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U.S. Department of Justice  
Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[Redacted]

02 AUG 2002

File: [Redacted] Office: Texas Service Center Date:

IN RE: Petitioner: [Redacted]

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

IN BEHALF OF PETITIONER:

[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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, Director  
Administrative Appeals Office

**DISCUSSION:** The approved preference visa petition was revoked by the Director, Texas Service Center. The Associate Commissioner for Examinations summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on motion. The motion will be granted, the previous decision of the Associate Commissioner vacated, and the petition denied.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director approved the petition on August 20, 1997. On March 3, 1999, the director issued a notice of intent to revoke, concluding that the petitioner had not demonstrated that he had established a new commercial enterprise that he intended to manage, that he had made a qualifying investment of lawfully obtained capital in a targeted employment area, or that he would create the necessary employment. The petitioner responded to this notice on March 26, 1999. On July 22, 1999, the director revoked the petition, concluding that the petitioner had not overcome the concerns expressed in the notice of intent to revoke.

On appeal, dated August 3, 1999, counsel asserted that he would submit a brief in 30 days. It is noted that the appeal, Form I-290B, specifically states that additional evidence or a brief should be submitted "*to the AAU.*" (Emphasis in original.) On February 21, 2001, the Administrative Appeals Office (AAO) summarily dismissed the appeal, asserting that the record did not contain an additional brief.

On motion, counsel argues that he submitted an additional brief and exhibits to the Texas Service Center on August 20, 1999. In our previous decision, we placed the petitioner on notice that the appellate brief and exhibits were not part of the record. Nevertheless, while the petitioner resubmits a copy of the brief allegedly submitted in 1999, he does not resubmit the exhibits that were allegedly attached to that brief. We will reopen the matter and adjudicate the appeal on its merits based on the evidence in the record.

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, VIN Investment Inc., established in August 1989, and other enterprises. The petitioner indicated that the business operates hotels and a convenience store. The petitioner further indicated that he had established a new commercial enterprise through the reorganization of an existing business. Finally, the petitioner claimed to have invested \$337,000 initially and \$745,250 total.

On the petition, the petitioner indicated he made an initial investment of \$337,000 in August 1989, and a total investment of \$745,250, suggesting an investment of only \$408,250 after August 1989. In his initial brief, counsel stated:

[The petitioner] first made investments in the United States through his wholly owned company VIN Investments, Inc. Through this company [the petitioner] gained ownership in three hotels and took on the responsibilities of running these enterprises. Subsequent to this original investment [the petitioner] invested in several other hotels and a convenience store as well.

The petitioner submitted an "investment portfolio" prepared June 20, 1997. This chart indicates that Lucky Stop was purchased for \$85,000, of which the petitioner invested \$50,000 cash; the San Augustine Inn was purchased for \$405,000 of which the petitioner invested \$191,250 cash; the Victorian Inn was purchased for \$450,000, of which the petitioner invested \$80,000 cash; Stratford House was purchased for \$622,598.73, of which the petitioner invested \$374,000 cash; and property for a future motel on Route 59 North was purchased for \$50,000, of which the petitioner invested \$50,000 cash. Thus, this chart asserts a personal investment of \$745,250 beyond the mortgages and bank loans. The portfolio further indicates that the petitioner owns 100 percent of Lucky Stop, 75 percent of the San Augustine Inn, 50 percent of the Victorian Inn in Whitesboro, 50 percent of Stratford House, and 100 percent of the property on Route 59 North. In support of this chart, the petitioner submitted a more detailed "investment portfolio" with similar information, although this second portfolio concludes "we estimate after improvements of property and current income according to present market, property's value would be \$1,025[, ]000.00[.] [A]t this rate [the petitioner's] share would be \$337,500.00."

Initially, the petitioner submitted what appear to be personal British bank statements<sup>1</sup> reflecting debits of \$236,900 on May 23, 1990 and \$100,000 on August 14, 1989. This documentation does not indicate the destination of those fund transfers. The petitioner also submitted his accountant's estimate of his 1996 income. Included as income is interest from loans to Victorian Inn of Waco, Victorian Inn of Paris, and Stratford House totaling \$10,640. Further, the petitioner submitted a list of bank accounts for Stratford House, Augustine Inn, and the Whitesboro Victorian Inn.

