

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B7



FILE: SRC 05 012 50927 Office: TEXAS SERVICE CENTER Date: JUL 19 2003

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:



PUBLIC COPY

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.

Maia Johnson

2 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, approved the preference visa petition and certified that decision to the Administrative Appeals Office (AAO). The AAO remanded the matter back to the director for additional consideration. The AAO ordered that any new decision be certified back to the AAO. The director requested additional evidence and subsequently approved the visa petition a second time. The matter is now before the AAO on certification. The director's decision will be affirmed.

The director determined that the petitioner had overcome the AAO's concerns regarding the lack of commitment from the entity that will ultimately receive and use the invested funds and the ongoing nature of the new commercial enterprise. 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 June 28, 2005, advising the petitioner to send any brief directly to this office within 30 days. On July 7, 2005, this office received a letter from counsel commenting on the director's decision and waiving the 30-day period.

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).

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. [REDACTED] 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.

In our previous decision, we found that the petitioner had sufficiently demonstrated that the requisite amount was fully committed to an at-risk investment in the new commercial enterprise and that his funds were lawfully obtained. At issue is whether the petitioner has demonstrated that the new commercial enterprise is fulfilling the approved regional center plan and whether it was structured as an ongoing entity.

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, [REDACTED] 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 [REDACTED] 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 [REDACTED] 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 [REDACTED] agreeing to loan a minimum of \$500,000 and maximum of \$5,000,000 to [REDACTED] to assist in its establishment of new commercial for-

profit businesses within the PIDC Regional Center.” [REDACTED] 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 [REDACTED] as the “Borrower.” In its previous decision, however, the AAO noted that the signature page of the letter 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 [REDACTED] or his or her authority to sign on behalf of [REDACTED]. The AAO concluded that this letter is peculiar evidence of a large, publicly traded company agreeing to a \$5,000,000 loan. The AAO noted the lack of actual loan documents, the related promissory note, or Lannett’s loan request.

The AAO further noted that 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.

The AAO questioned whether the loan had to have been advanced by December 31, 2004, which had passed, in order to remain valid.

Finally, the AAO obtained Lannett’s publicly available 2004 financial statements and expressed concern that the statements did not reflect a \$5,000,000 loan from PIDC or the new commercial enterprise.

In response to the director’s inquiry into the above issues, the petitioner submitted an extension of the close out date, an unsigned but negotiated loan agreement,¹ and a May 5, 2005 board resolution accepting the terms of the June 16, 2004 loan offer. The petitioner also submitted a PIDC Loan Committee Project Data Sheet for [REDACTED] drawn up at the committee’s February 18, 2004 meeting. The sheet includes a \$5,000,000 loan from an “immigrant investor fund” referenced as “INS.” [REDACTED] asserts that Lannett was persuaded to remain in Philadelphia after an agreement whereby PIDC would secure a “Welcome Fund” from immigrant investors. Mr. [REDACTED] asserts that while [REDACTED] (CFO) at the time of the February 18, 2004 meeting has left [REDACTED] is current working with the current CFO. The new CFO, [REDACTED] is the individual who introduced the May 5, 2005 board resolution to accept the terms of the loan.

The director concluded that the new evidence did not constitute a material change to the petition. The director cites *Matter of Katigbak*; 14 I&N Dec. 45, 49 (Comm. 1971). We note that the petitioner must provide evidence of eligibility as of the date of filing. See *id.*; 8 C.F.R. § 103.2(b)(12). Thus, the question is not simply whether there has been a material change in the investment plan, but whether the investment was sufficiently committed as of the date of filing. The extension of the close out is an extension of an agreement that already existed as of the date of filing and is, therefore, not problematic.

The board resolution, passed after the date of filing, and the loan agreement negotiated after the date of filing, while of some concern, is not sufficiently problematic as to render the petitioner ineligible. We must take into consideration that, as of the date of filing, the petitioner’s funds were in escrow and, thus, irrevocably committed to the new commercial enterprise should the petition be approved. The new commercial enterprise is a limited partnership funding the loan [REDACTED] through the regional center entity, PIDC. It is reasonable that Lannett deal more directly with PIDC than the limited partnership. The minutes for the February 18,

¹ The petitioner submitted letters from [REDACTED] counsel and a representative from [REDACTED] affirming that the unsigned loan agreement and promissory note constitute the negotiated contracts.

