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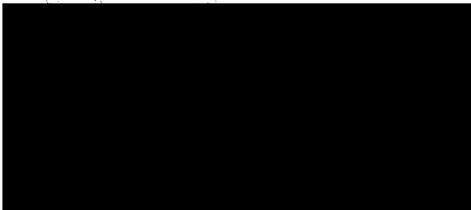


U.S. Citizenship
and Immigration
Services

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FEB 16 2005

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FILE: SRC 05 012 50927 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:



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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office on certification. The director's decision will be withdrawn; the matter will be remanded for further action and consideration and a new decision.

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 demonstrated a qualifying investment of lawfully obtained funds into a new commercial enterprise located in a regional center. Pursuant to the regulation at 8 C.F.R. § 103.4, the director certified the decision to this office based on the unusual, complex, and novel issues presented. We concur with the director that this case involves issues appropriate for certification. In this decision, we intend to provide guidance to the field on these issues, although we caution that every petition must be adjudicated on a case-by-case basis. While we concur with the director that the petitioner overcame the concerns raised in the director's request for additional evidence, we find that the record is deficient in other respects.¹ Thus, as will be discussed in more detail below, we are remanding the matter to the director to request additional evidence and enter a new decision.

The regulation at 8 C.F.R. § 103.4(a)(2) provides that the affected party has 30 days in which to submit a brief to this office. The director issued her decision on January 7, 2005, advising the petitioner to send any brief directly to this office within 30 days. As of this date, more than 30 days later, this office has received nothing from the petitioner or counsel.

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).

The record indicates that the petition is based on an investment in a business, PIDC Regional Center, LP III, 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

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

¹ We note that we do not question the general regional center plan approved by Citizenship and Immigration Services. Rather, we find that the petitioner has not submitted sufficient evidence that his investment vehicle fulfills the proposals in the approved plan.

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;

(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 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*, 22 I&N Dec. 206, 209 (Comm. 1998). 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*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001)(citing *Matter of Ho*). The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998).

The petitioner submitted evidence that he transferred \$530,000 to an irrevocable escrow account whereby the funds will be released to the limited partnership upon approval of the petition. The Limited Partnership Agreement provides that the general partner will spend no more than \$30,000 on administrative costs per investor; thus, the full \$500,000 will be available for loan to the employment generating entity, Lannett Company, Inc. (Lannett).

In her request for additional evidence, the director expressed concern regarding whether the petitioner's funds were fully at risk since they would only be loaned to Lannett and the loan was secured by the assets of Lannett. In response, counsel noted that the investment into the limited partnership was an equity investment. Counsel further notes that the investment structure in *Matter of Izummi*, 22 I&N Dec. at 169, involved loans to the employment generating entities and yet that decision, which found several problems with the investment structure, never suggested that investing in a company designed to loan money to the employment generating entity was problematic.

The director concluded that the business plan to loan the funds was not problematic. We concur. Nothing in the law, regulations, or precedent decisions indicate that the new commercial enterprise must take unnecessary risks, such as lending money without any security interests. We differentiate this case from a non-regional center case relying on direct employment where a petitioner sets up a shell company to lend money to the actual employment generating entity. Cf. *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998) (finding that a petitioner cannot establish the requisite investment if he lends the money to the employment-creating enterprise). In addition, unlike the investment plan struck down in *Matter of Izummi*, 22 I&N Dec. 183-191, the instant plan does not require the partnership to set aside funds in reserve accounts or include a guaranteed redemption agreement. Thus, should the petitioner not get a return on his funds, he would have no legal recourse against the partnership or general partner for failure to set aside funds or breach of an agreement to buyback the petitioner's interest.

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*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. 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 at 1040 (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).

The director did not question that the petitioner sufficiently established the lawful source of his funds. We simply note that the record contains satisfactory evidence that the petitioner's income since 1967 and the accrual of value to his real property can account for the accumulation of \$500,000.

