



BY

U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-99-152-52183 Office: California Service Center

Date: AUG - 5 2002

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:



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 preference visa petition was denied by the Director, California Service Center. The Associate Commissioner, Examinations, summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be vacated and the petition will be denied.

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

The director determined that the petitioner had failed to demonstrate a qualifying, at-risk investment of lawfully obtained funds or that he would create the requisite employment.

On appeal, counsel requested an additional 30 days in which to supplement the record. On January 10, 2001, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, summarily dismissed the appeal, concluding that the petitioner had not supplemented the record within the 30 day period.

On motion, the petitioner submits evidence that a brief and additional exhibits were submitted. The petitioner submits copies of these items and the items themselves are now in the record. As such, we will now adjudicate the appeal on its merits.

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

While the director did not contest that the petitioner had established a new commercial enterprise in a targeted employment area, the record does not support the petitioner's claim to have done so. While we concur with the director's decision for the reasons discussed below, we raise this issue initially because the minimum investment amount is relevant to the remaining issues. The petitioner indicates that the petition is based on an investment in a business [REDACTED] 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).

The petitioner listed the company's address on the petition as [REDACTED] California. The petitioner submitted a list of cities in Los Angeles County designated as qualifying by the Employment Development Department (EDD) of California. This list, however, while including Los Angeles City, is based on 1997 data. The petition was filed May 3, 1999.

More significantly, the record does not establish that the business is located at the address specified by the petitioner. While the petitioner submitted a short lease for the Los Angeles address, the company's bank statements, invoices, construction subcontract with [REDACTED] Forms DE-6 Quarterly Wage and Withholding Reports, and 1999 and 2000 tax returns all reflect the address [REDACTED] in Calabasas, California. Calabasas is located in Los Angeles County well outside Los Angeles City. The EDD's list of qualifying cities within Los Angeles County does not list Calabasas as qualifying. It is acknowledged that the contractor's license submitted on appeal lists the Los Angeles address as [REDACTED] business location. Nevertheless, the record remains inconsistent regarding where the company will be creating employment. 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).

In light of the above, the minimum investment amount in this case is \$1,000,000.

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.

On the petition, the petitioner indicated that he invested \$519,950 in January 1999. The petitioner submitted an April 12, 1999 Bank of America statement for [REDACTED] reflecting that the account was opened on that date with \$423,575. The petitioner also submitted an appraisal of the company's assets reflecting a worth of \$89,950. The business plan included a balance sheet reflecting partners' capital of \$519,950.

The director concluded that the cash could be removed for non-business purposes. Similarly, the director noted that all of the invoices were dated prior to the organization of the company as a limited liability company and, thus, the petitioner could not establish that [REDACTED] had engaged in any business activity after the date of filing which would place the invested cash at risk. The director further stated that the petitioner had not submitted photographs and receipts for the items appraised. The director also noted that the appraiser, an expert in marble, had appraised office equipment as well.

On appeal, the petitioner submitted a new appraiser's report and photographs of the assets. The petitioner did not submit the receipts for the machines, equipment, and inventory despite the director's concern regarding the lack of such evidence.

We agree with the director that the invoices dated prior to the filing of the articles of organization raise concerns. We find, however, that this date discrepancy raises more concern regarding whether the petitioner established an original business as claimed than whether the funds were at risk. That issue will be discussed separately below. What the director may have been trying to articulate, and what we raise now, is the petitioner's inability to indicate any

capital expenses for which the invested funds would be utilized. At the time of filing, the company had marble carving tools, machinery, office equipment, and was conducting business. Yet, \$423,575, more than 81 percent of the petitioner's alleged investment, remained in the bank. The financial projections in the business plan predict in the first year: gross sales of \$452,000, costs of goods of \$151,691, costs of labor of \$270,612, and expenses of \$70,074. The costs of goods and labor are normal operating expenses and are covered by the gross receipts. Some of the remaining expenses are also normal operating expenses. Even assuming the creation of an original business and that some of the above costs can be considered start-up expenses because they needed to be paid before any sales took place, the record simply does not explain how the petitioner will use a significant amount of the \$423,575 for capital expenditures. As such, it appears that the company is grossly overcapitalized. Maintaining over 80 percent of the investment in a passive investment account in the company's name cannot be considered placing those funds at risk. Such funds are also not made available for employment-generating activities. See Matter of Izumii, I.D. 3360, 20 (Assoc. Comm., Examinations, July 13, 1998).

