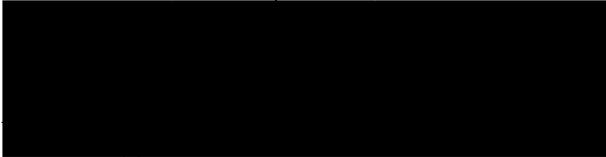




U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC-98-078-51714 Office: Texas Service Center

Date: DEC 12 2000

IN RE: Petitioner: [Redacted]

Application: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5) and § 610 of the Appropriations Act of 1993.

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying this matter as
prevent clearly substantiated
violation of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993. The director denied the petition finding that the petitioner failed to establish eligibility on several grounds. Relying, in part, on Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), the director found that the structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a six-year period, did not constitute a qualifying investment. The director also determined that the petitioner's investment did not constitute a qualifying investment for the purposes of this proceeding finding that the investment agreement's provisions for reserve funds, escrow funds, and guaranteed returns prior to completion of the investment rendered those sums not acceptable as a part of the minimum capital investment; that the redemption agreements negated the at-risk element; and that the security interest of the promissory note was not perfected as required. The director also found that the petitioner failed to demonstrate establishment of a new commercial enterprise and failed to establish the requisite employment creation. The director finally found that the petitioner failed adequately to document the source of her funds and thereby failed to establish that the funds were obtained through lawful means.

On appeal, counsel for the petitioner broadly argued that the center director's denial was based on the findings in Matter of Izumii, supra, and that both decisions ignore previously well settled Service interpretation of the immigrant investor provisions. Counsel also argued that the Service illegally applied the precedent retroactively and rendered its decision without notice and without affording the petitioner an opportunity to comment on the rule change. Counsel indicated on the appeal form that a written brief would be submitted on or before December 12, 1998. As of this date, however, no brief has been received by the Service.

Counsel here has not addressed the reasons stated for denial other than to challenge the director's reliance on precedent decisions and to assert that the director incorrectly sets forth certain unspecified facts. Counsel has not provided any additional evidence.

While the appeal generally fails to identify specifically any erroneous conclusion of law or statement of fact as required by 8

C.F.R. 103.3(a)(1)(v), counsel's unsupported assertion regarding the applicability of the precedent decisions will be addressed.

In his decision, the director stated that the petition was reviewed in accordance with the following precedent decisions issued by the Director, Administrative Appeals Office ("AAO"): Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998), and Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998). 8 C.F.R. 103.3(c) provides:

Service precedent decisions. In addition to Attorney General and Board decisions referred to in §3.1(g) of this chapter, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. (Emphasis added.)

Despite the clear language of the regulations, counsel argues the precedent decisions constituted new rules which could not be applied retroactively. However, in R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court concluded that the AAO precedent decisions did not involve rulemaking. The District Court for the Western District of Washington reached a similar conclusion in an unreported decision. Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

Contrary to counsel's assertion, published precedent decisions represent the Service's interpretation of the statute and the regulations and are used to provide guidance in the administration of the Act. They do not represent rule making requiring notice and comment pursuant to the provisions of the APA. The Associate Commissioner publishes precedents as deemed necessary under authority delegated by the Commissioner of the Service and by the Attorney General. 8 C.F.R. 2.1.

Counsel's additional argument that some similar petitions were approved by the Service prior to the precedents being issued is immaterial to the director's findings in the instant case. The Service is not bound to treat acknowledged past errors as binding. See Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327 (9th Cir. 1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517-518 (1994); Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987). The further argument that any corrections to adjudicative decision making was improper or that an administrative

agency is bound by past erroneous decisions is not tenable. That is simply the process by which any administrative agency inevitably performs its function over time. See National Labor Relations Bd. v. Seven-up Bottling Co. of Miami, 344 U.S. 344, 349 (1953).

Other than challenging the director's use of the precedent decisions, counsel has not alleged any other specific erroneous conclusion of law or fact and has not provided any additional evidence. As discussed above, the director correctly relied on the precedent decisions. The appeal must therefore be dismissed.

ORDER: The appeal is dismissed.