



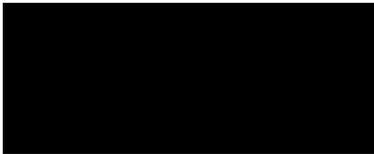
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U.S. Department of Justice

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: [Redacted] Office: Texas Service Center

Date: 6 - MAR 2002

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:



Public Copy

INSTRUCTIONS:

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

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

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

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

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise, invested the requisite amount of lawfully obtained funds, or that he would create the necessary employment.

On appeal, counsel argues that the petitioner purchased a business which had ceased operation. Thus, according to counsel, the petitioner established a new commercial enterprise and all the employees hired can be credited to the petitioner. In addition, counsel asserts that the petitioner invested the necessary capital in the form of inventory obtained through gifts and inheritances. Counsel asserts that the petitioner is unable to obtain documentation of the gifts and inheritances from Iran as doing so would endanger his family there.

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, Yanoor Corporation, 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 \$500,000.

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(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 Yanoor Corporation. The petitioner incorporated [REDACTED] on January 17, 2001.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

On the Form I-526, the petitioner indicated he had established a new commercial enterprise through the purchase of an existing business. On February 14, 2001, [REDACTED] entered into an agreement with [REDACTED] to purchase Burlington's assets for \$8,250,000. The closing date was set for not later than February 24, 2001. The record does not include the closing documents or transactional documents (such as a cancelled or cashier's check) reflecting that either the petitioner or [REDACTED] paid Burlington the purchase price.

The director requested evidence that the petitioner reorganized or restructured Burlington. In response, the accountant who prepared the petition stated:

[REDACTED] Corporation (an Arkansas corporation) was formed specifically to acquire the assets of the Monticello location of [REDACTED] Industries, Inc. (a Delaware corporation). [REDACTED] Industries, Inc. had closed this facility and terminated approximately 650 employees. [The petitioner] formed the [REDACTED] Corporation and contributed approximately \$5,000,000.00 in the form of subordinated debt and capital stock. The [REDACTED] Corporation then acquired certain assets .

(inventory, real estate, buildings and equipment) from ██████████ Industries, Inc. The ██████████ Corporation interviewed and hired approximately 160 employees (the majority of which were former ██████████ Industries, Inc. employees).

The director concluded that the petitioner had simply purchased an existing business and that the record included no evidence that the petitioner had restructured or reorganized the business. On appeal, counsel reiterates that ██████████ had closed its facility and terminated approximately 650 employees prior to the purchase. Counsel also argues that the petitioner substantially restructured the company by incorporating a new corporation. Finally, counsel argues that the petitioner substantially changed the operations of ██████████ by importing rugs to supplement the rugs which Burlington manufactures.

Where a petitioner purchases the assets of a business which ceased to operate long ago, we concur that the petitioner is not simply purchasing an existing business, but starting a new business. The record is absent, however, any evidence that ██████████ closed its plant prior to the petitioner's purchase of the assets. The record contains a letter from United States Senator Tim Hutchinson who asserts that the petitioner rehired employees terminated due to the closure of the plant. The Senator, however, does not indicate whether he has personal knowledge of the plant's closure. While we do not question the Senator's credibility, it is not clear whether he is simply repeating the petitioner's own claims. The Senator also fails to indicate when the plant closed. If it simply closed for a brief period during a change in management, then the petitioner must be considered to have purchased an operational business. The letter also includes a letter from Monticello, Arkansas Mayor Harold D. West who asserts that the petitioner "purchased and reopened the Burlington facilities in Monticello Arkansas on February 15, 2001." The mayor does not indicate how long the facility had been closed.

The sales contract, on the other hand, clearly indicates that Burlington's employees were only terminated upon the sale to Yanoor. Section 4.7.5 of the contract states:

Employee Costs. Except as otherwise set forth in Section 10.2, all employee wages, bonuses, social security and other payroll taxes, workers' compensation insurance premiums and fringe benefits, if any, with respect to all employees whose wages are charged to the operation of the Business, including, without implied limitation, accrued benefits which are not utilized prior to the Closing Date, such as vacation, sick leave, severance pay, and any other payments required to be made to or for the benefit of such employees, either as a result of this transaction or otherwise, will be paid by seller *and the employment of all such employees will be terminated by Seller at 12:01 o'clock a.m. on the Closing Date.*

(Emphasis added.) Section 10.2 provides that Yanoor is entitled to employ "any employees of Seller employed in the Business." Section 10.8 provides that Burlington and Yanoor "shall agree upon acceptable forms of communication with respect to this Agreement to deliver to Seller's employees."