REGIONAL CENTER

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, (8 USC 1153 note), as amended by Section 402 of the Visa Waiver Permanent Program Act of 2000, Pub. L. 106-396, provides:

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

(b) For purposes of the pilot program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Attorney General, shall set aside 300 visas annually for five years to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act, to accompany or follow to join such aliens.

(c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining

the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

The regulation at 8 C.F.R. § 204.6(m) provides:

(3) Requirements for regional centers. Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(4) Submission of proposals to participate in the Immigrant Investor Pilot Program. On August 24, 1993, the Service will accept proposals from regional centers seeking approval to participate in the Immigrant Investor Pilot Program. Regional centers that have been approved by the Assistant Commissioner for Adjudications will be eligible to participate in the Immigrant Investor Pilot Program.

(5) Decision to participate in the Immigrant Investor Pilot Program. The Assistant Commissioner for Adjudications shall notify the regional center of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program, and, if the petition is denied, of the reasons for the denial and of the regional center's right of appeal to the Associate Commissioner for Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

On February 28, 2003, Thomas E. Cook, Acting Assistant Commissioner for Adjudications, approved the Philadelphia Industrial Development Corporation (PIDC) as a regional center comprising of the geographical

boundaries of Philadelphia County. On April 23, 2004, [REDACTED] Associate Director for Operations, approved an amendment to the regional center proposal. This approval notice provides:

In its amendment for inclusion of leasehold improvements to commercial office space, PIDC plans to engage in a common business practice of short-term bridge financing to enable the time-critical leasehold improvement enterprise to proceed by PIDC initially undertaking to fund or otherwise facilitate supplementary funding sources in order to launch or assist in the development of various commercial enterprises that would, ultimately, benefit the economic potential of Philadelphia County. PIDC would initially either provide or arrange for critical start up capital for such an initiative, and then, through its regional center efforts[,] would replace such initial bridge financing with the alien entrepreneurs' pooled investment of capital, through the PIDC Regional Center, into the new enterprise.

The new commercial enterprise in this matter is PIDC Regional Center, LP III (the limited partnership), established on March 2, 2004. The limited partnership's general partner is CanAm GP III, LLC. On December 9, 2003, the general partner entered into an agreement on behalf of the limited partnership with PIDC for PIDC to perform the following services for the limited partnership:

- a. Identify and perform due diligence investigations on borrowers to qualify for approval by USCIS and Program funding.
- b. Identify and perform due diligence investigations on investments to be used as equity or debt investments to be approved by USCIS.
- c. Provide accounting and reporting services after equity and/or loan disbursement.
- d. Monitor completed investments for job creation and other compliance requirements.
- e. Cooperate with USCIS during audit process.
- f. Assist qualifying businesses in obtaining additional future financing.

The partnership agreement reflects that its purpose is to make a loan to Lannett and other qualifying investments in target businesses in the Targeted Employment Area. The record suggests that Lannett secured bridge financing and has already begun renovations at 9001 Torresdale Avenue.

On June 16, 2004, the limited partnership issued a commitment letter to Lannett agreeing to loan a minimum of \$500,000 and maximum of \$5,000,000 to Lannett "to assist in its establishment of new commercial for-profit businesses within the PIDC Regional Center." Lannett appears to have accepted the loan offer on June 28, 2004. The letter details the terms of the loan and identifies the limited partnership as the "Lender" and Lannett as the "Borrower." The signature page of the letter, however, contains an illegible signature, and is merely followed by "borrower" and not the name and title of the signer. The signature is not witnessed or notarized, and does not identify the signor's affiliation with Lannett or his or her authority to sign on behalf of Lannett. This letter is peculiar evidence of a large, publicly-traded company agreeing to a \$5,000,000 loan. The petitioner has not provided copies of the actual loan documents, the related promissory note, or Lannett's loan request. And although the commitment letter provides that the limited partnership will loan between \$500,000 and \$5,000,000, the petitioner has not stated the actual amount of the loan. In effect, the petitioner has submitted evidence of its intent to loan the funds, but has not provided evidence of the loan.

