

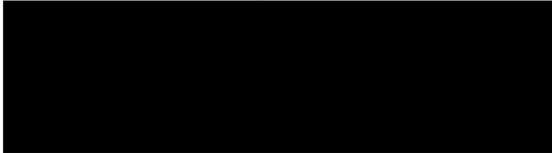


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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

APR 5 2001

File: WAC-98-017-53228

Office: Vermont Service Center

Date:

IN RE: Petitioner:



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:



Identification data deleted to prevent clearly unwarranted invasion of personal 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

Robert P. Wiemann, 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 or that he had or would create the necessary employment.

On appeal, counsel argues the petitioner established a new commercial enterprise by creating an original business, or, in the alternative, by restructuring an existing business. Counsel further argues that the petitioner has created the necessary employment.

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 indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

ESTABLISHMENT OF 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).

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., of which the petitioner is a shareholder, director, and officer.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

On April 1, 1997 [REDACTED] purchased a [REDACTED] Hotel from [REDACTED] Inc. Thus, the director concluded that the petitioner had not created an original business. The director further concluded that the petitioner had failed to establish that he had either restructured or expanded the existing business.

On appeal, counsel asserts:

But for the establishment of [REDACTED] and its negotiations with the [REDACTED] Hotel Franchisors, [REDACTED] the [REDACTED] Hotel, Fresno would not have existed, and had not existed prior to its formation in 1997.

(Emphasis in original.) In the alternative, counsel argues that the petitioner restructured the business such that a new business was created. Counsel submits materials regarding the differences between the Hilton and Doubletree franchises, the importance of a hotel's "flag," and asserts that the petitioner spent over \$1,000,000 in renovations in order to convert the hotel from a [REDACTED] to a [REDACTED] hotel. Counsel argues that a hotel building is not suitable for any other type of business and, thus, the petitioner cannot be expected to change the nature of the business. The petitioner submits undated newspaper articles regarding the reopening of the [REDACTED] Restaurant on the top of the hotel that had been closed for 17 years and an accountant's letter asserting that the petitioner reorganized and restructured an existing business.

The record contains no evidence that the hotel was inoperable at the time of purchase. Rather, the balance sheets for the business and the letter from [REDACTED] indicate the hotel was operating and that [REDACTED] retained the hotel's employees at the time of purchase. Therefore, we categorically reject counsel's argument that the petitioner created an original business. It is irrelevant that the hotel might not have become [REDACTED] hotel if not for the petitioner's investment or even that it might have eventually ceased operations without the petitioner's investment. The proper inquiry to determine whether the petitioner created an original business is whether the claimed new commercial enterprise was a business of any type prior to the petitioner's purchase. In this case, the petitioner purchased a fully operational hotel with over one hundred employees. Thus, the petitioner purchased an existing business and cannot be said to have created an original business. As such, the petitioner must demonstrate that he either reorganized or restructured the business or that he expanded the net worth of or employment at the business by 40 percent.

The regulations provide that a petitioner must reorganize or restructure an existing business such that a new commercial enterprise results. 8 C.F.R. 204.6(h)(2). A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

In response to a request for additional information, the petitioner submitted a letter from [REDACTED] vice president of American Hospitality Services, Inc., the hotel's management corporation, in which she asserts that the hotel was so worn down that Hilton had given notice that it would terminate its franchise agreement. She further asserts the new owners of the hotel obtained a new franchise agreement with [REDACTED] based upon their agreement to spend \$1,100,000 on renovations. She specifies that the changes

included the development of new marketing strategies, renovation of the physical plant, and acquisition of new signage, uniforms, logoed materials, amenity packages, and linens.

The record, however, does not support Ms. [REDACTED] assertions. The petitioner has not submitted evidence of the negotiations between [REDACTED] and [REDACTED] for the final franchise agreement. Nor has the petitioner submitted evidence that [REDACTED] spent \$1,100,000 on renovations. The newspaper articles regarding the reopening of the [REDACTED] Restaurant are undated. Therefore, it is not clear when this restaurant was renovated and reopened. The law provides benefits for a petitioner who has established a new commercial enterprise. Thus, if a petitioner is seeking eligibility based on the restructuring, reorganization, or expansion of an existing business, that restructuring, reorganization, or expansion must have already taken place at the time the petition is filed. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971) and Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998) at 7 for the proposition that a petitioner must be eligible at the time of filing.

