

Memorandum



CO 204.6

Subject Alien Entrepreneurs under Section 203(b)(5) of the Immigration and Nationality Act	Date SEP 10 1993
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To Lawrence J. Wainig
Acting Associate Commissioner
Examinations

From Office of the
General Counsel

ATTN: Edward H. Skerrett
Chief, Immigrant Branch

Background

You have asked our office to assist you in responding to a letter from Senators Kennedy and Simpson regarding the scope of section 203(b)(5) of the Immigration and Nationality Act, as amended (the "Act"). In their letter, Senators Kennedy and Simpson raise the following legal issues:

Questions Presented

1. Whether a mutual investment fund constitutes a "commercial enterprise" for purposes of section 203(b)(5) of the Immigration and Nationality Act, as amended (the "Act")?
2. Whether an arrangement for the disposition of an investment after the two-year conditional residence period prescribed under section 216A of the Act, such as by redemption right, third-party purchase or otherwise, satisfies the "at risk" requirement of 8 C.F.R. § 204.6(j)(2)?
3. Whether a capital investment backed by a third party guaranty or other similar promise to reimburse the alien, either in whole or in part, in the event the investment fails or the investment fund is otherwise unable to return the alien's capital, is "at risk" for purposes of 8 C.F.R. § 204.6(j)(2)?
4. Whether an alien who makes a capital investment in the requisite dollar amount in an "ongoing" commercial enterprise which provides full-time permanent employment for at least ten qualifying employees is eligible for classification under section 203(b)(5) of the Act where the capital investment is necessary to sustain current employment or successfully complete an ongoing project, but does not create new full-time jobs?

5. Whether the Immigration and Naturalization Service (the "Service") should "predetermine" any element necessary to establish eligibility under section 203(b)(5) of the Act prior to the time an alien actually submits to the Service a completed visa petition?

Summary Conclusions

1. Yes. Under 8 C.F.R. § 204.6(a), a mutual investment fund constitutes a "commercial enterprise" for purposes of section 203(b)(5) of the Act. However, in order to qualify for classification under section 203(b)(5) of the Act, an alien investing in such a fund must be "engaged in the management of the new commercial enterprise" as required by 8 C.F.R. § 204.6(j)(5). Moreover, if the investment fund is organized as a partnership, an alien seeking classification under section 203(b)(5) of the Act must show that he or she is engaged in either the direct management or policy-making activities of the partnership.

2. Yes. An arrangement for the disposition of an investment after the two-year conditional residence period, such as by redemption right, third-party purchase or otherwise, may, under certain circumstances, satisfy the "at risk" requirement of 8 C.F.R. § 204.6(j)(2). To ensure that the capital the alien has invested remains "at risk" during the entire period of conditional residence, as required by 8 C.F.R. § 204.6(j)(2), the agreement for disposition of the investment must expressly provide, in writing, that the amount the alien will receive therefrom shall not exceed the fair market value of the investment at the time of disposition.

3. In general, yes. A capital investment which is backed by a third-party guaranty or other similar promise to reimburse the alien, either in whole or in part, in the event the investment fails or the investment fund is otherwise unable to return the alien's capital, will generally be "at risk" for purposes of 8 C.F.R. § 204.6(j)(2). However, where the third-party guaranty is backed by an unconditional federal, state or municipal obligation, the capital investment will not be sufficiently "at risk" for purposes of 8 C.F.R. § 204.6.

4. No. An alien who makes a capital investment in the requisite dollar amount in an "ongoing" commercial enterprise which provides full-time permanent employment for at least ten qualifying employees is not eligible for classification under section 203(b)(5) of the Act where the capital investment is necessary to sustain current employment or successfully complete an ongoing project, but does not create new jobs.

5. No. As a matter of law and policy, the Service should not rule on requests from investment funds for designation as qualifying investments under section 203(b)(5), or on any other element required by that section of the Act prior to the time an alien actually submits to the Service a completed visa petition.

Discussion

I. Statutory Requirements

Section 203(b)(5) of the Act provides, in pertinent part, that

[v]isas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise--

- (i) which the alien has established,
- (ii) 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 specified in subparagraph (C),¹ and
- (iii) 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. Legislative History

- A. Congress intended that an alien immigrating to this country pursuant to section 203(b)(5) of the Act actively participate in the activities of the new commercial enterprise
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Section 203(b)(5) of the Act was enacted in 1990 as part of the Immigration Act of 1990 ("IMMACT 90"). Section 121 of Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). This section was originally introduced as Senate Bill No. 358 in 1989. See 136

¹Section 203(b)(5)(C) provides that, except in the case of "targeted areas," the amount of capital required under subparagraph (A) shall be \$1,000,000. Under 8 C.F.R. § 204.6(f), the amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is \$500,000.

