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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B7

JUN 29 2004

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER Date:

IN RE:

Petitioner:

[Redacted]

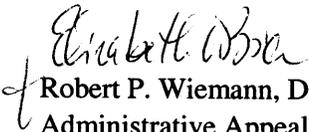
PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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 appeal will be dismissed.

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 a new commercial enterprise or that she would create the necessary employment. Finally, the director determined that the petitioner had not demonstrated that she was managing or would manage the enterprise in any way.

On appeal, counsel argues that the petitioner's funds allowed the new commercial entity to become operational, that the new commercial enterprise employs nine full-time employees and four part-time employees who job share and that she continues to be involved in the management of the company.

Counsel notes that the petitioner has filed three petitions seeking classification as an alien entrepreneur. We note that the prior two petitions were denied by the director and appealed to this office. Both appeals were summarily dismissed for failure to submit a brief and/or additional evidence. In the instant appeal, counsel indicates that he will submit a brief and/or additional evidence to this office within 30 days. Counsel dated the appeal August 13, 2001. As of this date, 32 months later, this office has received nothing further. Given counsel's skeletal arguments on the Form I-290B, however, we will adjudicate the appeal on its merits based on the record of proceedings.

Before discussing the law and evidence, we note that counsel also asserts that the director erred by not acknowledging that the court judgment in favor of the petitioner that served as the source of her investment funds was submitted in response to the director's request for additional documentation. In his final decision, the director reproduced the entire request for additional documentation on pages seven through ten. Thus, page nine repeats the request for the judgment against Thai Airlines International. Starting on page 11, however, the director begins discussing the petitioner's response and the remaining deficiencies. This discussion does not indicate or imply that the director continued to have concerns regarding the lawful source of the petitioner's funds. We concur that the record adequately establishes that the petitioner won a judgment of \$941,312.64 from Thai Airlines International and that \$500,000 of these funds were eventually transferred to the new commercial enterprise.

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. Thus, the director's concern on this issue is moot.

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 a business 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.

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:

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.

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.

d 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.

Id. at 213.

On the petition, the petitioner indicated that the new commercial enterprise employed nine employees and that all nine were created by her investment. In his accompanying brief, counsel asserts that nine full-time and six part-time employees. The petitioner submitted payroll documents prepared by EasyPay for The records list a single employee in January 1999. It appears that staggered its pay periods, as it submitted payroll records with overlapping pay periods and different names. The records for the period September 30, 2000 through October 13, 2000 contains nine employees, although the summary for that period indicates 14 employees were paid and another two active employees were not paid. Of the nine employees whose names are provided, two managers worked on salary, three front desk employees

worked full-time, one housekeeper worked full-time, another housekeeper worked part-time, and the laundry employee worked part-time. The records for September 23, 2000 through October 6, 2000 reflect an additional full-time front desk employee, two salaried managers, a part-time front desk employee and three part-time housekeeping employees. The records include no kitchen or health-related departments, such as nutrition or nursing. In support of these employees being qualifying employees, the petitioner submitted 16 Forms I-9.

The petitioner also submitted a business plan calling for an administrator, two cooks, one housekeeper, one nursing supervisor, three certified nursing assistants, and one laundry employee. The financial projections call for an administrative manager, a bookkeeper, two cooks, two dietary aides, an activity director, an activity assistant, a nursing aide, a director of marketing and a marketing associate.

In his request for additional documentation, the director acknowledged the Forms I-9 in the file and requested Forms W-2 and quarterly reports in order to demonstrate that the employees are working and working full-time. In response, counsel asserted that the Forms W-2 and quarterly reports were issued by the management company, Welcome Hotels, and that the petitioner would forward those documents to the director. In his final denial, the director noted that the petitioner had failed to submit the requested documentation and that the record lacks evidence of a job sharing arrangement. On appeal, counsel merely asserts [REDACTED] employs nine full-time employees and four part-time job-sharing employees.

We find that the director's request for Forms W-2 and quarterly returns was reasonable and consistent with 8 C.F.R. § 204.6(j)(4)(i)(A), quoted above. As of this date, those forms have not been submitted. While the director does not discuss the payroll records, they do not support the petitioner's claim that Sunny Days created nine new full-time positions and four new job-sharing part-time positions. Specifically, the jobs on the payroll document are not consistent with the type of new jobs to be created by an assisted living center, especially given its affiliation with the [REDACTED]. Specifically, the lease in the record reflects that the petitioner's partner [REDACTED] leased three floors including 70 rooms, a meeting room, and a restaurant from [REDACTED] own agent [REDACTED]. The modification of the lease assigned [REDACTED] as the tenant and [REDACTED] the landlord. The promotional materials [REDACTED] 17 in the record, provide:

[REDACTED] is now offering a limited number of rooms with special benefits at The [REDACTED]. [REDACTED] new extended stay plan offers you the opportunity to enjoy all the benefits of assisted living at a moderate price for as long as you want.

