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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: WAC-99-227-51910

Office: California Service Center

Date: MAY 16 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:

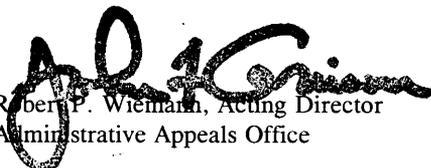
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied 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 determined that the petitioner had failed to demonstrate that his investment would directly or indirectly create at least 10 jobs.

On appeal, the petitioner submits a new job creation report prepared by the Seattle Research Institute.

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, ASPI Commerce Park II, LLC (ASPI II), doing business as Global Infrastructure and Export, 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.

REGIONAL CENTER ACTIVITIES

8 C.F.R. 204.6(m)(7) states, in pertinent part:

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.

(i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States;

8 C.F.R. 204.6(m)(4) provides that regional centers must submit proposals to the Service in order to obtain approval to participate in the pilot program.

In support of the petition, counsel asserted that the coordinating managing member, ██████ Group, Inc., was a designated regional center. On December 10, 1999, the director requested evidence supporting that assertion.

In response, the petitioner submitted the 1994 letter issued to ██████ Group, Inc., designating the corporation as a regional center. The record does not, however, include the proposal submitted to the Service including the proposed regional center activities upon which the designation was based.

A company cannot qualify under the pilot program simply by demonstrating that its management includes a designated regional center. The company must be formed for the purpose of conducting regional center activities.

It is not the intention of the Service to encourage entities to obtain regional center status based on a few qualifying projects, only to have these entities treat their status as a license to engage in a variety of unrelated activities. Such new activities, had they been mentioned in the original application for regional center status, may or may not have had an adverse impact on the determination to grant regional center status. If the Service were to accept a regional center's expansion into any and all new projects, petitioners would effectively be able to bypass the requirements of 8 C.F.R. 204.6(j)(4) regarding the submission of evidence to prove the direct creation of employment; petitioners could apply the easier standard of proof contained in the provisions relating to the indirect creation of employment without having to demonstrate the connection between the new projects and the requisite increased regional productivity.

As the record does not contain the proposal which resulted in the approval of regional center status, it is not known whether the project upon which the instant petition is based was part of that proposal submitted back in 1994. Therefore, we cannot conclude

that the alleged commercial enterprise will be engaging in regional center activities.

EMPLOYMENT CREATION

8 C.F.R. 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 C.F.R. 204.6(m)(7) states, in pertinent part:

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 C.F.R. 204.6(m)(7)(ii) further 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.

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, CIV-F-99-6117, 19 (E.D. Calif. 2001) (finding this construction not to be an abuse of discretion).

The business plan states that [REDACTED] II will specialize in "developing industrial properties in Grant County and sell [sic] the developed land to industrials & manufacturers that do business involving exports." The business plan further estimates that the company will sell the property for \$2 - \$3 per square foot. Relying on the building code which permits one employee for every 500 square feet of warehouse, the plan concludes a 25,000 square foot industrial building will create at least 50 indirect jobs. The business plan further estimates that the development costs by 2003 will amount to \$3,031,500 while sales will total \$6,300,000 during the same period.

In support of the business plan, the petitioner submitted an estimate of \$1,116,655 for the development of the property and the 1991 Uniform Business Code requiring 500 square feet per employee (but cautioning that the table should not be used to determine working space requirements per person). The petitioner also submitted a June 10, 1999 letter from the Seattle Research Institute regarding a proposal to:

Conduct micro economic research to specifically identify at least 50 direct and indirect positions that have been created in Grant County from July 1999 to June 2001 resulting from the ASPI Commerce Park II 70 acre industrial park.

Finally, the petitioner submitted several letters of support from various government authorities and legislators as well as several articles regarding the Moses Lake area in general and the proposal submitted to NASA for the building of a "spaceport" for its future VentureStar vehicle, planned for 2005.

On December 10, 1999, the director requested the Seattle Research Institute's final report on job creation. In response, the petitioner submitted a letter from the Seattle Research Institute indicating:

Currently Global Infrastructure & Export is in the process of developing warehouse space at ASPI Commerce

Park II near the Port of Moses Lake. The new development will be capable of accommodating the needs of up to 250,000 square feet of warehouse space, which could employ as many as 500 new workers. At a minimum, 25,000 square feet of warehouse space should be completed and occupied by July 2001, employing between 40 and 50 new workers.

Seattle Research Institute's previous economic analysis of the business climate in Grant County and of the business potential at the Port of Moses Lake indicates a potential growth of over 5,000 new jobs in Grant County if adequate facilities can be made available. Global Infrastructure & Export's investment in warehouse infrastructure will directly lead to the realization of a portion of these potential jobs.

Global Infrastructure & Export is currently in contact with several subcontractors for Genie Industries (Genie recently located a manufacturing facility in Moses Lake) and a retail distribution firm that are interested in the warehouse space under development. It is also reasonable to expect that other retail distributors will find this location desirable. Seattle Research Institute anticipates a high rate of occupancy once the warehouse development project is successfully completed.

The director concluded the record did not adequately establish that the indirect jobs would result from export revenues and that the petitioner had not provided sufficient methodologies.

