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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2011

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) affirmed the director's decision on certification. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

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 sustained investment in a new commercial enterprise. The director certified the decision denying the petition to the AAO pursuant to 8 C.F.R. § 103.4. The AAO withdrew the director's concern that the commercial enterprise was not "new" as defined at 8 C.F.R. § 204.6(e). The AAO also rejected the director's concern that the losses reflected on certain tax returns demonstrated that the petitioner was not sustaining his investment in the new commercial enterprise. Nevertheless, the AAO upheld the director's ultimate conclusion that the petitioner had not sustained his investment based on bank statements showing withdrawals of funds from the new commercial enterprise's account. The AAO also questioned whether the employment creating entity was still a wholly owned subsidiary of the new commercial enterprise.

On motion, the petitioner submits documentation explaining the withdrawal of funds. Counsel further asserts that the employment creating entity is an "affiliate" of the new commercial enterprise, a relationship that the regulations do not prohibit. For the reasons discussed below, the petitioner has now overcome the AAO's concerns about the withdrawal of funds. Nevertheless, counsel's assertions about the affiliate nature of the employment creating entity confuse the structure of the business with the relationship of the business to the new commercial enterprise and, thus, are not persuasive.

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, [redacted] not 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 $1,000,000.

INVESTMENT OF CAPITAL

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.
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> * * *
>
> *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.

The petitioner indicated on the Form I-526 petition, Part 3, that he made an initial investment of $175,000 on August 24, 2005 and that he had made a total investment of $1,029,070.84.

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'r. 1998). The employment generating entity, [redacted] was, at the time of filing, a wholly-owned subsidiary of the new commercial enterprise, [redacted] Thus, the AAO accepted that [redacted] was part of the commercial enterprise as defined at 8 C.F.R. § 204.6(e) as of that date. In addition to complying with the definition of commercial enterprise, this relationship makes it easier to demonstrate a nexus between the petitioner's investment and job creation.

The petitioner submitted the schedules K-1 accompanying [redacted] IRS Forms 1065. The petitioner's schedule K-1 for 2006 reflects a capital investment of $89,970 and a withdrawal of that amount. In 2007, however, the petitioner's schedule K-1 reflects a capital contribution of $1,029,041. While this schedule K-1 also reflects a decrease of $577,147, that decrease purports to represent the petitioner's share of the company's losses. The separate and distinct line for "withdrawals and distributions" does not reflect that the petitioner withdrew any money in 2007. In addition, because the petitioner transferred his interest in [redacted] to [redacted] in 2007, his schedule K-1 for that year showed an ending capital balance of $0. The director noted that decrease in capital in [redacted] and the zero ending balance for the petitioner's capital in [redacted] and concluded that the petitioner had not sustained his investment.

On certification, the petitioner submitted a letter from [redacted], Senior Financial and Tax Manager at [redacted] the firm that prepared the tax returns for [redacted] and [redacted] correctly notes that the schedules K-1 for [redacted] show losses, not withdrawals. In addition, [redacted] explains that the petitioner's zero ending balance in [redacted] reflects the change in ownership of that company. The petitioner submits his 2008 schedule K-1 for [redacted] showing an additional contribution of $684,630 during that year.

[redacted] assertions are supported by the plain language of the schedules K-1. Thus, the AAO concluded that the schedules K-1 in and of themselves do not suggest that the petitioner has withdrawn any of his investment in [redacted] after 2006. Moreover, the petitioner's lack of interest in [redacted] would not be problematic. In fact, for the reasons stated below, the new commercial enterprise, [redacted], includes only wholly owned subsidiaries. As will be discussed below, however,

[redacted] is no longer a wholly-owned subsidiary of [redacted] and, thus, is no longer part of the new commercial enterprise.

