decision.

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).

#### **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 she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise at issue here is Columbus Hotel Partners, Limited Partnership (CHP), in which the petitioner became a special limited partner on September 30, 1999.

On August 23, 1999, CHP amended the limited partnership agreement to include a new limited partner, bringing the total capital to \$4,500,000. On September 29, 1999, the Partnership resolved to return \$300,000 in capital to one of the limited partners. On September 30, 1999, the petitioner executed a subscription agreement in which she was admitted as a special limited partner in exchange for an investment of \$1,800,000. Her admission was contingent upon a third amendment removing any managerial rights of the other limited partners and giving the special limited partner and general partner sole control over the partnership and the acceptance of the attached business plan calling for renovations to the hotel and a change of franchise.

The director stated that the petitioner must establish an increase in the net worth of the employment creating enterprise, the hotel. The director concluded that the petitioner had not done so, and, thus, had not established a new commercial enterprise.

On appeal, prior counsel argued that the regulations include partnerships in the definition of commercial enterprise, and that the petitioner need only demonstrate an increase in the net worth of the partnership. Prior counsel cited the discussion of the payment of partnership expenses in Matter

of Izumii, I.D. 3360 (Assoc. Comm., Examinations, June 30, 1998), for the proposition that it is the partnership which is the new commercial enterprise.

The AAO rejected prior counsel's argument and relied upon a case more on point, Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998). That case involved the purchase of an existing hotel, as is at issue in this case. The AAO held that it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Id. at 10. Therefore, the director was correct in stating that the petitioner must show her investment increased the net worth of the employment-creating enterprise by 40 percent. In this case, the employment will be created by the hotel. However, as asserted by prior counsel, the partnership purchased the hotel and its sole purpose is to operate the hotel. As the hotel appears to be a wholly-owned asset of the partnership, the net worth of the hotel is included in the net worth of the partnership. In other words, the new commercial enterprise is the partnership and the hotel. Including the hotel as part of the new commercial enterprise, however, does not necessarily change the net worth of the new commercial enterprise; the increased value of the hotel as an asset is offset by the liability of the mortgage.

The AAO noted that while the petitioner had provided audited income statements, the petitioner had not provided audited balance sheets or tax returns reflecting the net worth as of September 29, 1999.

On motion, counsel submits a balance sheet for September 26, 1999. Counsel argues that a tax return reflecting information as of September 29, 1999 cannot be obtained due to the annual nature of tax returns.

Where a petitioner claims to have established a new commercial enterprise by expanding the net worth of an existing business, it is the petitioner's burden to establish the net worth of the business both prior to and subsequent to her investment. The Service does not, however, require an exact daily accounting. The balance sheet submitted on motion demonstrates a net worth of \$4,471,316 on September 26, 1999. The petitioner has demonstrated that on September 29, 1999, that net worth would have decreased by \$300,000 due to a return of investment to one of the limited partners. On the same date, the petitioner contributed \$1,800,000 to the enterprise. Thus, on that date, the net worth would have been \$4,171,316 and the petitioner's investment would have increased it to \$5,971,316, an increase of just over 40 percent.<sup>1</sup>

In light of the above, the record now contains evidence that the petitioner expanded an existing business by 40 percent and, thus, established a new commercial enterprise according to 8 C.F.R. 204.6(h)(3).

---

<sup>1</sup> Not only does the petitioner meet the letter of the law by increasing the net worth of the Partnership, the petitioner's funds were used to renovate the hotel, purchased with other funds, thus increasing the individual net worth of the employment-generating entity in a way which increased the job potential of the hotel.

**CAPITAL AT RISK**

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

*Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

*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)(2) states:

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.

In support of the petition, the petitioner submitted her subscription agreement in which the petitioner agreed to contribute \$1,800,000 and the Partnership agreed to spend the same amount for capital improvements to the hotel, and a Funds Transfer Statement indicating that the petitioner had transferred \$1,800,000 to the Partnership's account at Harris Bank on September 29, 1999. The business plan calls for \$2,500,000 in renovations.

