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**U.S. Citizenship
and Immigration
Services**



B7

FILE:

SRC 07 143 50171

Office: TEXAS SERVICE CENTER

Date:

NOV 14 2008

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) 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 denied the petition concluding that the petitioner failed to establish (1) that the alien has invested, or is actively in the process of investing, the required amount of capital; or (2) that the commercial enterprise will create full-time employment for not fewer than 10 United States citizens, permanent residents, or other immigrants lawfully authorized to be employed in the United States.

On appeal, the petitioner asserts that it will invest the funds in the commercial enterprise upon approval of the petition and that the enterprise will employ 22 full-time employees. In support, the petitioner submitted a "Memorandum of Understanding" describing his intent to invest in the commercial enterprise in the United States.

Section 203(b)(5)(A) of the Act, 8 U.S.C. § 1153(b)(5)(A), 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 commercial enterprise, Bhagavati Corporation, purportedly 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 alleged to be \$500,000.00.

The first issue in this matter is whether the petitioner has established that the alien has invested, or is actively in the process of investing, the required amount of capital in the commercial enterprise.

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

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.

The regulation at 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.

In this matter, the petitioner indicates in the Form I-526, Part 3, that he has not yet made the \$500,000.00 investment in the business. It appears that the alien plans to make the investment upon approval of the instant petition by Citizenship and Immigration Services (CIS). The record is devoid of evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on capital placed at risk.

On June 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that he has invested, or is actively in the process of investing, the required amount of capital. The director also concluded that the petitioner failed to establish that the commercial enterprise will operate in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.00.

On appeal, the petitioner claims that the instant petition must first be approved before the "Reserve Bank of India" will permit the investment of funds in the commercial enterprise. The petitioner also submits a copy of a Memorandum of Understanding in which the petitioner agrees to invest \$500,000.00 in the enterprise upon approval by both the United States government and the "Reserve Bank of India." However, the petitioner did not submit evidence that it has invested the funds or that he has put these claimed funds at risk.

Upon review, the petitioner's assertions are not persuasive.

As noted above, the regulations require that the petitioner establish that he "has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. §204.6(j)(2). The regulations further indicate that "[e]vidence 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." *Id.*

In this matter, the petitioner has failed to establish that it has placed the required amount of capital at risk. The proposed \$500,000.00 investment has not yet been invested in the commercial enterprise or otherwise placed at risk. The record as a whole, including the Memorandum of Understanding submitted on appeal, indicates only a "mere intent to invest," and fails to establish that the petitioner is actively in the process of investing.

Furthermore, as correctly noted by the director, the petitioner failed to establish that the commercial enterprise will operate in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.00. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Accordingly, the petitioner has failed to establish that the alien has invested, or is actively in the process of investing, the required amount of capital. The petitioner has also failed to establish that \$500,000.00, and not \$1 million, is the required amount of capital for relevant employment area, and the petition may not be approved for these reasons.

The second issue in the present matter is whether the petitioner has established that the commercial enterprise will create full-time employment for not fewer than 10 United States citizens, permanent residents, or other immigrants lawfully authorized to be employed in the United States.

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

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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) (finding this construction not to be an abuse of discretion).

In this matter, as the employment-creation requirement was not satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.” 8 C.F.R. § 204.6(j)(4)(i)(B). To be considered comprehensive, a business plan must be sufficiently detailed to permit CIS to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition’s products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business’s organizational structure and its personnel’s experience. It should explain the business’s staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this matter, the petitioner claims in the Form I-526 that the investment will create 10 jobs in the United States. However, the record is entirely devoid of evidence substantiating this claim. The record does not contain a comprehensive business plan or other evidence establishing that the proposed investment will create any jobs.

On June 22, 2007, the director denied the petition. The director concluded that the record is devoid of evidence establishing both the number of existing employees as well as the likelihood of additional employees being hired.

On appeal, the petitioner claims that 22 employees will be hired in the United States. However, the petitioner failed to submit any additional evidence corroborating this claim.

Upon review, the petitioner's claims are not persuasive.

As noted above, in order to show that a new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must submit a "comprehensive business plan" establishing that the commercial enterprise will more likely than not need these workers. However, as correctly noted by the director, the record in this matter is devoid of evidence corroborating the petitioner's claim that his investment in the commercial enterprise will create the necessary number of jobs. The record does not contain a "comprehensive business plan" or other evidence substantiating the petitioner's claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Once again, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

Accordingly, as the petitioner failed to establish that the commercial enterprise will create full-time employment for not fewer than 10 United States citizens, permanent residents, or other immigrants lawfully authorized to be employed in the United States, the petition may not be approved for this additional reason.

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

ORDER: The appeal is dismissed.