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U.S. Citizenship
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FILE:

WAC 07 004 50015

Office: CALIFORNIA SERVICE CENTER

Date: SEP 24 2008

IN RE:

Petitioner:



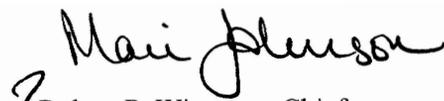
PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which 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 a qualifying investment in the new commercial enterprise identified on the Form I-526 petition.

On appeal, counsel submits a brief and a bank letter. For the reasons discussed below, we uphold the director's decision. We concur with the director that the petitioner must demonstrate a qualifying investment in the new commercial enterprise identified on the petition and that the petitioner has not done so. Significantly, while not raised by the director, the tax returns filed by the new commercial enterprise, Schedules K, support the director's finding that the petitioner has not made a sufficient investment into the new commercial enterprise.

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, Green Earth Manure Management, LLC, (hereinafter GEMM) 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.

At the outset, a discussion of what the new commercial enterprise includes is warranted. The statute, quoted above, requires evidence that the petitioner will engage in "a" new commercial enterprise. The regulation at 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.) This requirement is not simply a technicality. Specifically, it is often difficult to demonstrate a nexus between the investment and employment creation where the bulk of the investment is in a different company than the one generating employment. 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). While that case involved different facts, it stands for the proposition that there must be some nexus between the petitioner's investment and the employment being created.

On the Form I-526 petition, the petitioner identified GEMM, established on July 2, 2002, as the new commercial enterprise. In the initial cover letter, counsel stated that in 2002, the petitioner established GEMM "utilizing the proceeds from the sale of his dairy business." On appeal, counsel asserts that the director erred in only considering GEMM as of July 2, 2002. Counsel contends that the petitioner "established a new commercial enterprise in 1998 that he continues to operate individually and through GEMM on the same land he purchased in 1998." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

GEMM is the new commercial enterprise identified on the petition with an establishment date in 2002. The petitioner may not now amend the petition to attempt to rely on a different new commercial enterprise. Specifically, 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 CIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 175.

GEMM is a limited liability company that is owned by petitioner and one other individual. GEMM is not a sole proprietorship and there is no evidence that it is a holding company for any subsidiaries. Whether or not the petitioner could have consolidated his activities into one business entity is immaterial; he chose not to do so. Thus, the petitioner's farming activities in the aggregate are not relevant to this petition beyond demonstrating a lawful source of the petitioner's funds invested into GEMM. It is the petitioner's burden to demonstrate that any personal expenditure for land or equipment was an investment in GEMM, and not in one of the petitioner's other farming or real estate activities, including real estate activities culminating in a lease of land to GEMM.

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.

As stated above, 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. at 179.

In 1998, the petitioner sold property in Canada and purchased property for a dairy farm in the United States. The petitioner claims to have funded his investment in GEMM through the sale of 40 acres of his dairy farm. The petitioner maintains some of the original acres and contracted with the buyers of the 40 acres to farm haylage and corn silage, which the petitioner agreed to buy. As noted by the director, counsel seems to imply that the petitioner's initial investment in 1998 should count towards his qualifying investment. As stated above, however, only the petitioner's investment in GEMM will be considered.

The petitioner indicated on the Form I-526 petition that he made an initial investment of \$1,749,293 in May 2001, more than a year before GEMM was organized. While startup equipment and property may be acquired before the business is formed, the petitioner must demonstrate that this equipment and property was transferred to the business after organization in order for these assets to be considered an investment in the business. Neither the statute nor the regulations provide any mechanism for valuing assets purchased for use in more than one business activity. Moreover, the regulation at 8 C.F.R. § 204.6(e) defines invest as a contribution of capital, which we cannot conclude includes a loan of an asset. Thus, we will only consider assets contributed to GEMM such that they are now owned by GEMM.

As evidence of the petitioner's personal investment, the petitioner has submitted several checks issued on M&I Bank account [REDACTED]. Counsel refers to this account as a personal account. The account, however, bears the names of the petitioner and his wife and "Farm Account." Thus, it appears that this account may be maintained for the expenses of the petitioner's farming activities outside of GEMM. As the remaining farming activities appear to be run as a sole proprietorship, which is not a separate entity from the owner, we will consider funds from this account insofar as they can be traced directly to GEMM. Expenditures for farm equipment, however, must be shown to be for equipment contributed to GEMM. Equipment owned by the petitioner personally and either used in his personal farming operations or leased to GEMM is not an investment by the petitioner in GEMM.

