

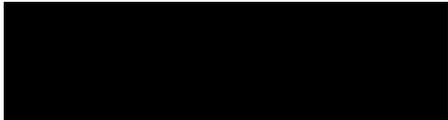


BT

U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted
prevent clearly unwarranted
invasion of personal
privacy

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



File: [Redacted] Office: Texas Service Center Date: 14 AUG 2002

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:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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, Director
Administrative Appeals Office

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

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 an investment of the required amount of lawfully obtained funds in a targeted employment area or that he had or would create the necessary employment.

On appeal, counsel argued that the director erred in his conclusion but failed to support her arguments with substantive arguments applying the law to the facts. The petitioner did submit new evidence on appeal, which was considered.

On April 9, 2001, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, dismissed the appeal. In a 15 page opinion detailing the many documentary deficiencies in the record, the AAO concluded that while the petitioner had overcome the issue of whether or not the investment was in a targeted employment area, the petitioner had not overcome the director's other concerns. The AAO also determined that since the record contained no documentation whatsoever on how the petitioner acquired his location, equipment and inventory, the Service could not determine whether he had established a new commercial enterprise as defined in the regulations.

On motion, counsel asserts that the AAO inappropriately applied the law and that the analysis "was inconsistent with the information provided." As on appeal, however, counsel provides no support for that assertion. For example, counsel does not provide her own analysis of the facts and explain how the AAO's analysis was in error. Nor does counsel allege a single fact misrepresented in the AAO's decision. Rather, counsel's sole argument is that since the petitioner has a legitimate business with real employees and did not participate in any schemes, his petition must be approved to comply with congressional intent. Despite the Service's notice to the petitioner on several occasions regarding the documentary deficiencies in this case, the petitioner submits no new documentation on motion.

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).

In its decision, the AAO noted the lack of audited balance sheets or certified tax returns, including schedule L, the loan agreement between the petitioner and his mother or even a statement from the petitioner's mother confirming the existence and terms of the alleged loan, transactional documentation reflecting the transfer of money from the petitioner's mother to him, evidence such as tax returns evidencing the petitioner's personal income over the past five years, documentation of the number of employees at the time the petitioner made his investment, and documentation demonstrating how the petitioner acquired his warehouse business. Some of this documentation, such as the petitioner's personal tax returns, is specifically mandated in the regulations and had been requested earlier. In fact, counsel had stated that such evidence would be forthcoming. As stated by the AAO, such evidence was never submitted.

Rather than submit this documentation or explain why such documentation is not necessary on motion, counsel merely requests that the AAO reconsider the evidence in the record. The AAO spent 15 pages analyzing the evidence in the record. Without arguments identifying a specific error of fact or law, the AAO finds no reason to review the matter de novo simply because counsel believes more visas should be granted in this category. Instead, we will reopen the matter for the limited purpose of addressing counsel's single argument that congressional intent mandates the approval of at least 3,000 visas for investors in targeted employment areas.

On motion, counsel quotes Section 203(b)(5) of the Act which sets the number of visas for the programs and asserts:

It is clear from reading the plain language of the statute that Congress intended these entrepreneur visas to be used --- used for the purpose of encouraging aliens to start real businesses in the United States that would create real jobs for American workers. . . . Congress wanted these visas to be used, and expressly intended that 3,000 per year, no less, be given to immigrants like [the petitioner] who start businesses like Downtown Warehouse that create jobs in targeted employment areas like Brooklyn. . . . Congress envisioned that about ten thousand entrepreneur visas would be used each year, encouraging the creation of a hundred thousand jobs, with at least three thousand going to immigrants setting up businesses in targeted areas. The stark reality is that only a fraction of these visas are given.

Quoting from Matter of Crammond, 23 I&N Dec. 9 (BIA March 22, 2001), a case regarding the interpretation of legislative intent, counsel argues that the Service should re-examine and approve the petition.

Section 203(b)(5) of the Act states:

(A) Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise. . . . (B) . . . Not less than 3,000 visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who establish a new commercial enterprise . . . which will create employment in a targeted employment area.

As with all preference visas, Congress set a limit for immigrants seeking visas under the entrepreneur program. That not less than 3,000 of that limited number were reserved for those investing in targeted employment areas in no way implies that Congress intended for the Service to issue a minimum of 3,000 visas to investors investing in targeted employment areas regardless of whether they met all of the statutory and regulatory requirements. We note that Congress specified that these visas were to be set aside for qualified immigrants.

In response to a similar argument, the AAO stated in Matter of Izumij, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998):

In his brief, counsel states “INS is supposed to grant immigrant investor petitions, not to deny them. INS is to interpret the laws and regulations liberally and generously so as to achieve [this] Congressional purpose.” He presents statistics showing that, of the total number of visas made available, only six percent has been used. The fact that counsel considers this category underutilized is irrelevant. The alien-entrepreneur classification is for a special kind of person, and it is not surprising that, notwithstanding the random number fixed by Congress, few people have both the financial means and the entrepreneurial spirit to apply. The Service will not eviscerate the meaning of the regulations or the essence of the law simply to “fill up” the numbers. The measure of success or failure of the EB-5 program is not the number of petitions granted; rather, it is the extent to which proper compliance is achieved and genuine investments are made.

At no point has the Service accused the petitioner of participating in any type of scheme. Of the four entrepreneur precedent decisions issued by the AAO, only one dealt with a pooled investment “scheme.” Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) dealt with an operational hotel with several employees that simply did not meet the regulatory requirements. The Service has never denied that the petitioner’s business employs real workers. Nevertheless, the law and the regulations set forth several specific requirements beyond simply running a business with employees, all of which must be met. In this case, the AAO noted that the petitioner had not transferred the full \$500,000 to the business or otherwise demonstrated that the full amount was fully committed to the business as required by the regulations.

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 sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.



ORDER: The Associate Commissioner's decision of April 9, 2001 is affirmed. The petition is denied.