



B1

U.S. Department of Justice

Immigration and Naturalization Service

**Identifying data deleted to prevent clearly unjustified invasion of personal privacy**

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



File: [Redacted] Office: Texas Service Center

Date:

18 NOV 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 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, Texas 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 will be vacated, and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to section 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 invested his own lawfully obtained funds in a new commercial enterprise or that he had created or would create the requisite employment.

On appeal, counsel argued that the director based his decision on unsupported factual conclusions.

On June 6, 2001, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, summarily dismissed the appeal. On motion, counsel asserts that an appellate brief and exhibits were submitted on February 16, 2001. The petitioner resubmits those materials. As such, we will reopen the matter and 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).

The record indicates that the petition is based on an investment in a business, Southern Star, 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.

### **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 . . ." (Emphasis added.)



8 C.F.R. 204.6(e) defines “new” as “established after November 29, 1990.”

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) 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. The alleged new commercial enterprise at issue here is Southern Star, Inc.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, 22 I&N 158, 166 (Comm. 1998).

On the Form I-526, the petitioner indicated that Southern Star was established on January 30, 1991 and indicated he had created an original business. The petitioner submitted the articles of incorporation for Southern Star filed on that date. The petitioner also, however, submitted a brochure for Southern Star indicating that the company commenced operations in July 1990. In his request for additional documentation, the director noted this discrepancy. In response, counsel asserted that the brochure was incorrect. The petitioner submitted wage and withholding reports for 1991 for Southern Star’s holding company, Hung’s Shrimp Farm. These reports reflect the following number of employees:

January	0	February	1	March	2
April	4	May	10	June	10
July	25	August	25	September	27
October	29	November	28	December	29

In his final decision, the director concluded that the record reflected that the shrimp farm was operating prior to November 29, 1990. On appeal, counsel asserts that Southern Star did not

transact any business prior to the date of incorporation and was not the incorporation of a preexisting business, Hung International (formerly Hung's Shrimp Farm).

Southern Star is the wholly owned subsidiary of Hung International, Inc., formerly Hung's Shrimp Farm. Hung's Shrimp Farm was incorporated on May 21, 1990. It amended its articles of incorporation to change its name to Hung International on December 30, 1994.<sup>1</sup> While we acknowledge that Hung's Shrimp Farm (now Hung International) continued as its own business after the incorporation of Southern Star, Hung International owns several other subsidiaries. The fact that Hung International continues to exist as a holding company for Southern Star and its other subsidiaries does not establish that Hung's Shrimp Farm did not operate a shrimp farm at the location now operated by Southern Star prior to November 29, 1990. Even if Hung's Shrimp Farm did not open the shrimp farm before incorporating a subsidiary to operate the farm, the record does not establish how Southern Star acquired the shrimp farm. Specifically, the petitioner has not submitted the deed or lease for the location of the shrimp farm. If Southern Star purchased a shrimp farm in operation prior to November 29, 1990, the petitioner has still not created an original business.

Since the record does not establish the number of employees at the shrimp farm location or the net worth of that operation prior to its purchase by Hung's Shrimp Farm or Southern Star, we cannot determine whether the petitioner increased the employment or net worth by 40 percent.

#### **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

---

<sup>1</sup> We note, however, that Hung International had its own bank accounts in addition to those belonging to Hung's Shrimp Farm as early as 1993.

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 Izummi, 22 I&N 169, 179 (Comm. 1998).

Initially, the petitioner submitted a stock certificate issued by Southern Star to Hung's Shrimp Farm for 1,000 shares. The petitioner also submitted 1997 and 1998 tax returns for Hung International and its subsidiaries. The returns reflect \$1,000 in stock for both years. The 1998 return reflects that Southern Star's additional paid-in-capital increased from \$12,576,610 to \$13,926,204. Statement 28 reflects that all of that capital consists of an investment by Hung International, Inc. The 1997 return reflects that Southern Star's additional paid-in-capital increased from \$1,351,739 to \$12,576,610. Moreover, Hung International's "investment" in Southern Star increased from negative \$4,509,306 to \$12,577,610 during the year while Southern Star's loan from Hung International decreased from \$6,713,873 to \$0. (Southern Star also repaid its loans from other subsidiaries.) The petitioner also submitted July, August, and October 1998 bank statements for Hung's Shrimp Farm, Inc. These statements reflect that the petitioner

transferred \$519,148 to Hung's Shrimp Farm, Inc. account [REDACTED] at NationsBank during July and August 1998. In addition, Chen Ogb and Daphne Wang also transferred substantial funds to that same account during July and October 1998. These statements, however, also reflect that most of these funds were transferred out to Hung International on the date they were received or the following day.