In his notice of intent to revoke, the director questioned whether the petitioner had established his ownership in all of the businesses claimed to be part of the new commercial enterprise. The director also noted the lack of documentation regarding the new commercial enterprise named on

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<sup>1</sup> The bank statements only contain his first and middle initial in addition to his common last name.

the petition, VIN Investment, Inc. The director further noted the number of loans used to finance the businesses, most of which were executed by the businesses, noted that the loans were secured by the assets of the business, and determined that the petitioner had not established a qualifying investment.

In response, counsel argued that the petitioner "put much of his investments in his brothers' names" because they were permanent residents and he had no status. In addition, counsel asserted that the petitioner sent \$336,966 to his brother [REDACTED] on August 4, 1989, for the formation of VIN Investment, Inc., which eventually entered into a three-hotel package deal in 1990. Counsel further asserted that the petitioner "is bound to invest another \$300,000 of his own money into [a new Holiday Inn] along with monies from his two brothers."

The petitioner provided additional detail, asserting that his brothers invested his money and did business in their names because he was unable to obtain loans due to his lack of immigration status. He indicated that he was given management rights, a 50 percent share of Stratford House, and a 25 percent share of the Victorian Inns at Paris and Waco. The petitioner notes that S-Corporations cannot have non-resident alien shareholders, but that in 1999, "we all agreed to transfer my share of 100% which will leave me as a sole owner of Stratford House in Nacogdoches." The petitioner appears to indicate that this transfer will be in exchange for his ownership in Victorian Inns at Waco and Paris "at original purchase price of \$628,016.17 less my original investment of \$337,144.83." This information is confirmed by letters from [REDACTED] and [REDACTED]. Further, the petitioner asserted that he and his brothers were building a Holiday Inn Express, of which his share will be between 25 and 28 percent, or \$300,000. Finally, the petitioner indicated that he had sold his interests in Lucky Stop and the Britney Hotel in Waco, Texas. The response to the intent to revoke was the first time the petitioner mentioned any investment in Britney Hotel.

Regarding the proposal for a new hotel, the petitioner submitted a business plan for Satya Sai, Inc., which intends to build a Holiday Inn Express. The petitioner also submitted a March 4, 1999 letter from Bank One confirming Satya Sai's terms for the construction of a Holiday Inn and estimating closing costs of \$24,722. The letter lists the petitioner as having limited liability on the loans of 30 percent.

The petitioner further submitted the articles of incorporation for VIN Investment, Inc., filed August 9, 1989, in response to the notice of intent to revoke. At that time, the petitioner also submitted a stock certificate issued to him for 100 shares on August 4, 1989. Other documentation reveals that the stock was issued in consideration for \$100 and that the petitioner's brothers, [REDACTED] and [REDACTED] were elected directors. The petitioner also submitted more detailed evidence regarding his alleged transfer of funds to VIN. Specifically, the record suggests that on August 15, 1989, the petitioner transferred \$99,992 to VIN. The petitioner provided more convincing documentation that on May 23, 1990, he transferred an additional \$236,900 to VIN. On September 5, 1990, VIN transferred \$267,015 to three different Victorian Inn accounts by order of [REDACTED]. On September 10, 1990, VIN transferred \$107,000 to [REDACTED] by order of [REDACTED]. Despite claims by counsel and the petitioner that VIN Investments, Inc., the new commercial enterprise identified on the petition, is a holding

company for the other businesses, the record reveals that each hotel is either an S-corporation with individual shareholders,<sup>2</sup> a limited liability company where all members are individuals, or a partnership between individuals.

The record contains no evidence that VIN has any ownership interest in any of the companies discussed in the record, generates its own income, or has any of its own employees. As such, we will consider each business separately as to whether it can be considered part of the new commercial enterprise and whether the petitioner's alleged investment in that business can be considered part of a qualifying investment. We will list the evidence regarding each business here and analyze the evidence below.

Baba's Associates, LLC (Lucky Stop)

On July 10, 1996, Baba's Associates issued the petitioner a membership certificate for 900 membership interests. The certificate is labeled "1." Baba's Associates issued another 100 membership interests to [REDACTED] on the same date per certificate "2." Baba's Associates sub-leased a convenience store from Dandy Double on July 12, 1996 and purchased all of its inventory and equipment on the same date. In response to the notice of intent to revoke, the petitioner submitted his 1997 Schedule K-1 reflecting no capital account at the beginning of the year. The schedule further indicates, however, that the petitioner's share of the profits that year was \$13,236, leaving a total of \$13,236 in his capital account at the end of the year. Regardless, as stated above, the petitioner also stated in response to the notice of intent to revoke that he sold this business. As such, the petitioner does not seek to enter the United States to manage this business and he will not create any employment at this business. Therefore, his past investment in Lucky Stop cannot be considered part of the new commercial enterprise.

