

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

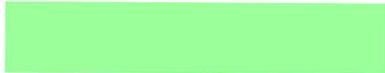


U.S. Citizenship
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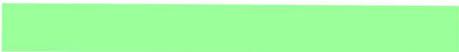
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DATE: FEB 10 2014 Office: INVESTOR PROGRAM OFFICE

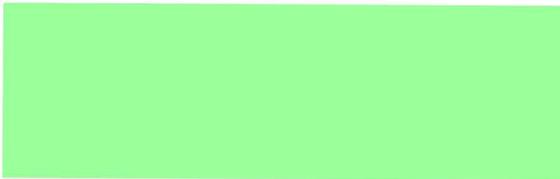


IN RE: Petitioner:



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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition and certified the decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration to the Investor Program Office (IPO).

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 petitioner's claimed investment was through a U.S. Citizenship and Immigration Services (USCIS) designated regional center, South Florida Investment Regional Center, LLC (SFIRC) pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). USCIS designated SFIRC as a regional center on March 5, 2009, and approved a subsequent amendment on June 2, 2011. The petitioner's investment is through an affiliated limited partnership, [REDACTED] which seeks to loan funds to Business [REDACTED] doing business as [REDACTED] to establish a factory/assembly plant and to build steel structures.¹ The petitioner's investment is located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

The director determined that the petitioner did not submit a comprehensive business plan establishing that the petitioner's investment would create at least 10 full-time positions to qualifying employees and that the petitioner made material changes to the business plan in response to the director's request for evidence.

I. LAW

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

¹ The initial 2010 business plan, page 6, identifies [REDACTED] "a large Chinese based manufacturer of integrated pre-engineered cold rolled steel framing components." The record also contains a Summary of Testing: 2 Inch Autoclaved Aerated Concrete Building Panels listing the client as [REDACTED]. While the petitioner submitted evidence that [REDACTED] owns the fictitious name [REDACTED] the petitioner did not document the relationships between [REDACTED] Ltd.

- (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).

II. PROCEDURAL AND FACTUAL BACKGROUND

On July 19, 2011, the petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, along with supporting documentation. On December 28, 2011, the director issued a request for evidence. On March 21, 2012, the petitioner responded to the director's notice and submitted additional documentation. The director denied the petition and certified the decision to the AAO on July 18, 2013. The director determined that the petitioner did not submit a comprehensive business plan establishing that the petitioner's investment would create at least 10 full-time positions, and made material changes to the business plan in response to the director's request for evidence.

In accordance to the regulation at 8 C.F.R. § 103.4(a)(2), the director informed the petitioner that she may submit a brief to the AAO within 30 days of the certification. As of October 21, 2013, the petitioner had not submitted a brief or any additional documentation. On that date, the AAO issued a notice of adverse information and intent to affirm the director's decision. Specifically, the AAO advised that according to the Florida Department of State, Division of Corporations, [REDACTED], was in an "inactive" status. The petitioner was afforded 30 days to respond to the AAO's notice. However, as of the date of this decision, the petitioner has not responded to the AAO's notice.

III. ANALYSIS

A. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Forms I-9, or other similar documents for ten (10) qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite 10 jobs, the petitioner must submit a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(B).

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'r 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

At the initial filing of the petition, the petitioner indicated on Form I-526, Immigrant Petition by Alien Entrepreneur, in Part 5 that the commercial enterprise did not have any full-time employees at the time

she made her investment, that there were currently no full-time employees, that her investment did not create any full-time jobs, and that there would be no additional jobs as the result of her investment. As the petitioner did not claim that her investment had already created at least 10 full-time positions to qualifying employees, the petitioner was required to submit a comprehensive business plan pursuant to the regulation at 8 C.F.R. § 204.6(j)(4)(B).

At the initial filing of the petition, the petitioner submitted a USCIS letter, dated March 5, 2009, designating SFIRC as a regional center. The approval letter reflects that the investment focus “shall be the development of a manufacturing facility devoted to the production of construction material from agricultural residues,” and the industry focus will be the “[c]onstruction of a hotel complex (with spa, restaurants and retail space).” The petitioner also submitted an approval letter, dated June 2, 2011, for an amendment to SFIRC’s regional center designation reflecting:

As depicted in the economic model, the general proposal, business plan, and associated economic analysis, the Regional Center will engage in the following activities: Loans to 3rd party businesses and organizations, real estate construction, renovation and management, securing equipment for new and existing businesses and paying salaries for start-up businesses.

Moreover, the regional center amendment indicated that the focus would be the manufacturing of steel frame buildings as well as the construction of a hotel complex.

Furthermore, the petitioner submitted a declaration stating that [REDACTED] “will create qualifying US employment by establishing its fabrication/assembly facility, and by building a 40,000 square foot commercial building.” In addition, the petitioner submitted an “Economic Impact of Manufacturing and Constructing [REDACTED] and [REDACTED], as Part of a EB-5 Regional Center in South Florida,” dated January 2011, reflecting that “[t]he company plans to construct a 40,000 square foot commercial steel building in [REDACTED] [REDACTED]” and “[t]he company also plans to manufacture, construct and sell steel homes in [REDACTED] and [REDACTED].” The petitioner, however, also submitted the 2010 business plan, which does not discuss a 40,000 square foot commercial building. Rather, it reflects that [REDACTED] would build affordable housing in [REDACTED] (page 4). Specifically, [REDACTED] would rent the residences under the Housing Choice Vouchers Program (page 43) or to people with median to low income in [REDACTED] counties (page 47). Finally, the business plan contained brief job descriptions for [REDACTED] employees (pages 56 – 60).

