

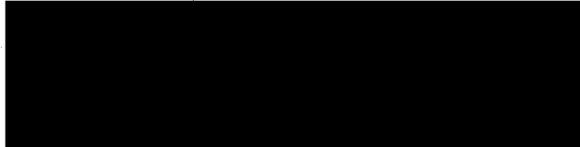


U.S. Department of Justice

Immigration and Naturalization Service

101

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



Public Copy

MAR 15 2001

File:



Office: Texas Service Center

Date:

IN RE: Petitioner:



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

IN BEHALF OF PETITIONER:



Identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas 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 a qualifying investment, the lawful source of her funds, or that any of her employees worked full-time.

On appeal, counsel argues that the petitioner is actively in the process of investing \$1,000,000, that her funds were obtained from a lawful source, and that 30 of her employees work full-time. The petitioner submits previously submitted documentation and little new documentation.

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).

On the Form I-526, the petitioner claimed to have established Oriental Eagle, Inc., doing business as China Star, in which the petitioner owns 90 percent of the outstanding stock. The petitioner indicated that she established the corporation on October 27, 1997, had invested a total of \$1,500,000, and had increased employment from zero to twenty-three. Finally, the petitioner indicated that she established the new commercial enterprise through the creation of an original business.

#### 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.

In support of the petition, counsel asserted that the petitioner had invested \$900,000 for the property and restaurant building, \$225,000 for equipment, and \$755,684 for remodeling. The petitioner submitted a bill of sale for restaurant equipment with a purchase price of \$225,000; a warranty deed for the property and restaurant with a purchase price of \$900,000, \$690,000 of which was financed by a note secured by the property; a cashier's check purchased by the petitioner issued to Stewart Title for \$150,400; invoices from Bedford Advertising for \$10,380, \$10,815, \$10,565, and \$11,185; an invoice from Silk Construction for \$712,739; and checks issued by China Star to Silk Construction and other contractors totaling \$162,179.

On March 3, 1999, the director issued a request for additional documentation, noting that \$690,000 of the purchase price for the property was financed and secured by the assets of the new commercial enterprise. In response, counsel asserted the petitioner had invested \$1,240,758: \$443,601 towards the purchase price of the property; \$612,500 for construction; \$122,422 for signs, carpet, furniture, air conditioning and other miscellaneous expenses; and \$62,235 for advertisements and carpets. Counsel submitted previously submitted closing documents for the purchase of the property; the previously submitted invoice from Silk Construction; a list of checks issued by the petitioner totaling \$525,205 with accompanying cancelled checks; a list of checks issued by the corporation totaling \$209,716 with some accompanying cancelled checks; the previously submitted advertising invoices; and an invoice for carpeting paid by one of the petitioner's personal checks included on the above-mentioned list.

On July 23, 1999, the director issued a second request for additional information. Specifically, the director requested evidence that the petitioner personally paid the closing costs of \$443,601 and that the funds paid by the corporation are traceable to the petitioner.

In response, counsel asserted the petitioner had documented the following investment:

The total amount was \$1,240,748 including the sum paid at the closing. A copy of "Not Negotiable" cashier's check

of \$150,400.00 was submitted initially, and has been attached for the 2nd time with this response. The remaining amount, a sum of \$20,000.00 was paid as a deposit for the earnest money, and a sum of \$257,829.17 was withdrawn directly from the bank account. We have attached a duplicate copy of receipt from NationsBank, evidencing that a sum of \$257,829.17 was charged onto the Petitioner's account.

Please note, the sum of \$1,240,748.08 listed above was the money paid off by Petitioner during the process of investment. That did not [sic] including the funds in the bank, nor the funds which would be additionally invested by Petitioner.

The grand opening date of China Star was October 19, 1998. Therefore, any funds paid by the company checks before that date were the funds invested by Petitioner.

In addition to previously submitted documents, counsel submits a handwritten August 25, 1997 "advice of charge" addressed to the petitioner and Hung Ta Chang<sup>1</sup> advising of a \$257,829.17 withdrawal.

The director determined that the petitioner had not documented the source of the \$20,000 earnest money, that the \$257,829.17 was wired to the Title Company, or that the corporate funds used for capital expenditures could be traced to the petitioner.

On appeal, counsel reiterates that the petitioner paid all the closing costs including the \$20,000 earnest money deposit and that the corporate funds all derived from the petitioner. The petitioner submits no new documentation regarding this issue and counsel provides no explanation for this failure.

Despite repeated requests by the director and the denial notice which specifically stated that the documentation did not support counsel's assertions, the petitioner has submitted little new documentation. As conceded by the director, the petitioner's business appears to be legitimate and the petitioner appears to have invested substantial capital. We concur with the director, however, that the petitioner has failed to document that she has invested or committed the full \$1,000,000 to the business.

#### \$20,000 Earnest Money Deposit

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<sup>1</sup> The record reflects that the petitioner married Mr. Chang in 1980, although, as will be discussed below, it is not clear that Mr. Chang and the petitioner remained together after 1996.

While counsel asserts that the petitioner paid the \$20,000 earnest money deposit for the property purchase, the record does not support this assertion. The petitioner has not submitted a cancelled check and relevant bank statements to support counsel's claim. 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).

