



U.S. Citizenship
and Immigration
Services

B7

FILE: SRC 08 177 52043 Office: TEXAS SERVICE CENTER Date: DEC 19 2008
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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mai Plunson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office on certification pursuant to 8 C.F.R. § 103.4. The director's decision will be withdrawn and the petition will be approved.

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 petition is based on the petitioner's involvement in a limited partnership investing within a designated regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, 106 Stat. 1874 (Oct. 6, 1992), as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, Pub. L. 106-396, 114 Stat. 1637 (Oct. 30, 2000).

Citing to 8 C.F.R. § 204.6(j)(4)(ii), the director determined that the petitioner was not a troubled business and could not rely on job preservation instead of job creation. Instead, the director determined that the new commercial enterprise and the troubled business are two separate entities and concluded that the petitioner must demonstrate that it is creating employment in the form of new jobs. While counsel's assertions made throughout the proceedings are not persuasive, for the reasons discussed below, the director's decision is not supported by the regulation on which he relies.

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 [REDACTED]. The new commercial enterprise proposes to purchase stock in [REDACTED] 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. In addition, [REDACTED] NE operates the Sugarbush Resort within the Vermont Agency of Commerce and Community Development (VACCD) Regional Center.

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, 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.

* * *

(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, in pertinent part:

(1) *Scope.* The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

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

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

The regulation at 8 C.F.R. § 204.6(j)(4) states:

(ii) *Troubled business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the

pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

(iii) *Immigrant Investor Pilot Program.* To show that a new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program.¹ Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

Finally, the regulation at 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

Section 203(b)(5) of the Act requires that the alien “create full-time employment.” In interpreting this phrase, the legacy Immigration and Naturalization Service (INS) (now U.S. Citizenship and Immigration Services (USCIS)) concluded that job creation included job preservation. 56 Fed. Reg. 60897, 60902 (Nov. 29, 1991). At the time of enactment of section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, it had been over one year since legacy INS had issued its regulations including job retention in troubled businesses within the wider concept of job creation. We must assume that Congress was aware of the agency’s previous treatment of job creation under the Act as including job preservation when the Regional Center Pilot Program was enacted and did not intend to alter the agency’s interpretation of job creation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law).

¹ Section 402 of the Visa Waiver Permanent Program Act of 2000 amended section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993 to remove the requirement that any indirect job creation result from increased exports.

On June 26, 1997, VACCD was designated as a regional center. On June 11, 2007, [REDACTED] of USCIS Service Center Operations, approved an amended proposal that included a proposed investment in the Sugarbush Vermont Resort. The approval letter states that aliens may file Form I-526 petitions based on investments in the Jay Peak Resort project, the Sugarbush resort project “and other similar ski and all seasons’ resort-related projects which are located in a rural area within the VACCD Regional Center geographic area comprised of the entire State of Vermont.” The approval letter further states that such petitions need not reestablish the ability to create indirect jobs but that additional evidence relating to employment creation will be necessary “where preservation or creation of ‘direct jobs’ is claimed.” (Emphasis in original.) The list of VACCD’s responsibilities for the operation of the regional center in the approval letter states that, if applicable, VACCD must provide “the total aggregate of ‘preserved’ jobs by EB-5 alien investors into troubled businesses through your regional center for each Federal Fiscal Year to date since your approval and designation.” Thus, it is clear that the approval of VACCD’s regional center proposal contemplated job preservation at troubled businesses.

The petitioner has purchased a limited partnership interest in [REDACTED]. The proposal is for [REDACTED] to purchase Class D stock in [REDACTED]. The petitioner asserts, and the director does not contest, that [REDACTED] is a troubled business. The petitioner further asserts, and the director does not contest, that the proposed investment would preserve 147 jobs at [REDACTED]. The record contains documentation of the above claims.

The only issue raised by the director is whether [REDACTED] can rely on job preservation at [REDACTED]. The director concluded that it could not.

Counsel has consistently relied on an incomplete copy of a May 29, 2008 electronic mail message purportedly from [REDACTED], an official with USCIS, discussing the use of employment retention within VACCD. Counsel variously refers to this e-mail as a “written approval” and an “informal approval.” The e-mail provided by counsel is only part of what appears to have been a longer discussion, was not added to the record of proceeding by any USCIS officer, and is provided by counsel only as quoted material within a brief.

According to section 551(14) of the Administrative Procedure Act (APA), “*ex parte* communication” is defined as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.”

Section 557(d)(1) of the APA limits *ex parte* communications, in part, as follows:

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

Significantly, *ex parte* communications are not part of the record of proceeding and cannot be considered in future proceedings including those relating to Forms I-526 filed based on the approved regional center. Finally, the opinion of a single USCIS official is not binding and no USCIS officer has the authority to pre-adjudicate an immigrant-investor petition. *Matter of Izummi*, 22 I&N Dec. 169, 196 (Comm. 1998). Accordingly, this e-mail does not constitute a formal adjudication of an amendment to the regional center plan approved for VACCD. Thus, we will only look at the most recent approved amendment dated June 11, 2007.

The director cited 8 C.F.R. § 204.6(j)(4)(ii), quoted above, and concluded that the new commercial enterprise must be the troubled business if it is to establish eligibility through the maintenance of jobs. The plain wording of the regulation, however, does not support this interpretation. The regulation references a new commercial enterprise that has been established by a capital investment in a troubled business. At the time this regulation was written, the alien himself had to establish the new commercial enterprise. The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) removed that requirement. The regulation also predates section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993. Regardless, the regulation requires that the alien make a capital investment in a troubled business, not necessarily that the new commercial enterprise itself be the troubled business. In fact, when the Act was passed, a new commercial enterprise would not have been old enough to constitute a troubled business, which must have been in existence for at least two years. 8 C.F.R. § 204.6(e) (definition of troubled business).

Two precedent decisions support our interpretation. In *Matter of Soffici*, 22 I&N Dec. 158, 166 (Commr. 1998), the alien incorporated [REDACTED], which purchased a [REDACTED]. The AAO concluded: "it is the job creating business that must be examined in determining whether a new commercial enterprise has been created." The AAO then noted that the petitioner had not demonstrated that the Howard Johnson's was a troubled business. The AAO did not consider whether [REDACTED] was a troubled business.

Similarly, in *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Commr. 1998), the alien was one of 14 investors in Imedix, Inc., which proposed to purchase 27 medical clinics projected to employ 194 employees. The AAO concluded:

Although the petitioner could argue that Imedix is the new commercial enterprise at issue here, the clinics Imedix claims it will purchase are pre-existing, ongoing businesses. Through his company's business activities, a petitioner cannot directly cause a net loss of employment. It is not known if the projected figure of "194" employees represents the maintenance of the former levels of employment at the unidentified clinics (in the case of troubled businesses), the addition of 10 new positions per investor, or an actual loss of employment.

Clearly, the AAO was looking at whether the pre-existing businesses, and not the new commercial enterprise that would pool the money of its investors, were troubled businesses.

The petitioner's investment will be used to capitalize² a troubled business as required under 8 C.F.R. § 204.6(j)(4)(ii). Given that the petitioner is investing in a project specifically included in the approved regional center plan for VACCD and that the approval letter clearly contemplated job preservation in troubled businesses within the regional center, we are satisfied that the proposal to preserve jobs at [REDACTED] does not preclude approval of this particular petition which is based on an investment in an approved regional center. The director raised no other concerns.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The petition is approved.

² The proposal makes clear that [REDACTED] will be purchasing an equity interest in [REDACTED], and not simply loaning money to that company.