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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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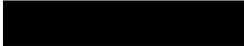


File: WAC-98-194-50913

Office: Vermont Service Center

Date: AUG 16 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, Vermont Service Center. The Associate Commissioner for Examinations 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 affirmed, 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).

On March 23, 1999, the director issued an extensive request for additional evidence. Specifically, the director stated that the record suggested that the petitioner's corporation had merely assumed the business of another company and requested additional evidence regarding the establishment of a new commercial enterprise. In addition, the director requested evidence that the petitioner had actually made his alleged investment and that those funds were at risk. Further, the director requested evidence regarding any pre-existing employees and a comprehensive business plan including a staffing plan. Finally, the director requested additional evidence regarding the source of the funds that the petitioner claims to have invested.

The petitioner responded, but did not submit all of the evidence requested. The director considered the petitioner's response and denied the petition on July 1, 1999. In his decision, the director only discussed the lack of evidence regarding the source of the petitioner's funds.

On appeal, the petitioner provided additional evidence regarding the funds gifted to him by his uncle. On January 23, 2001, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, dismissed the appeal. In addition to upholding the director's conclusions regarding the source of the petitioner's funds, the AAO also concluded that the petitioner had not resolved the issues raised in the director's request for additional documentation.¹ Specifically, the AAO determined that the petitioner had not demonstrated that he had established a new commercial enterprise, that he had made a qualifying investment, or that he would create the requisite employment. The AAO also questioned the source of the funds beyond the petitioner's alleged contribution that the corporation seemed to possess.

On motion, counsel argues that the petitioner has submitted more than enough documentation to show that he meets each requirement and the petitioner submits new evidence regarding the source of his funds and the employment at his business.

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,

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

(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, Hansa Investments, Inc., not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

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).

Initially, the petitioner submitted a bank letter from Bank of America reflecting that, as of June 30, 1998, the petitioner's personal account contained \$1,001,001.25. The letter does not indicate when or from where the money was transferred into this account. Nor does the letter indicate that these funds were ever removed.

In his request for additional evidence, the director requested the petitioner's personal tax returns for the past five years. If the funds were a gift, the director requested evidence that gift taxes had been paid.

In response, counsel asserted that the funds were a gift from the petitioner's uncle, who resides outside the United States. Since both the uncle and the petitioner resided outside the United States, counsel argued, the petitioner did not owe any gift taxes to the Internal Revenue Service (IRS). The petitioner submitted a June 30, 1998 confirmation from Bank of America asserting that \$1,000,000 was transferred to his account on that date from "ONE OF OUR CLIENT via ISRAEL DISCOUNT BANK LTD." This letter does not identify the account holder of the account from which the \$1,000,000 was transferred. The petitioner also submitted a letter from an attorney asserting that gifted funds from nonresidents to nonresidents are not taxable in the United States.

In his decision denying the petition, the director noted that he had not specifically requested U.S. tax documentation. The director concluded that the petitioner could not establish the lawful source of his funds without evidence that he and his uncle paid any taxes due in their country of residence and evidence of how the uncle acquired his funds.

On appeal, counsel asserts that the petitioner's uncle, Hareshkumar Jogani, currently resides in Israel and amassed his wealth through his work in the diamond industry and his security investments. Counsel also made two curious arguments that are easily addressed. First, counsel argued that the director's decision did not "take into account the great preponderance of the evidence enclosed with this brief." It is not clear how the director could have possibly considered evidence which had not yet been submitted. At the end of her brief, counsel stated that to deny the petition "for one element would be irresponsible." Congress specified each element of this visa program in its enactment of section 203(b)(5) of the Act. As such, denying a petition which does not meet each and every statutory requirement is responsible and appropriate adjudication.

The petitioner submitted three letters from Gur David, an outside accountant for Jogdian (Israel) 1988 Ltd. Mr. David confirms that in 1988 Hareshkumar Jogani made a \$6,000,000 non-interest bearing loan to that company; that Mr. Jogani and Kalpana Jogani own 60 percent of the shares

in Jogdian (Israel) 1988 Ltd.; that their income was \$1,154,512 between 1995 and 1998; and that Jogdian (Israel) 1988 Ltd. is involved in the manufacturing, marketing and trading of rough and polished diamonds. The petitioner also submits financial statements and bank letters reflecting that Mr. Jogani had \$4,985,410 in an account at Union Bank of Israel as of September 17, 1997; \$5,950,910 in investments with JWCharles Securities as of September 27, 1996; \$14,508,394 in investments with Bear Stearns as of June 30, 1998 up from \$6,852,411 as of January 23, 1998; \$15,100,000 with the Israel Discount Bank as of July 12, 1999; \$11,351,092.42 in investments with Brown & Company as of May 28, 1999; \$10,448,060 with Banque Diamantaire as of May 13, 1997; \$18,357,356 with Bankers Trust as of July 9, 1999; and \$14,316,666 with Lloyds TSB as of July 12, 1999. Finally, the petitioner submitted an affidavit from Mr. Jogani asserting that he gifted \$1,000,000 to the petitioner on June 29, 1998.