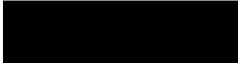
#### Remaining \$443,601 after \$20,000 Deposit and \$690,000 Mortgage

Counsel asserts that the petitioner paid in cash the remaining purchase price of \$443,601. The closing documents reflect that the remaining closing costs were only \$408,229.17. The record contains a cashier's check purchased by the petitioner issued to Stewart Title for \$150,400 and a handwritten August 25, 1997 "advice of charge" addressed to the petitioner and Mr. Chang advising of a \$257,829.17 withdrawal. The advice is not supported by a bank statement confirming the debit or receipt documenting to whom the money was transferred. Despite the director's express concern with the lack of documentation supporting the advice of charge, the petitioner submits no additional supporting documentation on appeal. Without such documentation to support the unverified, handwritten advice, we cannot conclude that the petitioner was the source of the \$257,829.17 or that the money allegedly debited from the petitioner's account was transferred to the title company. Therefore, the petitioner has only established an investment of \$150,400 regarding the purchase of the restaurant and equipment.

#### \$612,500 Construction Costs

Counsel asserts the petitioner paid Silk Construction \$612,500 for renovations to the restaurant. The list of checks indicate the petitioner personally paid Silk Construction only \$475,000 and that Oriental Eagle, Inc. paid Silk Construction \$137,500 for a total of \$612,500.

Counsel asserts that the corporate funds must be considered the petitioner's own funds. The mere fact that the petitioner claims to be a shareholder of the corporation, however, in no way indicates that all of the corporation's funds prior to beginning operation were contributed by the petitioner. As correctly stated by the director, a corporation is a separate and distinct legal entity from its owners or stockholders. Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). This principle does not mean the petitioner can never include expenditures of the corporation. The petitioner must, however, be able to trace such funds back to herself as a stock purchase or other contributed capital. See 8 C.F.R. 204.6(j)(2)(iv).



In this case, despite repeated requests by the director, the petitioner has not submitted any evidence that she has ever transferred any money to the corporation. While the record contains a stock certificate verifying the petitioner's ownership of 900 shares of stock, the record contains no evidence of how much the petitioner paid for those shares. The articles of incorporation and the stock certificate both indicate the shares have no par value. The record does not contain a stock ledger, cancelled checks, corporate bank statements showing deposits, the petitioner's personal bank statements showing debits, the minutes of a board meeting in which the consideration for the shares of stock was decided, or audited balance sheets indicating the amount of capital stock. Without such documentation, we cannot trace the corporate funds back to the petitioner. A corporation can obtain funds from a number of sources, such as business loans. The director correctly determined that the petitioner had not established that the corporate funds originated from her, and not the other shareholder, a business loan secured by the assets of the business, or some other source.

Therefore, the petitioner has only established that she contributed \$475,000 towards the construction costs.

Remaining \$122,422 in Capital Expenditures

As with the construction costs, the petitioner has only established that she personally paid \$50,205 of these capital expenditures such as advertising, carpeting, and furnishings. For the reasons discussed above, the petitioner has not established that the remaining \$72,217 paid from corporate funds can be attributed to the petitioner.

Total Investment

In light of the above discussion, the petitioner has established an investment of \$150,400 towards the purchase price, \$475,000 towards construction costs, and an additional \$50,205 towards other capital expenditures for a total of \$675,605. While the record does not preclude the possibility that the petitioner contributed much more to the corporation, the petitioner's failure to comply with two Service requests for evidence or to submit the necessary documentation on appeal prevents a finding that the petitioner did, in fact, contribute any additional funds. Counsel provides no explanation for the failure to submit the requested documentation, assuming it exists, other than to continue to assert the evidence already submitted is sufficient.<sup>2</sup>

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<sup>2</sup> The petitioner has been afforded two opportunities as well as on appeal to submit the requested evidence. Thus, a motion based solely on that evidence will not be entertained. See Matter

**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. at 26. 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 wire transfer receipts from 1986, 1987, 1997, and 1998 showing money transferred from accounts held by the petitioner or Mr. Chang to their U.S. account; deposit slips for deposits into the petitioner's U.S.

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of Soriano, 19 I&N 764 (BIA 1988). A new petition which includes such evidence, however, is not precluded.



account; statements confirming the petitioner's overseas bank account balances of \$136,495, \$141,841, 109,488, \$43,502, \$534,214, \$98,092; several bank statements from one of Mr. Chang's bank accounts; appraisals of land owned in Taiwan by the petitioner; corporate tax returns for Wang Chi Co., Ltd. identifying the petitioner as the managing director; and an appraisal of Wang Chi Co., Ltd. indicating the petitioner invested \$34,904 in 1995 for stock currently appraised at \$150,000.

In response to the director's second request for additional documentation, the petitioner submitted her marriage certificate reflecting her marriage to Hung Ta Chang, a letter from the Taipei Mission in Korea indicating Mr. Chang served as the First Secretary of the Taipei Mission from October 1995 to December 1998, and the previously submitted bank statements.

