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

[redacted]

File: WAC-00-003-52191 Office: California Service Center Date: APR 30 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)

Public Copy

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

IN BEHALF OF PETITIONER

[redacted]

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, California 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 made a qualifying investment of lawfully obtained funds or that he had met the employment-creation requirement.

On appeal, counsel argues that the petitioner was actively in the process of investing the required amount, that the funds were obtained through 20 years of lawful employment, and that the petitioner preserved employment in a troubled business.

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).

MINIMUM INVESTMENT AMOUNT

While not discussed by the director, it is necessary to first examine whether the petitioner has demonstrated employment creation (or maintenance) in a targeted employment area as the amount of the petitioner's required investment is determined by this issue. The petitioner indicates that the petition is based on an investment in a business [redacted], located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

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

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
>
> (ii) In the case of a high unemployment area:
>
> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
>
> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

On the Form I-526, the petitioner indicated the business is located at [redacted], Pico Rivera, California. The petitioner submitted 1996 and 1997 employment data indicating Pico Rivera was a targeted employment area in those years. The petitioner filed her petition on October 1, 1999; thus, according to Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), the petitioner must show Pico Rivera was a targeted employment area at that time.

Independently obtained data indicates that Pico Rivera continued to be a targeted employment area in 1999. As will be discussed in this section, however, the record does not establish that the business actually moved from its original location in Montebello,

California to Pico Rivera as claimed. The record indicates that Montebello was not a targeted employment area in 1997. The petitioner has not submitted any evidence regarding the unemployment rate in Montebello for 1998, when the petitioner made her investment, or in 1999, the time of filing.

The petitioner submitted a notice of bulk sale reflecting that Fortune Seasons purchased 1120 South Maple Avenue and the Amerasia Shipping Line business from Sky Hall International on January 28, 1997; a photocopy of an August 3, 1998 deed purporting to grant property in Pico Rivera to Fortune Seasons; an insurance policy issued to Fortune Seasons for the property in Pico Rivera identifying the property as office space; and a "business projection" for Fortune Seasons indicating the business will be moving from Montebello to Pico Rivera in October 1998.

The deed is not supported by the closing documents or transactional documents (bank statements and cancelled checks or wire transfer receipts) reflecting the purchase.[1] In addition, other evidence in the record casts doubt on the above documentation. The August 31, 1998 balance sheet for Fortune Seasons lists no buildings or property among the company's assets. The income statement for the nine months ending August 1998 reflects $17,162.50 in rental costs. While Fortune Seasons did not purchase the Pico Rivera property until August 1998, the record reflects that the company purchased the Montebello property when it purchased the shipping business. Therefore, it is not clear on which property the company was paying rent and whether that property is in a targeted employment area. Moreover, while Fortune Seasons purportedly moved from Montebello to Pico Rivera, the record does not reveal that Fortune Seasons sold the Montebello property or is renting that property to another business.

The "business projection" further indicates that the business will "continue our success with our harbor operations in terms of loading and unloading freight containers." Neither Pico Rivera nor Montebello are located on the harbor. Therefore, it appears Fortune Seasons employs at least some of its workers at an unidentified harbor location. The projection further indicates the petitioner will "work from our main office in Pico Rivera." Such language suggests that the company has other business locations not identified in the record.

Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998) states that in order to qualify for the reduced investment amount, it is not sufficient to simply have an office in a targeted

---

[1] Furthermore, the photocopy of the deed is of poor quality and has defects in both places where the name of the grantee is listed.

employment area. The employment benefits must arise in the targeted employment area.

The petitioner claims to have invested in a troubled business and that she is maintaining previous employment. She submits seven Forms I-9 and two Forms W-4. Many of the Forms I-9 are incomplete, missing the employer's name, address, and dates. One Form I-9, however, indicates an employer address at [redacted] Rowland Heights, California, and another Form I-9 indicates an employer address at [redacted]l Monte, California. None of the Forms I-9 or W-4 indicate an employer address in Pico Rivera.

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). The petitioner has not resolved the inconsistencies regarding the number and location of Fortune Seasons' offices, warehouses, and shipping facilities.

In light of the above, the record does not establish that all seven jobs allegedly being preserved are in Pico Rivera.[2] As such, the petitioner has not established an investment in a targeted employment area and the minimum investment amount in this case is $1,000,000.