Moreover, the loan provides:

The Loan shall be closed ("Close Out Date") based upon the Principal Amount advanced on the earlier of the date that (i) the maximum Loan amount is advanced or (ii) December 31, 2004.

It is not clear from this language whether the loan must be advanced by December 31, 2004, which has passed, in order to remain valid.

In addition, as a publicly-traded company, Lannett's 2004 annual report is available on its website and through the Securities and Exchange Commission (SEC). See <http://www.sec.gov/edgar/searchedgar/webusers.htm>. This report reflects that in November 2003, Lannett secured the following financing from Wachovia Bank: a \$2.7 million mortgage loan, a \$6 million equipment loan, and a \$1 million construction loan. From Lannett's annual report, it appears that the Wachovia Bank loan requires payments of interest only until PIDC lends \$1,250,000 or November 26, 2004, whichever is earlier. While this information appears to confirm that Lannett secured bridge financing to be replaced with financing from PIDC, the loan amount of \$1,250,000 is far less than the proposed maximum of \$5,000,000. Thus, it is not clear that, should the limited partnership obtain the full \$5,000,000, it will all be made available to the employment-generating entity.

In light of the above, we will remand the matter to the director to advise the petitioner of the information on Lannett's website and to request copies of the following specific documents: the minutes of [REDACTED] board of directors meeting approving the \$5,000,000 loan from the limited partnership; a witnessed or notarized loan agreement between Lannett and the limited partnership; and a copy of [REDACTED] original request for the \$5,000,000 loan. The director should also inquire as to the meaning of the "Close Out Date." Specifically, the director should inquire as to whether the loan agreement is still valid.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise" (Emphasis added.)

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.) The new commercial enterprise at issue is a limited partnership. As is clear from the above definition, CIS and its predecessor agency have never implied that limited partnerships are not acceptable and we acknowledge that Congress has expressly included limited partnerships as acceptable commercial enterprises. The issue, however, is whether the limited partnership was formed for the ongoing conduct of lawful business.

Section 15.1 of the Partnership Agreement provides:

The Partnership shall be terminated and dissolved on (the "Termination Date") January 1 of the year following the year in which all of the Partnership's assets have been realized upon and distributed.

The agreement does not define the critical terms of this phrase, "assets . . . realized upon and distributed," or clearly define the event that will cause the termination and dissolution of PIDC Regional Center, LP III. The business plan, while allowing the possibility of future investments, focuses on the Lannett loan, which terminates after five years.

Thus, we remand this matter to the director to request a definition of this phrase and section 15.1 in general; an explanation of the event that will cause the termination and dissolution of PIDC Regional Center, LP III; a specific time frame for the expected life of PIDC Regional Center, LP III; and evidence that PIDC Regional Center, LP III was formed for the *ongoing* conduct of lawful business.

In summary, the director should request the following documents to establish the validity of the loan agreement and the ongoing nature of PIDC Regional Center, LP III, the new commercial enterprise identified on the Form I-526 petition:

- A reconciliation of the purported agreement to lend \$5,000,000 to Lannett with the company's 2004 financial statement reflecting an intent to borrow only \$1,250,000 from PIDC;
- The minutes of [REDACTED] board of directors meeting approving the \$5,000,000 loan from the limited partnership and any other corporate documentation that would confirm the corporation's consent to this loan;
- A witnessed or notarized loan agreement between Lannett and the limited partnership;
- A copy of Lannett's original request for the \$5,000,000 loan;
- An explanation of the "Close Out Date" specified on the loan agreement;
- A definition of the phrase "assets . . . realized upon and distributed" and section 15.1 in general;
- An explanation of the specific event or events contemplated under section 15.1 that will cause the termination and dissolution of PIDC Regional Center, LP III;
- A specific time frame for expected life of PIDC Regional Center, LP III; and
- Evidence that PIDC Regional Center, LP III was formed for the *ongoing* conduct of lawful business.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, shall be certified to the Administrative Appeals Office for review.