Finally, the changes claimed by Ms. [REDACTED] do not constitute a reorganization or restructuring of the hotel such that a new business was created. The accountant [REDACTED] merely states that the renovations asserted by Ms. [REDACTED] and discussed in the newspaper articles constituted a restructuring and reorganization of the hotel. While we do not challenge Mr. Spindler's accounting knowledge, we are not bound by his interpretation of Service regulations.

Counsel distinguishes Matter of Soffici by asserting that that case did not involve a change in franchise. While the facts of that case may differ somewhat from the instant case, the language in the case is still binding.

It remains, the petitioner purchased a hotel and continues to operate a hotel. While the petitioner may have renovated the hotel, changed flags, and targeted a new market, there is no evidence that the petitioner has changed the mission of the hotel: to provide lodging and host conferences, or that he has substantially expanded the services of the hotel: lodging, food services, conference space rental.

Counsel's arguments that the building was not suited to any other business is not on point. The director did not question the wisdom of the petitioner's business decisions or suggest, as implied by counsel, that the petitioner should have converted the hotel to a machinery factory plant. We cannot conclude, however, that the mere change in flag constitutes sufficient restructuring such that a new commercial enterprise is created.

The petitioner does not claim to have expanded a business by 40 percent and the record does not indicate that he has done so. The balance sheet for the hotel prior to the purchase indicates the net worth of the hotel was \$5,557,025 while the balance sheet for April 30, 1997, right after the purchase, indicates the net worth was \$2,214,286. Thus, the net worth of the hotel actually decreased upon purchase by [REDACTED]. The employment records do not indicate that the petitioner increased employment at the hotel by 40 percent.

In light of the above, the petitioner cannot establish that, at the time of filing, he had created a new commercial enterprise.

EMPLOYMENT CREATION

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

(i) 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.

(ii) *Troubled business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

8 C.F.R. 204.6(e) provides the following definitions:

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.

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 percent 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.

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.

On the Form I-526, the petitioner indicated the new commercial enterprise had 0 employees at the time of his investment and 106 employees currently. The petitioner also indicated 17 of these "new" jobs were created by his investment. In support of the petition, the petitioner submitted Forms I-9, payroll records, and wage and withholding reports for the second quarter of 1997 indicating 114 employees in April 1997, 108 employees in May 1997, and 109 employees in June 1997. Finally, the petitioner submitted

the minutes of a board meeting whereby the directors of LCWK resolved to allocate all qualifying employees to the petitioner and an attached list of 17 employee names.

On March 30, 1999, the director requested additional evidence to establish that the petitioner had, or could be reasonably be expected to create 10 new jobs. The director stated:

In fact, the record demonstrates that the petitioner has only maintained the previous level of employment. As the record does not show the Double Tree Hotel is a troubled business, the petitioner cannot just maintain the current level of employment but must demonstrate he created ten full-time positions in addition to those already in existence. Moreover, as the petitioner is investing in an existing business, the petitioner must submit evidence to establish the pre-investment and post-investment level of employment.

In response, counsel asserts the petitioner has already met the employment-creation requirement and asserts:

Attached are payroll records indicating new hires and the corresponding list of employees who have been designated to be recorded for the sole benefit of this particular investor's I-526 Petition. Also attached are the last payroll records for the [REDACTED] Hotel and recent payroll records for [REDACTED] indicating the increased number of employees, although, with respect [sic] this is irrelevant to the Investor's case since his investment is based on the creation of an original business, namely, the Doubletree hotel which is distinct in all respects from a Hilton hotel.

The petitioner submitted a letter from [REDACTED] indicating LCWK had retained all the employees at the site when the hotel was purchased. The payroll records for March 1997 for the Hilton hotel indicate 107 employees. [REDACTED] quarterly wage and withholding report for the fourth quarter of 1998 indicates 103 employees in October 1998, 106 employees in November 1998, and 109 employees in December 1998.

In his decision, the director stated:

Counsel is mistaken to think the Service will not consider the aggregate number [sic] workers. The petitioner may have hired 16 new employees but at least 14 were to replace those who were terminated. In essence, there was an increase of only two employees over pre-acquisition levels.