Stratford Nacogdoches, Inc. (Stratford House Inn)

The petitioner submitted a promissory note dated September 1, 1990, whereby [REDACTED] and [REDACTED] promise to pay the petitioner \$336,000 on demand. The note concludes:

This note is given to reflect the agreement between the parties concerning the contribution from [the petitioner] for the purchase of Stratford House, Nacogdoches, Texas. Upon receipt by [the petitioner] of his E-2 Visa, Payees will transfer to [the petitioner] 51% ownership in the Stratford Nacogdoches, Inc. corporation in full settlement of this Note.

In addition, the petitioner submitted the 1995 tax return, Form 1120-S, for the Stratford House Inn. This return reflects total capital stock of \$40,000 and shareholder loans to the company of \$201,102 at the beginning of the year. The two Schedules K-1 accompanying the return are for Mr. [REDACTED] and Mr. [REDACTED] and account for the entire 100 percent of ownership of the company. The petitioner also submitted other evidence of loans to Stratford House, none of

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<sup>2</sup> S-Corporations are not permitted to have corporate shareholders according to 26 C.F.R. 1.1361-1(f).

which are secured by the petitioner's personal assets. Finally, the petitioner submitted a bank statement for Stratford House for May 1997 which reflects several small deposits but does not reflect that any of that money came from the petitioner.

As stated above, in response to the director's notice of intent to revoke, the petitioner documented that he had transferred approximately \$336,000 to VIN and indicated that the promissory note to transfer 51 percent of Stratford House to the petitioner was in exchange for that money. He also noted that he was precluded from being a shareholder in Stratford House, an S-Corporation, presumably because he was previously a non-resident alien as defined by the Internal Revenue Service (IRS). The petitioner further indicated that in 1999 his brothers would transfer 100 percent of Stratford House to him as compensation for his previous contribution of \$336,000 and in exchange for his interests in the Paris and Waco Victorian Inns.

The petitioner also submitted a June 12, 1992 letter from Mary Clark, an attorney, to Bill Robertson, a loan analyst with MDS Loan Services, indicating that Stratford Nacogdoches, Inc. wanted to bring on the petitioner as a 50 percent owner but was concerned that such an act would be considered an act of default under the terms of Stratford's loan with MDS. Another loan analyst for MDS Loan Services, Mark Krenz, responded on August 14, 1992, indicating that the Resolution and Trust Corporation which managed the loan would permit the petitioner to be added as a 50 percent owner provided he agreed to personally guarantee the note. According to a November 19, 1992 letter, Mr. Krenz sent the necessary documentation to Stratford Nacogdoches, Inc. for completion to be returned to MDS Loan Services and subsequently forwarded to the Resolution Trust Corporation for signature. The record does not indicate, however, that Stratford Nacogdoches actually completed the documents or that they were subsequently accepted by the Resolution Trust Corporation.

Finally, the petitioner submitted the 1998 tax return for Stratford Nacogdoches reflecting a total of \$40,000 in capital, loans from shareholders of \$440,350 at the beginning of the year and \$429,180 at the end of the year.

#### SAI Associates, LLC (San Augustine Inn)

The petitioner submitted the settlement documentation for SAI Associate's purchase of property for \$243,865. While the settlement documentation does not refer to a loan, the petitioner also submitted a real estate lien note by which SAI Associates, LLC, the petitioner, [REDACTED] and [REDACTED] borrowed \$155,000 secured by property located in Augustine County. Finally, the petitioner submitted bank statements for SAI Associates which do not reflect financial contributions from the petitioner. In response to the director's notice of intent to revoke, the petitioner submitted his 1997 and 1998 Schedules K-1 reflecting an opening balance in his capital account of \$7,730 at the beginning of 1997 increasing to \$19,686 at the end of 1997 due to his share of the profits and increasing to \$162,107 at the end of 1998 due to his share of the profits. The petitioner also submitted a check issued to him for \$131,250 from SAI Associates dated March 12, 1999 with the notation, "share of profits '98.'" This check is not cancelled.

