

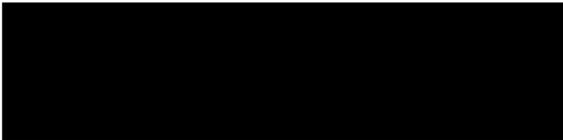


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U.S. Department of Justice
Immigration and Naturalization Service

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

Public Copy



File: WAC-98-231-54300 Office: California Service Center Date: MAR 30 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner¹ 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 of lawfully obtained funds into a new commercial enterprise in a targeted employment area or that the new business would create the necessary employment

On appeal, counsel argues the petitioner invested the requisite \$500,000 of lawfully obtained funds in a new commercial enterprise which was located in an area designated as a targeted employment area and that the business would create the necessary employment.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

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.

¹ This decision will refer to [REDACTED] as the petitioner; however, as will be discussed below, the Form I-526 was not properly filed by Ms. [REDACTED]

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

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

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

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

On the Form I-526 the petitioner indicated the new commercial enterprise [REDACTED] International, Inc. (MMII), was operating a car wash in Azusa, California. On March 30, 1999, the director requested evidence that Azusa was a targeted employment area. In response, the petitioner submitted a letter from the [REDACTED] Redevelopment Agency confirming that the car wash is located in Azusa.

The director concluded the petitioner had failed to submit any evidence of the unemployment rate in Azusa or that Azusa is a rural area. On appeal, the petitioner submits materials from the

California Trade and Commerce Agency indicating that the California Employment Development Department (EDD) had designated Azusa a targeted employment area for 1998 as well as a letter from Governor Gray Davis advising Service Commissioner Doris Meissner that the EDD is responsible for designating targeted employment areas in California.

In light of the materials submitted on appeal, the petitioner has now established that the car wash is located in a targeted employment area. Therefore, the minimum investment amount in this case is \$500,000.

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, the petitioner submitted the closing documentation indicating that MMII purchased a car wash in February 1998 for \$2,500,000, with \$438,000 due at closing; a business license and seller's permit for MMII; a February 12, 1998 cashier's check for \$438,000 issued to Atlantic Escrow; the petitioner's February 1998 bank statement reflecting a cash withdrawal of \$438,000 on February 12; and a June 1, 1998 cashier's check for \$80,000 issued to Bank of America.

In response to the director's request for additional documentation including audited financial statements, the petitioner resubmitted much of the above documentation as well as the petitioner's June 1998 bank statement reflecting a cash withdrawal of \$80,000 on June 1, 1998; MMII's June 1998 bank statement reflecting an \$80,000 deposit on June 4, 1998; stock ledgers which fail to reflect the consideration paid for the shares purchased; unaudited financial statements; and MMII's 1998 corporate tax return.

The director noted that one of the other shareholders in MMII, [REDACTED] is listed as the buyer of the car wash on some of the sales documentation and concluded that the petitioner had not demonstrated that the balance of the sales price was MMII's responsibility. On appeal, counsel asserts that the negotiations

for the sale of the car were initiated prior to the incorporation of MMII but that MMII ultimately purchased the car wash.

While the sales contract reflects the buyer as [REDACTED] the final closing statement and the deed for the sale of the car wash reflect that [REDACTED] sold and granted the car wash to MMII. It is clear, therefore, that MMII, and not [REDACTED] purchased the car wash and that the car wash is an asset of MMII. Thus, by paying the balance of the purchase price at closing, the petitioner effectively transferred those funds for the benefit of MMII.

The record, however, does not reflect the nature of that transaction. The director specifically requested that the petitioner submit audited balance sheets and income statements for MMII. Instead, the petitioner submitted unaudited financial statements and a corporate tax return which contain inconsistencies.

