



U.S. Department of Justice
Immigration and Naturalization Service

B7

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

[REDACTED]

PUBLIC COPY

File: [REDACTED] Office: California Service Center Date: FEB 6 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]

Identification data deleted to prevent clearly unwarranted disclosure 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, 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 established a new commercial enterprise, invested sufficient capital which was at risk and derived from a lawful source, or that he would create sufficient employment.

On appeal, counsel fails to address the specific points raised by the director and submits a lengthy business plan.

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], of which the petitioner became a shareholder on November 28, 1997.

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 the petition, the petitioner claimed to have established a new commercial enterprise from the creation of a new business. The petitioner submitted evidence, however, that Satellite Group was not engaging in any business activity on its own but was negotiating to purchase [REDACTED] and [REDACTED], an existing business.

On July 7, 1998, the director requested additional evidence regarding [REDACTED]. In response, the petitioner submitted evidence that the escrow agent for the sale [REDACTED] had closed the escrow account. The petitioner also claimed that [REDACTED] had been a troubled business and submitted that company's tax returns, income statement and balance sheet.

The director concluded that because the petitioner had failed to submit audited balance sheets, the Service could not determine whether or not [REDACTED] had been a troubled business. The director also noted there was no evidence of reorganization, restructuring, or that the petitioner would expand [REDACTED].

On appeal, counsel argues that the petitioner has restructured and reorganized [REDACTED] because it was a troubled business when purchased. Counsel submits balance sheets and income statements for [REDACTED] and [REDACTED].

Whether or not [REDACTED] was a troubled business is not relevant to a determination of whether the petitioner established a new commercial enterprise. The concept of "troubled business" is only relevant to the employment-creation requirement.¹

The regulations require that a petitioner have already established the new commercial enterprise at the time of filing. Therefore, if a petitioner is establishing a new commercial enterprise through restructuring, reorganizing, or expanding an existing business, those actions must have occurred by the time the petitioner files his petition.

At the time of filing, the petitioner had not even completed the purchase of [REDACTED]. Therefore, it is not possible for him to demonstrate that he had already restructured, reorganized, or expanded that business when he filed the petition.

The business plan submitted on appeal indicates the petitioner intends to expand [REDACTED] by providing window chip repair services, auto detailing services, and paint touch ups at airport parking lots through the proposed Mobile Executive Enterprise Service. Business Plan, at 21. Page 14 of the business plan indicates the start up costs of the Mobile Executive Enterprise Service are unknown because the vehicles have yet to be purchased. Thus, it does not appear that even at this late date the petitioner has taken any actions toward expanding [REDACTED] as proposed.

Regardless, 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

¹ The regulations mention troubled businesses in the context of establishing a new commercial enterprise only insofar as they require that when a petitioner establishes a new commercial enterprise through a 40% expansion of employees, that petitioner must still meet the employment creation requirements. 8 C.F.R. 204.6(h)(3).



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 a new commercial enterprise. Regarding this issue, at best the petitioner filed prematurely.

INVESTMENT OF CAPITAL

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided 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. ...

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) states, in pertinent part, that:

(2) 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 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362, 5 (Assoc. Comm., Examinations, July 31, 1998).

In support of the petition, the petitioner submitted stock certificates, a stock transfer ledger, [REDACTED] bank statements, wire transfer receipts, Escrow Instructions, and a transfer agreement in which the petitioner sold his interest in a foreign enterprise to [REDACTED] in exchange for \$606,000. In response to a request for additional documentation, the petitioner submitted an escrow statement indicating the escrow account was closed on August 4, 1998, a copy of a July 30, 1998 cashier's check for \$2,034,012.50 issued by General Bank to the escrow agent, a copy of a check for the same amount issued on [REDACTED] account [REDACTED] to General Bank, a receipt from the escrow agent, a copy of the Deed for [REDACTED], and additional bank statements and wire transfer notices.

The stock transfer ledger and stock certificate indicate the petitioner purchased 3,333 shares of stock in [REDACTED] on November 28, 1997 for \$500,000. The petitioner's original attorney, however, conceded that, at the time the petition was filed on April 21, 1998, the petitioner had not yet transferred the full \$500,000 to [REDACTED]. The bank statements and wire

transfer receipt notices indicate that [REDACTED] transferred \$249,984 to [REDACTED] account [REDACTED] on November 28, 1997 and another \$249,984 on July 22, 1998. The notations indicate this money was transferred on behalf of the petitioner. The record also reveals [REDACTED] transferred additional money to the same account on November 28, 1997 and on March 20, 1998 on behalf of the other two shareholders.