#### Victorian Inn Paris

The petitioner submitted a management agreement whereby Victorian Inn Paris contracted with VIN for management services. The agreement does not specify VIN's compensation for these services. The petitioner signed the agreement as the principal for VIN while [REDACTED] signed the agreement for Victorian Inn Paris. The agreement indicates that VIN "serves as the holding company and investment conduit for the Patel family assets in the United States." The petitioner also submitted stock certificates for Victorian Inn Paris issued to [REDACTED] and [REDACTED] [REDACTED] loan documentation for loans obtained by Victorian Inn Paris and a balance sheet reflecting \$40,000 of stock and shareholder loans to the company from [REDACTED] of \$70,251.21.<sup>3</sup>

#### Victorian Inn Waco

The petitioner submitted a management agreement between Victorian Inn Waco and VIN identical to the one between Victorian Inn Paris and VIN discussed above. The petitioner also submitted stock certificates issued to [REDACTED] and [REDACTED]. Finally, the petitioner submitted settlement documentation for the purchase of property for \$689,120, \$551,296 of which was financed, and a balance sheet reflecting \$40,000 capital stock.

#### Star Enterprises (Victorian Inn Whitesboro)

The petitioner submitted the partnership agreement for Star Enterprises dated October 6, 1994 reflecting that the original partners were the petitioner, [REDACTED] and [REDACTED]. The partnership was formed to jointly invest in the Swiss Villa Motel in Whitesboro, Texas. The 1994 tax return reflects that the partnership was doing business as Swiss Villa Motel and the 1995 tax return reflects that the company was doing business as Victorian Inns. The attached Schedules K-1 reflect that the petitioner did have a capital account. The petitioner submitted the settlement documentation for the sale of 2.6 acres to Star Enterprises for \$429,244, \$185,747.79 of which was financed by a loan to Star Enterprises and the 1994 and 1995 tax returns with Schedules K-1 reflecting capital accounts. The Schedules K-1 reflect that the petitioner contributed \$60,000 in 1994. His capital account increased to \$74,995 by the end of 1995 due to the petitioner's share of the company's net income that year. Finally, the petitioner submitted bank documentation for accounts held by Star Enterprises, none of which reflect a financial contribution traceable to the petitioner.

In response to the director's notice of intent to revoke, the petitioner submitted his 1997 and 1998 Schedules K-1, which reflect that his capital account increased to \$107,719 by the end of 1997 due to his share of the profits but that he withdrew his entire capital account of \$160,842 at the end of 1998. Curiously, the petitioner also submitted a \$65,000 check issued to him dated March 18, 1999, from Vibhuti Inc, dba Victorian Inns, with an address in Whitesboro. The notation in the memo section of the check reads, "profit share '98." The record contains no evidence regarding the formation and ownership of Vibhuti, Inc. and other documentation

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<sup>3</sup> The balance sheet also reflects a shareholder loan to the company by [REDACTED] for negative \$25,984.90. The significance of a negative loan is unclear.

indicates that Star Enterprises owns the Victorian Inn in Whitesboro. Moreover, the check is not cancelled.

Property on Hwy 59

On November 30, 1994, the petitioner purchased the above property in Nacogdoches, Texas for \$50,000, \$40,000 of which was from a loan secured by the property. As stated above, the property is currently used to lease a billboard and the petitioner's alleged intent to build a motel on this 1.35-acre tract is unsupported by any legal commitment.

Business Loan

The petitioner borrowed an additional \$35,010 on July 10, 1996 for unknown purposes. The loan is secured by "all inventory, raw materials, work in progress or materials used or consumed in debtor's business, whether now owned or hereafter acquired, together with all proceeds including accounts receivable and notes."

**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.

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).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. Matter of Soffici, I.D. 3359, 2-3 (Assoc. Comm., Examinations, June 30, 1998) cited with approval in Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

On the petition where a petitioner must list the location of the business if in a targeted employment area, the petitioner indicated "several different areas." The petitioner listed the address of the business as [REDACTED] in Nacogdoches, Texas. In his notice of intent to revoke, the director stated that the petitioner had not submitted any evidence to demonstrate that the businesses were located in targeted employment areas. In response, counsel asserts that he was unable to obtain such information from the mayors of the relevant cities, who are delegated by the State of Texas to provide such information.

