



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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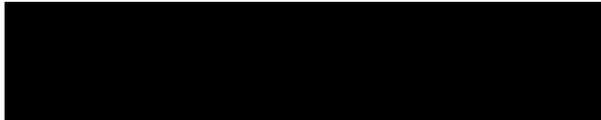
Date: JUL 10 2001

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:



Identifying 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.

On appeal, counsel argues the petitioner did not merely purchase a preexisting business and that the director erroneously applied precedent decisions issued after the petition was filed.

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 record 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. Thus, the required amount of capital in this case is \$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 Rabka, Inc., of which the petitioner is the sole shareholder.

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 Form I-526, the petitioner indicated that he had established a new commercial enterprise through the reorganization of an existing business. He submitted the articles of incorporation for [REDACTED] filed March 26, 1998 and an Agreement for Purchase and Sale of Assets dated April 1, 1998 between [REDACTED] and [REDACTED]. On page 2, section 5, the agreement specifically states, "Effective upon the execution date hereof, Buyer agrees to accept for employment by Buyer those employees working at the L.A. Warehouse and previously employed by Seller."

On March 22, 1999, the director requested additional documentation, stating:

The record shows the petitioner purchased [REDACTED] an existing business, on April 1, 1998, for \$500,000. Since the petitioner is investing in an existing business, the petitioner must establish that he has restructured or reorganized the existing business such that a new enterprise has emerged, or expanded the existing business' net worth or number of employees by 40%.

In response, counsel asserted that [REDACTED] did not purchase [REDACTED] that [REDACTED] remains in business as a separate entity, and that there is no subsidiary, affiliate, or other relationship between the two companies. The petitioner submitted quarterly tax reports, Forms W-2 wage and tax statements, and employee lists for [REDACTED] and [REDACTED] to demonstrate that there is no overlap of employees.

On August 2, 1999, the director clarified his concerns and provided the petitioner another opportunity to supplement the record. The director expressly accepted that [REDACTED] had not purchased [REDACTED] entire business. The director quoted extensively from the purchase and sales agreement, concluding that the petitioner had purchased the warehouse portion of [REDACTED] business. Thus, the director requested evidence regarding pre-investment and post-investment levels of employment and information regarding those employees who *previously* worked at the L.A. facility under [REDACTED]

In response, counsel stated:

In the present case, it is clear from all previous documentation disclosed that new employees are in fact in place. In response to a previous I-797, request for additional information, at section three, [sic] it is clear that the employees currently in place are distinct from the previous employees of the acquired corporation. Forms 941 and W-2s were submitted of all current employees of current petitioner, [REDACTED]. These employees are separate and distinct from previous entity [REDACTED]. Prior to the two year period [REDACTED] created 16 full time positions. This is in accordance with the business plan except for the newly created positions. Please review again this information. Although the business plan called for all [sic] purchase of assets, including employees, it is clear that with the new structuring, there was a need for new employees with different positions, etc. Therefore, by existing law, this is indeed a commercial enterprise.

In his final decision, the director stated:

[REDACTED] is a corporation in the business of clothing production and distribution. The record shows [REDACTED] is spread over several areas in California, Chicago, and Atlanta. [REDACTED] is a multi-million dollar operation that sought to disencumber itself with its distribution warehouse operations in Los Angeles. The petitioner was a willing buyer and the transaction was made. The evidence shows the business was a clothing distribution center under [REDACTED]. After the petitioner acquired the operations at the warehouse facility in Los Angeles the business continued as a clothing distribution center.

There was no change whatsoever, even the employees remained the same. The only restructuring was in the replacement of the former owner with the petitioner. This cannot be construed as restructuring an existing business by any stretch of the imagination.

The director then concluded that the petitioner merely contributed the purchase price of the warehouse business, which did not expand the net worth of that business. The director finally concluded that as the record did not establish which of [REDACTED] employees worked at the warehouse prior to the purchase, the petitioner could not establish a 40 percent increase in employment.

On appeal, counsel merely reiterates his previous arguments. Counsel continues to argue that the director incorrectly concluded that [REDACTED] purchased [REDACTED]. Counsel notes that [REDACTED] continues to operate and asserts that only one employee works for both companies. Counsel attempts to distinguish Matter of Soffici, *supra*, because, according to counsel, in that case the employees, federal tax identification and every other facet of the previous business stayed the same and the sales agreement referenced the payroll of the previous business.

Finally, counsel states:

Again, on three occasions, in the initial application and in the responses to the two I-797 requests for additional information, it is clear that all employees are different, resulting from restructuring subsequent to the assets purchase. All forms 941 and W-2 were submitted. The forms showed distinct change in employees from Rabka, Inc. and [REDACTED]. As indicated, provided with substantial information, [REDACTED] continues to operate their distribution company and has hired more employees. Taxes were submitted and other information to prove same. The new commercial enterprise created in excess of 16 full time positions, more than the required amount under regulation. It is interesting that an individual can invest \$500,000 and create 16 new jobs, and not be able to obtain permanent resident status in the United States.

