

Evidence of Source of Capital

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Introduction

This article is written for immigration law practitioners with an interest in the law concerning immigrant investors. Substantial hurdles exist for practitioners representing immigrant investors, as legal standards appear to be evolving. An ever-higher hurdle is the government's insistence on voluminous evidence concerning the investor's "lawful" source of funds. Recent practice strongly suggests that the government has erected a de facto evidentiary presumption that all investor capital is not from a lawful source. This article attempts to present the arguments available to the practitioner who confronts these challenges.

Background of Immigrant Investor Law

In 1990 the U.S. Congress enacted legislation authorizing issuance of approximately 10,000 immigrant visas annually to aliens who invest substantial capital and create full-time employment for at least ten U.S. workers. This provision is contained in Immigration and Nationality Act (INA) § 203(b)(5). It is known as the immigrant investor or EB-5 category. The Immigration and Naturalization Service (Service or INS) promulgated regulations implementing the immigrant investor category in 1991. The purpose of the immigrant investor law is to stimulate investment that would create jobs in the U.S. economy, by offering to foreign nationals the benefit of U.S. permanent residence. The authorizing legislation requires an investor to establish a new commercial enterprise, participate in the management of the enterprise, and invest capital so that the enterprise will employ at least ten qualified U.S. workers.

In 1993 Congress enacted the immigrant investor pilot program. The purpose of the pilot program is to amass large amounts of capital and to concentrate the investment of capital in certain defined regional zones "to determine the viability of pooling investments in a region of the United States." Congress sought to achieve these economic development objectives by appealing to immigrant investors who invest in "regional centers." The statute authorizes such investors to establish eligibility for an immigrant investor visa based on the relaxed standard of indirect job creation. Congress has extended the pilot program twice, most recently in 2000. In doing so, Congress has increased the number of visas available under the pilot program to 3,000 visas annually, and has amended the statute to facilitate immigrant visa issuance to investors in regional centers.

An immigrant investor files an I-526 petition with the Service. If that petition is approved the investor proceeds via immigrant visa processing or adjustment of status to obtain conditional permanent residence status. That status is conditional for two years. Before the expiration of the two-year period the investor must file a I-829 petition to remove the conditions.

Since its enactment in 1990 the immigrant investor law has not proven to be the vehicle for many investor families to immigrate to the United States. Visa issuances to immigrant investors have dropped precipitously since the issuance of four precedent case decisions in 1998 by the Service's Administrative Appeals Office (AAO). Since then, standards employed by the Service to qualify investors for the immigrant investor visa classification appear to have tightened significantly, and just a trickle of cases have been approved. The Service's insistence on overwhelming evidence of the investor's "lawful" source of capital appears at the heart of many investor case denials.

The Problem: How to Prove to the Service's Satisfaction that Invested Capital is "Lawful"

In recent nonprecedent AAO decisions and in case decisions by INS Service Centers, the Service requires that the investor petitioner prove that the source of the invested capital is "lawful," and that the investor petitioner has a "level of income" or has accumulated sufficient wealth that would enable the investor to invest. While at first glance these requirements may appear to be innocuous and in furtherance of seemingly salutary objectives, substantial practical problems exist in meeting these requirements. The fact is that many law-abiding investors who have entirely legitimate wealth to invest, and who have presented substantial evidence of how that wealth was obtained, have nonetheless received petition denials from the Service.

Until the Service acts to encourage investment-based immigration, the key to turning the tide in these immigrant investor cases may be to challenge Service decisions by demonstrating that the Service imposes unsound principles of evidence, legal standards that lack a statutory basis, and requirements that are arbitrary and capricious.

Challenges Based on Principles of Evidence

Characteristic of the unfavorable decisions on issues of lawful source of capital are the Service's adverse findings concerning the relevance or reliability of evidence presented by the petitioner, the Service's incorrect application of certain principles of evidence, and the Service's unfavorable conclusions concerning the sufficiency of petitioner's evidence. For example, the Service has stated that: (1) evidence is "vague" and therefore does not prove that the investor's capital is from a lawful source; (2) evidence is not sufficient to prove a level of income that would enable the petitioner to invest in the U.S. enterprise; and (3) the investor cannot simply "go on the record" without supporting corroborative evidence. These statements of course raise fundamental questions concerning what Congress required investors to present as evidence in support of a petition filed in this visa category. Such statements also present basic issues of evidence.

In the vast majority of these cases, no evidence exists to contradict the petitioner's evidence of how the petitioner amassed the capital necessary to invest, whether that capital was obtained by loan or gift from a family member, by way of inheritance, as the result of lifetime earnings, or even by winning the lottery. Indeed, it would be a rare case

for the Service to introduce contradictory evidence. Certain evidence, of course, may be dismissed by the Service in its adjudication because the evidence is not probative of a material fact and therefore is not relevant to the Service's adjudication, or because it is inherently inconsistent in a material manner, or because it is entirely unintelligible. But absent these failures in the presentation of evidence, the Service cannot dismiss evidence that is material. The Service should be required to consider all evidence that is probative of facts that would be material to resolving the issues the Service determines are relevant to the visa classification. For the Service to reject a petitioner's relevant evidence on the claim that the evidence is "vague" without explaining in what sense it is vague and why it is also not credible is to abrogate its role as an evenhanded finder of the facts.