The balance sheet as of December 31, 1998 and the 1998 tax returns reflect common stock of \$2,198,733.97. The income statement for 1998 reflects wages of \$57,484.93 and officer salaries of \$6,594. The tax return for that year, however, indicates no salaries or wages on Form 1120, line 13. While the tax return does reflect officer compensation of \$6,594 on Form 1120 line 12, Schedule E reflects no officer compensation. In addition, on Form 5472, the corporation identified only the petitioner as a 25 percent or more foreign shareholder. On Schedule K, the corporation indicated that one individual, partnership, corporation, estate or trust owned 50 percent or more of the corporation's voting stock referencing Statement 4, and on Statement 4 the corporation listed the petitioner as an owner of 22.74 percent, [REDACTED] as an owner of 22.74 percent and [REDACTED] as an owner of 31.78 percent. On the attachment to the Form I-526, the petitioner indicated she owned 20 percent, [REDACTED] owned 40 percent, [REDACTED] owned 20 percent, and [REDACTED] owned the remaining 20 percent. The stock ledger supports the information on the Form I-526 attachment.

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 record does not resolve the inconsistencies. Moreover, the petitioner failed to submit audited financial statements as requested and the stock ledger in the record does not indicate the consideration paid for the shares purchased. Thus, the petitioner has not demonstrated that the \$438,000 was a stock purchase or paid-in capital.

Funds loaned to a business are not considered "invested" as defined in the regulations. In light of the above, the petitioner has not established that her funds were invested in MMII.

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).

In support of the petition, the petitioner submitted a certificate confirming a balance of \$520,000 in a Chinese bank; a bank statement for Advance Technology and Development addressed to [REDACTED] reflecting a wire transfer deposit of \$756,662.50 on November

20, 1997; a July 28, 1997 advice of irrevocable documentary credit confirming the transfer of \$758,000 from [REDACTED] Trading Co. to [REDACTED] Technology and Development Co. in Alhambra, California; the petitioner's Economics degree from Liaoning University; a registration certificate for [REDACTED] Guesthouse indicating the petitioner is the legal representative of that enterprise which has a capital of RMB 6,200,000 Yuan and began business in 1991; an "Enterprise Legal Person Business License" for [REDACTED] Social Service Co., Ltd. indicating the petitioner is the legal representative of that enterprise which has a capital of RMB 5,000,000 Yuan and began business in 1997; and two certificates of stockholder's investment indicating the petitioner invested RMB \$4,500,000 Yuan in [REDACTED] Social Service Co., Ltd. which has a registered capital of RMB 5,000,000 Yuan and that the petitioner is the owner of 18,200,000 shares of stock in [REDACTED] Special Environmental Protection Equipment Manufacturing General Plant.

The director requested additional evidence that the petitioner had lawfully acquired her funds. In response, counsel asserted that the petitioner owns significant bank holdings in China, including a balance of \$520,000 around the time of the investment. Counsel also stated:

Besides that account, Ms [REDACTED] is also privy to funds made available after the dissolution of a family enterprise, Yuan Da Trading Company. The funds, through a letter of credit, totaled \$758,000. . . . Please note that the beneficiary name on the account receiving the direct transfer from the dissolution is [REDACTED] [REDACTED] is [the petitioner's] sister and co-investor in [REDACTED] Hand Car Wash. As stated above, these are family funds that the [REDACTED] [sic] used to for [sic] their investment in [REDACTED] and [REDACTED]

The petitioner resubmitted the certificate documenting the balance of \$520,000 in a Chinese bank account, Advanced Technology and Development's bank statement addressed to [REDACTED] and the credit advice.

The director noted the funds transferred from China to the U.S. were transferred to Advanced Technology & Development and concluded that the petitioner had not demonstrated that the invested funds were her own. The director further concluded:

[T]he evidence in the record fails to show your income earned within five years from the date of filing the petition. The evidence submitted also fails to establish that you have worked in a certain occupation through which you have accumulated capital over time, or documentary evidence of the path of the funds.