On June 20, 2000, the director requested additional documentation, advising that the petitioner must be able to trace the funds through the subsidiaries to the new commercial enterprise since a corporation is a separate legal entity from its shareholders. The director also expressed concern regarding the repayment of Southern Star's loan from Hung International in 1997. Finally, the director noted that the petitioner claimed to have invested \$1,352,739 in June 1991. Since the reinvestment of proceeds by a corporation cannot be considered part of a petitioner's qualifying investment, the director requested evidence of the claimed 1991 investment.

In response, counsel asserted that the petitioner wired money from his accounts in Singapore, Hong Kong, and Taiwan to Hung Shrimp Farm and Hung International and that this money was then transferred to the various subsidiaries. The petitioner submitted a summary of the money allegedly invested by him as well as bank statements and wire transfer notices from 1993 through 1998. The annual summary indicates that the petitioner invested \$2,823,349 in 1993, \$743,967 in 1994, \$785,150 in 1995, \$231,439 in 1996, \$389,600 in 1997, and \$874,829 in 1998. The petitioner also provided an alleged summary of the petitioner's wire transfers to Hung's Shrimp Farm.

A review of the bank statements and wire transfer notices, however, does not reveal that all of the money indicated on the summary came from the petitioner. While all of the alleged wire transfers are too numerous to address in this decision, we will demonstrate the deficiencies with reference to the 1993 bank statements and wire transfer receipts. The summary lists the following transfers from the petitioner to Hung's Shrimp Farm: \$50,000 on September 16, 1993; \$150,000 on September 30, 1993; \$22,008 on September 30, 1993; two \$100,000 deposits on October 12, 1993; \$100,000 on October 15, 1993; \$50,000 on October 27, 1993; \$100,000 on November 5, 1993; \$57,169 on November 5, 1993; \$65,000 on November 10, 1993; \$34,000 on November 22, 1993; \$500,000 on November 23, 1993; \$300,000 on December 22, 1993; and \$305,000 on December 31, 1993. A review of the wire transfer notice for the September 16, 1993 transfer, however, reveals that the money, deposited in Hung's Shrimp Farm account 0088 8102 4140 at NationsBank, came from Hung's Shrimp Farm's account at Chase NYC. The \$500,000 transferred to Hung's Shrimp Farm's NationsBank account on November 23, 1993 also originated from Hung's Shrimp Farm's account at Chase NYC. The wire transfer notice for the \$300,000 received by Hung's Shrimp Farm's NationsBank account on December 23, 1993 originated from Hung's Shrimp Farm's account at China Trust, NYC. Those funds were credited to Hung's Shrimp Farm's account at China Trust as the proceeds of a loan. Funds borrowed by Hung's Shrimp Farm to invest in Southern Star cannot be considered the petitioner's at-risk investment of his personal funds. The remaining wire transfer notices for deposits with Hung's Shrimp Farm and Hung International (NationsBank account [REDACTED]) fail to identify the source of the transfer.

The investment summary, bank statements, and wire transfer notices for 1994 through 1997 have similar deficiencies, with the money attributed to the petitioner in the summary actually coming from Hung's Shrimp Farm or Hung International accounts at Chase NYC, Citibank, China Trust, Bankers NYC, and Land Bank of Taiwan. In addition, some of the deposits are from unidentified parties, such as [REDACTED]. In fact, the summary even credits the petitioner with a December 31, 1996 deposit of \$7,000, a March 14, 1997 deposit of \$16,000, and an April 17, 1997 deposit of \$10,000, when the wire transfer receipts reflect that the funds originated from Southern Star, the very entity in which the petitioner is supposedly investing. The only transfers traceable to the petitioner from January 1994 through December 1997 are \$60,000 on March 15, 1994, \$46,000 on March 8, 1994, \$49,985 on April 30, 1997, and \$9,985 on July 21, 1997. The only new transfer from the petitioner evidenced by the full year of 1998 bank statements is a transfer of \$19,985 to Hung's Shrimp Farm on May 8, 1998.

In the decision denying the petition, the director reiterated his concerns regarding the loan repayment and the use of reinvested proceeds. In addition, the director noted that Hung International, not the petitioner, owned 100 percent of the stock in Southern Star and stated:

If the petitioner invested his personal funds through a series of 100% owned subsidiaries, then the ownership of each entity (including all offshore entities) and the path of the capital through the accounts of each entity must be established. In the instant case, the petitioner has submitted evidence to indicate substantial sums were transferred to Hung International, Inc. and to Southern Star, Inc. However, no foreign bank statements were submitted to enable the Service to trace the path of the capital before it reached the U.S. Additionally, the ownership of the foreign entity, Hung Holding of the British Virgin Islands, has not been sufficiently demonstrated.

