



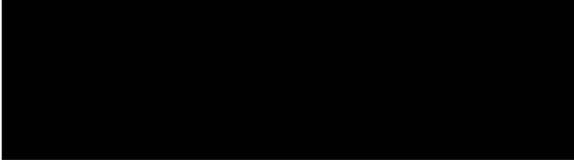
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U.S. Department of Justice

Immigration and Naturalization Service

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



File: WAC-99-055-50009 Office: Vermont 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, Vermont 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 could not rely on indirect employment creation because she had not invested in an export-related industry and that she had not demonstrated she would create the necessary employment directly. The director further determined that the petitioner had not demonstrated that her funds were fully at-risk or that they had been lawfully obtained.

On appeal, counsel asserts that Hawaii's Department of Business, Economic Development and Tourism (DBET), designated a Regional Center by the Service, identified eating and drinking establishments (and 19 other industries) as export related in its application for Regional Center status based on Hawaii's tourism-based economy. As the definition of export has not changed since that time, argues counsel, the Service is estopped from reaching a different conclusion now. The petitioner submits a new letter from DBET explaining why it determined that an eating and drinking establishment was export related. Counsel further asserts that the petitioner's funds had already been transferred from escrow to the new commercial enterprise at the time of filing and the petitioner submits evidence relating to that transfer. Finally, counsel asserts that the petitioner submitted sufficient evidence of the lawful source of her funds, distinguishing the facts in this case from the three precedent decisions cited by the director.

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, Whalers Brewpub partners, located in a targeted employment area<sup>1</sup> for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000.

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<sup>1</sup> The letter from the DBET designating the island of Kauai as a targeted employment area did not meet the requirements set forth in 8 C.F.R. 204.6(i). Nevertheless, we have independently

**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. ...

*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;

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obtained evidence of the unemployment rate of Kauai at the time of filing which was more than 150 percent of the national average.

(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 petitioner initially submitted a restated partnership agreement for Whalers Brewpub Partners indicating that limited partners attempting to qualify for the entrepreneur program could purchase their interest by placing \$500,000 in escrow to be immediately and irrevocably released upon the approval of the Form I-526 petition. The petitioner also submitted a wire transfer application for the transfer of \$250,000 from the petitioner to First Hawaii Title Corporation, escrow account number [REDACTED] and a receipt from First Hawaii Title. The petitioner also submitted two "notices to customer, miscellaneous entry receipts" from the Bank of Hawaii reflecting the transfer of \$250,000 from account [REDACTED] belonging to [REDACTED], to account [REDACTED] belonging to Whalers Brewpub Partners on June 1, 1998. Finally, the petitioner submitted a capital account statement for the year ending December 31, 1997 reflecting that the petitioner had contributed \$500,000 and the Partnership's tax return for 1997 including the petitioner's schedule K-1 reflecting that the petitioner contributed \$500,000 during 1997 and suffered a loss of \$30,249.

The director questioned whether the funds in escrow were actually committed to the new commercial enterprise. On appeal, counsel asserts that the funds in escrow were released to the business prior to the date of filing the Form I-526. The petitioner submits a November 25, 1997 letter from First Hawaii Title Corporation advising the Partnership that funds from escrow account [REDACTED] were being deposited into the Partnership's account on that day. The petitioner submitted the check also dated November 25, 1997 issued to the Partnership, account number [REDACTED] for \$249,798.83. The check includes a notation reflecting that it relates to escrow account [REDACTED]

The petitioner has overcome the director's concern regarding the funds placed in escrow. Nevertheless, the record is still absent sufficient evidence that the petitioner invested the full \$500,000. The record contains no evidence regarding the source of the \$250,000 transferred to the Partnership's account from [REDACTED] account number [REDACTED]. Assuming [REDACTED] is one and the same as the petitioner, the petitioner has not provided a wire transfer receipt or other evidence of a transfer of \$250,000 from Taiwan to account [REDACTED]. Finally, the petitioner has not resolved the inconsistency between the dates of the transfer and the 1997 capital account statement and tax return. Specifically, as of December 31,

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<sup>2</sup> The record does not resolve the discrepancy between the check issued to the Partnership, account number [REDACTED] and the Bank of Hawaii notice reflecting that the partnership's account number is [REDACTED]

1997, the petitioner had only transferred \$250,000 to the Partnership. Yet, the 1997 capital account statement and the petitioner's schedule K-1 for 1997 both reflect that the petitioner had already contributed \$500,000. As such, the statement and schedule K-1 have little evidentiary weight.

### **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). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

As stated above, to demonstrate the path of funds, the petitioner submitted evidence that she transferred \$250,000 from Taiwan to an escrow account that the title company subsequently

transferred to the Partnership. She also submitted evidence that several months later, [REDACTED] transferred \$250,000 directly to the Partnership from an account at Bank of Hawaii. Regarding the source of the petitioner's funds, the petitioner submitted documentation of her marriage to [REDACTED] tax statements for her and her spouse for 1993 through 1997, savings account statements reflecting balances of \$29,377 as of August 12, 1997 and \$17,582.17 as of August 25, 1997, property tax documentation for Mr. [REDACTED] evidence of Mr. [REDACTED] ownership in two buildings in Taiwan, and letters from the petitioner's employer verifying her employment there since 1992 and her receipt of \$77,410 in bonuses and \$45,427 in profit sharing over the years she worked there.

The director accepted that the petitioner and her spouse had an annual income of approximately \$100,000, but concluded that the petitioner had failed to submit "evidence concerning offsetting expenditures or copies of bank-type statements showing a steady accumulation of funds that were used to make the investment."

On appeal, counsel distinguishes the facts in this case from the facts in the precedent decisions cited above. Counsel argues that evidence of the steady accumulation of funds is not required, but is available. The petitioner submits several bank statements for her and her spouse. These bank accounts do not demonstrate that the petitioner had \$500,000 in liquid assets in August 1997 when she began investing.