On appeal, counsel asserts that the Hilton hotel would have ceased to exist had the petitioner not purchased the hotel, resulting in the loss of 106 jobs. Counsel further asserts:

[REDACTED] Hotel, Fresno immediately hired 106 employees, many of whom had previously been Hilton employees, and 17 of which were hired as a direct consequence of his investment. [The petitioner] has thus clearly fulfilled the requirement that at least 10 fulltime [sic] qualified employees be hired. Documentation establishing this fact was submitted at the time of filing the Petition, and has been included with this brief for ease of reference. The 106 new Doubletree Hotel employees were required to be re-trained to fulfill their completely new positions as Doubletree employees. This involved extensive training by management to ensure that all employees were equipped with the knowledge an [sic] understanding of the Doubletree policies and philosophy towards service as well as the new operating procedures.

The reference by the Service to Matter of Soffici (id) is misplaced in that in that case the new owners of the Howard Johnson Hotel maintained the hotel's employees and continued to operate as a Howard Johnson Hotel without change. The employees in that case were not new in that they continued to work for the same employer, performing the same duties under the same procedures. The present case is clearly distinguishable in that the employees hired by the Doubletree Hotel had to fulfill completely new roles as employees of a Doubletree Hotel.

Counsel's arguments are not persuasive. Counsel's initial argument regarding the risk that the Hilton Hotel would have gone out of business, thus causing the loss of 106 jobs, is not supported. The petitioner has not submitted evidence to support his claim that Hilton was about to terminate its franchise agreement with the hotel. Regardless, counsel appears to be arguing, in his first argument, that the petitioner merely preserved 106 jobs. The preservation or maintenance of jobs, as stated by the director, is only relevant where the petitioner invests in a troubled business. The regulations strictly define a troubled business as one where the net worth of the business decreased by 20 percent over the previous 12 or 24 months. As the petitioner has submitted only one balance sheet for the Hilton hotel prior to the petitioner's purchase of the business, the record does not establish that the Hilton hotel was a troubled business as defined in the regulations. Thus, whether the petitioner preserved any jobs is irrelevant.

Counsel's subsequent argument that the petitioner can be credited with all 106 jobs because the hotel changed its flag and retrained

the staff in Doubletree philosophy is entirely without merit. A petitioner must create 10 new jobs, cannot cause a net loss of employment, and, unless investing in a troubled business, cannot simply maintain previous employment levels. See Matter of Ho, supra, at 5. Even if we accepted counsel's argument that the petitioner restructured and reorganized the hotel such that a new commercial enterprise was established, the petitioner would still need to demonstrate that he increased the level of employment at the newly restructured business by 10 full-time jobs. The "establishment" and "employment-creation" requirements are entirely separate.

Counsel's final argument that the petitioner can be credited with at least 17 jobs because 17 individuals were hired after LCWK purchased the hotel also lacks merit. A petitioner must cause a net increase in employment. We completely concur with the director that the petitioner cannot be credited with any employees hired to replace employees no longer working for the hotel. The Hilton Hotel employed at least 107 people at the time of purchase and LCWK had only 109 employees as of December 1998. Thus, as stated by the director, the petitioner's investment has only resulted in a net gain of two positions.¹

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.

A 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:

¹ Ms. Penney indicates [REDACTED] retained all of the employees at the Hilton when it purchased the hotel in April 1997. While the March 1997 payroll records for the Hilton list 107 employees, LCWK's quarterly wage and withholding report lists 114 employees in April 1997, dropping to only 109 by June 1997. If the 114 employees were all Hilton employees, the petitioner has actually caused a loss of five jobs.

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 record does not contain a business plan. Counsel asserts a business plan is unnecessary as the petitioner has already met the employment-creation requirement. As discussed above, that assertion is not supported by the record.

It is acknowledged that one of the newspaper articles indicates 10 employees will be necessary for the Skyroom Restaurant. It is not known, however, whether the petitioner will be contracting out the restaurant services to another company, leasing the space to another company to operate as a restaurant, or hiring the restaurant staff as employees of LCWK. Without a business plan and evidence of how the restaurant is to be operated, the petitioner has not established that it is reasonable to conclude he will hire an additional 10 employees in the next two years.

CONCLUSION

Based on the information submitted, it is apparent that the petitioner is an individual of considerable wealth who is involved with a successful commercial enterprise well received by the Fresno community. The petitioner has submitted several letters from local politicians and congressmen supporting his petition and praising his investment. However, the petitioner has not established that he meets the minimum eligibility requirements for this visa classification.

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.

ORDER: The appeal is dismissed.