The AAO noted the lack of evidence tracing the path of funds from Mr. Jogani to the petitioner. The AAO also stated that the petitioner had not submitted the personal tax returns for Mr. Jogani.

On motion, counsel asserts that the petitioner has adequately established that his funds derived from Mr. Jogani, who has amassed tens of thousands of dollars through his work in the diamond industry. The petitioner resubmits the affidavit from Mr. Jogani.

Despite the explicit request for evidence tracing the funds into the petitioner's account and Mr. Jogani's tax returns found in the request for additional evidence, the director's decision, and the AAO's decision, the petitioner has failed to submit such documentation. While Mr. Jogani's affidavit that the funds constituted a gift might suffice to establish the nature of a documented transfer, absent transactional evidence of the transfer from Israel to the petitioner the petitioner cannot establish that such a transfer took place.

In addition, while the petitioner has established that Mr. Jogani is indeed wealthy, the documentation of the source of this wealth is minimal. Tax returns are the type of evidence specified by the regulations as establishing an individual's income, whether it be the petitioner's income or the income of the person who gifted the funds. An accountant's letter carries far less evidentiary weight than tax returns filed with a government agency, whether foreign or domestic. Once again, despite repeated requests for this documentation, the petitioner has failed to submit Mr. Jogani's tax returns.

Finally, the petitioner has never submitted the relevant sections of the Israeli tax code regarding the taxation of gifts. As such, the record does not establish whether Mr. Jogani's gift to the petitioner was taxable to the petitioner in Israel. Money owed in taxes to a foreign government cannot be considered lawfully obtained.

Given the repeated requests for the transactional documentation evidencing the transfer to the petitioner's account and relevant tax returns in this case, we would not need to consider such evidence submitted with any future motion. Matter of Soriano, 19 I&N 764 (BIA 1988).

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established . . .*" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is Hansa Investments, Inc., incorporated on May 19, 1998. On the Form I-526, the petitioner indicated that Hansa was an original business which would be engaged in real property management and investment.

While Hansa may be "new" as defined in 8 C.F.R. 204.6(e) in that it was incorporated after November 29, 1990, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

On the petition, the petitioner indicated that the business had five employees at the time of investment, 11 employees currently, and would create a total of 15 jobs. In her initial brief, counsel asserted that Hansa consisted of three separate divisions that would be involved in property investment, property management, and the jewelry trade. She further indicated that Hansa employed only six workers currently. The three divisions also appear in the business plan. Counsel further asserted that Hansa intended to "invest" \$1,000,000 in the first year acquiring property, and \$10,000,000 over three years. Counsel further indicated that the management division, Excel Residential Services, already managed 30 separate apartment

complexes and had six employees. Finally, counsel asserted that the diamond business would begin operations in approximately six months.

The business plan included an offer by Hansa to purchase an apartment at [REDACTED]. The offer expired July 2, 1998 unless signed by the seller. The seller did not sign this proposal. The business plan also included a brochure for another apartment building. Regarding Excel, the business plan included several management agreements between Excel and HK Realty, SJ Properties, and Woodman Realty, all dated July 1, 1998 and containing the same terms. It is noted that HK Realty, SJ Properties and Woodman Realty are all located at [REDACTED]. This is the same address listed for Hansa on the Form SS-4, Application for an Employer Identification Number, its bank statements, and tax return. The business plan indicates the address for Excel is the same, except the suite is [REDACTED]. Suite C is also listed on the Registration of Fictitious Name submitted in response to the director's request for additional documentation. The president of SJ Properties has the same last name as the petitioner. The names of the presidents of HK Realty and Woodman Realty are illegible.

On March 23, 1999, the director requested evidence that Hansa was doing business as Excel and evidence of Excel's capitalization and start-up costs. As stated above, the petitioner did submit evidence that Hansa registered the fictitious name Excel Residential Services on July 22, 1998. The petitioner also submitted Hansa's tax registration certificate issued to Hansa and Excel. The certificate indicates business started November 5, 1998. In addition, the petitioner submitted new agreements with HK Realty, SJ Properties, and Woodman Realty; an operations manual for Excel; bank statements for Excel from November 1998 through March 1999 reflecting a beginning balance of \$8,990.26 in November 1998; bank statements for Hansa from November 1998 through March 1999 reflecting a beginning balance of \$36,316 in November 1998 as well as a \$1,000,000 deposit from an unknown source on November 30, 1998; invoices from late 1998 and 1999; Hansa's 1998 tax return reflecting \$1,000,000 in capital stock but also, on Schedule K, that one person did not own 50 percent or more of the outstanding shares; and sales documentation for property acquisitions by Hansa, including [REDACTED].