INVESTMENT

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

---

[2] If, in fact, Amerasia Shipping Line employs more than seven people working at several facilities in several locations, the petitioner cannot chose one location with seven employees, move those employees to a targeted employment area, and meet the reduced investment amount requirements. Even assuming the petitioner established that she had invested in a troubled business, she would need to demonstrate that she preserved the employment at all locations and that all locations were in targeted employment areas.

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.

The record contains an August 15, 1998 investment agreement which calls for the petitioner to make a $500,000 investment by August 1999 as follows: a $20,000 stock purchase on August 3, 1998, a deposit of $260,000 by August 13, 1998, a purchase of property at [redacted] Pico Rivera for $132,500 by September 30, 1998, and $30,000 to $40,000 for improvements to the Pico Rivera property. As evidence of her investment, the petitioner submitted an August 3, 1998 stock purchase agreement for 20,000 shares for consideration of $20,000; a wire transfer receipt reflecting the petitioner wired $269,335 to Fortune Seasons on August 11, 1998; and an official check issued to Fortune Seasons for $35,000, dated August 14, 1998. The purchaser of the official check is not identified on the check. The petitioner also submitted an unaudited balance sheet for August 31, 1998 reflecting $86,975 in stock and $304,330 in paid-in capital.

The director concluded the petitioner had not demonstrated an investment of more than $324,355, which is less than the minimum investment amount required. On appeal, counsel asserts that the petitioner was actively in the process of investing $500,000 and completed her investment on January 31, 2000. The petitioner submits an undated amendment to the investment agreement extending the deadline for the petitioner's investment, a wire transfer receipt reflecting the transfer of $165,000 to Amerasia Shipping Line on January 31, 2000, and a personal check issued to Amerasia Shipping Line for $15,000 on January 29, 2000.

The record contains no stock certificates, stock ledgers, cancelled checks, or wire transfer receipts for the $20,000 allegedly paid for 20,000 shares of stock. Therefore, the petitioner has not established that she invested the initial $20,000. The record contains no evidence that the petitioner purchased the $35,000 official check with her personal funds. Therefore, the petitioner has not established that she invested $35,000 on August 14, 1998. As stated above, the record does not contain the closing documents for the Pico Rivera property or the financial documents reflecting how the property was purchased. Therefore, the purchase price and the source of the funds used to purchase the property are unknown. The purchase was also completed prior to the investment agreement. Thus, the petitioner cannot take credit for the purchase of the property. The remaining $269,335 transferred to Amerasia Shipping

prior to the date of filing is far less than the $1,000,000 minimum, or even the $500,000 minimum claimed by the petitioner.

Regarding the amounts transferred to Amerasia Shipping Line in January 2000, these funds were contributed after the date of filing. While the regulations only require that a petitioner be actively in the process of investing the required amount, they do require that the full amount be committed to the business at the time of filing.

The investment agreement is insufficient to demonstrate that the petitioner had committed her funds to the business prior to the date of filing. As stated in Matter of Izumii, supra, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that she has placed her assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Ex., July 31, 1998). Otherwise, the note is meaningless.

Even if we considered the investment agreement a promise by the petitioner to pay the full $500,000, the agreement does not meet the requirements listed above. The petitioner's promise is not secured by her personal assets. Moreover, as discussed above, the minimum investment in this case is $1,000,000. The record does not indicate the petitioner has committed $1,000,000 to the business.

Furthermore, the regulations provide that a 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. 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.

Review of the record reveals that the petition was not initially supported with any documentation of business activity other than the purchase of the property in Pico Rivera. The record contains no evidence of actual business activity such as business contracts

or tax returns for any years after Fortune Seasons purchased Amerasia Shipping Line from Sky Hall International. The financial statements for Fortune Seasons are not audited and cannot serve as the sole evidence of business activity.

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 she had invested or committed $1,000,000, or even $500,000, or that any money contributed to the proposed business was at risk.

SOURCE OF FUNDS

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

> (3) 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 within 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 within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July

31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31,1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In support of the petition, the petitioner submitted bank statements for [redacted] personal bank statements, certificates of deposit receipts, and employment letters for herself and Mr [redacted]

The director concluded the petitioner had not established her relationship to Mr. [redacted] and that her nursing salary could not account for accumulation of $500,000. On appeal, the petitioner submits her marriage certificate reflecting her marriage to Mr. [redacted]

The record now reflects the petitioner and her husband have been employed as professionals for 20 years, currently earning over $70,000 a year. Such employment can account for the accumulation of significant assets. The petitioner, however, failed to provide the exchange rate for the New Taiwan dollar. Therefore, it is not clear how much money the petitioner and her husband actually accumulated. Moreover, the wire transfer receipt does not reflect which account was the source of the petitioner's alleged investment. Therefore, it is not possible to trace the path of the funds wired to Amerasia Shipping Line.

