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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: [REDACTED] Office: Vermont Service Center

Date: 25 JAN 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: Self-represented

PUBLIC COPY

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, Director
Administrative Appeals Office

DISCUSSION: The approved preference visa petition was revoked by the Director, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal and reaffirmed that decision on motion. The matter is now before the Associate Commissioner on another 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 approved the petition on June 10, 1998. Upon review of the approved petition, the director determined that the petitioner had failed to demonstrate his eligibility. On July 12, 1999, the director issued a notice of intent to revoke, concluding that the petitioner had not demonstrated that he had established a new commercial enterprise in a targeted employment area, invested the required amount of lawfully obtained capital, or met the employment creation requirement.

On August 6, 1999, the petitioner responded to the director's notice. The director considered the petitioner's response and issued a final notice of revocation. In his final notice, dated October 26, 1999, the director conceded the petitioner had established a new commercial enterprise in a targeted employment area, but had not overcome the director's other concerns.

On appeal, prior counsel argued that the director did not follow proper procedure in revoking the petition, misstated the facts of the case, and misapplied the law.

On December 8, 2000, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, summarily dismissed the appeal. The record, however, contained a brief submitted by prior counsel in support of the appeal. The case, therefore, was reopened on Service Motion and the appeal was reviewed on its merits. In a decision dated May 2, 2001, the AAO withdrew its previous decision and denied the petition.

In his previous motion, the petitioner asserted that he received poor advice from his prior attorney and that he eventually invested the full \$500,000 which was placed at risk. The petitioner conceded, however, that the new commercial enterprise he established is no longer in operation.

The AAO reaffirmed its May 2, 2001 decision in a decision dated October 22, 2001.

In his current motion, the petitioner reiterates his prior arguments. In addition, he asserts that the AAO used a double standard in considering some evidence of facts which occurred after the petition was filed and discounting other such evidence.

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).

As acknowledged in our previous decisions, the record indicates that the petition is based on an investment in a business, Keaton Financial Services, 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.

INVESTMENT OF CAPITAL

In its initial decision adjudicating the merits of the petitioner's appeal, the AAO concluded that the petitioner's claimed investment consisted of unsecured loans both from third parties and to the new commercial enterprise which did not sufficiently place the petitioner's personal assets at risk. In his initial motion, the petitioner asserted that he lost more than \$500,000 through Keaton and that he was in the process of paying back the loans from banks, family, and his other businesses. In the AAO's decision dismissing the motion, the AAO failed to discuss this argument in detail as the petitioner did not contest that the full \$500,000 had not been fully invested at the time of filing. In light of the petitioner's continued pursuit of this matter despite the fact that the business no longer exists, we will reiterate this further point of ineligibility. The record contains no evidence of bank loans. Rather, the petitioner claimed to have borrowed funds from his father and his other business, [REDACTED]. While the petitioner claimed that he is personally repaying those loans, he submitted no evidence of that fact. Moreover, the record still contains no evidence that those loans were properly secured. The petitioner has not addressed the AAO's conclusion in its initial decision on the merits that an unsecured loan is insufficient evidence that the petitioner's assets are at risk.

The AAO also concluded that the financial documents did not reflect capital of more than \$390,000 at the time of filing. In his initial motion, the petitioner argued that he was only required to "show a business plan and intent of investing his money on the date of filing, which was done within the required period."

The AAO disagreed, noting that 8 C.F.R. 204.6(j)(2) provides that while a petitioner need only be in the process of investing:

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.

(Emphasis added.) An actual commitment must consist of evidence that the petitioner has irrevocably committed the funds to the new commercial enterprise at the time of filing. The AAO concluded that the petitioner had not demonstrated that he even had the remaining funds at the time of filing, much less that he had irrevocably committed those funds through the use of an irrevocable escrow account or a secured promissory note meeting the requirements set forth in Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998).

In his current motion, the petitioner once again argues that the regulatory provisions that require only that a petitioner be in the process of investing require no more than "a clear intent be shown regarding the investment (process of investing)." The petitioner notes that he initially submitted a business plan reflecting an "intent" to invest \$500,000 and that subsequent tax returns reflected that he had fulfilled this intent.

The petitioner's assessment of the regulatory requirements is simply wrong and clearly contradicted by the language quoted in our previous decisions and above which states that an intent to invest is insufficient and requires that the funds be fully committed to the investment.

The AAO further concluded that the petitioner's subsequent alleged investment was not evidence of the petitioner's eligibility at the time of filing, stating:

Even if we accepted the petitioner's evidence that he eventually contributed the full amount, 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. At the time of filing, the petitioner had not established that he had committed the full \$500,000.

