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U.S. Citizenship
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Services

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JUN 29 2004

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER Date:

IN RE:

Petitioner:

[Redacted]

PETITION:

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

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 Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 she had established the new commercial enterprise.

On appeal, counsel argues that the petitioner reorganized and restructured an existing business.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, she need not demonstrate that she personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 *new* jobs. Moreover, the law still requires an investment in a "new" commercial enterprise as defined at 8 C.F.R. § 204.6(e).

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) 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
- (ii) 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 [REDACTED] 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.

On the petition, the petitioner indicated that she invested \$1,020,000 on November 12, 1999. She further indicated that the business was a restaurant, that there were 20 jobs when she made her investment and that there were 20 jobs at the time of filing the petition. [REDACTED] was formed in 1999 as the paper reorganization of [REDACTED]. We note that a few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple

change in ownership. *Matter of Soffici* 22 I&N Dec. 158, 166 (Comm. 1998). That case specifically dealt with an entity that was incorporated in 1997 but was operating a hotel already in operation prior to the date of incorporation. It concluded: “[I]t is the job-creating business that must be examined in determining whether a new commercial enterprise has been created.” *Id.* In the instant case, it appears that the job creating entity, the restaurant, was previously operated by [REDACTED]. The record does not establish when [REDACTED] was incorporated.

In addition, the petitioner submitted a purchase agreement indicating that the predecessor business [REDACTED] used the petitioner’s funds to purchase an interest in The Meng Partnership. In fact, \$570,000 of the invested funds were paid by the petitioner directly to The Meng Partnership. While the record includes letters asserting that The Meng Partnership owned the property on which the restaurant operated by [REDACTED] is located, the record contains no evidence of the partnership’s ownership of [REDACTED] or federal income tax returns for either the commercial enterprise and The Meng Partnership reflecting the capitalization of both entities after the petitioner’s investment.

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.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment [REDACTED] 229 F. Supp. 2d 1025, 1039 (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 Citizenship and Immigration Services (CIS) 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 relies on the fact that the restaurant already employed 20 full-time employees at the time of the petitioner’s investment and does not submit a business plan explaining how she will create an additional 10 jobs. As stated in *Matter of Ho*, 19 I&N Dec. 169, 179 (Comm. 1998), 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. While based on different facts, we find that this part of the decision stands for the proposition that there must be some nexus between the funds and the job creation. As such, we will remand this matter to the director for a determination as to whether the petitioner’s investment, used by an existing restaurant to purchase an interest in The Meng Partnership, is an at-risk investment that will likely result in the creation of 10 new jobs. Specifically, the director should request evidence that The Meng Partnership owns the restaurant property and evidence of the creation of 10 additional full-time jobs or a business plan. The director should also request evidence as to when [redacted] was incorporated. The director may also request any other evidence deemed relevant, such as federal income tax returns, including the Schedules K-1 reflecting the petitioner’s investment in [redacted] and that company’s investment in The Meng Partnership.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.