

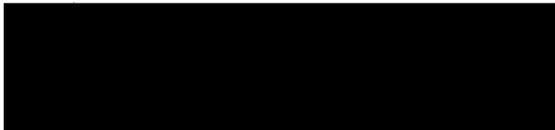


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U.S. Department of Justice

Immigration and Naturalization Service

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



File: [Redacted] Office: Texas Service Center

Date: JUL 10 2001

IN RE: Petitioner: [Redacted]

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

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:

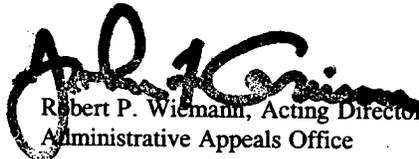
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The case is now before the Associate Commissioner on motion. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 established a new commercial enterprise. The Administrative Appeals Office (AAO) concurred with the director and dismissed the petitioner's appeal on January 25, 2001.

Specifically, the AAO concluded that the petitioner had not demonstrated any business activity; thus, any funds deposited into the corporate account were not placed at risk. Regarding the source of the petitioner's funds, the AAO noted the absence of documentation evidencing the transactions which resulted in the petitioner's receipt of \$904,000 from an escrow account on January 31, 1997, the petitioner's alleged business operations in the United States since 1989, or the receipt of gifts from the petitioner's in-laws.

On February 26, 2001, the petitioner filed a motion to reopen, stating:

I am submitting additional evidence showing the original source of my Funds [sic] and evidence that Monsouni Inc [sic] actually used my investment to purchase 10 existing [redacted] and build one new one for a total of \$6,250,000.

The petitioner submitted an affidavit from the petitioner's father-in-law regarding an alleged gift to the petitioner's wife, 1999 letters from [redacted] regarding conditional consent to the petitioner's assumption of existing franchises, a business purchase agreement, and the petitioner's E-2 non-immigrant visa and Form I-94 authorizing the petitioner to remain in the United States until June 28, 2001.

An affidavit from the petitioner's father-in-law cannot overcome all of the AAO's concerns regarding the source of the petitioner's funds. The affidavit is not supported by transactional documentation demonstrating a transfer of funds from the petitioner's father-in-law to his wife or evidence of how the father-in-law obtained the funds. Moreover, the petitioner has not addressed the lack of evidence of the petitioner's own business operations, the alleged source of the bulk of the petitioner's funds.¹

Finally, the evidence suggesting the petitioner was negotiating the purchase of 10 [redacted] in 1998 and 1999 does not establish that the petitioner's funds were at risk at the time of filing, November 24, 1997. A petitioner must establish eligibility at the time of filing; a petition

¹ It is acknowledged that the petitioner has resolved the director's concerns regarding whether any income earned in the United States was earned while in an unlawful status.

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, 7 (Assoc. Comm., Examinations, July 13, 1998).

Even if the Service were to consider the petitioner's negotiated purchase of existing [REDACTED] the purchase of existing restaurants raises additional concerns which were not raised in previous decisions because the nature of the petitioner's business was not yet documented. Specifically, 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, 10 (Assoc. Comm., Examinations, June 30, 1998). The purchase of 10 existing [REDACTED] suggests the petitioner did not create a new commercial enterprise even if he founded a "new" corporation. While the petitioner indicated he also purchased a preexisting [REDACTED] which had burned down, the record does not establish the cessation of business at that location. 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). Even if the one Burger King were considered a new commercial enterprise, the petitioner has not demonstrated that he invested \$1,000,000 into this one restaurant.

Finally, the purchase of existing [REDACTED] raises concerns that the petitioner will not be creating any new employment. When purchasing an operational business, a petitioner cannot cause a loss of employment and, unless the business meets the regulatory definition of "troubled business," must demonstrate the creation of 10 new jobs. Matter of Hsiung, I.D. 3361, 5 (Assoc. Comm., Examinations, July 31, 1998). The record does not establish that the petitioner will be creating 10 new jobs at the preexisting [REDACTED]. Even if the petitioner established that one of the restaurants was not operational when purchased and that the petitioner invested \$1,000,000 into that one restaurant, the record does not indicate that the petitioner will create 10 full-time jobs at this one restaurant.²

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 previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of is affirmed. The petition is denied.

² The petitioner's assertion that he will create 40 to 50 full and part-time jobs at a single Burger King restaurant is completely unsupported and not credible.