The petitioner argues that this analysis was inappropriate as the law permits a reevaluation of the petitioner's investment two years after he adjusts to conditional permanent residence. The petitioner states that the tax returns are not evidence of new facts, but verification of his intent to invest \$500,000 at the time of filing. The petitioner's arguments might be persuasive if he was only required to demonstrate an intent to invest at the time of filing. As quoted above, the regulations clearly and unambiguously state that a mere intent to invest is insufficient. Thus, even if he eventually invested the \$500,000 as claimed, that fact would be irrelevant. It remains that the petitioner had not fully and irrevocably committed \$500,000 to the enterprise at the time of filing. In fact, as stated above, he has not demonstrated that he even possessed \$500,000 at the time of filing.

SOURCE OF FUNDS

The AAO also concluded in its previous decisions that the petitioner had not demonstrated how his father or [REDACTED] lawfully accumulated the funds they loaned to the petitioner or that he had the personal, lawfully obtained assets to repay the loans.

The petitioner does not address this conclusion in his current motion.

ENGAGEMENT IN NEW COMMERCIAL ENTERPRISE

Finally, the AAO concluded that the petitioner could not be entering to engage in the new commercial enterprise since he conceded that it no longer existed. The AAO cited Section 216A of the Act, which provides:

- (a) Notwithstanding any other provision of this Act, an alien entrepreneur . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

Section 216A further provides that a petitioner must file a petition to remove conditions on residence within 90 days of the second anniversary of the petitioner's admission to lawful permanent residence and that the petition must demonstrate that he sustained the commercial enterprise and his investment in that enterprise. As the new commercial enterprise is defunct, the AAO concluded that the petitioner was unable to demonstrate that he would be able to sustain his investment over a two-year conditional residence period.

As in his previous motion, the petitioner again quotes from commentary to the revised regulations expressing recognition that good faith efforts may not result in the realization of all expectations by the end of the two-year period. The petitioner urges the Service to consider that his investment was made in good faith. As stated in our previous decision, at no point has the Service ever challenged the petitioner's good faith. Nevertheless, the petitioner no longer has an investment in a new commercial enterprise which he could sustain over the two-year conditional period. Thus, this is not the situation discussed in the commentary where an operational business at the time of adjustment simply failed to meet all expectations during the two-year conditional period. While the petitioner continually argues that his investment was in good faith, he does not explain how he would ever be able to successfully remove the conditions on his residence if we were to approve the petition since there is no longer any business investment to sustain during the two-year conditional period. There is no provision for the waiver of the two-year conditional status or the inability to sustain an investment during that period. We do not find the argument persuasive that the petitioner is eligible for conditional resident status despite being unable to demonstrate that there is even a possibility that he will be able to remove the conditions on that status after the conditional period.

The petitioner also argues that the AAO's consideration of the business' failure is contrary to the AAO's refusal to consider evidence that the petitioner had contributed additional capital to the enterprise after the date of filing. The petitioner states:

It is debatable whether the law intends for the AAO on one hand to reject a case (despite the fact that everything is in order) and claim that it cannot consider new facts (despite the fact there are not new facts, but just the logical extension of the old) and on the other hand ignore the same argument it relied on previously and claim that now since the business is no longer in existence (five years after being incorporated and three years after being granted the approval), it cannot grant approval.

We disagree that the AAO's previous decision reflects a double standard with regard to the consideration of new facts. A petitioner must already be eligible at the time of filing and remain eligible up until he adjusts status or immigrates.¹ Thus, we find no contradiction in the AAO's decision. New assertions, which, if true, might reflect that the petitioner became eligible after the date of filing, are irrelevant because they do not establish his eligibility at the time of filing. New adverse facts, however, are relevant to whether the petitioner remains eligible. The fact that the enterprise upon which this petition was originally based is now defunct clearly precludes the petitioner from establishing that he is seeking to immigrate to the United States to engage in the management of that enterprise. It is difficult to foresee how a new motion in this case could remedy this flaw.

Finally, although it would not change the outcome, we simply note that this is not a case where the petitioner was eligible at the time of filing and sustained the business during what would have been the two-year conditional period had the Service not revoked its approval of the petition. The director revoked the petition because the petitioner was not eligible at the time of filing. Moreover, the director's decision was based on more than the petitioner's failure to have completed his investment at the time of filing. As discussed above, the petitioner has still not resolved the issues regarding whether he was primarily liable on the third-party loans used to finance the business or the lawful source of the borrowed funds. In all of the AAO's decisions on the merits in this case, we have upheld the director's conclusions on these issues.

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

¹ As an example, compare the situation where a United States citizen petitions for her intended husband as a spouse and later marries him with a United States citizen who petitions for her spouse (whom she married in good faith) but subsequently divorces him before he adjusts his status. In each case, these new facts would be considered very differently. Specifically, the subsequent marriage in the first case would not cure the defect in the beneficiary's eligibility at the time of filing. The subsequent divorce in the second case, however, would be grounds for dismissal, or, if the petition had been approved, automatic revocation under 8 C.F.R. 205.1(a)(3)(i)(D).



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 October 22, 2001 is affirmed. The petition is denied.