In response to a request for additional documentation, the petitioner submitted a resolution dated December 31, 1999 resolving to spend the petitioner's capital investment on renovations; a memorandum from Paul Conkle, the hotel's controller, asserting the petitioner's funds are being used for renovations; a punchlist of improvements mandated by Ramada; an agreement with Ramada to operate the hotel as a Ramada franchise; numerous invoices; several checks issued on the Partnership's account with the Fifth Third Bank; a letter from accountant Robert M. Jamieson indicating that the Bronfman Trust, the source of the petitioner's funds, acts as a banker for some partnerships related to the Bronfman family; and a Bronfman trust general ledger entitled "Deposit from Columbus Hotel Partners, L.P." showing credits of \$1,525,245 and debits of \$1,413,025 for September 1999 through December 1999.

The director, relying on Matter of Ho, supra, noted that the petitioner, as the only special limited partner and the only member of the general partner, exercised sole control over the Partnership's accounts. Therefore, the director concluded, a mere deposit in the partnership's account did not indicate those funds were at risk. While acknowledging that renovations were taking place, the director further concluded that the petitioner had not established that her funds, and not the funds of the other investors, were being used to finance the renovations. The director noted that the petitioner had not established that the previous investors' funds all went towards the purchase price of the hotel.

On appeal, prior counsel asserted that the initial partnership funds were all spent on the closing costs and purchase price of the hotel, and, therefore, any renovations must have been financed by

the petitioner's funds. Prior counsel asserted the evidence submitted in response to the request for additional evidence was sufficient. Prior counsel submitted a chart purporting to document all of the renovations purchased to date for a total of \$3,736,947, \$2,494,419 of which had been paid.

The AAO found that the director's reliance on Matter of Ho, supra, was misplaced. Unlike that case, the petitioner in this case has invested with other investors, the new commercial enterprise has undertaken meaningful business activities, and, while the petitioner may be in control of the business, the petitioner is not in sole control of the finances. However, the AAO raised concerns that the record contained certain inconsistencies which indicated that the petitioner's funds were not placed at-risk.

The AAO was concerned that the petitioner had not documented that the \$4,487,152 wired from CHP's account on August 25, 1999 was used to pay the down payment for the hotel. The AAO further concluded that the petitioner had not demonstrated that her funds were applied towards the renovation of the hotel or satisfactorily traced her funds among the three CHP accounts.

On motion, counsel provides evidence that CHP transferred the \$4,487,152 to the title agent's escrow account for the purchase of the hotel. Counsel further argues that the petitioner need not demonstrate that her funds can be traced to the payment of renovation expenses, and that she only need demonstrate an increase in net worth of 40 percent.

We strongly disagree with counsel's argument. While the record now demonstrates that the petitioner deposited \$1,800,000 into the Harris Bank account, \$1,500,000 of which was subsequently transferred to the Bronfman Trust account in CHP's name, the petitioner must still demonstrate that her funds were made available to the employment-creating entity and placed at risk. Prior to the motion, the record contained no evidence that the funds transferred to and subsequently debited from the trust account were being applied towards business expenses. Thus, there was no evidence that the petitioner had placed her funds at risk and made them available for CHP expenses.

Despite counsel's argument that additional documentation was unnecessary, he did supply evidence that the funds debited from the trust account were transferred to CHP's operating account and applied to business expenses. As such, the record now demonstrates that the funds were used for business capital expenses and, thus, properly placed at risk.<sup>2</sup>

### **SOURCE OF OTHER FUNDS**

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

---

<sup>2</sup> Counsel refers to additional "loans or advances" from an additional trust. As debt arrangements between a petitioner and the new commercial enterprise are prohibited by 204.6(e)(definition of invest) those funds cannot be considered part of the petitioner's investment.

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.)

The AAO also raised the issue of the lawful source of funds of the other investors, noting that without the wire transfer receipts it was not possible to determine that those funds originated from the companies identified as limited partners on schedule A of the Partnership Agreement. On motion, the petitioner submitted additional documentation confirming that the petitioner's co-investors are legitimate corporations.

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 met that burden.

**ORDER:** The decision of February 15, 2001, is withdrawn, and the petition is approved.