On July 2, 2002, the petitioner and [REDACTED] filed Articles of Organization for GEMM. The record contains this document and the operating agreement for GEMM. The petitioner agreed to contribute 90 percent of the attached list of equipment with a total "inventory book value" of \$435,443. Ninety percent of that amount is \$391,898.70. As will be discussed in more detail below, however, GEMM only listed \$354,698 worth of depreciable assets (before depreciation) on its 2002 Schedule L and the petitioner only listed a capital contribution of \$243,064 on his Schedule K-1 for the same year. The tax records also show that [REDACTED] contributed \$52,500 in 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective

evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Despite the above inconsistency, we will evaluate each of the investment claims advanced by the petitioner and counsel.

Checks and Invoices

The petitioner submitted personal checks issued in 2001 and 2002 on M&I Bank account [REDACTED] for \$293,775.11. Of these funds, \$50,839.70 were paid directly to GEMM. We note, however, that according to the 2002 tax return filed by GEMM, Schedule L, statement 6, the petitioner lent GEMM \$35,000 in that year. As quoted above, the regulation at 8 C.F.R. § 204.6(e)(definition of invest) excludes debt arrangements from an alien's investment. Thus, only \$15,839.70 of the cash transferred from the petitioner to GEMM can be considered the petitioner's investment in GEMM.

Of the remaining \$242,935.41, the petitioner must demonstrate that these funds represent a qualifying investment, defined as a contribution of capital. 8 C.F.R. § 204.6(e). Thus, those funds must represent the payment of GEMM's expenses or the purchase of assets either on behalf of GEMM or subsequently contributed to GEMM.

The petitioner issued two checks to Hill Ford for a total of \$23,092.50 in May 2001. The invoice from Hill Ford reflects that the petitioner purchased a vehicle on May 8, 2001 for \$21,092. Two Ford vehicles valued at \$20,000 each are listed on the list of property contributions, but the record contains no evidence that the petitioner transferred title in the vehicle he purchased to GEMM or documenting the purchase of a second Ford vehicle.

The petitioner issued checks to Husky Farm Equipment in the amounts of \$5,900 and \$37,300 in March and April 2002. The petitioner also issued checks for \$35,000 and \$53,706 to the same company on his Canadian bank account in February and March 2001. The invoices reflect that the petitioner purchased a "Tiger Pit Prop," a soil injector, a lagoon pump, a discharge pipe, two manure spreaders and other equipment from this company. While the list of property contributions includes several Husky items that appear to have been purchased prior to GEMM's organization, the record contains no evidence that the petitioner subsequently transferred title to GEMM.

The remaining checks cannot be traced to GEMM expenses. Even if we accepted that all of the checks represent the petitioner's investment in GEMM less the \$35,000 loan, these checks do not account for the full \$500,000 investment and are, in fact, more consistent with the capital contribution of \$243,064 listed on the petitioner's 2002 Schedule K-1.

Repayment of Loans

The repayment of outstanding loans owed by GEMM could be considered a capital contribution. The petitioner, however, must demonstrate that the loans represented amounts owed by GEMM prior to repayment.

On January 29, 2002, the petitioner repaid a loan for \$105,000, initially borrowed on September 14, 2001. The original loan and the repayment both predate the existence of GEMM. Thus, this repayment cannot be considered a satisfaction of GEMM's debt. The collateral release includes a handwritten notation that this loan was used to purchase a chopper. The petitioner submitted an invoice dated August 16, 2001 for a Claas Corn Cracker priced at \$130,000. A Claas chopper with hay and corn head valued at \$130,000 is listed on the property contributions list. Attached to the invoice, however, is a financing contract with Claas Financial whereby the petitioner financed the full \$130,000. Thus, the petitioner has not established that the \$105,000 loan went towards the payment of the Claas chopper. Nevertheless, the Claas Financial loan was repaid on December 31, 2001. The record, however, contains no evidence that the petitioner transferred title of the chopper to GEMM.

