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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

JUL 17 2003

File: [redacted] Office: California Service Center Date:

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:
This is the decision 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 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 that his investment was fully at risk. Specifically, the director determined that the Operating Agreement contained impermissible redemption provisions.

On appeal, counsel argues that the petitioner's investment is at risk and that the provisions in the Operating Agreement are permissible under *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

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 petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. Thus, we need not address counsel's questionable arguments on that issue.

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 record indicates that the petition is based on an investment in a business, H.K. Partners, LLC, 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

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.

* * *

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.

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.

As stated in *Matter of Izummi, supra*, an alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. *Id.* at 183-188. The AAO further stated that the alien must go into the investment not knowing for sure if he will be able to sell his interest at all after he obtains his unconditional permanent resident status; and if he is successful in selling his interest, the sale price may be disappointingly low or surprisingly high and more than what he paid. This way, the alien risks both gain and loss. To allow otherwise transforms the arrangement into a loan. *Id.*

Section 29 of the Operating Agreement provides:

> Upon ninety (90) days written notice, a Member not seeking for [sic] immigration benefits shall have the right to require the Company to purchase such Member's interest in the Company insofar as the Company is able in the reasonable discretion of the Managers. The purchase price to be paid by the Company shall be the purchase price set forth in the numbered paragraph of this Agreement titled "DETERMINATION OF PURCHASE PRICE."

Section 31 of the Agreement provides:

> . . . After January 1, 2002, the purchase price shall be determined as follows:
>
> The value of the Company shall be mutually agreed upon between the purchasing and selling parties, with the Managers to act on behalf of the Company. In the event the parties cannot mutually agree upon the value of the Company within (30) days after the date of the occurrence requiring valuation of the Company (the "Valuation Date"), then the value of the Company shall be the Total Project Income divided by ten percent (10%). For purposes of this section, the term "Total Project Income" shall mean and refer to the total scheduled rental income, without regard to vacancy or collection loss, of the Project for the month of Value Date times twelve (12), reduced by the total Project Expenses for the twelve (12) month period of time ending on the Valuation Date. For purposes of this section, the term "Project Expenses" shall mean and refer to (a) operating expenses of the Project excluding interest, (b) material items of a character significantly different from the typical or customary business activities of the operation of the Project and which would not be expected to recur frequently, and (c) capital items, which should be capitalized under generally accepted accounting principles.

Section 34 of the Agreement provides that, where a dispute arises that could lead to litigation, any Member may offer to purchase the interest of another Member. The Member receiving the offer may accept the offer or respond with a counter-offer. This section is titled "Buy-Sell."

In addition to the above provisions, Section 8 of the Agreement provides:

> In the event any Member has received immigration benefits under the Alien Entrepreneur Program pursuant to Section 203(b)(5) of the Immigration and Nationality Act, such Member shall not be permitted to enter into any agreement to withdraw his or her membership interest until the Member is no longer seeking immigration benefits under the above Alien Entrepreneur Program.

The director concluded:

> The "Reinstated Operating Agreement" provides for a redemption agreement and a buy-sell agreement allowing the Members including the petitioner to reclaim or regain his or her capital investment. Such an agreement cannot be made prior to the end of the two-year required period where the members of the new commercial enterprise can sell or withdraw their interest under the conditions specified in the agreement. Thus, the investment is not considered capital at risk for the purpose of generating a return on the capital placed at risk.

First, we do not find that a provision that allows members to negotiate fairly to purchase the interest of another member to reduce the petitioner's risk. While termed "Buy-Sell," the provisions set forth in Section 34 are not similar to the "buy option" and "sell option" provisions discussed in *Matter of Izummi*. The options in that case obligated the Partnership to buy a Partner's interest at a set price when requested by the Partner and obligated the Partner to sell his interest to the Partnership for a set price if requested by the Partnership. Those options did not relate to the arms-length negotiation between partners for the sale of interests. Thus, we do not find Section 34 problematic.

Section 29 is more ambiguous. Standing alone, it strongly suggests that it represents an agreement made at the time of the Operating Agreement that allows a Member seeking immigration benefits to require the Company to purchase his interest once he is no longer seeking immigration benefits. A reasonable reading of this provision does suggest that the petitioner entered an agreement prior to the removal of conditions to guarantee himself a buyer once he had his conditions removed.

The director issued a notice of intent to deny that did not quote Section 8 of the agreement. In response, counsel submitted two letters from immigration attorneys asserting that Section 8 removes the right of redemption granted to other Members from Members who received immigration benefits under the Entrepreneur program. In his final decision, the director quoted Section 8, but did not address the argument that Section 8 exempted the petitioner from Section 29.

There are two ways to interpret Section 8. Either a Member who is seeking immigration benefits under the entrepreneur program is excluded from the initial agreement in Section 29 whereby the other Members are ensured that the Company will buy their interest if requested, or such a Member cannot enter the final withdrawal agreement until after his conditions are removed. The use of the phrase "agreement to withdraw" in Section 8 as opposed to specifically excluding such a Member from Section 29 causes us to find that the petitioner will be able to take advantage of Section 29 once he is no longer seeking immigration benefits. Further, the petitioner's pledge not to take advantage of Section 29 is undated. Therefore, even if we accepted this pledge as legally binding on the petitioner, we cannot conclude that this pledge is not a material change from the facts as they existed at the time of filing. While the petitioner asserts that it was his initial understanding that he was excluded from Section 29, what are relevant are his actual rights at the time of filing, and not what he believed those rights to be. In light of the above, we must consider whether Section 29 is disqualifying.

