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Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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File: WAC-00-237-56347 Office: California Service Center

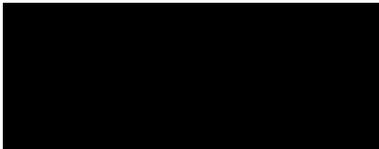
Date: MAY 13 2002

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 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 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 materially changed her claim of eligibility and, as such, could not establish her eligibility at the time of filing.

On appeal, counsel argues that merely transferring the necessary funds into a business account secures eligibility and that any subsequent change in the nature of the investment is merely a “business decision.”

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).

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of

capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established.

The record indicates that the original petition was based on an investment in a business, Yong Li International Corporation. On the Form I-526 petition, the petitioner indicated that the type of business was a “farm” and that it would be located in Troutdale, Oregon. The petitioner submitted the articles of incorporation filed with the State of Oregon on June 30, 2000 indicating that the type of business would be a Chinese restaurant. The initial business plan indicated that the petitioner intended to purchase land and build a “central kitchen” for marketing prepackaged Chinese food. In response to the director’s request for additional documentation, the petitioner submitted a new Form I-526 without fee still listing the new commercial enterprise as Yong Li International Corporation. The type of business on the new Form I-526, however, is listed as real estate development and management. The petitioner listed the location of the business as King County, Washington and submitted articles of incorporation filed with the State of Washington on February 26, 2001.

Citing Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971), the director noted that 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. Therefore, the director stated, 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.

On appeal, counsel argues that the petitioner only needed to establish that she had transferred her funds to a business account. Any changes to the nature of the corporation, asserts counsel, is the petitioner’s business decision.

Counsel’s arguments are not persuasive. We concur with the director that a change in the location of the new commercial enterprise and the type of business intended is a material change as contemplated by Matter of Katigbak. See also Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7.

Moreover, counsel’s assertion that a deposit in a corporate bank account establishes eligibility is contrary to the regulatory requirement that the petitioner’s funds be fully committed and at risk at the time of filing. 8 C.F.R. 204.6(j)(2). In order to establish eligibility, a petitioner must have already established a new commercial enterprise and have placed all of the required investment funds at risk. A mere deposit into a corporate money-market account, such that the petitioner herself 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, she must establish that she placed her own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), specifically states:

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.

Review of the record reveals that the petition was not initially supported with any documentation of business activity other than the deposit of funds in a business account. The petitioner had not yet purchased (or even contracted to purchase) the location for the restaurant, much less undertaken any business activity.

Moreover, 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 such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) In her subsequent submission, the petitioner submitted evidence that she has purchased a piece of property which she intends to develop by constructing 10 single family houses between April 2001 and March 2004. While this single project is projected to take five years, it is not an ongoing business. It is acknowledged that the petitioner also indicated an intent to form a real estate management team, however, the petitioner only projects five to six employees for this portion of the business (a manager, a bookkeeper, a maintenance “repairer” and two to three maintenance workers). As the ongoing portion of the business is not projected to require 10 employees, the petitioner has not established that her newly proposed investment is qualifying.

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.