2004 meeting, which predate the filing of the petition, reflect [REDACTED] acceptance of the entire PIDC package, including the Welcome Fund made up of the limited partnership's investment. Thus, we accept that the board resolution is merely confirmation of a commitment that already existed as of the date of filing. We note that we had some evidence of that commitment previously, namely the June 28, 2004 letter, but we questioned its sufficiency. Thus, the board resolution merely reinforces evidence already a part of the record.

Regarding the 2004 financial statements, Counsel asserts that Mr. [REDACTED] has advised that the \$5,000,000 "Welcome Fund" loan was not included on those financial statements because:

- (1) No company benefit was derived from the proposed Partnership loan in 2004;
- (2) the PIDC Regional Center was a relatively new and unproven investment capital source;
- (3) the actual amount of the loan depended on the CIS adjudication of each of the ten (1) prospective limited partners' I-526 petition (pursuant to the escrow agreement, capital invested by a prospective limited partner who fails to have his or her I-526 petition approved will be fully refunded.)

Counsel further states that Lannett will include the loan on its 2005 financial statements, which will be provided as part of the evidentiary documentation in support of any Form I-829 Petitions to Remove Conditions on Residence.

The director concluded that this explanation was acceptable. We concur. While we disfavor assertions that evidence of the viability of the investment will be submitted at the removal of conditions stage, in this matter we find sufficient evidence of [REDACTED] commitment to the loan as of the date of filing. We emphasize, however, that it can now be expected that financial statements reflecting the loan will be submitted at the I-829 stage.

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 noted by the AAO in its previous decision, 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 AAO noted that the business plan, while allowing the possibility of future investments, focuses on the Lannett loan, which terminates after five years.

Thus, the AAO remanded the 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 response to the director's inquiry into this issue, counsel obtained a legal opinion from [REDACTED] of the law firm Hangle, Aronchick, Segal & Pudlin. Mr. [REDACTED] asserts that he reviewed section 15.1 and concludes that it is a "'boilerplate' provision [that] merely provides a way to terminate and dissolve the Partnership if and when it no longer has any ongoing commercial purpose." Mr. [REDACTED] notes that limited partners can withdraw after the initial investment proceeds are realized, implying that the remaining limited partners may elect to make a new investment with the remaining realized but undistributed proceeds pursuant to sections 16.11(b) and 9.3. Counsel asserts that it is in the interest of PIDC and the general partner to encourage new investments after the initial investment concludes.

The director concluded that while the investment was structured for investors seeking permanent residence and that such investors would have no incentive to remain investors after the initial investment, it would be unreasonable to expect the business to continue "forever." The director correctly notes that no alien investor is required to sustain his investment after conditions are removed.

We maintain that an investment plan centering on a single loan to a single company that will end on a date certain (five years after the loan closes) bears some scrutiny. Such an enterprise is not continually operating in a manner that would require cessation of activities to dissolve, such as a retail store that is continually buying and selling its inventory. We are persuaded, however, that section 15.1 does not mandate termination on the January 1 of the year after the initial loan proceeds are realized (which would effectively be the January 1 of the sixth year after the loan was advanced) as some of those proceeds may not be distributed to limited partners who choose to continue. Thus, we will not contest the ongoing nature of the new commercial enterprise.

While the AAO will approve this current petition, the AAO notes that each petition has its own separate burden of proof and must stand on its own individual merits. *See generally* Section 291 of the Act, 8 U.S.C. § 1361; *also* 8 C.F.R. § 103.8(d). The approval of this petition in no way relieves future petitioners from the burden of proof associated with other PIDC I-526 petitions or the I-829 applications for the removal of conditional approval. Each individual petition must be supported by probative evidence.

For the reasons discussed above, we concur with the director that the petitioner has overcome the concerns expressed in our previous decision. 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 approving the petition will be affirmed.

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ORDER: The petition is approved.