Where material evidence exists in the record tending to support the petitioner's contention that the capital invested was derived from a lawful source -- such as where the petitioner has presented a declaration in support of the petition -- the Service is not at liberty to hold out for "better" evidence to prove the lawful source of capital. In other immigration cases, for example, where it is plausible that the applicant might not have the best documentation of a certain event, at least some documentation or testimony probative of the asserted fact is certainly relevant and in many cases is sufficiently persuasive proof of the facts asserted. Federal courts have ruled that where a petitioner presents credible evidence in support of proving a particular fact and no contradicting evidence is available, the Service should conclude that petitioner has satisfied his or her burden of proving that fact.

In rejecting the evidence presented by petitioners in the hundreds of nonprecedent EB-5 cases reviewed for this article, the AAO consistently cites *Matter of Treasure Craft of California*, a case decided by the Board of Immigration Appeals (BIA), for the proposition that the petitioner has the burden of proof and that the burden of proof is not met by merely going "on record" with self-serving statements concerning petitioner's lawful source of funds. The citation to *Treasure Craft*, however, is inapposite. *Treasure Craft* involved a petition for H-3 trainee status. The law at the time required the employer-petitioner to prove that training of the proposed beneficiaries in pottery making was not available in Mexico and that employing the beneficiaries in a partially productive capacity would not displace U.S. workers. The BIA stated that it would take "administrative notice" of the "commonly known" fact that Mexico has a thriving pottery industry, and of the "well known" fact that Los Angeles County was teeming with unemployed U.S. workers who were likely to have the skills and desire required to fill the jobs that the beneficiaries sought. Based on those "well-known facts," the Board rejected the petitioner's argument that it need only "go on record" as stating that training in Mexico was not available and that employment of the beneficiaries would not displace U.S. workers. Common knowledge, therefore, was the basis for refuting petitioner's unsupported assertion in *Treasure Craft*.

Treasure Craft

No comparable common knowledge is germane to adjudication of I-526 petitions filed by immigrant investors. Does the Service suggest that it is common knowledge that all alien

investors seeking classification under INA § 203(b)(5) invest capital that is derived from unlawful sources? Of course not. Reliance on Treasure Craft, therefore, is misplaced.

Courts have held that before an agency can take administrative notice of any fact in the course of adjudication, it must specifically identify the facts to be noticed and provide an opportunity to rebut the noticed facts. Therefore, due process requires the Service to identify which specific facts are the subject of administrative notice if it is to rely upon Treasure Craft.

Viewed through another lens, the Service's use of Treasure Craft is also improper because it establishes an evidentiary presumption -- i.e., that the source of capital is unlawful -- that is not warranted by the statute. Where evidentiary presumptions exist in immigration law, they are authorized by Congress in a statute and they include standards for presenting evidence to rebut the presumption. The evidentiary presumption of unlawful source of funds that the Service advances in immigrant investor cases lacks both a statutory basis and a realistic standard for rebutting the presumption.

In short, it has no value as precedent on the burden of proof issues in EB-5 cases, and it has no value as precedent on the question of what evidence of lawful source of capital is required.

Treasure Craft

In some of the cases we have reviewed, the INS has denied meritorious petitions not because of an absence of evidence but because the Service misapprehended what a petitioner must prove when presenting evidence of his or her source of funds. We agree with the Service that a petitioner must demonstrate that he or she invested the capital. However, we disagree with the Service's requirement that a petitioner must necessarily prove the lawful source of that capital. How to challenge the Service's insistence on the latter kind of evidence is the subject of the remaining sections of this article.

Challenges Based on Statute

Any agency action that violates or exceeds statutory authority can be set aside by a court. Therefore, Service adjudications of immigrant investor petitions must be consistent with INA § 203(b)(5). At the practitioner's disposal are arguments that: (1) the petitioner has complied with the statute; (2) the Service's regulations violate the statute; (3) the Service's interpretation of its regulations violates the statute; and (4) the statute requires the Service to present evidence concerning the investor petitioner's unlawful source of funds before it can deny a petition for immigrant investor classification.

a. Compliance with Statute

To be eligible for immigrant investor classification, INA § 203(b)(5) requires the investor to prove the following:

* that the investor is "seeking to enter the United States for the purpose of engaging in a new commercial enterprise" that the investor "has established"

* in which the investor "has invested" (after November 29, 1990), or "is actively in the process of investing"

* "capital" in the amount of \$1,000,000 (or at least \$500,000, if the investment is in a targeted employment area)

* and "which will benefit the United States economy and create full-time employment" for at least 10 persons authorized to work.