Counsel clearly misunderstands the director's concerns. The director acknowledged that [REDACTED] is still an existing company and that the petitioner operates a separate warehouse/distributor company for [REDACTED] merchandise. Contrary to counsel's assertions, the record fails demonstrate that [REDACTED] did not simply retain the current warehouse employees.

As stated by the director, the purchase and sales agreement between [REDACTED] and [REDACTED] clearly require [REDACTED] to retain the employees of [REDACTED]. If the petitioner asserts that [REDACTED] did not abide by this requirement, he must provide evidence to support his claim. The petitioner has submitted 1998 third quarter Forms 941 for [REDACTED] after the petitioner had already purchased the warehouse. Thus, the [REDACTED] and [REDACTED] showed different employees in late 1998 is not significant. While the petitioner did submit 1997 Forms W-2 issued by [REDACTED] there is no indication that these are the W-2s of the employees who worked at the Los Angeles warehouse at 2636 South Main Street purchased by the petitioner. While the W-2s provide a Fountain Valley address for A&G, Inc., several of the accompanying Forms I-9 for the employees list a business address of 3630 West Garry Avenue in Santa Ana, California. Several of the employees also reside in Santa Ana. The promotional materials for [REDACTED] list a distribution center on West Garry Avenue. Thus, without additional documentation, the petitioner cannot establish that these employees worked at the Los Angeles warehouse, and not the Santa Ana warehouse.

Regardless, whether the petitioner replaced the existing employees at the warehouse is irrelevant. According to the terms of the purchase and sales agreement, the petitioner purchased the warehouse inventory, furniture, fixtures, and equipment and assumed the lease for the warehouse

from A&G, Inc. The purchase and sales agreement requires that Rabka, Inc. purchase all of its future inventory solely from A&G, Inc.

Matter of Soffici, *supra*, states:

Although Ames Management was incorporated in 1997, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. The Howard Johnson's Motor Lodge purchased by Ames Management had been in operation for approximately 24 years and was an ongoing business at the time of purchase; Ames Management, doing business as Howard Johnsons Hotel, has merely replaced the former owner.

The above paragraph is the only discussion of whether or not the petitioner created an original business in that case. The only factors mentioned as relevant to the issue are that the hotel purchased had been in business and was an ongoing business at the time of purchase and that the petitioner's corporation had merely replaced the former owner. All of those factors are present in this case as well. The petitioner purchased a warehouse which was previously in business and was an ongoing business at the time of purchase. [REDACTED] merely replaced [REDACTED] as owner of the warehouse.

Counsel's attempts to distinguish Matter of Soffici are not persuasive. The fact that the petitioner in that case purchased the hotel from a corporation which may have ceased to exist after the sale is not significant. As in this case, the petitioner in that case assumed an existing, operational entity with its own employees. Similarly, while the purchase agreement in that case may have referred to payroll records, the purchase agreement in this case also referenced the seller's employees, expressly requiring that the petitioner retain existing employees. Nor is it clear that the reference to payroll records was significant in the determination of whether the petitioner established a new commercial enterprise as the discussion of the payroll records appears in a separate section of the decision. Finally, while counsel asserts the petitioner in Matter of Soffici retained the previous employer identification number, this fact is not included as a factor in the decision. Thus, the only reasonable conclusion in this case is that the petitioner purchased a preexisting business, albeit a portion of another corporation's business, which continues to operate separately.

In light of the above, it cannot be concluded that the petitioner created an original business. Thus, we must determine whether the petitioner reorganized an existing business or increased the net worth or number of employees by 40 percent.

The warehouse served as a distributor for [REDACTED] inventory prior to the petitioner's purchase. The purchase agreement requires that the warehouse serve as a distributor solely for [REDACTED] after the purchase. While counsel refers several times to the "restructuring" of the warehouse, counsel fails to explain what restructuring occurred or provide any evidence of such restructuring. There is simply no evidence of a change in mission or substantial increase in services. As stated in Matter of Soffici, a simple change in ownership does not amount to such a

restructuring or reorganization that a new business results. As such, the petitioner has not established that he either restructured or reorganized an existing business.

The director determined that the value of the warehouse at the time of the petitioner's investment was the purchase price and that the petitioner has not demonstrated an increase in that worth.

The term "net worth" is a defined accounting term. Also defined as owner's equity, it is the total assets minus the total liabilities. Without audited balance sheets from prior to and after the petitioner's investment, we cannot determine whether the petitioner increased the net worth of the warehouse. It is further noted that the increase in net worth must result from the petitioner's investment. Even if the petitioner were to demonstrate an increase in net worth resulting from the reinvestment of profits, such an increase could not be considered to have resulted from the petitioner's investment.

Finally, despite repeated requests from the director, the petitioner has failed to provide documentation regarding the number of employees at the warehouse prior to the purchase by the petitioner. As such, it is not possible to determine whether or not the petitioner increased employment at the warehouse by 40 percent.

