



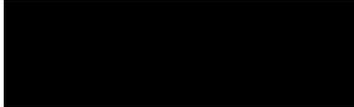
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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



File:

Office: Texas Service Center

Date: AUG 30 2002

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:



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, 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 the funds allegedly invested by the petitioner were used to purchase the business facility or that her funds were sufficiently at-risk at the time of filing.

On appeal, counsel argues that the new commercial enterprise has engaged in business activities and the petitioner submits a letter from the Virginia Commercial Bank resolving the director's concern regarding the path of funds from the petitioner to the seller of the business facility.

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, Preferred Assisted Living of Butler, LLC (PALB), that initially intended to build a facility in Choctaw County, Alabama, a rural area as defined in 8 C.F.R. 204.6(e). Subsequently, PALB purchased a constructed but allegedly abandoned facility in Union Spring County, Alabama, also a rural area. 8 C.F.R. 204.6(f) permits a reduced minimum investment for targeted employment areas, defined in 8 C.F.R. 204.6(e) as including rural areas. Thus, the required amount of capital in this case is \$500,000.

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.

As of the date of filing, PALB maintained five \$100,000 certificates of deposit at the Virginia Commerce Bank with a maturity date of June 7, 2003. The terms of the deposit account, however, permitted one withdrawal of up to 100 percent of the account anytime after 14 days without penalty. The account numbers for those accounts were [REDACTED] through [REDACTED]. In response to the request for additional evidence, the petitioner asserted that he had purchased an "abandoned" assisted living facility site in Union Springs, Alabama, and submitted settlement documentation dated November 16, 2001. The documentation indicates that PALB purchased [REDACTED] in Union Alabama from Preferred Assisted Living, LLC (of which PALB manager Jacques Jarry and counsel are managers). The settlement documentation indicated that the buyer would wire \$501,971.83 to "Whitney Bank," promissory note [REDACTED]. The petitioner also submitted a letter from the Virginia Commerce Bank asserting that PALB wired \$500,000 from account [REDACTED] to "Whitney National Bank" account [REDACTED] on November 16, 2001.

The director concluded that since the \$500,000 was wired to Whitney National Bank from account number [REDACTED] and not the certificates of deposit, the petitioner had not established that those were her "invested" funds.

On appeal, counsel "respectfully maintains that the Service did not understand the standard banking practice." The petitioner submits a new letter from the Virginia Commerce Bank confirming that the money in the five certificate of deposit accounts were consolidated into account [REDACTED] prior to the transfer to Whitney National Bank on November 16, 2001.

Whether or not it is "standard banking practice" to consolidate funds from multiple accounts into a single account prior to transferring such funds, the record at the time of the director's decision contained no evidence that this was done. Thus, the director's concerns were legitimate. Nevertheless, the petitioner has overcome those concerns on appeal. We do note, however, that the petitioner was requested to provide evidence that the uncanceled checks issued by her to PALB were actually cashed and deposited. While not mentioned in the director's final decision, the record remains absent evidence that the money in the certificates of deposit originated from the petitioner.

The director's remaining concern involved whether the petitioner had demonstrated sufficient business activity so that her "invested" funds could be considered at risk. 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. Even if a petitioner transfers

the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

In his initial brief, counsel asserted that the petitioner had “undertaken meaningful concrete business activity’ in registering and incorporating the limited liability company and has established the new commercial enterprise.” Counsel continues, “the actual disbursement of the funds to the enterprise places her capital at-risk for the purposes of investment.” The business plan states:

The proposed land and facility building acquisition in Choctaw County is part of the Senior Citizen complex in Butler, Alabama. The facility building will be maintained on this 3.2 acre tract of land and the building will be the property of PALB, with the land under their lease for a 94 year period.

The petitioner submitted a redacted proposal from an unknown developer for the project. The proposal requires an initial deposit of \$172,884, which includes the costs of transferring the lease and indicates the total cost would be \$576,283. The proposal indicates that the Mayor of Butler hoped for a July 10, 2000 ground breaking ceremony. The proposal is unsigned.

In response to the director’s request for additional documentation, counsel asserted that the petitioner had discovered a better deal and had purchased “a vacant, sixteen-room residential building” in Union Springs, Alabama. Counsel alleges that “the facility was already built, but the business was never developed, so it was abandoned.” Counsel continues that the purchased facility “is fully equipped to operate as a residential facility to serve the elderly and those seeking rehabilitation.” The settlement documentation for this facility reveals that it was not an arms length transaction. Rather, the seller was a limited liability company managed by the petitioner’s fellow manager in PALB and counsel. The settlement documentation is dated November 16, 2001.