The bank statements, however, also indicate that on November 28, 1997, [REDACTED] transferred \$1,000,000 to account [REDACTED]. The statement for that account indicates that it was a monthly certificate of deposit (CD) which [REDACTED] renewed on March 2, 1998 and April 2, 1998. When the account matured on May 4, 1998, it contained \$1,016,886.70. While the record does not establish whether the CD was allowed to roll over on May 4, 1998, the record contains a statement from another CD, account [REDACTED] which matured on June 4, 1998 with a balance of \$1,006,255.13. The record does not indicate whether that money remained in that account or was transferred to another account. The record also contains statements from United National Bank regarding a checking account and a savings account belonging to [REDACTED]. Neither account ever had a balance of more than a few thousand dollars.

Most significantly, however, the General Bank statements reveal a loan payment withdrawal of \$215,081 on March 20, 1998 from account [REDACTED] for a loan referenced as account number [REDACTED] and a \$1,000,000 deposit on May 29, 1998 into [REDACTED] account [REDACTED] resulting from another loan referenced as account number [REDACTED]. In light of these two documented loans and in the absence of evidence documenting the transfer of the investors' money out of the CD account and back into account [REDACTED] the petitioner cannot demonstrate that the investors' money was used to pay the purchase price to the escrow agent from account [REDACTED].

The petitioner's original attorney, in a letter dated August 5, 1998, stated the July 1998 bank statement for account [REDACTED] which would have documented the receipt of the final wire transfer and the withdrawal of the funds used to pay the purchase price, was unavailable. The record still does not contain this bank statement.

The director concluded the petitioner had not demonstrated that he had done anything with his money other than deposit it in the corporate account. Therefore, the director concluded the petitioner had not demonstrated that his money was at risk.

On appeal, counsel asserts [REDACTED] has a capital investment of over \$2,000,000." Counsel further asserts that the purchase price of the property was \$1,850,000 and the purchase of equipment amounted to an additional \$150,000. Counsel submits

checks documenting payments from [REDACTED] account [REDACTED] to [REDACTED] and a letter from [REDACTED] asserting that company was contracted in September 1998 to provide improvements to the car wash facilities amounting to \$120,000 which was paid in full.

The record does not contain corporate tax returns, including schedule K-1 and schedule L which would reflect the capitalization of the corporation and the petitioner's ownership interest. As will be discussed in more detail below, there is some indication the individual who allegedly transferred money to the corporation in behalf of the petitioner, [REDACTED], has some ownership interest in the corporation.

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.

Review of the record reveals that the petition was not initially supported with any documentation of business activity other than an escrow agreement for [REDACTED] purchase of [REDACTED]. At the time of filing, the petitioner had merely deposited money in a corporate account, much of which was removed to a CD account before any money was placed in escrow. At least \$1,000,000 of the money placed in escrow resulted from a loan, which, if secured by the assets of the business to be purchased with the borrowed funds, cannot be considered invested capital. At the time of filing, the escrow agreement had not yet closed and the petitioner had placed no money at risk.

As stated above, 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. At the time of filing, the petitioner had not established that any money contributed to the proposed business was at risk. Therefore, the petition may not be approved.

Even on appeal, it is not clear the additional improvements were paid for out of the investor's capital investment. The record contains November 8, 1998 letters from [REDACTED] on behalf of [REDACTED] to the corporation's tenants increasing their rent due to "indebted factors including" \$200,000 of "injected funds"

used to pay for improvements.² This language implies the improvements were funded by a debt which the corporation intends to pay off by increasing the rent of its tenants. As discussed above, loans secured by the assets of the corporation cannot be considered invested capital.

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 petitioner 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 his burden of establishing that the funds are his own funds. Matter of Izumii, supra, at 26. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting

² The letters increase the rent for [REDACTED] by \$300 per month, the rent for [REDACTED] by \$200 per month, and the rent for [REDACTED] by \$350 per month.

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 an agreement between the petitioner, "one of the [redacted] shareholders" and [redacted] for the purchase of the petitioner's interest in [redacted], equivalent to \$606,000, a letter to the board signed by the petitioner and his fellow investors assigning their interest in [redacted] [redacted], Ltd." to [redacted] a board resolution accepting the transfer of interests to [redacted] a business license for [redacted] which describes the business as a "collective ownership" with the following business scope: "produces and business activities," an audit of [redacted] indicating assets of RMB 50,000,000 and revenue of RMB 150,000,000, and a wire transfer receipt documenting the transfer of \$259,984 from [redacted] to Satellite Group "on behalf of [the petitioner] for stock purchase price."

