



U.S. Citizenship
and Immigration
Services

B7

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2009
WAC 98 158 52246

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)

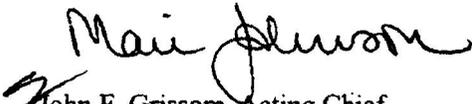
ON BEHALF OF PETITIONER:

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.

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).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

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 a targeted employment area and that he had created or would create the necessary employment. On appeal, prior counsel submits a brief and resubmits previously submitted evidence. For the reasons

¹ The appeal was filed by [REDACTED]. According to the California State Bar's website, [http://members.calbar.ca.gov/search/member_search.aspx?ms=\[REDACTED\]](http://members.calbar.ca.gov/search/member_search.aspx?ms=[REDACTED]) accessed January 29, 2009 and incorporated into the record of proceeding, [REDACTED] is deceased. According to the California Secretary of State's website, <http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C2507544>, accessed January 29, 2009 and incorporated into the record of proceeding, Global American Attorney Group's corporate status is suspended. Thus, we consider the petitioner self-represented.

discussed below, we withdraw the director's decision and remand the matter for the director to consider any amendments that predate the filing of the petition and resolve the inconsistency in the director's decision regarding the requisite minimum investment amount.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the director reopened the matter and revoked the petition after November 2, 2002, the petitioner need not demonstrate that she personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, 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 procedural history in this matter is relevant and will be set forth in detail. On February 23, 1998, the petitioner filed a Form I-526 petition, receipt number WAC-98-100-51942. On March 25, 1998, the petitioner, through prior counsel, withdrew that petition. The director acknowledged the withdrawal on June 4, 1998. On May 15, 1998, the petitioner filed the instant petition, receipt number WAC-98-158-52246. After requesting and receiving additional evidence, the director approved this second petition on January 21, 1999. Subsequently, on May 7, 1999, the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On January 14, 2004, the director advised the petitioner that the Service Center was unable to locate the petitioner's Form I-526 petition and requested that the petitioner reconstruct the original filing by resubmitting the petition and all supporting documentation. On May 26, 2005, the petitioner complied with the request. Specifically, prior counsel submitted a cover letter dated February 19, 1998, a copy of the petition signed by the petitioner and prior counsel and supporting evidence. While the petitioner's signature is undated, prior counsel's signature is dated February 13, 1998. The new commercial enterprise identified on this copy of the petition is [REDACTED]. The supporting documentation included a November 7, 1997 [REDACTED] for [REDACTED] and a January 21, 1998 partnership agreement for [REDACTED]. The July 1, 1998 request for additional evidence lists the new commercial enterprise as [REDACTED]. On August 4, 2005, the director issued a notice of intent to revoke referencing the November 1997 and January

1998 agreements. In response, prior counsel asserted that the original supporting documentation for the February 1998 petition had been submitted by mistake and submitted more recent unemployment data and the March 26, 1998 partnership agreement for [REDACTED]

The director acknowledged the submission of more recent unemployment data and concluded that the petitioner had invested in a targeted employment area as defined at 8 C.F.R. § 204.6(e). An investment in a targeted employment area allows an alien to invest only \$500,000 rather than \$1,000,000. 8 C.F.R. § 204.6(f)(2). As noted by prior counsel on appeal, however, the director later concluded that the petitioner had failed to document an investment of \$1,000,000. On remand, the director shall resolve this inconsistency by either enumerating any deficiencies in the evidence submitted to demonstrate that Los Angeles County was a targeted employment area at the time of filing, *see Matter of Soffici*, 22 I&N Dec. 158, 159 (Comm'r 1998), and the time of investment, 8 C.F.R. § 204.6(e) (definition of "targeted employment area"), or accepting that the petitioner need only invest \$500,000.

The director then refused to consider the March 26, 1998 partnership agreement. The director relied on *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971), for the proposition that the petitioner could not make material changes to the petition. Prior counsel asserts in both the response to the director's notice of intent to revoke and again on appeal, however, that the March 26, 1998 partnership agreement was submitted with the May 1998 petition and that the petitioner accidentally reconstructed the earlier petition in May 2005.

The record contains the director's acknowledgement that the original petition filed in May 1998 cannot be located. As the only version of the May 1998 petition in the record is the reconstructed petition, which is clearly a reconstruction of the February 2008 petition, the record contains nothing that would contradict prior counsel's assertion that the petitioner mistakenly reconstructed the February 2008 petition and that the March 1998 partnership agreement was submitted with the original May 1998 petition that is now lost. Clearly the March 1998 partnership agreement predates the May 1998 priority date of the petition before us.

In light of the above, the matter is remanded to the director for the purpose of considering the March 1998 partnership agreement. In addition, given that the Form I-526 submitted as the reconstructed petition is signed by prior counsel in February 1998 and lists a different new commercial enterprise than the one listed on the director's July 1, 1998 request for evidence, the director shall request a new reconstruction of the entire May 1998 submission, including the May 1998 petition, cover letter and other evidence.

In addition, the director shall also inquire into the following issues. First, while the petitioner has amended the [REDACTED] that partnership had agreed to contribute \$488,800 to [REDACTED]. Prior counsel, however, asserts that [REDACTED] is not part of the new commercial enterprise identified on the May 1998 petition. The petitioner has not submitted any evidence that [REDACTED] withdrew as general partner of [REDACTED] and received a full return of its investment. We note that, according to the California Secretary of State's California

Business Portal, available at <http://kepler.sos.ca.gov> and accessed January 2, 2008, [REDACTED] is still active and lists prior counsel as the agent for service of process.²

Second, the only tax returns for [REDACTED] in the record cover 2001 and 2005. These returns, Schedules K-1, show the petitioner's capital account for both years starting at \$0. In 2005, the petitioner's capital account ends at -\$11,124. Without all schedules K-1, the record cannot establish whether the petitioner ever invested the necessary funds as equity and, if she did, whether her capital account was diminished by company losses or withdrawal of capital. The director shall request all federal tax returns for [REDACTED], including Schedules K-1.

Finally, while prior counsel asserts on appeal that the petitioner is not required to submit evidence of employment creation until the removal of conditions stage pursuant to section 216A of the Act, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) requires the submission of evidence of employment "if such employees have already been hired." Prior counsel has asserted in response to the notice of intent to revoke and again on appeal that the petitioner has already created 10 positions. The record contains a quarterly employer return for the first quarter of 2005 reflecting nine employees. Thus, the director may request pay roll records, quarterly employer returns and Forms I-9 to confirm that the petitioner is complying with her business plan.

The matter is therefore remanded to the director for further action. Should the director conclude that grounds of ineligibility exist that were not raised in the initial notice of intent to revoke, the director must issue a new notice of intent to revoke. A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations in the notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988).

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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

² We acknowledge that the same website indicates that [REDACTED] is also currently active. Evidence of the status of both partnerships has been incorporated into the record of proceedings.