Cong. Rec. at S7622, 7626 (daily ed. July 11, 1989). As is clear from the floor debate on this bill, the purpose of this provision was to "create[] jobs, growth, and opportunity for Americans," see Remarks of Sen. Gramm, *id.* at S7770, and not to enable the rich to "buy their way into this country." See Remarks of Sen. Bumpers, *id.* at S7769. As stated by Senator Kennedy, "[w]e do not say if you just have the million dollars you come in here . . . We say you have to create . . . 10 new jobs." Remarks of Sen. Kennedy, *id.* at S7771; see also Remarks of Sen. Simpson, *id.* at S7773. Thus, as explained in the Senate Report accompanying this bill, this provision

is intended to create new employment for U.S. workers and to infuse new capital into the country, not to provide immigrant visas to wealthy individuals. The committee endorses the present investor requirements as described in 22 C.F.R. § 40.7(a)(14), note 1.3 (except for the investment amount and number of individuals to be employed, and except for note 1.3-6).

S. Rep. 101-55 at 21.²

Section 40.7(a)(14) provided that the exclusionary ground for immigrants failing to possess a valid labor certification did not apply if the alien could establish: (a) that the purpose of his or her admission was to engage in an enterprise in which the alien had invested, or was actively in the process of investing, a certain amount of capital; (b) that he or she would be a principal manager of the enterprise; and (c) that he or she would provide employment to at least one U.S. citizen or lawful permanent resident other than a family member. Former 22 C.F.R. § 40.7(a)(14)(iii)(C); see also 9 F.A.M., Note 1.3 to former 22 C.F.R. § 40(a)(14).

Note 1.3-3 to former 22 C.F.R. § 40.7(a)(14) provided, in pertinent part, that

when assessing the requirement . . . that the alien be a principal manager of the enterprise, the consular officer must examine the position to be held by the applicant as it relates to the entire business organization. It is important to determine the direct effect on the enterprise of the alien's measure of control over the business, the structure of the organization, and the business charter. [T]he regulation requires only that the applicant be "a

²Subsequent to the publication of S. Rep. 101-55, the Department of State deleted 22 C.F.R. § 40.7(a)(14) and the interpretive notes to this section, which it had published in Volume 9 of the Foreign Affairs Manual.

principal manager" and not "the principal manager." If it can be established that the applicant possesses and will engage in managerial duties which significantly affect the course or direction of the business, then the applicant meets the managerial requirement. _

It is therefore clear from the legislative history that, in enacting current section 203(b)(5), Congress did not intend for an alien simply to "sit down and write out a check for a million dollars [or \$500,000 in a targeted area] and get a visa to come into the country," see Remarks of Senator Sarbanes, 136 Cong. Rec. at S7775 (July 12, 1989), but instead, intended that the alien "earn" his or her visa by actively participating in a new commercial enterprise in which the alien invested.

B. Congress intended that an alien seeking to immigrate to this country pursuant to section 203(b)(5) of the Act place his or her capital "at risk" for the two-year period following admission as a lawful permanent resident

It is also clear from the legislative history of section 203(b)(5) of the Act that Congress was concerned with the possibility that this visa category could be used by unscrupulous persons to engage in visa fraud. Congress sought to prevent fraudulent investments by requiring that the alien's commitment to the new commercial enterprise be a genuine one. The alien is therefore required to demonstrate the sincerity of his or her capital commitment by sustaining the investment for a two-year period following the alien's admission as a lawful permanent resident. See section 216A of the Act, 8 U.S.C. § 1186b. Moreover,

the funds invested [must be] the alien's own funds. The concept of investment connotes the placing of funds or other capital assets at risk in the hope of generating a return on the funds risked.

Note 1-1.3 to former 22 C.F.R. § 40.7(a)(14),

III. Regulatory Requirements

A. "Commercial Enterprise" Requirement

To qualify for classification under section 203(b)(5) of the Act, an alien must show that he or she has invested in, or is in the process of investing in a new "commercial enterprise." As defined in 8 C.F.R. § 204.6(e), the term "commercial enterprise" means any for-profit activity formed for the ongoing conduct of lawful business, including a joint venture, a holding company and its wholly owned subsidiaries, or any other entity which may be publicly or privately owned. Under this broad definition, it is clear that an investment fund which pools investments into real

estate or other for-profit projects qualifies as a "commercial enterprise." Moreover, as long as the business is "for profit," it is immaterial whether it is co-owned by a government entity or entities.