On appeal, counsel asserts that the Service should rely on the tax returns that reflect substantial amounts of capital invested into Southern Star. Counsel "conceded" that foreign bank statements were not submitted, but argues the remaining evidence was sufficient. Counsel notes "bank statements were submitted in accordance with 8 CFR 204.6(j)(2) showing amounts deposited in the U.S. business accounts." Further, counsel asserts that since the holding company and Southern Star have both lost money, the capital cannot have resulted from reinvested proceeds. Finally, counsel asserts that the conversion of debt to capital is not uncommon and notes that the total capital for Southern Star was \$13,926,204 as of December 31, 1998.

We agree with counsel that the conversion of debt to capital or the use of capital to pay off a loan can fall within the definition of capital. We concur, however, with the director's remaining concerns.

Counsel's argument that the petitioner met his burden by submitting bank statements showing deposits in the corporate accounts is not persuasive. The types of evidence are listed in the disjunctive since some types of evidence are for different types of investments such as cash, assets purchased for the business, personally secured loans, etc. We note, however, that 8 C.F.R. 204.6(j)(2)(iv) requires evidence of money transferred to the business in exchange for stock. In

the instant case, the petitioner owns no stock in the new commercial enterprise. As such, the director is justified in requiring more, not less, documentation tracing the money back to the petitioner himself. We note that 8 C.F.R. 204.6(j) provides that "the petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below." The petitioner has failed to submit transactional evidence or foreign bank statements establishing that the money allegedly invested came from him personally, rather than from Hung International's holding company, Hung Holding International Company, Ltd. Moreover, as discussed below, the remaining evidence not only fails to support the petitioner's claim to have invested sufficient funds, it suggests otherwise.

The record reveals that Hung International is the holding company for Southern Star. As stated by the director, a corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Counsel concedes this principle. Thus, even assuming the petitioner is the sole shareholder of Hung Holding International Company, Ltd. as alleged, the petitioner cannot rely on Hung Holding International Company's investment into Hung International or that company's investment into Southern Star as his own. It is acknowledged that the majority of Southern Star's \$13,926,204 capital is not stock, but paid-in-capital. Nevertheless, as stated above, the tax returns reflect that Hung International's investment in Southern Star amounted to \$13,927,204 at the end of 1998. Thus, the tax returns upon which counsel urges us to rely reflect that Hung International, which counsel concedes is a separate entity from the petitioner, is responsible for all of Southern Star's capital.

The bank statements support this conclusion. As stated above, prior to 1998, the petitioner had only established a personal contribution of \$165,970. In 1998, the petitioner contributed another \$539,133. These contributions were deposited with Hung's Shrimp Farm. The bank statements do not allow us to trace these funds as a contribution to Southern Star. For example, the petitioner transferred \$133,745 to Hung's Shrimp Farm's NationsBank account [REDACTED] on July 22, 1998. On the same date, Hung's Shrimp Farm transferred the same amount to Southern Star's NationsBank account [REDACTED]. Southern Star, however, transferred the same amount to Hung International's United World Chinese Commercial Bank account [REDACTED] gain on the same date. The \$95,025 transferred by the petitioner on July 24, 1998 followed the same route in one day, with the exception that it was ultimately transferred to Hung International's Taiwan Cooperative Bank account [REDACTED]. As the funds did not remain with Southern Star and Southern Star did not owe money to Hung International in 1998, we cannot conclude that any of those funds constitute the petitioner's capital contribution to Southern Star.

Moreover, the transfers clearly attributable to the petitioner total \$705,103. Even if we concluded that none of that money went to the other subsidiaries, a conclusion not supported by the record, \$705,103 is less than the minimum investment amount. The petitioner has not demonstrated that the remaining \$294,897 is irrevocably committed to the business. The remaining transfers are all intercompany transfers and cannot be attributed to the petitioner. Despite the director's conclusion that the record lacked evidence that the petitioner is the sole

owner of Hung Holding International Company, Ltd., the petitioner fails to submit evidence on appeal regarding the ownership of Hung Holding International Company, Ltd.. Regardless, as stated above, since a corporation is a separate legal entity from its shareholders, even if the petitioner is the sole shareholder of Hung's Holding International Company, Ltd., that company's investment in Hung International cannot be attributed to the petitioner.

On appeal, the petitioner asserts that because Hung International has lost money, the increased capitalization of Southern Star could not have originated with the parent company. In light of the above, however, regardless of whether Hung International has shown a profit, its investment in Southern Star cannot be attributed to the petitioner.

### **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, 22 I&N 201, 210-211 (Comm. 1998); Matter of Izummi, 22 I&N 169, 195 (Comm. 1998). 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). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. Matter of Ho, supra, at 211.