It is well settled that "[t]he legislative purpose is expressed by the ordinary meaning of the words used." Considering the ordinary meaning of the words used, it is clear that the statute does not require a petitioner to prove that he has a lawful source of capital or that his level of income is sufficient to support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise.

The Supreme Court has stated that an administrative agency may not "make law" if Congress already has specified what the law requires. If Congress' intent on the precise question at issue can be ascertained by employing traditional tools of statutory construction, "the agency must give effect to the unambiguously expressed intent of Congress."

The precise question at issue in EB-5 cases is whether, based on a reading of the language of INA § 203(b)(5), Congress intended that an investor-petitioner have the burden of proving that the source of the capital he invests in the enterprise is derived from lawful means or that he had a sufficient level of income that would support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise. The answer to that question is found directly in INA § 203(b)(5), and it is an emphatic "no" – Congress did not intend an investor-petitioner to have such a burden of proof.

In drafting INA § 203(b)(5) Congress was specific in articulating what an investor-petitioner must prove in support of a petition for immigrant investor visa classification: The investor must present evidence that he will be "engaging in a new commercial enterprise;" which the investor "has established;" in which the investor "has invested" or "is actively in the process of investing;" "capital" in the requisite amount; and "which will benefit the United States economy" and create ten full-time jobs.

The statute is by no means silent or ambiguous about what Congress expects an investor-petitioner to prove. Nor has Congress explicitly or even implicitly left legislative gaps for the agency to fill. Congress has directly and specifically addressed the issue of what the investor-petitioner must prove in filing a petition for the visa classification. Nothing in INA § 203(b)(5) specifies that the investor carries the burden of proving that the source

of the capital he invests in the enterprise is derived from lawful means or that he has a sufficient level of income that would support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise. By specifying what a petitioner must prove in the filing of the I-526 petition, and by electing not to require evidence concerning the "lawful" source of petitioner's capital, Congress intended that the Service not require such proof from an investor who files an I-526 petition.

In instances where the Congress has delineated clearly what it requires, all agencies, including the INS, "must give effect to the intent of Congress" and not attempt to impose additional requirements not found in the statute. This result is dictated by the maxim of statutory construction *expressio unius est exclusio alterius* ("the explicit mention of one is the exclusion of the other").

To infer from a reading of INA § 203(b)(5) that Congress intended that a petitioner has the burden of proving that the source of the capital he invests in the enterprise is derived from lawful means or that he had a sufficient level of income to be able to invest the required amount of capital in the enterprise is no different from also concluding, for instance, that the petitioner must prove that the new commercial enterprise must generate more than \$10 million in annual revenues, or that the new commercial enterprise must be a fast-food franchise. Such additional requirements would require importing unusual and bizarre meanings into the words of the statute, rather than reading the statute based on the "ordinary meanings of the words used." No such intent can be inferred from the language of INA § 203(b)(5).

Congress has proven it is fully capable of specifying what is required to establish eligibility for a visa classification. For instance, outstanding professors and researchers must prove that they are recognized internationally as outstanding in a specific academic area, have at least three years of experience in the academic area, and seek to enter the United States to fill a tenured or tenure-track teaching position or research position. Congress did not limit the visa classification to just professors and researchers in the sciences, or to only those professors and researchers who could prove that their research was not used for purposes of controversial human embryo testing. It would therefore be illegal if the Service was to require petitioners to prove, by regulation or otherwise, that a petitioner's research had not been used for purposes of human embryo testing. Similarly, it is illegal for the Service to alter INA § 203(b)(5) by grafting into the statute a requirement that the petitioner must prove that the source of the capital he invests in the enterprise is derived from lawful means or that he had a sufficient level of income that would support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise.

Congress also takes care to specify who bears the burden of proof in adjudications of petitions. For example, Congress has explicitly stated that if the Service acts to terminate an investor's conditional permanent residence status during the two-year conditional residence period, the burden of proving noncompliance with INA § 203(b)(5) rests with the Service. If, however, a petition to remove the condition on residence is already filed, the petitioner has the burden to prove that he or she meets the requirements of INA §

216A. If the Service determines that the petitioner failed to sustain his burden of proof, the petition to remove conditional resident status should be denied. If the investor requests review of that determination before an immigration judge, the statute specifies that the burden of proof is on the Service to prove that the investor failed to comply with INA § 216A.