B. Active Investor Requirement

In addition to demonstrating the existence of a "commercial enterprise," a petitioner seeking benefits under section 203(b)(5) of the Act must also show that he or she

is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment . . .

8 C.F.R. § 204.6(j)(5). Where the new commercial enterprise is either a limited or general partnership, the petitioner must present evidence that he or she is engaged in either direct management or policy making activities. 8 C.F.R. § 204.6(j)(5)(iii). If the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise. 8 C.F.R. § 204.6(j)(5)(iii).³ To ensure that a limited partner seeking benefits under section 203(b)(5) of the Act is not maintaining a purely passive role in regard to the investment, but is actually engaged in direct management or policy-making activities, the alien must not only establish that the limited partnership agreement provides him or her with such rights, powers, and duties, but also that he or she: (1) actually has exercised, or is actively in the process of exercising, these rights and powers, and (2) actually has performed, or is actively in the process of performing, these duties.

³Although 8 C.F.R. § 204.6(j)(5)(iii) makes reference to the ULPA, which was approved by the National Conference of Commissioners on Uniform State Laws in 1916, we note that the National Conference on Uniform State Laws approved the Revised Uniform Limited Partnership Act ("RULPA") in 1976 which superseded the original ULPA. See 6 Uniform Laws Annotated 299 (West 1993). Therefore, the reference to the ULPA in 8 C.F.R. § 204.6(j)(5)(iii) also includes the RULPA.

C. "At Risk" Requirement

To show that the alien meets the requirement in section 203(b)(5) that he or she have invested, or actively be 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.⁴

8 C.F.R. § 204.6(j)(2).

Moreover, under section 216A(b)(1) of the Act, an alien entrepreneur's permanent resident status is conditioned on the alien's sustaining the requisite capital investment for the two-year period following the date he or she obtained such status. It follows that, during this period, the alien's investment must remain "at risk." Thereafter, provided the alien complies with the requirements of section 216A of the Act, the conditions on his or her permanent resident status will be removed.⁵

D. Job Creation Requirement

As discussed above, the Act specifically requires that an alien's investment "create" full-time employment for not fewer

⁴It is clear from the language of 8 C.F.R. § 204.6(j)(2) that an alien will not be deemed to have "actually committed" the requisite capital, and therefore will not meet the statutory requirement that he or she have invested, or be actively in the process of investing, the requisite capital if he or she conditions the investment on the success of the visa petition and/or application for permanent residence.

⁵To remove the conditional basis of his or her permanent residence, the alien entrepreneur, among other things, must submit to the Attorney General, during the ninety-day period preceding the second anniversary of his or her obtaining permanent residence, a petition containing facts and information demonstrating that a commercial enterprise was established by the alien; the alien invested or was actively in the process of investing the requisite capital; and the alien sustained the above actions throughout the period of the alien's residence in the United States. Section 216A(c) and (d) of the Act, 8 U.S.C. § 1186b(c) and (d).

than 10 United States citizens" and certain other persons. Section 203(b)(5)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(5)(A)(iii). Moreover, as we have noted, the clear Congressional purpose in enacting section 203(b)(5) was to promote job creation. Consistent with the language and intent of the statute, the regulations provide that "[a] petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the . . . new commercial enterprise . . . will create full-time positions for not fewer than 10 qualifying employees." 8 C.F.R. § 204.6(j). It is therefore clear that an investment which merely preserves the status quo with respect to qualifying employees, but does not result in the requisite job growth will not suffice for purposes of section 203(b)(5), regardless of any favorable impact such an investment may have on the economy of the United States or the region.⁶

IV. Investment Agreements

A. Redemption and Similar Agreements

Significantly, nothing in either the statute or the relevant regulations requires the alien to sustain the capital investment after the conditions of his or her permanent residence have been removed. Although the statute clearly provides that the investment be "at risk" for the two-year period following admission as a permanent resident, there is no requirement that the capital remain at risk following this period. It is therefore entirely appropriate for an alien to enter into an agreement with the investment fund whereby the seller agrees to repurchase the investor's shares upon, but not before, removal of the conditional basis of the alien's permanent residence.