The director concluded that the petitioner had not established her salary or that of her husband. Therefore, the director determined the petitioner had not established the source of her assets.

On appeal, counsel asserts that the petitioner's spouse served in the military for 23 years and, thus, is not required to pay taxes. Counsel submits a translation of Taiwanese law indicating that wages earned as a serviceman or as an officer without diplomatic immunity in an embassy are not taxable and Internal Revenue Service Certificate indicating an unnamed individual with ID number A101091640 filed no taxes in 1997 or 1998. The family register in the record indicates the petitioner's ID number is A224649502; Mr. Chang's ID number is not in the record.

More significantly, the family register indicates the petitioner's spouse left the household in 1996. It is not clear the petitioner still has access to her estranged spouse's assets or whether they are even still married. Further, the record contains no evidence of Mr. Chang's military service, his salary while serving in the military, his salary while working at the Taipei Mission, or whether his position granted him diplomatic immunity and, thus, tax exemption status. Moreover, according to the translation submitted, only the salaries of servicemen and non-diplomatic officers are exempted. Therefore, any other income earned while employed as a serviceman or non-diplomatic officer, such as business income and a spouse's income, would still, apparently, be taxable.

While the petitioner has demonstrated significant assets, she has not fully established that those assets derived from a lawful source. The record contains no evidence of wages or other income which could explain the large bank accounts, valuable property, or the petitioner's 1995 investment in Wang Chi Co., Ltd.

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.

In support of the petition, the petitioner submitted Form 941, Employer's Quarterly Federal Tax Return for the second quarter of 1998, several payroll "recaps," and 22 Forms I-9. The Quarterly Federal Tax return does not indicate the number of employees and the payroll recaps do not indicate the number of hours worked by each employee.

In July 19, 1999, the director requested evidence that at least 10 of the employees worked full-time. In response, counsel stated:

China Star, as you can see from the photos submitted initially, is a large-scale Chinese restaurant with over three hundred customer seats. Petitioner claims that, in order to maintain a good order for the instant restaurant, the company needs to maintain, at any time, an army of at least thirty employees, including outside managers, cashiers, bar-tenders, waiters/waitress, kitchen managers, chefs, kitchen assistants, etc.

In the initial supporting letter, Petitioner claimed that twenty-three *full time* employees had been created, and submitted IRS Form 941, I-9 and the company's payroll. In addition, Petitioner estimated that the company would create more than twenty-five *full time* employees when the business was in full swing. (Emphasis in original.)

Counsel did not, however, submit evidence that any of the employees worked full-time, such as payroll records reflecting the employees' hours, as requested by the director.

In his notice of denial, the director stated,

The Service specifically requested evidence to demonstrate that the positions were full-time. The petitioner failed to provide additional evidence which could establish the number of hours worked by each employee. In addition, the estimation by the petitioner that at least thirty employees are necessary to operate the restaurant is not detailed enough or based on a viable methodology such that it could be considered a "comprehensive business plan."

On appeal, counsel states:

The initial application included Form I-9, IRS 941 and the company's payroll to evidence that the company had hired twenty-three full-time employees at the beginning of the business operations, the Petitioner estimated the company would create more than twenty-five *full time* employees when the business was in full swing. To further clarify this issue, the Petitioner is submitting,

with this brief, the company's 1999 IRS 941, evidencing the company maintains an average of 40 employees, among whom, approximately 30 are full-time employees. . . . There is no question that Petitioner's investment has directly created the minimum of ten new jobs as required by the statute.

While the employer's quarterly report for the third quarter of 1999 reflects that China Star employed at least 40 employees during that quarter, it does not reflect, as counsel asserts, that 30 employees worked full-time. Assuming the employees all earn at least minimum wage, no more than 14 employees worked full-time. Without evidence of the employees' salary or hours worked, however, it is not possible to determine whether all 14 employees actually work full-time.

Despite the director's request on July 19, 1999 and the director's specific language in his denial regarding the lack of evidence of hours worked, the petitioner has failed to submit such evidence. As with the evidence of investment requested by the director, counsel provides no explanation for the petitioner's failure to submit the requested documentation, assuming such documentation exists.

In addition, as will be discussed in more detail below, the record is ambiguous regarding whether the petitioner purchased an existing business. The record does not contain evidence that the prior restaurant was a troubled business or that indicates how many employees were employed at the restaurant prior to the petitioner's purchase of that business. Without such information, it cannot be determined if the petitioner created 10 new jobs. See Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) at 5.

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.

We concur with the director that the petitioner's unsupported estimates of employment do not constitute a comprehensive business plan.

**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 Oriental Eagle, Inc., doing business as China Star.

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. The record reflects that the petitioner purchased the property, restaurant building, and restaurant equipment from Mesa S.W. Restaurants. While not discussed by the director, the record does not reveal whether Mesa S.W. Restaurants was operating a restaurant in the building at the time the purchase was negotiated. If so, then the petitioner actually purchased an existing business and would need to establish a reorganization, restructuring, or expansion of the business. As the petitioner claimed to have established a new commercial enterprise through the creation of an original business, this issue was not discussed by counsel or documented in the record.

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..