On appeal, counsel states:

First, the Service's opinion delves into questions about [the petitioner's] transactions with Advanced Technology & Development. All dealings with Advanced Technology & Development are not relevant to [the petitioner's] case. They are relevant only to the case of her brother. Therefore, any information surrounding Advanced Technology & Development should not confuse the more direct issue of actual lawful source of funds. [The petitioner's] source for her investment originates back to investments and companies she managed in China more than two years ago. [The petitioner] ran a company in the garment industry from 1987 to 1991. Her success with that enterprise allowed [sic] to invest in and manage a very popular restaurant in China from 1991 to 1994. Again, she was fortunate in her investment and subsequently invested in a hotel in China. Thus, the trail of her funding begins with hard work and good investments.

The petitioner submits previously submitted documentation as well as evidence of the petitioner's investments in China subsequent to her investment in MMII.

As stated by the director, the petitioner has failed to document evidence of her income or accumulated capital prior to 1991. Thus, the petitioner has not demonstrated the source of the funds invested into the restaurant in 1991.

In addition, while the petitioner has documented assets in China, she has not demonstrated that they are the source of the \$438,000 withdrawn from her personal account. While counsel questions the director's analysis of the funds transferred to Advanced Technology and Development, that transfer is the only evidence of funds coming from China to the United States. It is not clear how counsel can criticize the director for considering evidence submitted in support of the petitioner's case. Indeed, the director and counsel (on appeal) reach the same conclusion: this evidence, submitted by this petitioner in support of her petition and again in response to a request for additional evidence, has no relevance to the source of the funds in her U.S. account. Finally, counsel's current dismissal of the funds transferred to Advanced Technology is a contradiction of counsel's previous claim that those were family funds to which the petitioner was "privy."

Regardless, the transfer of funds from [REDACTED] Trading Company to Advanced Technology and Development Company is the only transfer of funds from China to the United States. The petitioner has not demonstrated that she has any interest in [REDACTED] company, that the business was

dissolved as claimed, or that the funds transferred to [REDACTED] Technology and Development Company account were her own funds. As counsel asserts that [REDACTED] Company is a family business and that [REDACTED] is the petitioner's sibling, the possibility exists that those were [REDACTED] funds. Moreover, the petitioner has not submitted any evidence such as cancelled checks or wire transfer receipts documenting the transfer of funds from Advanced Technology and Development Company's account to the petitioner's account from which she withdrew the \$438,000.

In light of the above, the petitioner has not established the path of funds from her Chinese assets to her U.S. account.

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.

On the Form I-526, the petitioner indicated Azusa Hand Car Wash employed 13 people at the time of her investment and 13 at the time the petition was filed. The business plan projects a need for 25 employees at the car wash, 15 at the maintenance center, and 30 at the fast food restaurant, a Burger King. In support of the petition, the petitioner submitted 14 Forms I-9 and Forms W-4. In response to the director's request for additional documentation, the petitioner asserted Azusa employed 24 people and submitted the previously submitted business plan and 25 Forms I-9 and Forms W-4.

The director noted that, as stated in Matter of Ho, supra, Forms I-9 do not verify that the individuals have begun working or that they work full-time. The director also noted that some of the documents submitted lacked information such as complete social security numbers.

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative

strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The director noted that the business plan submitted contained no approximate dates of hire for the future employees or sufficient detail to permit the Service to reasonably conclude the enterprise had the potential to meet the job-creation requirements.

On appeal, the petitioner submits Quarterly Wage and Withholding Reports; alleged Forms 941, Employers Quarterly Federal Tax Returns, for 1998 and 1999; and 40 Forms W-2 Wage and Tax Statements. Of the Forms W-2, two reflect annual wages of approximately \$6,000, some reflect annual wages between \$1,000 and \$3,000, but most reflect annual wages of a few hundred dollars. Contrary to counsel's assertion on appeal that the documentation reflects an increase to 30 employees, the Quarterly Wage and Withholding Reports reflect 14 employees in October 1998 and 19 employees in June 1999. That the second quarter 1999 report lists 30 names does not mean that all 30 worked at one time.