It would violate the intent of Congress and therefore be illegal for the Service to impose a burden of proof on the conditional resident investor that is inconsistent with the statutory scheme of INA § 216A. Likewise, the Service would illegally alter the terms of INA § 203(b)(5) by imposing on the petitioner the burden of proving that the source of the capital he invests in the enterprise is derived from lawful means or that he had a sufficient level of income that would support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise.

b. Regulations in Violation of Statute

In denying I-526 petitions filed by investor petitioners, the Service's AAO and Service Centers cite INS regulations as authority for imposing on the petitioner the burden of proving that the source of the capital he invests in the enterprise is derived from lawful means or that he had a sufficient level of income that would support a conclusion that he has ample wealth to be able to invest the required amount of capital in the enterprise. However, the regulation is ultra vires, i.e., beyond the requirements of the statute. To mask the ultra vires act in the shape of a regulation does not lend legality to the ultra vires agency action. An agency cannot promulgate regulations that are beyond its statutory authority. Insofar as the Service's regulation at 8 C.F.R. § 204.6(j)(3) on its face is inconsistent with INA § 203(b)(5), the Service cannot insist that the investor petitioner comply with the regulation.

8 C.F.R. § 204.6(e) provides in pertinent part: "Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of Section 203(b)(5) of the Act." 8 C.F.R. § 204.6(j)(3) purports to impose on the petitioner a burden of proof "[t]o show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means." The regulation lists the categories of acceptable evidence, such as evidence of business registration and income tax returns.

Our review of immigrant investor decisions reveals that the Service's interpretation of its regulation also violates the statute. In the typical case, the Service Center cites the Service's regulations and the four precedent AAO decisions issued in summer 1998 concerning I-526 petitions. The precedent decisions purported to interpret the law concerning adjudication of I-526 petitions, i.e., INA § 203(b)(5) and 8 C.F.R. § 204.6. The AAO decision in *Matter of Soffici* involved a I-526 case filed by a petitioner who contended that the funds invested had come from personal savings and from the sales of a house and a business. *Matter of Ho* involved a I-526 case filed by a petitioner who contended that he had substantial liquid assets in the form of bank accounts and stock holdings and had earned a living from his work as a medical doctor. *Matter of Izumii*

involved an I-526 petition filed by a 30-year-old petitioner who claimed that he had saved money as a result of his being in business for several years trading Levi jeans in Japan. The AAO cited 8 C.F.R. § 204.6(j)(3) in each of the three cases and concluded that the petitioners failed to prove their source of funds. The AAO ruled that the petitioners failed to comply with the literal requirements of the regulation. In dicta, the AAO also questioned whether the petitioners had sufficient levels of income to enable them to invest. But the AAO did not hold that a petitioner must prove a sufficient level of income to be able to invest.

All three precedent decisions can be distinguished from the vast majority of cases we have reviewed. In the vast majority of cases, the investor petitioners present some kind of evidence that is indicated in the INS regulation. By contrast, the petitioner in *Matter of Soffici* presented absolutely no documentation concerning the house or business that were the alleged sources of his investment. The petitioner in *Matter of Ho* did not present any evidence regarding his working as a medical doctor or his level of income, and presented only bank statements for accounts that did not hold sufficient funds to enable him to make the \$515,000 investment he claimed to make. In other words, Ho did not present any of the kind of evidence indicated in the regulation. The petitioner in *Matter of Izumii* presented only two years of corporate income tax returns, but no additional documentation as prescribed in 8 C.F.R. § 204.6(j)(3).

In most of the cases we have reviewed, the investor petitioner submitted foreign business records, individual or business income tax returns, or some evidence of a gift or inheritance. Those petitioners, in many cases, appear to comply with the letter of the INS regulation. If, as we have observed in its case adjudications, the Service interprets the decisions in *Soffici*, *Ho* and *Izumii* to impose obligations on petitioners in I-526 cases to prove that the capital invested was lawfully obtained and to prove a level of income that would justify such an investment, such an interpretation is inconsistent with INA § 203(b)(5).

c. The Burden of Producing Evidence of Unlawful Source of Capital is on the Service

It is axiomatic that the petitioner for a benefit or a visa classification under the immigration laws bears the burden of proving eligibility for the benefit or classification. But the petitioner does not have to prove every fact that the Service may consider relevant to its adjudication. Instead, the petitioner's specific obligations are prescribed by statute. Nothing in INA § 203(b)(5) supports imposing a burden on the petitioner to prove the lawful source of the capital invested. Contrary to the Service's decision to impose such a burden on investor petitioners, numerous statutory and regulatory authorities exist for imposing the initial burden of showing that an investor's funds were unlawfully obtained on the government rather than investor petitioners.

The first authority is the statute. As described above, INA § 203(b)(5) does not require the petitioner to prove lawful source of capital. The Service lacks the legal authority to impose that obligation through its regulations.

The next legal authority is the overall statutory scheme for immigrant investors. According to the statute, if the INS approves a I-526 petition, the petitioner obtains "conditional" permanent resident status for a two-year period. Near the end of the two-year period the investor must file a I-829 petition to remove the condition. Congress specified the requirements for removal of the condition in INA § 216A(d)(1). In turn, the INS has specified the requirements for removal of the condition in 8 C.F.R. § 216.6.