The director concluded that the petitioner had not overcome the concerns expressed in the notice of intent to revoke. In his appellate brief submitted on motion, counsel refers to a letter from the Chamber of Commerce in St. Augustine in addition to letters from the cities of St. Augustine, Nacogdoches, and Whitesboro. None of these letters are in the file. Therefore, the minimum investment amount in this case is \$1,000,000.

### **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(e) defines "new" as "established after November 29, 1990."

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

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship,

partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(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).

Further, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, *supra*, at 10.

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 petitioner indicated on the Form I-526 that he had established a new commercial enterprise through the reorganization of an existing business. On motion, counsel argues that while VIN was incorporated prior to November 29, 1990, the investment was made after that date. It is noted that the petitioner transferred the money to VIN in August 1989 and May 1990.

Regardless, as stated above, the petitioner listed the alleged new commercial enterprise on the I-526 as "VIN Investment Inc. and other enterprises." The petitioner indicated that the business was established in August 1989, prior to November 29, 1990. Regardless, VIN Investment, Inc. is not the holding company for any of the businesses documented in the record. Rather, they are all owned by individuals. There is no evidence that VIN Investment, Inc. created any employment and the money transferred to VIN Investment's account was immediately

transferred to three accounts for the various Victorian Inns in which the petitioner has no interest. Thus, VIN Investment, Inc. cannot be considered a qualifying commercial enterprise.

At the time of filing, the petitioner had a documented ownership interest in Baba's Associates (Lucky Stop), SAI Associates (San Augustine Inn), and Star Enterprises (Victorian Inn, Whitesboro). The petitioner has not established when Baba's Associates was organized, although his membership certificate is dated July 10, 1996. Regardless, Baba's Associates purchased a pre-existing store, assuming its lease, and cannot be considered an original business. Without evidence of the employment at or net worth of the store prior to the petitioner's purchase, he cannot establish that he expanded either by 40 percent. As the store continued as a convenience store, the petitioner cannot establish that he has reorganized the business such that a new business resulted. Regardless, in response to the director's notice of intent to revoke, the petitioner asserted that he had sold this business. As such, it cannot be considered part of the new commercial enterprise that he seeks to enter the United States to manage.

The petitioner has not documented when SAI Associates, a limited liability company, was organized. Regardless, SAI Associates purchased an existing hotel in July 1996. As such, it cannot be considered an original business. Without evidence of employment at or net worth of the hotel prior to the sale, the petitioner cannot establish that he expanded either by 40 percent. As the petitioner contributed, at most, \$7,730 in capital to this hotel purchased for \$242,500, it seems unlikely that his investment resulted in an increase in net worth of 40 percent. An appreciation in value due to reasons other than the petitioner's personal investment, such as an appreciation in property value or increased proceeds, is insufficient according to the plain language of the regulations. Moreover, a petitioner must have already established the business at the time of filing. As such, an increase in net worth after the date of filing cannot be considered evidence of the petitioner's eligibility at the time of filing. Finally, the petitioner purchased the business from San Augustine Inn, Inc. The record does not establish that the petitioner has reorganized this business, which was a hotel prior to the sale and remains a hotel, such that a new business resulted.

The petitioner was an initial partner in Star Enterprises, a partnership formed in October 1994. While this corporation is "new" as defined in the regulations, the partnership purchased an existing hotel, the Swiss Villa Hotel, subsequently named the Victorian Inn, Whitesboro. While counsel asserts that the Victorian Inn hotels were bankrupt prior to purchase, the record contains no evidence to support this assertion. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Without evidence of the net worth of the hotel prior to purchase, such as a certified tax return with all attachments or an audited balance sheet, we cannot determine whether the petitioner has increased the net worth by 40 percent. Similarly, without employment records prior to the purchase, we cannot determine that the petitioner increased employment at the hotel by 40 percent. Finally, the evidence suggests that the petitioner purchased a hotel and continues to operate it as a hotel. That the petitioner changed the name is not significant. The record does not reflect that the petitioner has reorganized the business to such an extent that a new business resulted.

