



U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

File: [Redacted] Office: Vermont Service Center

Date: JAN 10 2001

IN RE: PETITIONER: [Redacted]

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

IN BEHALF OF PETITIONER:  
[Redacted]

Identifying data removed to prevent disclosure of personal information and invasion of privacy

INSTRUCTIONS:

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

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

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

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

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Mary C. Mulrean, Acting Director  
Administrative Appeals Office

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

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise, that he had invested or was actively investing at the time of filing, that his investment would create 10 full-time jobs, and that the petitioner had managerial control over the "new enterprise."

On appeal, counsel argues that the petitioner created a new commercial enterprise, had invested the entire \$1,000,000 at the time of filing, submitted a sufficient business plan to establish future job creation, and has managerial control.

Section 203(b)(5)(A) of the Act provides classification 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 not less than the amount specified in subparagraph (C), 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).

**THE PETITIONER HAS NOT ESTABLISHED A NEW COMMERCIAL ENTERPRISE**

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

8 C.F.R. 204.6(e) states that:

*Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is [REDACTED] Inc. [REDACTED], of which the petitioner became the sole shareholder on September 11, 1998.

According to the documents submitted with the petition, [REDACTED] was to be involved in the financing and leasing of equipment. In response to a request for additional documentation, the petitioner submitted documentation indicating on October 15, 1998, [REDACTED] purchased 1,666

shares of stock in [REDACTED] Inc. [REDACTED], which provides equipment financing and leasing under the name [REDACTED]

The director, relying on Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), examined the job-creating enterprise, noted that [REDACTED] was established in 1988, and determined that [REDACTED] could not qualify as a "new" commercial enterprise. The director also concluded that [REDACTED] could not qualify as part of the new commercial enterprise because [REDACTED] was not a wholly owned subsidiary of [REDACTED].

On appeal, counsel argues the director erroneously relied on Matter of Soffici, that [REDACTED] is the employment-creating enterprise, and that the regulations' list of qualifying commercial enterprises is not exclusive. Counsel also argues that the petitioner expanded ATI more than 40% and that [REDACTED] was a troubled business.

Counsel asserts that the director mistakenly relied on Matter of Soffici because it involved a different set of facts. While the investment arrangement in that case was different from the instant case, it did involve an investment into a holding company. The plain language of the decision provides that it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, *supra* at 10. Therefore, as correctly stated by the director, we must examine the job-creating enterprise.

While the payroll records indicate the employees are being paid by [REDACTED] the record indicates those employees are only working for [REDACTED] through it's partially owned subsidiary, [REDACTED]. The record does not establish that [REDACTED] itself is hiring employees for its own operations separate from [REDACTED]. Therefore, it is [REDACTED] that is the employment-creating enterprise. But for [REDACTED] there would be no jobs. As such, we must examine [REDACTED] to determine whether or not RFI is a new commercial enterprise.

The petitioner indicated on the petition that he had created a new commercial enterprise through the creation of a new business. As [REDACTED] was established in 1988, it is not "new" under that definition of "new." While counsel argues that the petitioner was reviving a defunct business, the letter from the Franchise Tax Board indicates [REDACTED] was revived May 2, 1997, over a year before [REDACTED]'s investment. Counsel also argues that the petitioner expanded [REDACTED] more than 40% and that [REDACTED] is a troubled business. As [REDACTED]'s tax returns for 1996 do not include a Schedule L balance sheet, it is not possible to determine its net worth two years prior to the filing of the petition. Regardless, while the tax returns show a net operating loss of \$628,597 in 1997 and \$506,777 in 1998, the income statement for 1998 documents a net income of \$117,881 in that year. In addition, the business plan for RFI, page 5, refers to the "profitability" of [REDACTED].

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). As the record does not resolve the inconsistencies of whether ATI suffered losses or gains prior to RFI's purchase, we cannot conclude ATI was a troubled business.

Regarding the expansion of an existing business, the balance sheet for July 1998 along with the tax returns for 1998 indicate the petitioner's investment through [REDACTED] did increase [REDACTED] net worth by 40%. As the petitioner's investment ultimately expanded [REDACTED] net worth, he would be able to demonstrate the establishment of a new commercial enterprise if [REDACTED] were a wholly owned subsidiary of [REDACTED]. The record reveals that at the time of filing, [REDACTED] did not own any interest in [REDACTED]. Once [REDACTED] did purchase its interest in [REDACTED] it did not become the sole shareholder.

8 C.F.R. 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business.

Counsel relies on the phrase, "including but not limited to" for his assertion that the regulations do not preclude holding companies with partially-owned subsidiaries. While that language permits some types of business organization or structure not included in the first sentence, the language clearly does not modify the second sentence as the second sentence serves to limit the broad categories specified in the first sentence. If counsel's interpretation were correct, there would be no need for the second sentence, as all holding companies of whatever type would be permissible according to the first sentence.

Counsel argues that the petitioner's business is not a "scheme" and the petitioner has no "ulterior" motives. We do not read the director's decision to imply any impropriety on the part of the petitioner. Rather, the director correctly concluded that the petitioner did not meet the statutory and regulatory requirements. While RFI might qualify as "new" and [REDACTED] might qualify as "expanded;" at the time of filing, the petitioner had not

established a holding company with a wholly-owned qualifying subsidiary.