While we acknowledge that the petitioner has addressed the director's concern regarding the sufficiency of the appraisal and the lack of photographs of the machinery and equipment, an appraisal is not sufficient evidence of the petitioner's personal investment. The appraisal and the photographs of the machinery and equipment can only establish, at best, that [REDACTED] has the assets photographed and appraised. This evidence cannot establish when those assets were acquired or by whom. Without receipts, which were also noted as lacking by the director, and transactional documentation such as credit card receipts, wire transfer receipts, or cancelled checks, the petitioner cannot establish that he is the source of those assets. Nor has the petitioner established that he personally owned marble carving tools and equipment which he donated to the business when he founded it. As discussed below, the record reveals that [REDACTED] in some incarnation was operating prior to its organization as a limited liability company and prior to the petitioner's alleged investment. The continued ownership of its machines and equipment cannot be considered a contribution by the petitioner for which he is personally and primarily liable.

Moreover, the 1999 and 2000 tax returns submitted subsequent to the appeal raise new concerns. While the balance sheet in the business plan reflects that the cash was all contributed as capital, the tax returns contain so many omissions regarding the petitioner's capital contribution as to raise credibility issues. Schedule L, the balance sheet portion of the tax return, is completely blank on both returns. As such, we cannot determine the company's capital and liabilities which might include loans from members. In addition, Schedule M-2, the analysis of Partners' Capital Accounts, and the petitioner's K-1, section J, Analysis of Partner's Capital Account, are also completely blank. As such, we cannot determine the value of the petitioner's capital account. This omission of required information on tax documents raises serious concerns regarding whether the petitioner is providing the Internal Revenue Service (IRS) the same information it is providing to this Service. If the cash was transferred to the company as a loan to the company, it cannot be considered part of the petitioner's investment. See 8 C.F.R. 204.6(e)(definition of invest) quoted above. In light of Matter of Ho, *supra*, any attempt to overcome this issue on motion would have to include tax returns certified by the IRS.

For the reasons stated above, the petitioner has not demonstrated a qualifying investment of \$1,000,000, or even \$500,000 as claimed.

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).

The business plan indicates that the petitioner has 10 years of experience managing successful businesses, but the petitioner failed to explain or document the source of the funds in the Bank of America account or the funds used to purchase the appraised assets.

The director concluded that the petitioner had failed to submit five years of tax returns or other evidence of how he acquired the funds purportedly invested or documentation tracing the path of the funds from the petitioner to [REDACTED]

On appeal, the petitioner submits affidavits from his father in law attesting to a gift of \$225,000 in April 1999 to the petitioner's wife,¹ an affidavit from the petitioner's oldest brother attesting to the petitioner's inheritance of \$315,000 in 1991, and an affidavit from an Israeli Social worker with the Ministry of Defense confirming that the petitioner receives education subsidies and veteran compensation from the Israeli Army. The petitioner also submitted a bank statement and translation for the petitioner's account at Mizrahi Bank. Neither the Hebrew nor the English version reflects the currency. As the statement is for a bank in Israel, we must presume that the currency is Shekels unless otherwise specified. The statement reflects a total balance in all accounts of 1,064,718.75 Shekels or \$259,055 as of June 11, 1999, after the funds appeared in [REDACTED] account. Finally, the petitioner submitted a statement for his accounts at Bank of America dated March 29, 1999, one month before the funds appeared in [REDACTED] account, reflecting balances of \$41,244.23 and \$21,730.60.