During the course of the adjudication of the petition, the petitioner submitted a March 2012 business plan addendum indicating that [REDACTED] planned to construct a 40,000 square foot commercial building, which would include a bank, retail space, and office space (pages 6 – 7) as well as the prior claim of building 50,000 square feet of affordable housing (page 8).

In the director’s certified decision, she discussed several deficiencies in the petitioner’s March 2012 business plan addendum. For example, the director expressed concern with the unexplained high proportion of the direct and indirect jobs associated with the 40,000 square foot commercial building,

especially in light of the total number of employees [REDACTED] lists on its website, and revisions to the organizational chart. In addition, the director determined that the business plan addendum was vague.

The director further concluded that the contract for the purchase of 15,000 square feet and construction permit for 1,000 square feet was not consistent with either the initial business plan to build 50 homes at 1,000 square feet each for a total of 50,000 square feet or the addendum's plan to build a commercial building that would be 40,000 square feet.

Separately, the director determined that the petitioner made a material change to her business plan by submitting the addendum. Significantly, however, despite counsel's assertion during the proceeding before the director that the business plan and economic analysis were "identical" to those that supported the regional center amendment request, the director did not make the initial assessment as to whether the business plan or its addendum contained material changes from the business plan(s) that supported the regional center proposal or amendment request.

On May 30, 2013, United States Citizenship and Immigration Services (USCIS) issued a policy memorandum, *EB-5 Adjudications Policy*, PM-602-0083, 14-15, 23 (May 30, 2013). According to this memorandum provides, if the regional center proposal the Director, California Service Center, approved on March 5, 2009, and subsequent amendment request the director approved on June 2, 2011, contained a comprehensive business plan satisfying the requirements set forth at *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), then USCIS officers should afford that business plan, and the accompanying economic impact analysis, deference.

The director certified the decision to the AAO on July 18, 2013. As the director certified the decision, it is not a final agency action. Administrative Procedure Act, 5 U.S.C. § 704. At no point in the proceeding prior to analyzing the business plan and the business plan addendum did the director explain why deference should not be afforded to the business plan, the business plan addendum, or the economic analysis SFIRC filed in support of the instant petition. See *EB-5 Adjudications Policy* at 14-15, 23. The Policy Memorandum provides that under certain circumstances, USCIS is not required to afford deference to USCIS's previous favorable determinations. For example, USCIS need not give deference to previous determinations that were based on hypothetical projects, that were legally deficient, or where the underlying facts have materially changed. See *EB-5 Adjudications Policy* at 14-15, 23. In this case, while the director stated that the petitioner materially changed the business plan by submitting the addendum, the director did not make an initial assessment as to whether either the plan or the addendum constitutes a material change from the business plan(s) that supported the regional center proposal or the amendment request.

As the director never explained in writing, as an initial assessment, why the business plan, the business plan addendum, and the economic impact analysis filed in support of the instant petition were not due deference, either because of a material change in the underlying facts or otherwise, the director did not properly deny the petition. Thus, the AAO is remanding the matter to the IPO to make an initial assessment as to whether the business plan, the business plan addendum, and the economic impact analysis in the record should be afforded deference. If the IPO determines that deference is not

warranted, the IPO must explain that determination to the petitioner prior to evaluating those documents *de novo* and addressing the separate issue of material change during the pendency of the Form I-526 petition.

B. Ongoing Conduct of a Lawful Business

According to the regulation at 8 C.F.R. § 204.6(e), a commercial enterprise is defined as “any for-profit activity formed for the ongoing conduct of lawful business.” As stated in the AAO’s October 21, 2013 notice, as of January 15, 2013, [REDACTED] was in an “inactive” status. Furthermore, according to the Florida Department of State, Division of Corporations, [REDACTED] remains in an “inactive” status.² As the petitioner has not rebutted the information that [REDACTED] is an inactive corporation in the State of Florida, it does not meet the definition of a commercial enterprise pursuant to the regulation at 8 C.F.R. § 204.6(e).

Therefore, regardless of whether the IPO determines that any of the business plans are due deference, the IPO shall consider whether the petitioner has established that [REDACTED] continues to meet the definition of a commercial enterprise pursuant to the regulation at 8 C.F.R. § 204.6(e).

IV. SUMMARY

Based on the reasons stated above, this matter will be remanded. The IPO must issue a new decision, containing specific findings. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The director’s decision is withdrawn; however, the petition is currently not approvable 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 IPO for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

² See <http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail/EntityName/domlp-a11000000030-54d1345b-ce85-433c-a800-cb3ed052980f/prestige%20investments%201%2c%20ltd./Page1>, accessed on January 15, 2014, and incorporated into the record of proceeding.