It is important to note, however, that a repurchase agreement may not be used as a vehicle to avoid or reduce the risk of capital loss to the alien investor during the two-year period of conditional residency set forth in section 216A of the Act, 8 U.S.C. § 1186b. To ensure that the capital truly remains at risk during this two-year period, we believe that the repurchase agreement should expressly provide that the price of the shares to be resold at the time of the repurchase shall not exceed the fair market value of the shares at that time. Any other repurchase arrangement would impermissibly shift the risk of loss from the investment from the alien to the party promising to buy back the alien's interest in the investment.

⁶We note that, while the regulations specifically permit an alien seeking classification under section 203(b)(5) to invest in a pre-existing business see 8 C.F.R. § 204.6(h)(2) and (3), with the exception of "troubled businesses," the requirement that the investment create, as opposed to merely preserve, ten full-time jobs for qualifying persons is an absolute one.

B. Guaranty and Similar Agreements

Under C.F.R. § 204.6(j)(2), a petitioner must show that he or she has placed the required amount of capital "at risk" for the purposes of generating a return on the capital placed at risk. Neither the statute nor the regulations require, however, that that risk be an absolute one. We believe that aliens investing the relatively large amount of capital required for immigrant investor classification under section 203(b)(5) of the Act should be able to expect a relatively risk-free, minimum return on their investments. See Rose, The Immigrant Investor Visa, 29 San Diego L. Rev. 615, 630 (1992). Certainly nothing in the statute or the regulations requires an alien investor to engage in unsound or unorthodox business practices in order to obtain benefits under section 203(b)(5) of the Act. Given the wide variety of permissible forms of "for profit" business which will qualify as "commercial enterprises," the critical issue is whether second-stage⁷ and other types of investments backed by third-party guaranties⁸ and similar agreements can be deemed to be sufficiently "at risk" for purposes of § C.F.R. § 204.6(j)(2).

It is our opinion that, in general, as long as an investor places his or her capital at commercial risk, the "at risk" requirement of § C.F.R. § 204.6(j)(2) will be met. While a third-party guaranty may reduce the investor's risk of loss, it is clear that, in most cases, such a third-party guaranty will not completely eliminate the commercial risk incurred by the alien in making the investment. See id. at 631. The strength

⁷One commentator has described a "second-stage investment" as, among other things, an investment "in which the immigrant investor invests in [a] new United States commercial enterprise, which in turn invests into a further venture." See 29 San Diego L. Rev. at 632.

⁸A "guaranty" is defined as "[a]n undertaking or promise that is collateral to [a] primary or principal obligation and that binds [the] guarantor to performance in [the] event of nonperformance by the principal obligor." Black's Law Dictionary 705 (6th ed. 1990). To induce investors to participate in an investment, the sponsor of an investment project may sometimes enter into a guaranty agreement with a third party, such as a bank, whereby the guarantor will agree to reimburse an investor, either in whole or in part, in the event the investment project becomes insolvent or the sponsor otherwise becomes incapable of meeting its obligations to the investor. A "guaranty" does not, of course, refer to property, theft, fire, or other standard forms of business insurance. Neither the statute nor the regulations restricts an investor from purchasing standard business insurance to protect his or her commercial enterprise.

of the third-party guaranty depends on a wide variety of factors, including, but not limited to, the financial solvency of the guarantor, the type of collateral supporting the guarantee, the extent of the guarantor's obligation, the extent the underlying investment fails, and the time for reimbursing the investor. See id. at 630-34. It is therefore clear that, unless the third-party guarantee is supported by collateral unconditionally backed by the full faith and credit of the federal, state or municipal government (e.g., U.S. Treasury obligations or municipal bonds placed in escrow),⁹ an alien investor cannot be entirely certain that he will be able to recover his capital investment in the event the guarantor becomes financially insolvent or incapable of meeting its third-party contractual obligation to the investor.¹⁰

In light of the above, we conclude that requiring alien investors to place large amounts of capital place at absolute risk, without some private third-party guaranty that they will receive a minimum rate of return on their investment, would not only be contrary to current reasonable business practices, but would be violative of Congress's intent to encourage foreign capital investment in this country for the purposes of job creation. On the other hand, we believe that where a third-party guaranty is unconditionally backed by the full faith and credit of a federal, state or municipal authority, there will be insufficient risk of the investor being unable to recover his or

⁹In light of the relative rarity of even financially weak state or municipal governments or agencies defaulting on their obligations, we believe that guarantees backed unconditionally by such obligations are not sufficiently "at risk" to qualify an alien investor under 8 C.F.R. § 204.6(j)(2). We are aware, however, that, in certain cases, a governmental obligation may be conditioned on the occurrence of an event or events or the performance of others. See e.g., United States v. Carman, 577 F.2d 556, 563 (9th Cir. 1978) (federally backed student loans at risk because federal guarantee conditioned on certain actions of schools and students). In cases where the third-party guaranty is not backed unconditionally by a governmental agency, we believe the investment will be sufficiently "at risk" for purposes of 8 C.F.R. § 204.6(j)(2).