Initially, the petitioner submitted two company licenses for Chiao Lung Construction, Ltd., one indicating the registration was approved on August 29, 1989 and the other indicating that the registration was approved August 14, 1996. The petitioner is listed as the chairman and the company is capitalized at 900,000,000 new Taiwan dollars. The petitioner also submitted the company's balance sheet that reflects 1,221,939,000 new Taiwan dollars in total shareholders' equity and numerous untranslated financial statements. In his request for additional documentation, the director, not realizing that the balance sheet was expressed in thousands of new Taiwan dollars, concluded that the capital in Chiao Lung Construction was only \$37,000. The director also requested personal bank statements and personal tax returns. Neither counsel nor the petitioner addressed this issue in the petitioner's response.

In the decision denying the petition, the director reiterated his concerns, noting that the petitioner had failed to submit the requested bank statements and personal tax returns submitted. On appeal, counsel correctly notes that the director failed to notice that the balance sheet was expressed in thousands of New Taiwan dollars. Thus, the correct equity in the company is \$37,000,000. Neither counsel nor the petitioner, however, address the director's concern regarding the lack of tax returns and foreign bank statements. There is no evidence that the petitioner withdrew money from Chiao Lung Construction, Ltd. for his investment. Without tax returns, we cannot determine how much money he received from this company and whether it is sufficient to account for the accumulation of the money allegedly invested, although, as stated above, most of that money appears to have come from Hung Holding International Company, Ltd., and not the petitioner personally.

### **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).

Initially, the petitioner claimed to have created 30 jobs. He submitted Forms 941 and state wage and withholding reports that reflect 26 employees as of the fourth quarter of 1999. The petitioner also submitted a 1999 W-3 indicating Southern Star paid wages totaling \$526,341 that year. In his request for additional documentation, the director acknowledged Southern Star claimed to have more than 10 employees, but, since the director questioned whether a shrimp farm existed prior to Southern Star's incorporation, he concluded that the petitioner had not established how many of the employees were new employees. In response, the petitioner submitted 1991 wage and withholding reports for Hung's Shrimp Farm reflecting employment beginning at zero in 1991 and increasing to 29.

In his final decision, the director stated that the evidence did not establish how many hours each employee worked. In addition, the director concluded that while the 1998 first and second quarter Forms 941 reflect wages over \$130,000, statement two of the 1998 tax return reflects that

Southern Star paid considerably less in wages.<sup>2</sup> Finally, the director reiterated his concern that the petitioner had not established how many employees worked on the shrimp farm prior to Southern Star acquiring it.

On appeal, counsel asserts that the discrepancy between the Forms 941 and the tax return are because the tax return was computed on the accrual basis and the Forms 941 use the cash basis. The difference, as stated by counsel, is that the accrual system reports expenses when incurred and the cash basis reports expenses when paid. In addition, counsel notes the inclusion of \$337,000 as cost of labor on Schedule A. Counsel finally asserts that the Forms 941 list sufficient employees and that annual wages of \$22,000 are consistent with full-time employment in the area.

Counsel is correct that the director failed to consider the cost of labor amount listed on Schedule A. Nevertheless, it is the petitioner's burden to demonstrate that all employees work full-time. Matter of Ho, 22 I&N Dec. 206 (Comm. 1998), states:

In the absence of such evidence as paystubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full-time employment within the United States.

Further, the petitioner has not resolved how Southern Star acquired the shrimp farm. Without such evidence, we cannot determine whether Southern Star purchased an existing business, and, if so, how many workers were employed there. As stated above, the petitioner submitted 1991 wage and withholding reports for Hung's Shrimp Farm. Hung's Shrimp Farm, however, is not the new commercial enterprise. It has a different federal identification number than Southern Star. While it appears that the petitioner was attempting to demonstrate that Southern Star did not assume the shrimp farm and its employment from Hung's Shrimp Farm, it is not clear how the employment numbers for Hung's Shrimp Farm in 1991, when Southern Star was already incorporated, relate to Southern Star.

Finally, beyond the decision of the director, the petitioner did not submit Forms I-9 for Southern Star employees as required by 8 C.F.R. 204.6(j)(4)(i)(A). As such, the petitioner has not demonstrated that any of Southern Star employees are qualifying.

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.

---

<sup>2</sup> The director concluded that statement two for 1998 indicated only \$34,317 in wages. We note that the statements for the 1997 and 1998 tax returns are reversed, and that statement two for 1998 actually indicates \$45,600 in officer compensation and \$151,123 in wages.



**ORDER:** The Associate Commissioner's decision of June 6, 2001 is vacated. The petition is denied.