Moreover, the Forms 941 allegedly for 1998 dated April, July, and October 1998, all indicate that the forms were revised by the Internal Revenue Service in January 1999. As such, the credibility of these documents, and the petitioner in general, is severely diminished. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, while not specifically discussed by the director, the petitioner concedes that he purchased an existing business. Therefore, the petitioner must establish that he created 10 new jobs; a petitioner cannot cause a net loss of employment. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998). The record contains no evidence of how many employees were employed

at the car wash prior to MMII's purchase of the business. As such, we cannot determine whether the petitioner has created any new jobs.

Finally, the petitioner indicated on the attachment to the Form I-526 that two other investors were seeking classification as an entrepreneur. In order for all three to qualify, MMII would need to create 30 new full-time jobs. While the Service will accept any allocation agreed upon by the investors, no evidence of such allocation has been submitted.

We concur with the director that the business plan is completely insufficient to allow us to reasonably conclude that MMII will create any additional jobs. While the record contains a proposal for renovations, the proposal is not signed. The record does not contain any evidence of negotiations or a final agreement between MMII and Burger King. As such, the petitioner has not demonstrated that MMII has taken any actions towards the establishment of a full service car maintenance business or a Burger King restaurant. In light of the above, the petitioner has not established that she will meet the employment-creation requirement.

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).

Beyond the decision of the director, according to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise at issue here is MMII.

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 reveals that the employment-creating enterprise in this case is [REDACTED] Hand Car Wash.

On the Form I-526, the petitioner claims to have created a new commercial enterprise through the reorganization of a preexisting business. The record does not support this assertion. The regulations provide that the restructuring or reorganization must be such that a new commercial enterprise results. Matter of Ho, I.D. 3662 (Assoc. Comm., Examinations, July 31, 1998) at 10 states:

A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership.

The business purchased was a car wash and is still a car wash. The petitioner asserts that she will be adding a service station and a fast food restaurant. The law, however, provides benefits for an alien who *has* established a new commercial enterprise. Where the petitioner claims to have established a new commercial enterprise through a reorganization, the reorganization must have already taken place prior to the date of filing. In this case, the record contains no evidence that, at the time of filing, the petitioner had reorganized the car wash such that a new commercial enterprise resulted according to 8 C.F.R. 204.6(h)(2).

As stated above, the petitioner does not claim, and the record does not reflect that the petitioner created an original business. Thus, the petitioner has not established a new commercial enterprise according to 8 C.F.R. 204.6(h)(1). Without balance sheets for [REDACTED] Car Wash before and after the sale or payroll documentation for the car wash before and after the sale, we cannot conclude that the petitioner expanded the net worth of or employment at the business by 40 percent. Therefore, we cannot conclude that the petitioner has established a new commercial

enterprise by expanding an existing business according to 8 C.F.R. 204.6()(3). In light of the above, the petitioner has not established a new commercial enterprise.

PROPER FILING OF PETITION

8 C.F.R. 204.6(c) provides:

Eligibility to file. A petition for classification as an alien entrepreneur may only be filed by any alien on his or her own behalf.

As the Form I-526 seeks benefits for Xijuan Xu, it cannot be considered unless Xijuan Xu is determined to be the petitioner. The underlying petition was signed, and thus filed, by Zhe Xu, president of Ming Ming International, Inc., the alleged new commercial enterprise. Thus, Zhe Xu, and not Xijuan Xu, is the "petitioner" for the instant petition. As such, the petition was not properly filed.

In addition, 8 C.F.R. 103.2(a)(2) provides that a petition is not properly filed unless signed by the petitioner. Xijuan Xu's signature does not appear anywhere on the Form I-526; thus, even if we were to consider him the intended petitioner, the petition is still not properly filed. Therefore, even if the petition were approvable on its merits, this petition cannot lawfully be approved.

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.