The contract also includes language which indicates that the terminated employees were not simply some type of skeletal security staff of an abandoned plant, but were employees of an operational company. Section 8.2 provides:

Seller has all requisite corporate power and authority to own its properties and carry on its business *as now conducted*. Seller is not in default with respect to any order of any court, governmental authority or arbitration board or tribunal to which Seller is a party or is subject and Seller is not in violation of any laws, ordinances, governmental rules or regulations to which the Business is subject. Seller has obtained all licenses, permits and other authorizations and has taken all actions required by applicable laws or governmental regulations in connection with the Business *as now conducted*.

(Emphasis added.) Section 1.1.5 indicates that the sale includes the “Seller’s lists of past, *present* and qualified prospective customers and their respective vendor numbers, which *are* exclusively used by Seller for the Business.” (Emphasis added.) The sales contract also provides that Yanoor is purchasing Burlington’s “goodwill and the business appurtenant thereto.” Contract, Section 1.1.6(b). Thus, the petitioner purchased more than the assets of a defunct company. He purchased a business, including its goodwill. Goodwill is defined as:

A business’s reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets.

Black’s Law Dictionary, 703 (7th ed. 1999). This dictionary further provides that goodwill is included in the going-concern value of a business, which is defined as:

The value of a commercial enterprise’s assets or the enterprise itself as an active business with future earning power, *as opposed to the liquidation value of the business or its assets*.

(Emphasis added.) Id. at 1549. Thus, it is difficult to imagine how a closed plant could have any goodwill.

Section 1.1.8 of the contract provides that the sale includes books and records pertaining to the assets or business “which *are* used in connection with the Assets and located on the Real Estate.” (Emphasis added.) Section 1.1.9 of the contract provides for the sale of inventory including, “all raw materials, *goods in process*, and finished products comprising a part of the Business.” This section further provides that the inventory is to be counted and valued “at the Closing Date.” If the business had ceased operations, it is unclear why a final value of the inventory would not be available prior to closing. Section 4.7.6 provides for Yanoor to provide Burlington with a list of accounts payable “for the period prior to the Closing Date which are received by Purchaser after the Closing Date.” Section 4.7.7. provides for the Seller to provide a list of accounts receivable “including all amounts owing to seller for completed sales prior to the Closing Date,” which

which Yanoor agreed to help Burlington pursue. Section 8.9 provides that Burlington will provide Yanoor with all employment agreements, business contracts, the names of employees and their salaries for employees Yanoor will continue to employ, and all customer backlog.

In light of the numerous references in the sales contract to current employees and the operations of the business, it is clear that the petitioner did not purchase an abandoned manufacturing plant, but purchased an existing, operating business.

While counsel argues that the petitioner substantially restructured Burlington by incorporating Yanoor, a simple change in ownership is insufficient. Matter of Soffici, supra, at 10. Moreover, the addition of rug importation to Burlington's rug manufacturing business is not a substantial reorganization. The petitioner has not demonstrated that Burlington previously sold only its own manufactured rugs. In addition, the addition of imported rugs did not change the mission of Burlington, a rug manufacturer and vendor, or substantially expand its services.

Moreover, the petitioner had not completed this new service at the time of filing. A petitioner must have already established a new commercial enterprise at the time of filing. If a petitioner seeks eligibility based on the reorganization of an existing business, the reorganization must have already taken place at the time of filing. When the petitioner filed his petition, he had not yet shipped the imported rugs to Burlington. In fact, he was still considering selling the rugs in the United Arab Emirates and investing the cash. Finally, a one time importation of rugs owned by the petitioner is not a reorganization of a business. The petitioner has not established that he would continue to purchase imported rugs for Burlington after importing the rugs that he already owned prior to purchasing Burlington.

The director also concluded that the petitioner had not expanded either the net worth or employment of Burlington. The petitioner does not contest this conclusion on appeal and the record supports the director's conclusion.

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

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 petitioner claimed on the Form I-526 that he had invested \$5,000,000 on February 14, 2001. On Part 4 of the petition, the petitioner indicated that he had purchased \$32,000,000 worth of assets for the company and transferred \$5,000,000 of property from abroad. In his cover letter, the petitioner asserted that he transferred \$5,000,000 of inventory to Yanoor in exchange for 100% of the corporation's stock and a subordinated note of an unspecified value. The petitioner further indicates that he funded the purchase of Burlington with a \$8,000,000 bond issue guaranteed by various Arkansas State agencies secured by the assets of Yanoor and the petitioner's personal guaranty in the form a \$2,000,000 letter of credit issued by the Union Bank

and Trust Company. The petitioner does not indicate how the remaining \$250,000 of the purchase price was paid. The petitioner submitted the articles of incorporation for Yanoor indicating that the corporation issued 1,000 shares of common stock for \$1.00 each and an unsigned stock certificate issued to the petitioner for 1,000 shares. The petitioner also submitted a Bill of Sale reflecting that the petitioner sold Yanoor rugs described in the 40 page attachment for \$10. The petitioner also submitted the sales contract for Burlington and the letter of credit. As stated above, the record does not include any transactional documentation of the sale such as a cancelled or cashier's check, receipt, or a bank statement reflecting the withdrawal/debit of the purchase price.