Notwithstanding the argument above that Congress did not intend the Service to require the I-526 petitioner to prove that the source of capital was lawful, and that Congress did not intend the Service to require the I-829 petitioner to prove that the source of capital was lawful, the INS regulations concerning removal of the condition do impose a burden of producing evidence concerning lawful source of funds. That burden of presenting evidence is on the government. 8 C.F.R. § 216.6(c)(2) provides that if "it becomes known to the government that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs)," the Service shall offer the alien the opportunity to rebut such evidence. The I-829 petition may be denied if the petitioner fails to overcome the Service's evidence. Absent evidence presented by the Service of criminal activity such as the sale of illegal drugs, no legal authority exists for requiring the I-829 petitioner to present evidence concerning source of funds, let alone to prove that the source of funds is from lawful means.

The requirement that the Service, not the petitioner, present evidence of criminal activity bearing on the source of petitioner's capital is consistent with 8 C.F.R. § 216.3, which imposes the burden of proof on the Service, by a preponderance of evidence, to demonstrate that petitioner obtained investment capital "through other than legal means (such as through the sale of illegal drugs)."

Note that the sometimes-analogous body of law concerning the nonimmigrant E-2 investor visa category does not provide any authority for the Service to impose a burden of proof on the investor petitioner. INA § 101(a)(15)(E)(ii) imposes no duty on an E-2 visa applicant to prove the lawful source of his or her capital. The lengthy definition of "investment" in the Department of State regulations on E-2 visas does not refer to lawful source of capital, let alone a burden of proving lawful source of capital. The E-2 visa application form, the Optional Form 156E, includes a question concerning "source of investment capital" and "evidence of possession and control of funds," but the Department of State's official clarification of the basis for the question is that "[t]he investment must be the investor's personal risk capital under the investor's control." In other words, the question is directed to ensuring that it is the visa applicant's, not somebody else's, capital that is used in the underlying investment. The Service's E-2 regulations state that "[a]n investment is the treaty investor's placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), at risk in the commercial sense with the objective of generating a profit." But this language has never been interpreted to impose a burden of proof on the E-2 petitioner concerning the lawful source of the invested capital. The information is not even requested on the Service's Form I-129 Supplement E. And insofar as the Service did not provide notice and opportunity for public comment on this aspect of the regulation, it

is highly doubtful that it could serve as authority for imposing a burden of proof concerning lawful source of funds on an E-2 petitioner. In practice, E-2 visa applicants are not required to present evidence to consular officers or to the Service that the invested capital was lawfully obtained.

Imposing on the government the burden of presenting evidence is consistent with other relevant statutory schemes. For example, to obtain entry to the United States an applicant must prove that he or she is not inadmissible under any ground provided in INA § 212(a). One ground of inadmissibility is INA § 212(a)(2)(C), which makes inadmissible an alien "who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance." In practice, to obtain a visa and entry to the United States, the applicant is not required to present any evidence to prove that he is not inadmissible under INA § 212(a)(2)(C). Instead, prevailing law clearly specifies that it is the consular officer or the Service who initiates the inquiry concerning this ground of inadmissibility. In such cases the consular officer must have "more than a mere suspicion – there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking" before the consular officer can deny the visa. The consular officer, in other words, must be in possession of the incriminating evidence before the applicant is required to present any evidence at all on the subject of this ground of inadmissibility.

The ground of inadmissibility stated in INA § 212(a)(3)(A)(iii) relating to subversion of the U.S. government operates in the same manner. Admission may be denied if the Service or the consular officer "knows or has reason to believe" the alien seeks to enter the United States to engage in unlawful activity. The applicant is not required to prove that he is not intending to engage in unlawful activity. Instead, the consular officer must have at least a reason to believe the applicant is not admissible. The reason for such a belief must be based on "the completed visa application, the applicant's statement, the results of name checks and advisory opinion requests (when required), checks of post files, the CLASS system or microfiche, and any other outside information available." The consular officer must obtain a security advisory opinion from the Department of State "to ensure consistency and uniformity of interpretation and to allow input from other interested U.S. government agencies." Again, the government must present the initial evidence on this issue before it becomes material to the visa adjudication.

The immigration law includes many instances where the applicant nominally has the burden of proof, but in operation the Service has the initial burden of presenting incriminating evidence. This is true in all cases involving proof of "good moral character," such as in naturalization cases. The applicant nominally has the burden of proof, but in practice the Service bears the burden of producing evidence that the applicant is barred from proving good moral character. Congress has stipulated certain conduct that would bar the applicant from proving good moral character, such as being a "habitual drunkard," or deriving one's income principally from illegal gambling activities. But to prove that he has good moral character the applicant is not required to prove that he has not been a habitual drunkard, and he is not required to prove that his income is not derived principally from illegal gambling activities. In fact, the applicant is

not required to present even a scintilla of evidence concerning his drinking habits or his gambling activities, beyond the applicant checking a box on the N-400 application form. Those habits and activities become relevant to the adjudication only if the Service first presents relevant incriminating evidence. Were the opposite true, and the applicant had the burden of production and persuasion concerning income from illegal gambling activities, every applicant for naturalization would be required to present to the Service with his N-400 naturalization application substantial financial and other documentation, sufficient enough for the Service to conclude that the applicant did not derive his income from illegal gambling activities. To avoid arbitrary and erroneous adjudication, the Service in turn would be required to conduct background investigations concerning the applicant's actual assets and true wealth, akin to an Internal Revenue Service audit, to measure and compare the applicant's actual wealth to reported income. That does not occur because the Service, not the applicant, has the burden of production on the issue of income from illegal gambling activities.