In response to the director's request for additional documentation, the petitioner submitted a wire transfer receipt documenting the transfer of \$249,984 from an unnamed source to [redacted] "on behalf of [the petitioner] for stock purchase price." While the remitter is unnamed, the originating bank account is the same as the originating account number on the previous wire transfer from [redacted]

The director concluded the evidence did not allow the Service to trace the petitioner's funds to a lawful source in the absence of detailed tax returns from the petitioner's country of residence, bank statements, and evidence that the petitioner had worked in an occupation through which he accumulated the investment money over time.

On appeal, counsel asserts the petitioner's funds derived from the sale of a portion of his ownership interest in [redacted] a conglomerate of 35 companies. Counsel asserts that the funds were transferred through Hong Kong to [redacted], who transferred the funds to [redacted]. Counsel states, [redacted] received funds [sic] Hong Kong companies who are members or affiliated with" [redacted]. Unfortunately, this sentence fails to clarify the path of the money as it does not state whether the money was received from the companies, on behalf of the companies, through the companies, or for the companies. Regardless, the assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel submits an amended agreement between the petitioner and Ms. [redacted] an affidavit from [redacted], and a Financial Plan containing financial documents pertaining to [redacted] and wire transfer

receipts documenting the transfer of a total of \$2,200,000 from [REDACTED] Group to [REDACTED] District Commercial Headquarters, Trade; [REDACTED] Development Company, Ltd.; and [REDACTED] Store. These receipts are notated "for commercial goods." According to the "List of Documents in this Fax" included in Exhibit 9(c) of the Financial Plan, the wire transfer receipts are submitted to show "the path of funds from China to Hong Kong to the United States." Finally counsel also submitted wire transfer receipts documenting money transferred from [REDACTED] and other unidentified sources to [REDACTED]

Other than the agreement and board resolution, there is no indication of the petitioner's interest in [REDACTED]. An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. Matter of Ho, supra, at 6.

It is significant that [REDACTED] who allegedly transferred money to the corporation solely as the purchase price of the petitioner's interest in [REDACTED] is listed as the agent on [REDACTED] articles of incorporation. In addition, the insurance documentation from Thorson & Associates indicates [REDACTED] is an "owner/officer excluded" from the policy, although she is not listed as a shareholder on the stock ledger.

In her affidavit, [REDACTED] who appears to be one and the same as [REDACTED] asserts that she arranged the purchase of the petitioner's interest by [REDACTED] a Hong Kong investment group and was subsequently retained to assist in the management of the petitioner's United States investment. She indicates the money wired to [REDACTED] originated from "companies in the investment group or from companies affiliated with the group." [REDACTED] does not make clear which "investment group" she means, the petitioner's or [REDACTED] Limited. Regardless, the Board resolution implies it is Ms [REDACTED] who is purchasing the interest in behalf of herself.

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 wire transfer receipts documenting funds transferred from [REDACTED] to other companies are for "commercial goods" and appear to have no relevance to the petitioner's sale of his interest to [REDACTED]. The wire transfer receipts from [REDACTED] and other sources to [REDACTED] also have no clear relevance to the petitioner's sale of his interest to [REDACTED]

Significantly, the amended agreement between Ms. [REDACTED] and the petitioner indicates the petitioner's initial capital investment in Heilongjiang was made in January 1997. Therefore, even if the petitioner established that he was a shareholder of that company and sold his interest to [REDACTED] in October 1997, the petitioner would still not have resolved where the money initially invested into [REDACTED] originated. A petitioner cannot resolve the lawful source of funds issue simply by investing in one company 10 months before investing that same money into the new commercial enterprise.

The Business Plan, page 18, indicates the petitioner is an associate manager of the Credit and Finance Division of [REDACTED] and has a bachelors degree in Finance and Economics. These assertions are not supported in the record. As correctly stated by the director, the petitioner has not demonstrated wages or other lawful income which could account for the money invested into [REDACTED].

SOURCE OF OTHER FUNDS

8 C.F.R. 204.6(g)(1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.** (Emphasis added.)

While not discussed by the director, the petitioner has also failed to document the source of funds for his fellow investors. The stock transfer ledger indicates [REDACTED] has two other shareholders. The record contains agreements between these investors and [REDACTED] similar to the petitioner's agreement and wire transfer receipts documenting money transfers from [REDACTED] to Satellite Group on behalf of the other two investors. For the reasons discussed above, these documents cannot establish the lawful source of these investors' funds.