In response to the director's request for additional documentation, the accountant who prepared the petition asserted that the petitioner invested inventory, cash, and a letter of credit in exchange for stock and a subordinated note. The accountant further asserts that "the stock was recorded at \$500,000 and the subordinated note was recorded at \$4,500,000."

The director noted that the bond issue and letter of credit were secured by the assets of the new commercial enterprise and concluded that those funds could not be considered part of the petitioner's investment. The director further noted that even if the petitioner had also personally guaranteed the letter of credit it would "not change the character of the debt as being primarily that of the borrowing entity rather than the petitioner's." Finally, the director concluded that the petitioner had not established the value of the carpets allegedly transferred to Yanoor or that the rugs were previously the assets of the petitioner.

On appeal, the petitioner submits a letter from the President and CEO of Union Bank & Trust Co. verifying that the petitioner did personally guarantee the letter of credit. The bond issue is secured by the assets of the new commercial enterprise and, thus, as stated by the director, we cannot consider these funds as the petitioner's contribution. While the petitioner has now established that in addition to being secured by the assets of Yanoor, the petitioner also personally guaranteed the letter of credit, we concur with the director that this additional guarantee does not alter the fact that the corporation's assets primarily secure the bond issue and the letter of credit. Matter of Soffici, supra, at 6-7. Such debt financing is precluded under 8 C.F.R. 204.6(e)(definition of capital).

Rather than exchange the rugs for stock, the petitioner actually sold the rugs to Yanoor. Nevertheless, the \$10 purchase price appears to be consideration to make the contract enforceable and is not sufficient to characterize the transaction as a true sale. Assuming the rugs were worth \$5,000,000, and the customs documentation supports their worth, the petitioner's "sale" of those carpets to Yanoor for \$10 could be considered a contribution of capital if the remaining accounting conformed with a contribution of capital.¹ The record, however, is

¹ It is of some concern that the petitioner had not transferred any of the rugs to Yanoor at the time of filing. The regulations, however, only require that a petitioner be in the process of investing the requisite funds. A bill of sale transaction would transfer title of the rugs to Yanoor as of February 14, 2001, thus completing the investment. Had this been an arms-length transaction, the rugs would have been fully committed to Yanoor at the time of filing. The transaction,

inconsistent regarding how the corporation reflected this transaction for accounting purposes. The petitioner initially claimed to have contributed inventory worth \$5,000,000 as capital. In response to the director's request for documentation, the accountant who prepared the petition asserted that the petitioner contributed cash and inventory in exchange for \$500,000 in stock and a note for \$4,500,000. 8 C.F.R. 204.6(e)(definition of invest) provides that a loan to the new commercial enterprise is not an investment. If the accountant is correct, then the \$4,500,000 worth of carpets exchanged for a note of \$4,500,000 is not part of the petitioner's investment. On appeal, the accountant, asserts that the petitioner has "injected" \$1,900,000 into Yanoor, \$1,700,000 worth of carpets received by Yanoor and \$200,000 in cash "advanced" by the petitioner.

The articles of incorporation and stock certificate reflect that the petitioner received only 1,000 shares of \$1.00 value stock. The unaudited balance sheet as of June 30, 2001 submitted on appeal reflects paid-in-capital of \$1,957,857, accounts payable of \$2,423,938, long term debt of \$6,735,000, and "Excess of Fair Value over cost on nets [sic] assets acquired" (also known as negative good will) of \$25,640,414. The balance sheet does not reflect a shareholder loan for \$4,500,000 as alleged by the accountant.

The various claims of the nature of the transaction transferring the rugs to Burlington are inconsistent with each other and the balance sheets. The record does not include balance sheets audited by an independent accountant or tax returns, including schedule L, certified by the Internal Revenue Service. 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). Thus, the indication of paid-in-capital of more than \$1,000,000 on the June 30, 2001 balance sheet cannot be accepted as credible.

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;

however, was not an arms-length transaction. It is doubtful that the petitioner would cause his own solely-owned corporation to sue him. Moreover, the balance sheets in the record reflect \$180,000 paid in capital as of February 14, 2001 and \$1,957,857 as of June 30, 2001, suggesting the company did not treat the sale as an immediate transfer of title.