The initial burden of production also rests with the government in cases of suspected misrepresentation. The burden of proof is on the applicant to prove that he is not inadmissible under any provision of the Act, including the provision proscribing willful misrepresentation to obtain an immigration benefit. But where there is no evidence that the alien presented fraudulent documents, or documents concerning material misrepresentations, to an authorized official of the U.S. government, the alien has sustained the burden of proof.

In no circumstances, therefore, did Congress intend for the Service to impose on the investor petitioner the initial obligation of presenting evidence of, and/or proving, the lawful source of invested capital. That burden is put squarely on the Service. The Service's declaration that it has no interest in venturing beyond Congress's intent has a hollow ring when the Service seeks to impose on the investor petitioner the onerous burden of proving the lawful source of invested capital. The imposition of such burden of proof is inconsistent with INA § 203(b)(5) and due process.

Challenges Based on the Regulation

Petitioners also have available arguments based exclusively on the INS regulations. In addition to challenging the regulations as ultra vires as discussed above, petitioners may contend that they indeed have complied with the letter of the regulations. Alternatively, petitioners may argue that the regulations are procedurally infirm and therefore are illegal.

a. Compliance with Regulation

8 C.F.R. § 204.6(j)(3) provides:

"To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed with in five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States with the past fifteen years."

Principles of statutory construction apply equally to regulations promulgated by the INS. The legislative purpose is expressed by the ordinary or plain meaning of the words used. Thus, in cases where the petitioner submits foreign business records in compliance with subpart (i), corporate and individual income tax returns in compliance with subpart (ii), and evidence of his inheritance, for example, in compliance with subpart (iii), the Service should conclude that the regulation is satisfied. According to the regulation, a petitioner must present at least one form of acceptable evidence. The regulation uses the disjunctive "or" in identifying acceptable forms of evidence. The Service should not be permitted to fault petitioners for not presenting evidence of a "level of income" sufficient to enable the petitioner to invest \$500,000 in an enterprise. As already discussed, there is no legal basis for imposing this standard on an immigrant investor petitioner. Where an agency interpretation of what the law requires is inconsistent with its own regulations, the agency's interpretation is not controlling. The agency interpretation shall be rejected if "[t]here simply is no room for the agency to interpret the regulation so as to add another requirement." The Service's failure to follow its own regulations should be challenged.

b. The Service's Regulation was Promulgated without APA Compliance

Another argument is that the regulation is procedurally infirm. The Administrative Procedure Act (APA) requires that before an agency may issue a rule it must first publish the proposed rule in the Federal Register to provide the public with notice of the rule, permit interested persons the opportunity to provide comment on the proposed rule and participate in the rulemaking process, address and respond to each comment provided, and incorporate in the rule a concise general statement of the rule's basis and purpose. Only after the APA's "notice and comment" requirements are met may the agency then issue a final rule. This rulemaking process under the APA is mandatory, not discretionary. Rules made without compliance with the APA have no force and effect.

The Service did not comply with the APA when it promulgated its source of funds regulation. The Service's proposed rule did not include any mention at all of the requirement of proof of source of funds, and it was only in the final rule that the Service

imposed this regulatory requirement, all without affording notice and opportunity for comment by the public. According to well-settled federal court precedent, regulations that are promulgated without compliance with the APA's notice and comment requirements shall be set aside as void. The Service's regulation at 8 C.F.R. § 204.6(j)(3) is illegal because the public has not been afforded an opportunity for comment.

The Arbitrary and Capricious Application of Standards

Another argument is that the Service acts arbitrarily and capriciously when it imposes on immigrant investor petitioners the burden of proving their lawful source of funds. Agency action that is arbitrary or capricious shall be set aside as illegal. Agency action is arbitrary and capricious if it is not supported by reasonable and objective criteria as distinct from whim and impulse, or if it is not based on a reasoned evaluation of relevant factors.

As described at length above, INA § 203(b)(5) does not require the investor petitioner to present proof of any kind concerning the petitioner's lawful source of funds or level of income. The Service's imposition of this burden of proof, therefore, arises from some other, unidentified legal authority. Not only is the source of the legal authority unclear, but the purpose of imposing the burden on petitioners is unclear and the legal standard the Service applies in individual cases is indefinite. As a consequence, the imposition of this burden of proof on investor petitioners is subject to legal challenge for reasons that it is both ultra vires and arbitrary and capricious.