The petitioner submitted a summary of time deposit accounts at Citibank dated December 16, 1994. These deposit accounts total approximately \$83,420 and a savings account with an ending balance on December 16, 1994 of approximately \$986. A Citibank statement for December 20, 1995 suggests that the petitioner renewed those time deposit accounts with new account numbers. The balance of the savings account as of December 20, 1995 was approximately \$7,877. As of December 19, 1996, the petitioner had a total of \$252,323.11 in savings at Citibank with a credit limit of \$8,342. As of December 19, 1997,<sup>3</sup> the petitioner had a total of \$257,465.76 in savings at Citibank with a credit limit of \$15,015.64. The petitioner also submitted a passbook for an account at Shanghai Commercial and Savings Bank. As the front page is not translated, the petitioner has not established that this account belongs to her or her spouse. Nevertheless, the ending balance in this account as of June 21, 1997 is only \$18,638.46. This documentation, in addition to the documentation submitted initially reflects that as of December 19, 1996, the petitioner had a balance of \$252,323 with Citibank. The statement for December 19, 1997 reflects that that money grew to \$257,465 during 1997 or, if removed on August 23, 1997 for investment, was replaced with a similar amount from an unknown source. The remaining accounts, even considered in the aggregate, amount to five digit figures only in 1997.

The above documentation does not resolve the source of the petitioner's funds. The documents reflect that the petitioner had little more than \$250,000 in liquid assets when she transferred the initial funds in August 1997 and that she had nearly the same balance in December 1997, after

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<sup>3</sup> The translation for this statement lists the date as December 19, 1996, but the original document is clearly dated December 19, 1997.

the transfer. As such, the petitioner has not established the source of the \$250,000 transferred into escrow in August 1997. If that money came from the petitioner's Citibank savings account, then the petitioner must establish the source of the more than \$250,000 which was in those accounts four months later. Moreover, as stated in the previous section, the petitioner has not provided evidence tracing the path of the funds into the Bank of Hawaii account [REDACTED] from which the final \$250,000 was transferred to the Partnership. As such, the source of those funds is unknown.

Another concern stated by the director was that the petitioner had not provided evidence of her spouse's equity in the property he owns. Counsel does not address this issue on appeal and the petitioner submits no evidence that the property is held free and clear of any encumbrances. Regardless, there is no evidence that Mr. [REDACTED] sold this property to obtain the invested funds.

### **EMPLOYMENT CREATION**

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

*Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

*Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Further, 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).

8 CFR 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 CFR 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.

Initially, the petitioner failed to provide a copy of the letter from the Service designating the State of Hawaii, DBEDT as a regional center, although the petitioner does submit this document on appeal. The petitioner did initially submit a letter from DBEDT asserting that it had identified 20 industries as “export-related, i.e. these industries generate revenues that result in exports.” The letter continues that eating and drinking places are one such industry. This designation is based on Hawaii’s tourist-based economy. The director determined that an eating and drinking business is not involved in exports.

On appeal, the petitioner submits a new letter from DBEDT explaining in detail its inclusion of eating and drinking establishments as export-related. DBEDT stresses that one of Hawaii’s major exports is tourism, and eating and drinking establishments cater to tourists. Counsel argues that the definition of export quoted above, “should include goods and services consumed by foreign nationals within the United States.” Counsel notes that the Department of Commerce includes travel in its definition of export services. The time to challenge the regulations, however, is when they are published as proposed rules. We are bound by the definition in our

own regulations. Finally, counsel argues that the Service is estopped from concluding that an eating and drinking establishment is not export-related because the State of Hawaii, DBEDT was designated as a regional center.

The petitioner submits the initial proposal by DBEDT requesting that Hawaii be designated as a regional center. The proposal discusses DBEDT's past successes in attracting investment in Hawaii, including an investment in a restaurant. In addition, Table 1 attached to the proposal, includes how many employees are generated per one million in invested dollars. This table includes 20 industries, including eating and drinking places. In the "Geography and Economic Growth Section," the proposal specifies eating and drinking places as contributing directly to tourism and states, "an investment in virtually any industry in Hawaii results in increased exports, regional productivity, and higher rates of job creation." Assuming this is the proposal that was approved as a regional center, we do not find that we are estopped from determining whether a particular industry is export-related at the I-526 stage. It is noted that the 20 industries include health and professional services and education and other services. The relationship between these industries and tourism is even more tenuous.

It is acknowledged that Pub. L. 106-396 Section 402 of the Visa Waiver Permanent Program Act, 2000, added language to the pilot program law which eliminated the law's focus on exports. Nevertheless, at the time of filing the instant petition, the law required a petitioner to invest in an export-related business in order to take advantage of the Regional Center benefits; namely, indirect job creation.

The term "exports," as defined in the Service regulation quoted above, mean services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise which are transported out of the United States. There is no indication that any goods or services are transported outside the United States from Whalers Brewpub. For example, the petitioner made no claim that the product of the microbrewery would be exported. A restaurant, regardless of its location or clientele, is not a qualifying export-related industry for the purpose of this provision. Accordingly, the petitioner is unable to rely on indirect employment creation.

The petitioner claims that the brewpub employs 29 full-time workers. The petitioner indicated initially that there were four investors seeking visas through the entrepreneur program. Thus, the brewpub would need to create 40 full-time positions in order for each investor to qualify. The petitioner has not submitted a business plan calling for the addition of 11 new full-time workers in the next two years. The petitioner has not submitted any agreement whereby the four investors seeking visas through the entrepreneur program have allotted employees among themselves. As such, the petitioner cannot establish that he meets the employment creation requirement.

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.