(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 claimed that he had recently sold his business in Canada which provided the capital for Yanoor. He asserted that he was including a bank letter as confirmation of this sale. The record includes a letter from the petitioner’s financial advisor asserting only that the petitioner and his wife maintain a balance in the low to mid seven digits. This letter is not evidence that the petitioner operated a legitimate company in Canada or that he sold that business.

In response to the director’s request for evidence regarding the source of the petitioner’s alleged investment, the petitioner’s accountant asserted that the inventory transferred to Yanoor was obtained through gifts and inheritances from relatives and in-laws in Iran. This information conflicts with the petitioner’s initial claim. The accountant further asserted, “The Iranian documentation of the gifts and inheritances can be provided upon request.” The petitioner submitted three years of Canadian tax returns. None of these returns reflect any business income, although the petitioner lists rental income in some years and a capital gain of \$172,825 for 2000.

The director concluded that the petitioner had failed to support his claim to have inherited the inventory transferred to Yanoor and that the tax returns did not reflect a sufficient income to account for the petitioner's investment.

On appeal, counsel asserts:

Obviously, it is not possible to obtain verification of the gifts and inheritances [the petitioner] has received from Iranian relatives as these funds are no longer within Iran, and to disclose such information could result in harm to his relatives.

The petitioner submits on appeal a letter from [redacted] Owner of Al Meha Carpet Trading Company who asserts that over the past three years the petitioner has purchased rugs from his company for a total of \$4,865,000. He also asserts that the petitioner has paid the full value of these rugs through real estate, cash and cash equivalents from the petitioner himself and his family in Iran.

Counsel's assertion that documentation from Iran is unavailable is completely contradictory to the previous statement by the accountant who prepared the petition assuring that such information was available upon request. In addition, the petitioner initially claimed that he financed his investment into Yanoor through funds obtained by selling his business in Canada. Mr. [redacted] indicates that he received some of the rug purchase price from the petitioner himself. Yet the records of the sale of the petitioner's Canadian business and the subsequent transfer of funds to Al Meha are not in the record. The petitioner has provided no explanation for why these Canadian documents are unavailable.

In light of the above, the petitioner has not established the lawful source of the funds used to purchase the carpets which have now been transferred to Yanoor as an investment.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4) states:

(i) 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.

(ii) *Troubled Business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

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.

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).

Initially, the petitioner claimed to have created 160 jobs as Yanoor allegedly employed that number of workers at the time. The accountant who prepared the petition reiterated this claim in response to the director's request for additional documentation. The director concluded that the petitioner had not created any new employment since Burlington was operational at the time of sale. The director also noted that the list of employees in the record, without Forms I-9, Form 941, or state employment tax reports, was insufficient evidence that those employees were qualifying employees or that they worked full-time.

On appeal, counsel asserts that Burlington's approximately 650 employees were terminated when that company "discontinued operations at the Monticello facility" and that the petitioner initially hired 160 employees and has now hired an additional 80. The petitioner submits Forms 941 reflecting that as of June 2001 Yanoor employed 197 employees in Arkansas, one in Georgia, and one in Massachusetts. He also submits a list of 174 names.

For the reasons discussed above, we conclude that the petitioner purchased an existing business whose employees were not terminated until the sale to Yanoor closed. A petitioner cannot cause



a net loss of employment. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) at 5. When purchasing an existing, non-troubled business, a petitioner cannot simply maintain the employment of that business; he must create new jobs which did not exist prior to his investment. As such, in order to demonstrate that he created (or will create) at least 10 jobs, the petitioner must demonstrate how many people Burlington employed prior to the date of purchase. The record does not include Burlington's employment records for early February 2001.

The sales contract, section 10.2, provides:

Purchaser understands that Seller has structured its sale and determined its sale price hereunder based upon the premise that the Purchaser intends to utilize the Assets in its business activities and that such activities will result in the employment of approximately 300 persons who previously worked for Seller.

This language strongly suggests that Burlington had at least 300 employees at the time of purchase, and counsel asserts that the number was actually approximately 650. Assuming the petitioner currently employees 240 workers as claimed, the petitioner has not created any new employment, and, in fact, has caused the loss of tens if not hundreds of jobs. Thus, even if the petitioner had claimed that Burlington was a troubled business² at the time of sale, and he hasn't, the petitioner has not even maintained the employment at that business as required for qualification through an investment in a troubled business. See 8 C.F.R. 204.6(j)(4)(ii) quoted above.

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. The record does not include a business plan.

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.

² A troubled business is one that has been in existence for at least two years, has incurred a net loss for accounting purposes during the twelve- or twenty-four month period prior to the date of filing, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. 8 C.F.R. 204.6(e)