**CAPITAL AT RISK**

8 C.F.R. 204.6(e) states, in pertinent part:

*Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. All capital shall be valued at fair market value in United States dollars. 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.

*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)(2) states:

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.

On the petition, the petitioner claimed to have already invested the full \$1,000,000. The record contains evidence that the petitioner transferred over \$1,000,000 to [REDACTED]. The petitioner also submitted a copy of an October 19, 1998 check issued by [REDACTED] to [REDACTED] for \$150,000 and a financial statement for [REDACTED] documenting an October 15, 1998 transfer of \$850,000 to [REDACTED]. The record also includes the minutes of an [REDACTED] directors and shareholders meeting at which time it was agreed to issue \$1,000,000 of stock to RFI as well as to borrow additional sums from RFI.

The director concluded that as the funds had not yet been invested in [REDACTED] at the time of filing, the petitioner only had an intent to invest when he filed the petition. The director further concluded that without audited financial reports, it was not possible to determine whether the money transferred to [REDACTED] was for the purchase of stock or the loan referenced in the minutes.

On appeal, counsel argues the petitioner should not be penalized for researching his investment options before choosing to invest in ATI and asserts:

At the time of filing the petition, the petitioner had set up a corporation as an investment vehicle, transferred \$1 million into it and had a *clear intention* to invest in a new commercial enterprise in order to qualify for this visa. (Emphasis added.)

Counsel also argues that the \$1,000,000 transferred from [REDACTED] to [REDACTED] was the investment, not the loan, and that the accountant used standard language in preparing the unaudited balance sheets. Quoting INS spokesman Russ Bergeron as stating, "all INS is saying is: 'Show me the money,'" counsel argues that since the petitioner has shown a deposit of \$1,000,000 he must necessarily qualify as an entrepreneur.

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough. Id. at 5-6.

Review of the record reveals that at the time of filing, the petitioner had merely deposited \$1,000,000 in a corporate account over which he executed sole control. Even on appeal, counsel concedes in the above quotation that the petitioner was still "intending" to invest at the time the petition was filed. While we do not deny that finding an appropriate investment takes time and research, the fact is the petitioner filed his petition on September 18, 1998, before placing any money at risk. Nothing in the statute or regulations provides that a petitioner must file the petition immediately upon forming a corporation. Regarding the investment of capital placed at risk, the petitioner filed his petition prematurely.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7. At the time of filing, the petitioner had not established that any money deposited with RFI was at risk.

#### MANAGERIAL CONTROL

8 C.F.R. 204.6(j)(5) states:

To show that the petitioner 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, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, 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.

The director concluded the petitioner had not established that he had any managerial control over the employment-creating enterprise. In response, counsel asserts the petitioner was mistakenly admitted as a visitor for pleasure instead of a business visitor and that he is involved in the policy formation of the enterprise.

The record reveals that the petitioner is a director and the vice-president of [REDACTED]. As the petitioner is both a director and an officer of [REDACTED], the record adequately documents that he will be involved in the management of [REDACTED].

**THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT**

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

*Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

*Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

The petitioner has also failed to demonstrate that his investment will create the required number of jobs. As stated in the first section of this decision, the petitioner has not demonstrated that ATI was a troubled business. Therefore, the petitioner must demonstrate at least 10 new jobs.

Contrary to counsel's assertion that the petitioner revived a "defunct" business, [REDACTED] was revived in 1997, more than a year before the petitioner's investment. While the petitioner claimed to have eight employees, the petitioner has not established how many employees were working for [REDACTED] at the time [REDACTED] obtained partial ownership of that business. A petitioner cannot directly cause a net loss of employment. Matter of Hsiung, I.D. 3361

(Assoc. Comm., Examinations, July 31, 1998). Without knowing the number of employees prior to the petitioner's investment, we cannot determine how many total workers the petitioner must employ.

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

Comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The petitioner's business plan submitted with the petition indicates the business was recruiting for an Accounting and Human Resources Manager and a Broker Relations Manager. The plan also indicates the business would begin recruiting "in the near future" for a Credit Analyst, Credit Assistant, a Document/Funding Specialist, a Bookkeeper, a CNC Division Sales Vice President, and a Broker Relations Manager. Finally, the plan indicates that by the end of the first year [REDACTED] would add five to ten commissioned sales representatives, three to four administrative



assistants, and a credit manager; and by the end of the second year would add an additional manager, two sales representatives, and an additional administrative assistant.

The plan does not adequately explain the businesses' staffing requirements and provide job descriptions for all positions. Moreover, when the appeal was filed, more than a year after the business plan was prepared, counsel acknowledges that RFI only employs the eight employees claimed originally. Given this admission, the goals of the business plan do not appear realistic. As we do not know how many employees were employed by [REDACTED] prior to [REDACTED] purchase, the record does not establish that the petitioner has created any new jobs.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the petition will be denied.

**ORDER:** The appeal is dismissed.