As the petitioner did not create an original business, or restructure, reorganize, or expand an existing business, we cannot conclude that the petitioner established a new commercial enterprise as described in the regulations.

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.

Beyond the decision of the director,¹ the petitioner has also failed to demonstrate a qualifying investment. The record demonstrates the petitioner transferred \$500,000 to the corporation and that the corporation purchased the warehouse for \$500,000. The corporate tax return for 1998 reflects \$500,000 worth of stock. However, the purchase agreement incorporates a financing agreement secured by the assets of the warehouse. Without the closing statement which would list any loan used to finance the sale or canceled checks reflecting the payment of the purchase price it is not possible to determine whether the petitioner's \$500,000 was used to purchase the warehouse. Moreover, the petitioner submitted a bank statement for [REDACTED] account number 6010-790, the account to which the petitioner wired the \$500,000. While the statement shows a credit of \$500,000 received from the petitioner on April 3, 1998, the statement also

¹ An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

shows a debit of \$500,000 on the same date.² The record contains no evidence that these funds were used for business expenses.

In light of the above, it is not clear that the \$500,000 placed in the corporate account were ever used for business purposes or placed at risk. As such, the petitioner has not demonstrated a qualifying investment.

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 his burden of establishing that the funds are his 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). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, supra note

² The statement indicates the funds were transferred to account 6010-7190. That explanation, however, is confusing as the statement is for account 6010-7190 and the transaction is clearly labeled a debit.

1, at 22 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Beyond the decision of the director, the petitioner submitted evidence regarding his ownership and sale of several pieces of property in Pakistan. The record, however, contains no evidence of the petitioner's income or how he acquired the funds used to obtain those pieces of the property in the first place. Thus, the petitioner has failed to adequately trace the source of his funds.

EMPLOYMENT CREATION

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

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

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

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

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

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

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

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

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No

allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, supra note 1, at 19 (finding this construction not to be an abuse of discretion).

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.

While implied but not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs. The petitioner claims to have already created 16 jobs. Even if the petitioner did not honor his commitment to retain [REDACTED] warehouse employees, as implied by counsel, a petitioner must create 10 new job opportunities. A petitioner cannot demonstrate the creation of 10 new job opportunities by replacing existing employees. Despite repeated requests by the director, the petitioner failed to provide evidence of the number of employees at the warehouse prior to the petitioner's purchase of that portion of the business. Therefore, it is not known how many total employees the

petitioner needs to demonstrate. As such, he has not met his burden to demonstrate that he has or will create 10 new jobs.

RETROACTIVE APPLICATION OF PRECEDENT DECISIONS

In his decision, the director stated that the petition was reviewed in accordance with the four 1998 precedent decisions issued by the Administrative Appeals Office (AAO). Counsel asserts on appeal:

There are serious concerns with receipt to adjudications [sic] as the denial in question. The service [sic] cites [sic] Matter of Izumii for the proposition that the service [sic] held that opinions of one service [sic] official couldn't work to remove from the AAU's authority to review. Additionally, the service [sic] does not pre-adjudicate investor petitions; each petition must be individually adjudicated on its own merits.

However, this does not stand for the proposition that the service [sic] may pick and choose certain facts to determine whether or not one meets regulatory authority. Like wise [sic] a precedent decision should be followed in determining whether [sic] an individual is qualified for a benefit. Otherwise, an alien entrepreneur after in [sic] investing substantial amount of funds and creating jobs for employees, such as [the petitioner], could not possibly know how he could demonstrate and or meet requirements to have a petition approved. Surely if the service [sic] request [sic] evidence and the beneficiary complies, that evidence should be considered in determining eligibility for the benefit sought.

In the instant case, certainly, ample evidence was submitted to prove eligibility for the benefit sought, most of which was not considered. A decision could have easily been drafted to state that the amount of capital had been invested and the number of employees had been created despite certain evidence.

The argument made in this response is whether the INS can legally make major changes to an investment visa program retroactively without going through the Administrative Procedure Act.

Counsel appears to be arguing that the director failed to consider evidence submitted in response to the requests for additional evidence. A thorough reading of the director's decision, which includes a discussion of the submitted documentation, does not support counsel's allegations. Counsel seems to further argue that an approval of the petition could be justified "despite certain evidence." We find no error in the director's consideration of all the evidence, including that evidence which indicated the petitioner was not eligible for the benefit sought.

Finally, the director appears to question the director's reliance on the precedent decisions. The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. See R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000); Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000); Spencer Enterprises, Inc. v. United States, Case No. CIV-F-99-6117 (ED Calif. 2001); but cf. Chang v. United States, Case No. CV-99-10518 (CD Calif. 2001)(holding that the precedent decisions did not constitute legislative rule making but remanding for a consideration of hardship claims *at the removal of conditions stage*.) Under any proper reading of the language of the regulations, this petitioner is not eligible for classification as an alien entrepreneur.

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.