First, these documents fail to sufficiently establish how the petitioner acquired the funds he allegedly invested. The affidavit from the petitioner's father-in-law is not supported with transactional documentation such as a wire transfer receipt or a cancelled check. Similarly, the affidavit from the petitioner's brother is not supported with official inheritance documentation. Regardless, evidence of an inheritance of 315,000 in 1991 is not evidence that those funds remained untouched until 1999, when the funds appeared in [REDACTED] account. The evidence regarding the petitioner's compensation from the Israeli Army is not helpful because it fails to indicate how much the petitioner receives. That the petitioner maintained bank accounts with a total balance of \$259,055 two months after the funds appeared in [REDACTED] account and a balance of \$22,974.83 in two U.S. accounts one month before the funds appeared in [REDACTED] account does not establish how the petitioner acquired the funds in [REDACTED] account, assuming the funds even derived from him.

Finally, the petitioner has not responded to the director's concern that the record contains no evidence tracing the path of the funds in [REDACTED] account. The record remains absent any transactional documentation such as a wire transfer receipt or cancelled check with accompanying bank statements reflecting the path of the funds from the petitioner to [REDACTED]. As such, the petitioner has not even established that he is the source of the funds in [REDACTED] account. As stated above, one month prior to [REDACTED] receipt of \$423,575, the petitioner had only \$22,974.83 in his U.S. accounts. The petitioner has not established how much was in his Israeli account prior to that date. Since [REDACTED] was operating before the petitioner organized it as a Limited Liability Company, the existence of funds in its bank account several months after the invoices are dated is in no way evidence that those funds originated from the petitioner.

¹ The record does not contain the petitioner's marriage certificate.

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).

On the Form I-526, the petitioner indicated that there were three employees at the time of his investment, four at the time of filing the petition, and that the business would create a total of ten jobs. The petitioner submitted Form DE-6, Quarterly Wage and Withholding Report for [REDACTED] reflecting four employees.

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 petitioner also initially submitted a business plan. The director concluded that while the financial projections included salaries for 10 employees, the business plan was insufficient as the projections were not adequately supported and the plan did not include a time line for hiring the remaining employees.

On appeal, the petitioner submits Form DE-6 Quarterly Wage and Withholding Report for [REDACTED] for the second quarter of 1999. The report lists 10 employees, but the wages for two of the employees are \$100 or less. The form indicates [REDACTED] had two employees in April, three in May, and five in June. As such, the form does not indicate that [REDACTED] maintained a workforce of six at one time as asserted by counsel. The petitioner also submitted a revised business plan with the petitioner's MBA degree attached. While counsel asserts that the

company is currently seeking a salesperson, the revised plan does not include a list of positions, job descriptions for all positions, or a hiring timetable. As stated above, the director specifically noted the absence of a hiring timetable. Thus, the revised business plan also fails to meet the requirements set forth above.

Moreover, as stated above, the petitioner indicated that the business already had three employees when he made his alleged investment. As such, the petitioner cannot be credited with those three employees. See Matter of Hsiung, I.D. 3361, 5 (Assoc. Comm., Examinations, July 31, 1998). Therefore, the petitioner must demonstrate that the business will need a total of 13 employees within two years.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Beyond the decision of the director, 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 [REDACTED] which the petitioner organized as a limited liability company on April 6, 1999.

The petitioner indicated on the Form I-526 that the petition was based on the creation of an original business. The petitioner submitted the articles of organization for [REDACTED] filed April 6, 1999. It is the job-creating entity, however, 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.

As stated by the director and discussed above, the record contains invoices reflecting that [REDACTED] as doing business prior to April 1999. The petitioner himself conceded on the Form I-526 that the business had three employees prior to his alleged investment. In light of this documentation, the petitioner has not established that [REDACTED] business is original.

[REDACTED] appears to be performing the same services as it was prior to April 1999. As such, the petitioner has not established that he has reorganized an existing company. Finally, without evidence regarding the prior company's net worth or number of employees, we cannot determine whether the petitioner has expanded that company with the organization of [REDACTED] as defined above. Thus, the record does not demonstrate that the petitioner has established a new commercial enterprise.

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 sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be vacated, and the petition will be denied.

ORDER: The Associate Commissioner's decision of January 10, 2001, is vacated. The petition is denied.