It is of paramount significance that the initial evidence the Service requires a petitioner to submit in support of the I-526 petition, according to 8 C.F.R. 204.6(j)(3), would not necessarily prove that petitioner's capital is from a lawful source, and would not necessarily prove that petitioner has sufficient capital to be able to invest. 8 C.F.R. § 204.6(j)(3) states that "the petition must be accompanied, as applicable" by evidence of foreign business registration records, corporate, partnership and personal tax returns including income, franchise, property (whether real, personal, or intangible), "or any other tax returns of any kind filed within five years" with any taxing jurisdiction, "[e]vidence identifying any other source(s) of capital," or certified copies of any judgments or evidence of other pending governmental civil or criminal actions within the past fifteen years. A petitioner could present all the documentation requested in the regulation, and still the Service could conclude that the petitioner did not prove that capital was derived from lawful means. Alternatively, a petitioner might present persuasive and conclusive documentation not specifically listed in the regulation and yet the Service could conclude that petitioner failed to comply with the regulation. The regulation is not narrowly tailored to elicit information that would prove anything at all, and therefore, the regulation is likely to be applied to specific cases arbitrarily and capriciously.

In practical terms, whereas a petitioner may be able to present evidence of a history of legitimate business and income-generating activities, that evidence understandably may not prove that the precise capital invested was obtained through lawful means. The difficulty a petitioner would have in proving such a fact is no different from the difficulty

a defendant in a criminal case would have in proving that he did not commit a particular crime. How does one prove that he did not do something alleged? The inherent unfairness in imposing such a burden in both instances is why the burden of proof is appropriately on the government. As perhaps arguably more reasonably presented in the Service's regulation concerning removal of conditions for permanent resident investors, if the government presents initial evidence of criminal activity, then the source of the investor's funds may be an issue that an adjudicator may inquire further into and request additional evidence.

A related problem is that the Service's refusal to apply an appropriate evidentiary standard also leads to arbitrary and capricious results. The appropriate evidentiary standard is akin to a civil law "preponderance" standard. When a petitioner submits evidence concerning past lawful business and financial activity, and the Service has no contradictory information or derogatory information concerning criminal activity, the preponderance of evidence standard should be met. Federal courts have ruled that where a petitioner presents substantial, credible evidence in support of proving a particular fact and no contradicting evidence is available, the Service should conclude that petitioner has satisfied his burden of proving such fact. Evidence of the filing of income tax returns and the operation of lawfully-registered businesses, combined with the petitioner's statement concerning lawful sources of capital, is probative of lawful sources of capital, not unlawful sources. That determination remains true even when the "level of income" is admittedly lower than what the Service might arbitrarily expect. As a matter of evidence, absent information concerning a petitioner's "unlawful" activity, the Service is hard-pressed to nullify the probative value of petitioner's evidence concerning lawful sources of capital. The Service's speculations about what level of income is required in a foreign country to be able to earn, invest and save sufficient capital for investment – without also knowing much more about the economic system of that country and the relative cost of living -- is an inherently flawed and suspect undertaking that is incapable of producing admissible evidence. The Service would need to present expert evidence to counter petitioner's probative evidence. The Service's speculations on the subject do not amount to expert evidence.

Another aspect of the Service's arbitrary and capricious application of 8 C.F.R. § 204.6(j)(3) is that the Service's exclusion of assets obtained by "unlawful means" from the definition of "capital" in 8 C.F.R. § 204.6(e) is so inherently ambiguous and incapable of definition. "Unlawful" is commonly understood to be broader than "criminal." Therefore, the Service's interpretation of its regulation may include countless activities, not including illegal drug trafficking and like criminal activity. For instance, the unlawful activity might include deceptive business practices such as false advertising, monopolistic business practices that amount to a restraint of trade, and cultural and social norms that involve payment of gratuities to local officials or the under-reporting of income when filing income tax returns. Unlawful activity also may include earning wages while present in the United States in violation of lawful immigration status. Insofar as the breadth of the how the Service defines unlawful activity may be limitless it is a standard that is subject to arbitrary and capricious application.

Furthermore, whereas each of the above "unlawful" activities may or may not constitute a "crime" in the United States, they are not necessarily crimes or even "unlawful" in the country where they occurred. Which country's law is to be applied when the Service ascertains what would amount to unlawful activity? The laws of the People's Republic of China, for example, define "subversion," "disrupting social order," "spreading reactionary publications," and "illegal publishing" as crimes punishable by imprisonment. Suppose author Gao Xingjiang, without obtaining the necessary government permission, wrote and published for worldwide circulation a book that directly criticized China's human rights record and as a result earned the \$1 million needed to invest in the United States and qualify for the investor category. His activity was unlawful and is to be punished in China. Are the proceeds of his unlawful activity to be rejected as a lawful source of capital? And what about the transfer of "legally-obtained" funds out of the petitioner's native country to the United States without compliance with a foreign country's foreign exchange requirements? The Service has not articulated a rational basis for distinguishing between various types of unlawful activity. Until the Service does articulate such a rational basis, the standard it imposes is arbitrary and capricious.