On appeal, the petitioner submits a job creation report prepared by the Seattle Research Institute. The report identifies the advantages for export companies to locate to the Moses Lake area, estimates \$500,000 will create 14,788 square feet of warehouse space, enough for 24 employees. The report then concludes that for each job, another three jobs will be indirectly created, amounting to 72 jobs per investor. The report asserts that three indirect job per every direct job is suggested by the Grant County Economic Development Council and is a "well accepted multiplier." The appendix to the report includes general information regarding the project, economic situation in Grant County, and efforts to market the developed property. Nothing in the appendix supports the multiplier used in the report.

In addition, it appears from the June 10, 1999 letter that the Seattle Research Institute was retained not to reach its own conclusions regarding indirect job creation, but to "identify" the necessary number of jobs. Moreover, the report calculates indirect job creation on top of the indirect jobs initially claimed. The projected employees at the warehouse will not be employees of [REDACTED]

II. Rather, the initial claim appears to be that the development and sale of the industrial property will indirectly result in job creation by the companies which purchase the property. The report then multiplies those numbers by three, adding another, unacceptable layer of indirect job creation.

As discussed below, the regulations require that a petitioner invest in a commercial enterprise, defined as an ongoing for-profit activity. Section 610 of the Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1993 (which created the pilot program) provides that a petitioner must still meet the remaining requirements under 203(b)(5) of the Act and that the indirect jobs must result through revenues generated from increased exports.¹ 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.

It is clear that indirect job creation means jobs which result from the ongoing productivity of the new commercial enterprise. For example, a manufacturer of widgets will necessitate truckers to move the widgets and perhaps retailers to sell the widgets. A new conference center may give rise to nearby hotels.² Indirect job creation does not include the development of industrial property to be passively sold to an entirely unrelated company which may hire new employees but which will be unaffected by the future activities and revenues of the new commercial enterprise. The petitioner's financial risk must be tied to the creation of any indirect jobs, encouraging the maintenance of those jobs by the petitioner. In this case, [REDACTED] II will merely develop property as a passive, non employment-generating real estate investment, sell the property to

¹ The law was recently amended to include revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment." Regardless, the law was amended after the petition was filed and still requires that the indirect jobs result from revenues resulting from the pilot program.

² These examples are used to demonstrate possible ongoing indirect job creation. They are not inclusive and in no way imply that every manufacturer of widgets or conference center would be able to demonstrate the necessary job creation.

another business over which [REDACTED] II will have no influence, economic or otherwise. In fact, according to the certificate of formation, [REDACTED] II will cease to exist once it has sold the property.

If we accepted the petitioner's theory of indirect job creation, conceivably a petitioner could form a company in a regional center, develop some property, sell it to another company, dissolve the development company prior to having his conditions removed, but still obtain removal of conditions because someone else is employing 10 people on the property he developed two years ago.

The letters submitted all pertain to the development, research, and marketing activities of [REDACTED] Group, Inc. [REDACTED] Group, Inc., however is only the coordinating member manager of [REDACTED] II. The record does not reflect that [REDACTED] II will be involved in any of these projects besides the development and sale of a single piece of property.

In light of the above, the petitioner has not established that he will indirectly create 10 jobs. The petitioner does not claim and has not documented that he will create 10 direct jobs. Thus, the petitioner has not met the employment-creation requirement.

ESTABLISHMENT OF A COMMERCIAL ENTERPRISE

8 C.F.R. 204.6(e) provides:

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 subsidiary is engaged in a for-profit formed for the ongoing conduct of a lawful business.

(Emphasis added.) Beyond the decision of the director, the business plan clearly indicates that [REDACTED] II was formed for the purpose of developing and selling a limited amount of property. The certificate of formation indicates that once the assets are sold, the company will be dissolved. Thus, the company was not formed for the ongoing conduct of lawful business, but, rather, to conduct one passive real estate investment. Therefore, the petitioner has not demonstrated that he established a commercial enterprise as defined by the regulations.

Finally, it is acknowledged that the Limited Liability Company Agreement for [REDACTED] II provides that if the company is determined not to be a commercial enterprise, it will automatically convert to a limited partnership. Operating the company as a limited partnership, however, will not resolve the issue of whether the company was formed for the ongoing conduct of lawful business.

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.

Moreover, while not discussed by the director, the petitioner will not be engaging in the management of the enterprise. Section 5.1 provides that there is one class of membership, and that the member managers shall each have voting rights. Section 5.2 provides that:

The day-to-day ordinary and usual decisions concerning the business affairs of the Company shall be made by the Member Managers who may choose to delegate certain operational tasks to the Coordinating Member Manager.

The final paragraph of Article VI, Authority of Member Managers to Bind the Company, provides:

The Member Manager's signature at the end of this document shall act as a ratification, resolution, and/or Limited Power of Attorney of the Member Manager and in favor of the Coordinating Member Manager's authority to act in the manner described above.

Despite the superficial language in sections 5.1 and 5.2, it is clear that the petitioner here does not, in fact, have any managing rights. As such, the petitioner is a purely passive investor.

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.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. 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).

While not discussed by the director, the record does not completely document the source of the petitioner's funds. The record reflects that the petitioner's wife has owned and operated a company since February 3, 1988, that the petitioner obtained an engineering degree in 1977, that the petitioner and his wife have a trust fund and real estate, and that the petitioner's wife transferred \$550,000 to Global Infrastructure and Export on August 12, 1999. The record is absent, however, historical evidence of the accumulation of wealth, such as five years of tax returns.

SOURCE OF OTHER FUNDS

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.)

While the petitioner has provided the resumes of his fellow investors, he has not provided supporting documentation regarding the lawful source of their funds.

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.