While the director did not address this issue in his final decision, the AAO determined that the petitioner had not adequately demonstrated that he established the divisions of Hansa, including Excel. On motion, counsel argues a new basis of eligibility. Specifically, counsel asserts that "these subsidiaries were 'made new' as a result of the petitioner's investment as set forth in 8 CFR 204.6(h)(2) and (3)." As counsel now asserts that the petitioner either reorganized an existing business under 8 C.F.R. 204.6(h)(2) or expanded an existing business under 8 C.F.R. 204.6(h)(3), she seems to be conceding that Excel is not an original business.

We concur with the AAO's previous decision that the record does not reflect that Excel is an original business. It appears to have assumed the property management contracts of HK Realty, SJ Properties, and Woody Realty and possibly their employees. Nor is it clear that the acquisition was an arms length transaction as all three companies operate from Hansa's address and the president of one of the companies has the same last name as the petitioner. Moreover, the petitioner conceded on the petition that the business employed five employees prior to his investment. While Hansa and Excel appear to operate from [REDACTED]

the petitioner has not submitted the lease for that location. Without the lease for the suites at the petitioner cannot establish how he acquired that space, whether an assumption of a previous business' lease, a sub-lease arrangement, or an original lease.

Counsel's assertion that the petitioner "made new" the property management business it assumed is totally unsupported. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) clearly stated that a change of ownership or the incorporation of a holding company is insufficient for the type of reorganization or restructuring contemplated by 8 C.F.R. 204.6(h)(2). The petitioner has not established that the business Excel assumed was operating a different type of business or offering far fewer services. Furthermore, without evidence of the net worth or the employment at the property management business assumed by Excel, we cannot determine whether the petitioner increased either by 40 percent through his investment. As will be discussed below, the petitioner has not demonstrated that any of his investment went to Excel. Thus, he cannot establish that his investment in Excel caused an increase in net worth or that his money resulted in an increase in employment. It is noted that a petitioner must establish eligibility at the time of filing. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner must have established the new commercial enterprise at the time of filing, where he relies on the reorganization or expansion of an existing business, he must demonstrate that such reorganization or expansion had already occurred prior to the date of filing.

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.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Ex., July 13, 1998).

In his request for additional evidence, the director requested evidence that the petitioner had actually transferred the \$1,000,000 from his account to the business account and that the money was at risk.

In response, the petitioner submitted the bank statements for Hansa reflecting a \$1,000,000 deposit from an unknown source on November 30, 1998 as well as Hansa's tax return reflecting \$1,000,000 in capital stock. The petitioner also submitted evidence that Hansa had purchased five properties for \$5,233,501, \$4,720,458 of which was financed with loans secured by the property. Hansa purchased all of these properties after July 1998 when the petition was filed.

The director did not address this issue in his decision. The AAO, however, noted that the record contained no transactional evidence of the transfer of \$1,000,000 from the petitioner's account to Hansa or Excel. The AAO also questioned whether the management or diamond business subsidiaries had engaged in any business activity.

On motion, counsel asserts that the escrow documents and bank statements reflect that the petitioner's investment was used to purchase properties. Counsel further asserts that the employee lists and financial statements reflect that the businesses are operational.

Despite a specific request by the director for transactional evidence reflecting the transfer of \$1,000,000 from the petitioner to Hansa and the AAO's conclusion that such documentation was missing from the record, the petitioner has failed to submit such documentation. The fact that Hansa has purchased properties is not evidence that it used the petitioner's funds to do so. A business can acquire funds from sources other than its shareholders, assuming the petitioner is even the sole shareholder. As stated above, the 1998 tax return for Hansa reflects that no one individual owns more than 50 percent of the outstanding stock.

As stated above, Hansa's bank statement reflects a deposit of \$1,000,000 on November 30, 1998. The source of this money is unknown. Regardless, even if this is the petitioner's investment, it was made well after the date of filing in July 1998. There is no evidence of an irrevocable escrow agreement or secured promissory note whereby the petitioner had irrevocably pledged the money to the company prior to the date of filing. As such, none of the petitioner's funds were committed to the business or at-risk at the time of filing. Their subsequent transfer is not evidence of the petitioner's eligibility at the time of filing.