The director concluded that the petitioner’s “invested” funds were not at risk because the enterprise had not “begun actual business activity.”

On appeal, counsel argues that the director “misapplied and/or misinterpreted” Matter of Ho. Counsel quotes the portion of that decision where the Associate Commissioner noted that, while the petitioner in that case had entered into a lease, he had not even purchased inventory, entered negotiations with potential buyers or suppliers, contracted with local utilities, or explained how the \$500,000 would be used. Counsel concludes that the Associate Commissioner “by implication” found that substantial evidence of business activity amounts to the purchase of inventory or office equipment, negotiations with potential suppliers / buyers, contracting with suppliers of local utilities, “or” the expenditure of \$500,000. Thus, counsel concludes, the petitioner’s failed negotiations with a contractor, her subsequent purchase of an existing facility after the date of filing, and her contracts with a landscaper for improvements on the purchased parcel are sufficient business activity.

We find that it is counsel who has misinterpreted Matter of Ho. We do not find that the Associate Commissioner was providing a list of activities which, individually, would establish business activity. Rather, the Associate Commissioner was listing examples of the types of activities, in addition to entering a lease, one would expect to see if the petitioner was truly committed to opening his business in three to six months. These examples emphasize why merely entering a lease is insufficient and demonstrate why the petitioner's claim in that case that he would begin business in three to six months was not credible. The Associate Commissioner continued:

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. [Footnote omitted.] Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

In addition, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7.

The record does not establish that, at the time of filing, any money contributed to the proposed business was at risk. At that time, the money apparently contributed by the petitioner was sitting in five three-year certificates of deposit in a bank in Virginia. While PALB was apparently "negotiating" for the construction of a facility in Choctow County, no binding agreement had been reached. The lack of risk is demonstrated by the petitioner's subsequent change of plans. The petitioner's subsequent purchase of an existing facility cannot demonstrate her eligibility at the time of filing and can only be the basis of a future petition. The petitioner's change of plan also alters her claim to eligibility. Regardless of whether the existing facility purchased was operational, her purchase of an existing facility from her fellow manager and counsel raises serious concerns as to whether she has created an original business as claimed.

OTHER ISSUES

In addition to the director's concerns,¹ we note some other concerns. As stated above, the petitioner is the sole owner of PALB. Jacques Jarry is a co-manager of PALB. Initially, the petitioner intended to build an assisted living facility. Ultimately, however, PALB purchased an existing "vacant" facility which counsel alleges was "abandoned." The assertions of counsel, however, do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, counsel is not a disinterested party. Rather, counsel is one of the managers of the company which sold the existing facility, Preferred Assisted Living, LLC, and signed the settlement documents along with Mr. Jarry. That the petitioner purchased the facility from her co-manager and counsel reveals that this was not an arms-length transaction.² Thus, the sale raises concerns regarding whether \$500,000 represents the actual value of the facility purchased. Finally, the purchase price appears to constitute the amount of a promissory note at Whitney National Bank, presumably the mortgage on the property, although no such evidence was submitted. The record does not fully explain why Mr. Jarry or counsel, who presumably had some equity in the facility, would acquiesce to the sale without gaining some interest in PALB. Further, the settlement documentation is signed by Mr. Jarry, counsel, and the petitioner. It is not signed by the title company. As such, it is self-serving. The petitioner did not submit the deed transferring ownership from Preferred Assisted Living, LLC to PALB.

Moreover, if Mr. Jarry and counsel were already in the process of developing this property, it is not clear how the petitioner has created anything new or will create any employment that Mr. Jarry and counsel were not already in the process of creating.

In light of the above, any new petition would need to provide significant evidence regarding Preferred Assisted Living, LLC. Specifically, when it purchased the property on which the facility is built, how much it paid, when it contracted to have the facility built, how much it paid for the construction, whether it had any employees, its net worth at the time the petitioner purchased the property, etc. Without such documentation, the petitioner cannot establish that her investment resulted in a new commercial enterprise or that it will create any new employment.

Finally, as stated above, the petitioner has not provided evidence that the checks issued by her to PALB were actually the funds deposited into the five certificates of deposit. The checks were not cancelled and the petitioner did not submit the bank statements of her account from that time period as requested by the director in his request for additional documentation.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

¹ An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

² Conflict of interest issues regarding an immigration attorney's business dealings with his client, especially dealings through which the client hopes to obtain immigration benefits, are beyond the scope of our authority.



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.