While the AAO concluded that the losses and transfers of capital from the subsidiary to the new commercial enterprise were not disqualifying, the AAO raised concerns about the transfer of funds represented on certain bank statements. The relevant bank statements reflect that as of June 22, 2007, the petitioner had transferred $555,001 to [redacted] As of September 28, 2006, the petitioner had transferred $650,000 to [redacted], which went towards the construction of the restaurant. On June 28, 2007, however, [redacted] transferred $1,000,000 to the petitioner's checking account. On the same date, he transferred those funds (in two transfers of $500,000 each) to his own personal money market savings account. On July 12, 2007, the petitioner transferred the same amount (in two transfers of $500,000 each) back to his checking account. On the same date, the petitioner transferred $1,000,000 to an unknown checking account. The AAO reviewed [redacted] checking account statement for July 2007, which did not reflect that [redacted] was the recipient of the $1,000,000 transfer. Thus, the AAO concluded that the beneficiary of the July 12, 2007 transfer of $1,000,000 from the petitioner's checking account is undocumented.

On motion, counsel asserts that the petitioner spent more than $1,000,000 on construction and other costs; thus, "it is not logically feasible" to conclude that the petitioner did not sustain his investment. Counsel notes that [redacted] is a holding company that serves to manage investments other than [redacted]. Counsel asserts that the petitioner took out a loan in June 2007 by refinancing his condominium and transferred those funds to [redacted] account to demonstrate sufficient funds for the construction of a new restaurant in Florida. Once the construction company was satisfied that the petitioner had sufficient funds, the petitioner transferred those funds to higher interest bearing accounts. Counsel asserts that these funds are unrelated to the petitioner's investment in [redacted] benefitting [redacted]

The petitioner submitted evidence of the refinancing, relevant bank statements and other evidence supporting counsel's assertions. Thus, we concur that these funds are unrelated to the investment in [redacted] through [redacted]

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.)

On motion, counsel asserts that the petitioner owns 90 percent of both [redacted] and [redacted], making the two companies "affiliates." As noted by counsel, the petitioner previously submitted the management agreement through which [redacted] manages [redacted]. Counsel states that an affiliate is a corporation related to another corporation by shareholding or other means of control, a subsidiary or sibling corporation. Counsel further notes that affiliates are viable and qualifying corporate entities for another immigrant classification pursuant to section 203(b)(1)(C) of the Act.

Counsel concludes that the "not limited to" language in the definition of commercial enterprise at 8 C.F.R. § 204.6(e) reveals that affiliates may be included as qualifying commercial enterprises. Counsel further asserts that the same definition excludes non-commercial activities but not affiliates. Finally, counsel asserts that the change in ownership is not a material change precluded under *Matter of Izummi*, 22 I&N Dec. at 175.

Counsel is not persuasive. The "not limited to" language relates to the types of business structures. "Affiliate" is not a business structure but a modifier of that structure explaining its relationship to other businesses. [redacted] and [redacted] are both limited liability companies. These are appropriate structures. Significantly, the regulatory definition is not silent on affiliates. Rather, the definition of commercial enterprise specifies that wholly-owned subsidiaries are affiliates considered within a commercial enterprise. Thus, it is clear that other affiliates, including subsidiaries that are not wholly-owned and sibling companies, are not included in the definition of commercial enterprise. As the regulatory definition is not silent on affiliates, the final sentence of the definition excluding noncommercial enterprises does not suggest that the definition of commercial enterprise includes a company and all of its affiliates. Moreover, as the regulatory definition pertinent to the classification sought answers the question of which affiliates may be included, we need not attempt to extrapolate this information from regulations relating to other, unrelated classifications.

On November 10, 2010, the AAO requested the complete 2009 tax returns, including all schedules K-1, for both [redacted] and [redacted]. The petitioner submitted the requested documents, which confirm that the petitioner owns 90 percent of both companies. [redacted] does not own any of [redacted]. Thus, [redacted] is not even a partially-owned subsidiary of [redacted].

Matter of Izummi, 22 I&N Dec. at 175, addresses the situation where a petitioner makes a material change in an attempt to correct disqualifying factors. That case does not address situations where the employment generating entity was part of the commercial enterprise at the time of filing but is no longer part of the commercial enterprise. We find that [redacted] is no longer part of the commercial enterprise and, thus, the investment in and employment at [redacted] can no longer support the petition.

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. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of February 18, 2010 is affirmed. The petition is denied.