The "unlawful means" standard raises many other issues, the most important being the actual purpose in promulgating a regulation that imposes such a heavy burden on the petitioner. Does the Service intend to bar anybody who has ever committed a crime from immigrating based on the investor category? Does a crime committed in 1984, for example, invalidate all income the petitioner earned from that time forward? Or is the purpose more circumscribed? One potential salutary objective is minimizing the possibility that the immigrant investor category may be used as a vehicle for the crime known as "money laundering." The crime and the prohibited underlying "unlawful activity" are well defined by federal statute. Money laundering is viewed as a scourge on society. The U.S. Department of Treasury has established the Financial Crimes Enforcement Network (FinCEN) to link law enforcement, financial and regulatory communities in a battle against criminal organizations and other money launderers. FinCEN issues an occasional "FinCEN Advisory" to inform banks and other institutions of "serious deficiencies in the counter-money laundering systems" of a particular country, to report that such country has been identified by the Financial Action Task Force on Money Laundering as non-cooperative in the fight against money laundering, and to advise how the lack of adequate counter-money laundering controls in the country affect the possibility that transactions originating from such a country are being used for illegal purposes. These and other like law enforcement resources are well known and readily available to the Service and consular officers. But the Service does not need any additional legal authority in the petition and visa adjudication process as weaponry to combat money laundering. The legal authority already exists in INA § 212(a)(2)(C) to deny admission to any alien who is suspected to have been an illicit trafficker in controlled substances, and in INA § 212(a)(3)(A)(ii) to deny admission to any alien who seeks to enter the United States to engage in any unlawful activity. The Department of State interprets the latter bar to admission to include aliens believed to be operatives of underworld criminal organizations. These statutory bars to admission authorize the Service and consular officers to deny U.S. immigration benefits to any alien who would attempt to use the proceeds of criminal activity to invest in and immigrate to the United

States. The authority of the consular officer in these matters is absolute and has been held to be not subject to review in court. The unduly burdensome legal standard concerning lawful source of funds that the Service would impose on immigrant investors does not measurably advance the fight against money laundering; instead, the Service's requirements on this issue deter would-be investors who are not criminals from investing and immigrating to the United States.

In sum, the Service's "unlawful means" standard suffers from incurable ambiguity because like-situated petitioners are apt to obtain different adjudication results as the Service applies indefinite requirements. Also, the purpose of requiring the petitioner to prove his or her lawful source of funds is nowhere evident. It violates due process to allow the Service to have both the authority to establish a vague and elusive concept such as "unlawful means" and the enormous power to enforce and regulate that concept in actual practice.

In adjudications of immigrant investor cases since 1998, when the AAO issued its four precedent decisions, the Service seems to operate on the theory that the investor's having a job, payment of taxes, possessing the capital to invest, and no apparent criminal record is insufficient evidence that the invested capital is derived from lawful means. The arbitrary and capricious nature of this determination is observed in the fact that the Service would not be able to rationally explain why its counterintuitive presumption is the more persuasive. The Service's arbitrary and capricious determinations concerning lawful source of funds appear to run counter to the employment-creating objectives of the immigrant investor statute without meaningfully advancing any law enforcement objectives.

Multiple Investor Enterprises

Cases involving multiple investor enterprises present even more onerous burdens, as the Service has insisted that petitioners provide evidence of the lawful source of the non-petitioners' funds. Investor petitioners, however, should not be required to present such unduly burdensome evidence. If the Congress intended that petitioners present such burdensome and duplicative proof to be filed in support of a petitioner's I-526 petition, INA § 203(b)(5) would specifically state the requirement. Similar to the analysis presented above with respect to source of funds generally, imposing a burden of proof concerning the source of other owner's funds is ultra vires. Also, the INS regulations at 8 C.F.R. § 204.6(j)(3) -- which specifically covers what evidence a petitioner must file -- would specifically require such proof. The pertinent INS regulation does not require a petitioner to file such evidence in support of the I-526 petition. Where a petitioner has satisfied the requirements of the applicable regulation, it is improper to deny a petition based on additional requirements not found in the applicable regulation. If the Service interprets the regulation to impose such a burden, then it is unenforceable for failure to comply with APA requirements of advance notice and comment.

Conclusion

Unless and until the Service takes steps to encourage investment by foreign nationals motivated by the opportunity for U.S. permanent residence, the immigrant investor program is likely to continue floundering. Practitioners are well advised to anticipate a battle with the Service on issues concerning the investor petitioner's lawful source of capital. Practitioners should advance arguments based on sound understanding of principles of evidence, statutory interpretation, substantive compliance with statutory and regulatory standards, and procedural defects in the Service's rulemaking process.

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