The petitioner has no documented interest in either of the other two Victorian Inns in Waco and Paris. The only evidence regarding the petitioner's involvement with these two inns is a management agreement between the inns and VIN. Assuming the petitioner has an ownership interest in VIN, a management agreement is not an ownership interest. A petitioner cannot claim to have an ownership interest in a business simply because he contracts with it. Even assuming the petitioner's money was used to finance the purchase of these hotels, without an ownership interest, such a contribution appears to resemble a bond more than equity. As quoted above, the regulations exclude bonds from the definition of invest. Even if he did have an ownership interest in these two inns, he now indicates that he is going to trade his interest in these inns for a full 100 percent interest in Stratford Nacogdoches, Inc. As such, the petitioner cannot include these inns as part of the commercial enterprise that he seeks to enter the United States to manage.

The petitioner has conceded that he did not have a documented ownership interest in Stratford Nacogdoches, Inc. at the time of filing. He asserts that, due to his status, he was unable to be a shareholder. There are several ways to organize a business other than as an S-Corporation, which may not have non-resident shareholders. The choice by the petitioner's brothers to use the S-Corporation structure does not relieve the petitioner from demonstrating that he established a new commercial enterprise. It remains, there is no evidence that the petitioner was a shareholder of this company as of the date of filing. Moreover, the claim that the brothers previously agreed to transfer a 51 percent ownership in the company in exchange for the petitioner's \$336,000 contribution to VIN is questionable. That money was transferred to Victorian Inns' accounts, not to Stratford Nacogdoches. Regardless, as with the other businesses, Stratford Nacogdoches purchased an existing hotel. As with the Victorian Inns, the petitioner has not documented an increase in net worth or employment. Nor has he documented a restructuring such that a new business resulted.

Finally, the petitioner purchased a piece of property on Route 59 for \$10,000 cash and \$40,000 in loans. The petitioner has provided no evidence that this property is suitable for a hotel or that he has committed to building a hotel on this property. The petitioner has indicated that it is currently used for renting a billboard. As such, this a purely passive, non-employment generating activity and cannot be considered part of the commercial enterprise.

In light of the above, the petitioner has not demonstrated that he has established a new commercial enterprise as defined above.

### **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.

As stated above, the petitioner claimed to have invested \$337,000 initially and \$745,250 total. On motion, counsel asserts that the petitioner has made "the requisite investment" and that the regulations permit joint ownership.

The petitioner has demonstrated that he transferred approximately \$336,000 from the United Kingdom to VIN Investment, Inc. in August 1989 and May 1990, some of which was transferred to Victorian Inn accounts. The remaining \$107,000 was transferred to [REDACTED]. These funds were all transferred prior to November 29, 1990. Even if we concluded that these funds were not used for business purposes until after November 29, 1990, and that [REDACTED] used the \$107,000 transferred to him for business purposes, the petitioner has not demonstrated that he transferred more than \$336,000 to the businesses claimed to be part of the new commercial enterprise.

Moreover, the vast majority of those funds were not invested as defined in 8 C.F.R. 204.6(e) quoted above. The petitioner's Schedule K-1 for Baba's Associates reflects no capital at the beginning of 1997 and only \$13,326 at the end of the year. That entire amount resulted from the company's profits. The regulations do not include evidence of the reinvestment of proceeds in the list of possible evidence of investment. Thus, the record does not reflect any investment into Baba's Associates. Regardless, as stated above, the petitioner no longer claims to be operating this business.

The petitioner's Schedules K-1 for SAI Associates reflect an investment of no more than \$7,730. The remaining funds in the petitioner's account resulted from proceeds. Finally, the Schedules K-1 for Star Enterprises reflect a capital contribution of only \$60,000. The tax returns that were submitted and discussed above reveal that several of these companies have large shareholder loans. The accountant's summary of the petitioner's 1996 income reflects that the petitioner received \$10,640 in interest on his loans to the Victorian Inns at Waco and Paris and Stratford House. Money loaned to the company is not part of a qualifying investment according to the definition of "invest" quoted above. In light of the above, the petitioner has not demonstrated an investment of more than \$67,730.

The petitioner's claim that he will invest another \$300,000 is not persuasive. First, given the history of the petitioner and his brother's loaning funds to their hotels, it is not clear that the petitioner would invest all of that money as defined in the regulations. Moreover, the petitioner had not fully and irrevocably committed those funds to the company at the time of filing.

### **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, CIV-F-99-6117, 22 (E.D. Calif. 2001)(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).