Moreover, the funds were transferred to Hansa. Excel maintains its own bank account. Hansa appears to have conducted passive real estate deals unlikely to create significant, if any, new employment. Hansa purchased existing apartment and office buildings, presumably already managed. Excel, were it truly an original property management company, would likely create most, if not all, of the jobs at Hansa. As such, even if we accepted that the November 30, 1998 deposit was a deposit of the petitioner's funds, he did not invest those funds for the purpose of employment creation.

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.

The petitioner indicated on the Form I-526 that the business already employed five workers at the time of his investment, employed 11 workers at the time of filing, and would create a total of 15 jobs. Counsel, however, asserted that the business employed only six workers currently. The petitioner submitted no evidence of employment and the business plan submitted initially did not include any job descriptions or a hiring schedule.

In his request for additional documentation, the director referred to the regulatory evidentiary requirements for employment creation and also requested that the petitioner distinguish between preexisting employees and new employees. In response, counsel asserted that the business had 19 employees currently. The petitioner submitted wage and withholding reports for the third and fourth quarter of 1998, 20 Forms W-2 for 1998, and a wage and withholding report for the first quarter of 1999. Additionally, the petitioner submitted 19 Forms I-9. The wage and withholding reports indicate Excel employed five workers in July 1998, six in August 1998, and eight in September 1998. The fourth quarter report for 1998 does not specify how many employees worked each month but includes a total of 19 names, five of whom could not have worked full-time at minimum wage. The first quarter report for 1999 also fails to indicate how many employees worked each month but contains 19 names, three of whom could not have worked full-time at minimum wage. Finally, the petitioner submitted the job titles for all 19 employees, including a general manager, two senior managers, two property supervisors, three assets managers, and office and accounting staff.

The director did not address this issue in his final decision. The AAO, however, questioned whether Hansa, as a holding company for preexisting companies, could be considered to have created any new employment. The AAO also noted that the application for certification of use and occupancy for [REDACTED] indicates that the space is for a maximum of two employees.

On motion, counsel asserts that Hansa occupies over 7500 square feet of office space at [REDACTED]. Counsel further asserts that Hansa employs 27 workers and Excel has 160 employees. Counsel provides no explanation for how Hansa (including Excel) went from 19

employees to 187 employees in two years. The petitioner submits a list entitled, "Hansa Investments, Inc. DBA Excel Residential Services Employee Name List" which lists 27 names and their alleged date of hire. The regulations do not list self-serving employee lists as acceptable evidence of current employment. The petitioner submitted no evidence whatsoever of the alleged 160 employees at Excel, although the list of 27 indicates that it includes Excel employees and includes several of the employees listed on Excel's previously submitted wage and withholding reports. Ten of the 27 "employees" were hired prior to the petitioner's apparent investment on November 30, 1998. The petitioner has not established how many of the 27 work full-time.

The petitioner has documented only 16 full-time employees on the 1999 wage and withholding reports. At least eight, if not more, of those jobs were created prior to November 1998 when, assuming the \$1,000,000 deposit on Hansa's bank statement originated from the petitioner, the petitioner made his investment. As such, the petitioner has not demonstrated that he has created 10 full-time jobs. Moreover, as stated above, the petitioner, assuming he made an investment, made the entire investment into Hansa. Excel maintains a separate bank account. The petitioner has not demonstrated how the investment of \$1,000,000 into the passive real estate division of Hansa created any jobs at Excel, the property management division. The list of the 19 employees and their job titles indicates only three of the 19, the assets managers, are traceable to the activities of property acquisition. Any management employees already working for the purchased properties cannot be considered "new," even if they were replaced. A petitioner cannot cause a net loss of employment. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998). By implication, then, the petitioner must demonstrate 10 new positions beyond the replacement of preexisting employees.

While we acknowledge that the petitioner has indicated he will be developing some of the acquired properties, the job descriptions of the employees to be hired do not include any employees who will be involved in this development. Such jobs are normally contracted out. Moreover, such jobs are generally temporary for the duration of the particular job. Such jobs cannot be considered as meeting the job creation element. See Spencer Enterprises, supra.

Finally, counsel asserts on motion that "this petition, with its multitude of evidence through millions of dollars of investment is precisely what the EB-5 case is supposed to be." For all of the reasons set forth above, considered in sum and as alternative grounds for denial, the petitioner has not met several of the statutory criteria. As such, this petition cannot be approved. We note that the petitioner appears to be trying to qualify based on, at best, an investment in purely passive real estate deals which create little, if any, employment. The petitioner appears to have acquired several management contracts to create the illusion of employment-creation, but has not demonstrated that he has actually created any *new* employment *through his investment*, which, if made, went solely towards the acquisition of real estate.

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.