



U.S. Citizenship
and Immigration
Services

57

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: 10/11/14

IN RE: Petitioner: [REDACTED]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson
for 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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 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 the lawful source of his investment or that he would create the necessary employment.

On appeal, the petitioner submits evidence adequately addressing the director's concerns regarding employment.¹ The petitioner also submits another bank letter attempting to resolve the director's concerns regarding the source of the petitioner's funds. That issue will be discussed in more detail below.

While not addressed by the director, we also find that the petitioner did not invest in a targeted employment area as defined in the regulations. As we uphold one of the director's bases for denying the petition, however, we need not remand the matter for a discussion of that issue and will, instead, decide that issue at this level. As this issue is fundamental to whether or not the petitioner even made the qualifying investment, we will address this issue first below.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) 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
- (ii) 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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business, La Grange Green River Motel, LLC, located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. The basis of this claim appears to be that the business is located in a rural area.

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

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

¹ The petitioner's contention that there is turnover in his business and that the business will have the potential to employ 10 full-time workers in two years is sufficiently documented and reasonable.

Rural area means any area **not** within **either** a metropolitan statistical area (as designated by the Office of Management and Budget) **or** the outer boundary of any city or town having a population of 20,000 or more.

(Bold emphasis added.) 8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

- (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

In support of the petition, the petitioner submitted evidence that the business is located in La Grange, Kentucky in the county of Oldham. The petitioner submitted evidence that La Grange City has a population of 5,767 and is 26 miles from Louisville. While this information confirms that the business is not within a city or town having a population of 20,000 or more, the definition of rural in the regulations clearly states that in order to qualify as rural, an area cannot be *either* in a city or town having a population of 20,000 or more *or* a metropolitan statistical area (MSA) as designated by the Office of Management and Budget (OMB). 8 C.F.R. § 204.6(e). MSAs, which are defined by the counties contained in those areas and designated by OMB, are listed at www.census.gov. This list reveals that the MSA Louisville, KY – IN includes Oldham County. As the business is located in Oldham County and Oldham County is in an MSA, the business is not located in a rural area as defined by the regulations.²

In light of the above, the minimum investment amount in this matter is \$1,000,000. The petitioner only claims an investment of \$500,000 and has not demonstrated that any other funds traceable to him were irrevocably committed to be invested into the commercial enterprise as of the date of filing. Thus, the petitioner cannot establish eligibility for the classification sought. While we acknowledge that the director did not raise this concern, 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*, 229 F. Supp. 2d 1025, 1043, (E.D. Calif. 2001).

SOURCE OF FUNDS

² While not obligated to do so, we checked to see whether Oldham County might be a high unemployment area, defined in the regulations as having an unemployment rate at least 150 times the national rate. 8 C.F.R. § 204.6(e)(definition of targeted employment area). According to the Bureau of Labor Statistics' website, www.bls.gov, however, Oldham County had an unemployment rate of 2.6 percent at the time of the petitioner's investment (December 2001) and 2.8 percent at the time of filing (July 2002). The national rates were 5.7 percent and 5.8 percent respectively.

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*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). 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*, 229 F. Supp. 2d 1025, 1040 (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).

Initially, the petitioner submitted a check for \$500,000 issued on a Bankers Trust Company account with no remitter listed. The check is issued to the petitioner and Green River Motel Management, LLC jointly. The petitioner also submitted a letter from Rebecca Graham, Assistant Manager for Allied Irish Offshore addressed to [REDACTED] Green River Motel Management asserting that a \$500,000 check is enclosed on behalf of the petitioner for investment. Additional evidence in the record confirms that the check was deposited, that the funds were used for business expenses, and that the petitioner made an equity investment of \$500,000 as represented on his Schedule K-1.

In a request for additional documentation dated October 24, 2002, the director requested evidence tracing the path of the invested funds from their source to the business. In response, the petitioner submitted a letter from A.C. Crowe, Director of Allied Irish Offshore asserting that the \$500,000 represented a distribution from a family trust established by Lallubhai Desai of which the petitioner is a beneficiary.

In a notice of intent to deny dated March 18, 2003, the director acknowledged the claim that the funds originated from a family trust and requested “all documents relating to that trust fund.” In response, the

petitioner submitted a letter from Allied Irish Offshore that they were enclosing the trust documents and a copy of the trust. The trust documents reflect that the trust was established in 1988 with \$100.

On September 10, 2003, the director requested evidence that the trust had more than \$100 in 2001 when the distribution was made. In response, the petitioner submitted more letters from Irish Allied Offshore affirming that the \$500,000 was distributed from the trust and noting that the trust allows for additional funds to be added.

The director denied the petition, concluding that the record lacked evidence confirming the balance of the trust fund at the time of the distribution. On appeal, the petitioner submitted a new letter from A. C. Crowe asserting that the trust had over \$2,000,000 at the time of the distribution. The petitioner did not submit a December 2001 statement for the trust reflecting the balance amount or the debit for the distribution.

8 C.F.R. § 204.6(j) provides that the petitioner may be required to submit documentation that Citizenship and Immigration Services deems appropriate. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). It is clear from the director's numerous inquiries that the director was requesting actual balance statements for the trust and was not willing to rely on the affirmations for employees at Allied Irish Offshore. Given that we are not required to accept bare assertions, we find the director's requests were not an abuse of discretion. *See generally Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has still not submitted balance statements confirming that the family trust had grown to over \$500,000 as of December 2001. Thus, the petitioner has not overcome the director's concerns.

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.