The opinions of private immigration attorneys obtained by counsel are not binding on this Bureau. While we will consider those arguments, they are no more persuasive than those offered by counsel. That said, we find that every investment arrangement must be examined on a case-by-case basis. It is important to look at the investment arrangement as a whole.

There are several factors that distinguish this case from *Matter of Izummi*. First, unlike that case, the petitioner is not investing in a scheme designed for immigrant investors that would not appeal to other investors.[1] We note that in the case before us, there are eight other Members, none of whom are seeking immigration benefits.

Second, the Company does not appear to be the top layer of an investment scheme where the money is funneled through several holding companies before reaching the employment-generating entity. Third, the Company is not required to hold the petitioner's money in a reserve account to ensure its ability to repay the petitioner. Fourth, the petitioner paid the entire investment in cash up front. There is no promissory note whose very terms relieve the petitioner from contributing the majority of his funds.

Fifth, while the argument was made in *Matter of Izummi* that repurchase was not guaranteed because the Partnership in that case might be unable to fulfill its obligation, the Partnership had no discretion to conclude that it was unable to repurchase a Partner's interest. Thus, if a Partner exercised his option to sell and the Partnership reasonably concluded it was unable to pay the purchase price, the Partner would be able to initiate legal action to recover his funds. Moreover,

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[1] In *Matter of Izummi*, counsel stated:

> If anybody ever suggests that this is a wonderful investment and they're going to make it without getting lawful permanent residence, they're lying and they're crazy; they're brain-damaged, all right? Nobody is gonna do this without getting a green card.

Id. at 184.

the Partnership's obligation to maintain reserve funds to guarantee the availability of funds to pay the purchase price provided reasonable assurance that the Partnership would be able to pay the purchase price. In the case before us, as stated above, the Company is not obligated to maintain reserve accounts to guarantee the availability of funds to repurchase a Members' interests. Moreover, if the Company reasonably determines that it is unable to purchase the Member's interest, it can decline to do so. In such a situation, unlike the facts in *Matter of Izummi*, the Company would not incur a liability. Assuming the Company's determination was reasonable, the Member would have no recourse in court to recover his investment.

The above factors are material factual differences from those in *Matter of Izummi*. Neverthless, two other elements of the agreement cause some concern. We acknowledge that the purchase price is not equal to the petitioner's investment or even the "fair market value" of the petitioner's interest, a term that is difficult to apply to a closed company whose securities are not available to the general public. Rather, if not mutually agreed upon, the price is determined by the specific formula relating to the total project income less total project expenses. Our first concern, however, is that the total project income includes "scheduled rental income *without regard to vacancy or collection loss*." Despite the characterization in the business plan of the project as the development of a grocery store, the investment is ultimately a real estate development investment to build a shopping center that will produce rental income. The only risk for the Company is that it will be unable to lease out or collect rent for its property. To evaluate the value of a member's interest without regard to vacancy does not appear to place the petitioner's money at risk. While we acknowledge that the record contains an appraisal reflecting that the shopping center is 100 percent occupied, any real estate investment risks that its property will not remain 100 percent occupied.

Our second concern is that the record does not allow us to determine what the total project income less total project expenses would be in a given year. The business plan, page six, includes financial forecasts. These forecasts, however, appear to only take into account the grocery store. The income includes gross receipts less cost of goods sold, payphone income, concession income, and vending machine income. The income projections do not include rent. Rather, rent is listed as an expense. Thus, these forecasts do not allow us to determine what the purchase price would be if the parties were unable to mutually agree upon a price.

The director, however, did not raise either of our concerns in his notice of intent to deny or final denial. Thus, the matter will be remanded for the purpose of allowing the petitioner to address these issues and those raised below.

Beyond the director's decision, we find that there are other issues that bear discussion. Specifically, while the petitioner submitted substantial documentation tracing his funds back to the legitimate earnings of his parents, the record does not contain a letter from either parent explaining whether the funds constituted a gift, a loan, or something else.

Finally, the petitioner indicated on the petition that the new commercial enterprise had 10 employees and would create 64 jobs. The record includes evidence of only one employee. The record reflects that the Company is constructing a shopping center, including a large Korean

supermarket. The jobs will allegedly be created at the supermarket. The leases submitted on appeal reflect that Galleria Market, Inc. is renting the Market-level space to run a full-service grocery. The record does not reflect that the petitioner invested in this corporation. The Company's 2001 California tax return lists no trade or business income or expenses, including salaries or wages. This evidence raises a significant concern regarding whether at least 10 of the employees will be direct employees of the Company, as opposed to employees of Galleria Market, Inc. We note that the record does not indicate that the petition is based on an investment in a regional center. Thus, all employees must be direct employees of the new commercial enterprise.

Therefore, this matter will be remanded for the purposes of requesting evidence regarding the following issues: (1) the petitioner's risk in light of the Operating Agreement's failure to consider vacancies in the repurchase price; (2) financial projections for the entire Company, not simply the grocery store; (3) the nature of the transfer of funds from his parents; and (4) the direct employer of the grocery store employees. 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. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that is to be certified to the Administrative Appeals Office for review regardless of outcome.