¹⁰Of course, even if a guarantee is backed by U.S. Treasury obligations placed in escrow, the investor faces a market risk in the event that the guarantor is forced to sell the obligations at a discounted price in order to reimburse the investor.

her capital in the event the investment fails for purposes of 8 C.F.R. § 204.6(j)(2).¹¹

V. As a matter of law and policy, the Service should not preapprove investment funds as qualifying investments under Section 203(b)(5) of the Act

We are aware that certain investment sponsors seek preapproval of their investment programs as a means of attracting capital from prospective immigrants. Preapproval could serve as a strong inducement to such aliens to invest in commercial enterprises in this country. We nevertheless suggest that, as a matter of law and policy, the Service should not "preapprove" investment funds as qualifying investments under section 203(b)(5) of the Act.

Under 8 C.F.R. § 204.6(c), a petition for classification as an alien entrepreneur may only be filed by an alien on his or her own behalf. As in other visa petition cases, it is the petitioner's burden to establish eligibility for visa classification at the time of filing of the petition. See Matter of Great Wall, 18 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977); Matter of Katiqbak, 14 I&N Dec. 45, 49 (BIA 1971). Should the Service determine that an investment qualifies for purposes of section 203(b)(5) of the Act before an alien files his or her petition, however, the petitioner would be relieved from meeting an essential part of this burden. See 8 C.F.R. § 204.6(j). If such preapproval were binding on the Service, an alien would be able to qualify for classification under section 203(b)(5) of the Act even if the investment no longer remained qualifying at the time the petition is filed. Since a binding preapproval policy could result in violations of the statute, it is clear that any preapproval policy could only be advisory in nature. In light of the nonbinding nature of such preapproval, reliance by prospective immigrant investors on any such determination would be inappropriate. Similarly, marketing an investment as "preapproved" by the Service in order to attract foreign investors would also be improper.

We also note that preapproval of an investment as "qualifying" for purposes of section 203(b)(5) of the Act could be construed by certain investors as an endorsement by the Service of the underlying merits of the investment, even if such

¹¹It is conceivable that some guaranties will be directly backed only partially by federal, state or municipal obligations. In such cases, it will be necessary to conduct a close analysis regarding the extent of protection provided by such governmental sources in order to determine whether the investment meets the "at risk" requirements of 8 C.F.R. § 204.6(j)(2).

preapproval were accompanied by an express disclaimer by the Service that preapproval does not constitute such an endorsement. In addition, adopting a policy of nonbinding preapproval would result in a duplication of efforts since the Service would be required to readjudicate the issue of whether an investment is qualifying if and when a petition actually is filed.


Paul W. Virtue
Acting General Counsel

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Appendix III

45206 Federal Register / Vol. 60, No. 168 / Wednesday, August 30, 1995 / Notices

DEPARTMENT OF STATE

Office of the Secretary

[Public Notice 2249]

Extension of the Restriction on the Use of United States Passports for Travel to, in, or Through Lebanon

On January 26, 1987, pursuant to the authority of 22 U.S.C. 211a and Executive Order 11295 (31 FR 10603), and in accordance with 22 CFR 51.73(a)(3), all United States passports, with the exception of passports of immediate family members of hostages in Lebanon, were declared invalid for travel to, in, or through Lebanon unless specifically validated for such travel. This action was taken because the situation in Lebanon was such that American citizens there could not be considered safe from terrorist acts.

I have concluded that Lebanon continues to be an area " * * * where there is imminent danger to the public health or the physical safety of United States travelers" within the meaning of 22 U.S.C. 211a and 22 CFR 51.73(a)(3).

Accordingly, all United States passports shall remain invalid for travel to, in, or through Lebanon unless specifically validated for such travel under the authority of the Secretary of State.

This Public Notice shall be effective upon publication in the **Federal Register** and shall expire at the end of six months unless extended or sooner revoked by Public Notice.

Dated: August 22, 1995.

Warren Christopher,

Secretary of State.

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¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).