Also on January 29, 2002, the petitioner repaid a loan of \$50,000, originally borrowed on February 2, 2001. A note on the collateral release indicates the loan was used to purchase a manure machine. If this loan was used in 2001 to purchase the Husky equipment, that equipment was already addressed above. We note that the first installment was for \$35,000 on February 21, 2001. On February 22, 2001, the petitioner transferred \$35,400 out of the United States. On March 12, 2001, the petitioner paid Husky Farm Equipment \$35,400 from his Canadian account, an amount already considered above. Thus, the repayment of this loan cannot be considered in addition to the \$35,400 check considered above.

Finally, on February 15, 2002, the petitioner repaid a loan initially issued on June 18, 1998. The petitioner also repaid a May 31, 2000 loan on January 29, 2002. The petitioner has not demonstrated that either loan was a GEMM obligation prior to being repaid.

Purchase of N7423 County Road A

On September 3, 2004, GEMM purchased N7423 County Road A for \$350,000. GEMM borrowed the funds for this purchase from M&I Bank, to be repaid on September 3, 2005. On September 4, 2005, GEMM secured a new loan for \$350,000 from M&I Bank to be repaid on September 3, 2006. The petitioner signed this loan in his capacity as a member for GEMM. GEMM then borrowed \$150,000 on September 4, 2006. The petitioner also signed this loan in his capacity as a member for GEMM. The record contains no evidence that any of these loans were secured solely by the petitioner's personal assets. As quoted above, the definition of capital includes 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. 8 C.F.R. § 204.6(e). Even if the petitioner had personally guaranteed these loans, a personal guaranty of a loan otherwise secured by the assets of the new commercial enterprise does not change the character of the mortgage, and, thus, cannot be considered a qualifying investment. *Matter of Soffici*, 22 I&N Dec. 158, 162-63 (Comm. 1998).

Properties Owned by Petitioner

The petitioner has purchased and sold several properties in Canada and the United States. Only those properties still owned at the time of filing will be considered here. The other property sales are relevant only insofar as they are indicative of how the petitioner lawfully acquired his funds.

The petitioner submitted eight property tax notices addressed to him, all requiring payment on January 31, 2006. The properties represent a total of approximately 374 acres. On January 1, 2005, the petitioner leased "all workable land," 380 acres, owned by the petitioner to GEMM at a monthly rate of \$150 per acre.

As stated above, an investment is defined at 8 C.F.R. § 204.6(e) as a contribution of capital. Property that remains under the petitioner's ownership and is merely leased to GEMM is not a contribution to GEMM. Rather, GEMM is incurring the expense of leasing this land. Thus, the petitioner's ownership of farmland leased by GEMM is a separate real estate investment that cannot be included as part of his qualifying investment in GEMM. While the petitioner need only be in the process of investing the required amount, the regulation at 8 C.F.R. § 204.6(j)(2) provides that the petitioner must show actual commitment of the required amount of capital. The record does not contain an irrevocable agreement whereby the petitioner committed to transferring ownership in any property leased by GEMM to GEMM. We note that this deficiency cannot be cured at a later date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971); *Matter of Izummi*, 22 I&N Dec. at 175. Significantly, the property lease is valid through December 31, 2008, suggesting the petitioner had no commitment to transfer the property to GEMM prior to that date.

Analysis of Tax Returns

As stated above, the tax return, Schedule K-1, filed by GEMM in 2002 does not demonstrate an investment of more than \$243,064 by the petitioner in that year. We have also reviewed the Schedules L and K-1 filed by GEMM in 2003 through 2005. In 2003, the petitioner contributed an additional \$16,740, but withdrew \$90,733 despite GEMM declaring a loss in that year. Thus, as of the end of 2003, the petitioner's capital contributions less withdrawals amounted to \$169,071. In 2004, the petitioner did not contribute any additional capital, but withdrew \$5,000 despite GEMM declaring a loss in that year. Thus, by the end of 2004, the petitioner's capital contribution had decreased to \$164,071. In 2005, the petitioner did not contribute or withdraw any capital.

In light of the above, the tax returns filed by GEMM reveal that the petitioner invested \$243,064 in 2002, but by 2005 had drawn down that investment to only \$164,071.

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.