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) 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.

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.

On the Form I-526, the petitioner alleged that she had invested in a troubled business and that she would preserve the seven employees at the business. As evidence that the business was a troubled business, the petitioner submitted 1996 and 1997 balance sheets for Sky Hall International showing a decrease in net worth from $99,203.10 to $31,303.03. As evidence of employment preservation

the petitioner submitted the investment agreement which indicated the business would maintain its seven employees.

The director concluded that the petitioner had failed to provide supporting evidence that the business had seven employees prior to the petitioner's investment or that it still retained seven employees.

On appeal, the petitioner submits seven Forms I-9 and two Forms W-4. As stated above, most of the forms are incomplete, missing the employers name, address, and date the form was completed. The petitioner also submitted purported payroll records for the period "thru" December 31, 1999, listing 22 employees, six of whom worked during the final pay period reflected on the records. Furthermore, the petitioner failed to submit Forms 941 and wage and withholding quarterly returns reflecting the number of employees reported to the Internal Revenue Service and the state government.

Regardless, the petitioner has not established that Fortune Seasons was a troubled business at the time she made her investment. The balance sheets submitted for 1996 and 1997 are both for Sky Hall International. The second balance sheet, however, is as of August 31, 1997, seven months after Sky Hall International sold [redacted] and Amerasia Shipping Line to Fortune Seasons. Therefore, the dramatic decrease in its net worth appears to be the result of the sale of part of its business, and not a sign that it was a troubled business.

Moreover, the petitioner must show the business experienced a net loss amounting to 20% of the net worth prior to that loss. The only balance sheet for Fortune Seasons is dated August 30, 1998, and purports to take into account the petitioner's alleged investment. Thus, the record does not establish the net worth of the business 12 months prior to the petitioner's investment. As stated above, the August 30, 1997 balance sheet submitted is for Sky Hall International after it had already sold Amerasia Shipping Line to Fortune Seasons. Even if we accepted the 1997 balance sheet as representing the assets and liabilities of Fortune Seasons, the balance sheets are not audited and cannot serve as the sole evidence of the company's net worth.

Furthermore, the financial statements for the period ending August 30, 1998, reflect a net income of $54,000. As the business did not experience a net loss during the twelve months prior to the petitioner's investment, it cannot be considered a troubled business. Therefore, the petitioner must demonstrate that she will create 10 new jobs.

The petitioner does not claim to have created 10 new jobs. 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:

> 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 has not submitted a business plan which projects 10 new jobs in the next two years.

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 Fortune Seasons, doing business as Amerasia Shipping Line, of which the petitioner allegedly became a shareholder on August 3, 1998.

The record does not contain a stock certificate or stock ledger reflecting the petitioner's alleged interest in the corporation. The petitioner claims to have purchased 20,000 shares on August 3, 1998 for $20,000. The petitioner has not submitted any evidence, however, of a transfer of $20,000 to Amerasia Shipping Line on or about August 3, 1998. Therefore, the petitioner has not supported her claim to have an ownership interest in Fortune Seasons.

In addition, the petitioner claims to have established a new commercial enterprise through an investment in an existing business. Counsel asserts the petitioner increased the net worth of Fortune Seasons by 40 percent. While the petitioner submitted a balance sheet for Fortune Seasons dated August 30, 1998, the balance sheet only reflects the net worth of the company after the petitioner's alleged investment. In order to establish an increase in net worth, the petitioner must establish the net worth of the business just prior to her investment. As stated above, the August 1997 balance sheet is for the predecessor company after that company sold Amerasia Shipping Line to Fortune Seasons. Even if we accepted that the balance sheet actually represents the net worth

of Fortune Seasons, the net worth of the company could have changed dramatically between August 1997 and August 1998, when the petitioner made her investment. Finally, the balance sheets are not audited and cannot serve as the sole evidence of an increase in net worth.

The petitioner has not claimed and the record does not support the creation of an original business or the restructuring of an existing business. Therefore, the petitioner has not demonstrated that she established a new commercial enterprise.

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.