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.

Regarding multiple investors, 8 C.F.R. 204.6(g)(2) 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.

Finally, 8 C.F.R. 204.6(e) provides 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.

Pursuant to 8 C.F.R. 204.6(j)(4)(ii), if the employment-creation requirement will be met through preservation of employment in a troubled business, the petitioner must submit a "comprehensive business plan." 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 maintain the jobs.

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 director concluded that the petitioner had not provided a sufficient business plan. On appeal, counsel asserts the petitioner saved 30 full-time and part-time positions, created 6 new positions, and will create an additional six positions with its expanded services. According to page 19 of the Business Plan, seven of the 36 current positions are part-time positions. The six proposed employees will consist of two three-person mobile teams: one marketing person and two people to handle window chip repair, detailing and paint touch-up. Counsel submits a first quarter 1999 Quarterly Wage and Withholding Report for [REDACTED] indicating between 26 and 28 employees, depending on the month; payroll reports for the third quarter of 1998; June payroll records for [REDACTED] prior to the petitioner's purchase of the business documenting 31 employees; and [REDACTED] Quarterly Wage and Withholding Reports for the first and second quarter of 1998 reflecting 32 employees in the first quarter and 33 employees in the second quarter.

Even if the petitioner had submitted audited balance sheets which established that [REDACTED] qualified as a troubled business, the petitioner has still not established that he will maintain all 31 jobs at [REDACTED] or that all 31 jobs are held by qualifying employees. Moreover, while the petitioner and his fellow investors have allegedly infused significant new capital into the business, the gross proceeds of the business have gone down. Specifically, the income statement for [REDACTED] for the six months ending March 31, 1999 indicates a gross profit of \$237,490 while the income statement for [REDACTED] for the year ending December 31, 1997 indicates gross profit totaling \$529,160. Doubling [REDACTED] income to take account for the shorter period (\$474,980), [REDACTED] is still generating less income than [REDACTED] was. Yet, the Financial Plan submitted on appeal projects income of \$547,318 in 1998, \$602,050 in 1999, and \$692,358 in 2000. Financial Plan at 50. Although these numbers appear to include projected income from the mobile units, the plan contains no evidence of negotiations to acquire and set up the mobile units. Therefore, there is no evidence these units will generate any income in the near future; certainly not within the 90 days projected by the Business Plan.

In addition, while the payroll records for the third quarter of 1998 seem to document over 40 employees, the first quarter 1999

Quarterly Wage and Withholding Report documents no more than 28 employees. As such, the petitioner's purchase of [REDACTED] has actually reduced employment at the business. Finally, the petitioner has not submitted Forms I-9 which would establish whether the employees are qualifying employees.

The Business Plan asserts the proposed mobile service will serve business travelers who, without such a service, return from trips to cars which are "dirty and malodorous from being closed up for extended periods of time." Business Plan at 21. The mobile service would "crank" the engines daily, keep the vehicles clean, vacuumed, detailed, and full of fuel. Business Plan at 26. The services would also include window chip repair and paint retouching. Business Plan at 6. The Business Plan does not contain the research methods and results of a study conducted to determine whether business travelers are looking to have their cars serviced, painted, or repaired at airport parking lots. As the cars are presumably remaining in the lot during the owner's business trip, it is not clear why the owner would need to employ anyone to keep his or her car "full of fuel." While the Business Plan evaluates other local car washes, the business plan merely lists but does not evaluate other mobile services. The advertisements for the mobile car washes which are listed in the business plan indicate these companies wash a customer's car at their home or office, and do not operate at airport parking lots.

Furthermore, while the Business Plan also includes promotional and informational sheets regarding mobile car wash franchises and nearby airports, there is no indication that [REDACTED] has begun negotiations with either the franchise company or the airport. As such, the Business Plan's assertion that [REDACTED] will begin building and staffing the mobile units within 90 days is simply not credible.

The Business Plan is not persuasive that there would be a market for such services or that local airports are willing to permit private companies to operate such a business on their parking lots. As the business plan asserts that the parking lot attendant would be responsible for marketing the mobile services, the plan does not contain any official correspondence from the airport parking management indicating a willingness to promote the petitioner's proposed services. The plan does not indicate the petitioner has entered into any such agreement with any airports or airport parking management. In light of these failures, we cannot conclude the petitioner will maintain or expand employment at Star Car Wash.

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.