In support of the petition, the petitioner submitted his accountant’s estimate of his 1996 income, including his salary, management fees, interest income on a note receivable, interest income on loans to Victorian Inn of Waco, Victorian Inn of Paris, and Stratford House, and his business income totaling \$80,500. In support of these numbers, the petitioner also submitted a Form W-2 from Stratford House. Finally, the petitioner submitted bank statements for an account at Barclay’s Bank for 1989 and 1990.

In his notice of intent to revoke, the director noted that the petitioner had not documented the path of his funds or their source. In response, counsel asserted that such documentation is at least ten years old and unavailable. The petitioner asserted that he worked various jobs in London since 1978, including as an accountant for retail businesses, and eventually purchased a “Newsagent shop” which he sold for 129,000 pounds. He also indicated that he sold his house for 38,000 pounds and another business for 57,500 pounds. Finally, he indicates that he invested in the British and American stock markets. While the petitioner submitted evidence tracing approximately \$336,000 from his personal account to VIN, he failed to submit any evidence regarding his accumulation of funds over the years.

**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, CIV-F-99-6117, 19 (E.D. Calif. 2001)(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.

Initially, the petitioner submitted an investment portfolio which indicated that Lucky Stop had two full-time employees, the San Augustine Inn had six full-time employees, and the Victorian Inn in Whitesboro had five full-time employees. The petitioner submitted wage and withholding reports reflecting that Star Enterprises fluctuated between three and seven employees, starting with four employees in October 1994 and ending with six employees in December 1996. Two of those employees are the petitioner's partners and share his last name. The remainder of the record suggests that these individuals are the petitioner's brothers. None of the remaining employees could have worked full-time at minimum wage. The petitioner also submitted Forms 941 and wage and withholding reports reflecting that SAI Associates fluctuated between four and six employees between the third and fourth quarter for 1996. Once again, one of the employees shares the petitioner's last name and of the remaining employees, only one could have worked full-time at minimum wage.

In his notice of intent to revoke, the director concluded that the petitioner had not established that the businesses had or would create at least 10 full-time positions. In response, counsel asserted that the petitioner's businesses employ 70 people. The petitioner claimed Stratford House employs 12 workers, Victorian Inn Waco employs 11, Victorian Inn, Paris employs 13, San Augustine Inn employs eight, Victorian Inn Whitesboro employs six, and that the proposed Holiday Inn will employ 18.

The petitioner submitted wage and withholding reports for the Paris Victorian Inn reflecting between nine and ten employees, some of whom could not have worked full-time at minimum wage; the San Augustine Inn reflecting between five and six employees, most of whom could not have worked full-time at minimum wage; Star Enterprises reflecting between zero and four employees, one of whom could not have worked full-time at minimum wage; Vibhuts, Inc.<sup>4</sup> reflecting between zero and five employees, three of whom could not have worked full-time at minimum wage; and the Waco Victorian Inn reflecting between eight and ten employees, several of whom could not have worked full-time at minimum wage. The petitioner also submitted lists of employees and what appear to be wages for Stratford House Inn. The list varies between 13 and 17 employees, including the petitioner. If the wages represent quarterly wages, several of these employees could not have worked full-time for minimum wage.

On motion, counsel asserts that the petitioner's businesses employ between 75 and 81 employees. In light of the discussions above, the petitioner cannot count any of these employees because he has not demonstrated that any of these businesses constitute a new commercial enterprise established by him. Further, as stated above, many of these employees appear to be part-time. Moreover, the businesses were all existing businesses. A petitioner cannot cause a net loss of employment. Matter of Hsiung, I.D. 3361, 5 (Assoc. Comm., Examinations, July 31, 1998). Without evidence of the number of employees at each of these businesses prior to the sale, the petitioner cannot establish how many new jobs he has created, if any. Finally, despite counsel's claim that the petitioner has submitted Forms I-9 for the existing employees, those documents are not 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.

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<sup>4</sup> The petitioner has not established that Vibhuti, Inc. and Vibhuts, Inc. are one and the same. Regardless, as stated above, the record does not explain the relevance of Vibhuti, Inc., which issued a check to the petitioner reflecting that it does business as the Victorian Inn in Whitesboro. As noted above, the record indicates that Star Enterprises owns the Victorian Inn in Whitesboro.