Thus, it appears from the record that the assisted living center is located on the first three floors of a Days Inn hotel.¹ As will be discussed in more detail below, the assisted living center, including the employees, are being managed by Welcome Hotels, a hotel management company founded by [REDACTED] and directed by [REDACTED]. [REDACTED] biography in the promotional materials for Welcome Hotels submitted by the petitioner

¹ Our review of the Days Inn website [REDACTED] confirms that a Days Inn is located at [REDACTED] and its phone number is the number listed by the petitioner on the petition. We further note that we called that number and were advised that the Sunny Days assisted living center was no longer located at that location. Neither counsel nor the petitioner has advised Citizenship and Immigration Services of a new location for the assisted living facility.

indicates that Welcome Hotels manages the [REDACTED]. Given that situation, the petitioner must establish that she has created 10 full-time jobs in addition to any jobs that may have existed at the Days Inn prior to her investment. The payroll records reflect only hotel-related positions, with no nutrition, activities or nursing staff. Thus, the petitioner has not established that these are new jobs specific to the assisted living center.

MANAGEMENT

8 C.F.R. § 204.6(j)(5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

- (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
- (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
- (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

On the petition, the petitioner asserted that she was the President and Chief Administrative Officer of Sunny Days. On January 8, 1998, the petitioner incorporated [REDACTED]. On August 14, 1998, [REDACTED] and [REDACTED]. The operating agreement for [REDACTED] provides that the company is to be managed by elected managers, not its members. Schedule 1 reflects that [REDACTED] retains a 51 percent interest for his contribution of a fully executed lease and that [REDACTED] retains a 49 percent interest for its contribution of the petitioner's services as Chief Administrative Officer.

On August 15, 1998, [REDACTED] resolution appoints the petitioner as Chief Administrative Officer and [REDACTED] sign the resolution as organizers [REDACTED] signs the resolution as the sole manager and again as a member, and the petitioner only signs the resolution under members on behalf of [REDACTED] as its president. The petitioner's employment contract with [REDACTED] indicates that as Chief Administrative Officer, she will manage Food Service operations, housekeeping operations, and assistance to the General Manager in policy formation and implementation. The agreement reflects that the petitioner is rendering her services as part of [REDACTED] membership capital and that her compensation will include only allocations of profits.

On May 30, 2000, the petitioner, [REDACTED] the dissolution documents reflect that the petitioner assumed the corporation's only asset, its interest in Sunny Days. On the same date [REDACTED] accepted the petitioner as a 51 percent member [REDACTED] signed the resolution as a member and manager and the petitioner signed the resolution as president of [REDACTED] as a member only.

On September 1, 1998 [REDACTED] entered into a management contract with Welcome Hotels. The agreement is signed by [REDACTED] of [REDACTED] and the petitioner a [REDACTED] of [REDACTED]. Yet notices pursuant to the agreement are to be delivered to [REDACTED] on behalf of Welcome Hotels at [REDACTED] on behalf [REDACTED]. Under the agreement, Welcome Hotels would be responsible for the day-to-day operations of the assisted living facility as an independent contractor of Sunny Days (identified as "Owner" in the agreement). Paragraph 2.5 provides:

EMPLOYEES. The execution of the directives of the management Company relating to the Facility will be the responsibility of an administrator (the "General Manager"). The General Manager shall be an employee of Owner. The Management Company shall assist the Owner in recruiting, hiring, training, promoting, assigning, setting the compensation level of, and discharging all operating and service personnel necessary for the proper operation and maintenance of the Facility, including the General Manager.

Paragraph 2.11 indicates that the management company is responsible for implementing changes in the scope of and manner of providing services offered by the facility when approved by [REDACTED]. Paragraph 2.13 provides that the management company will supervise, direct and maintain the operation of the accounting and management information systems for the facility. Paragraph 2.14 provides that the management company is responsible for assisting in purchasing food, equipment and supplies as well as reviewing and analyzing all contracts.

Noting this agreement, the director requested evidence that the petitioner was involved in the management of [REDACTED]. The director also stated that [REDACTED] reflected that [REDACTED] owned 100 percent of the company.

In response, counsel states:

While the enterprise has engaged the management consulting services of Welcome Hotels the principals in [REDACTED] LC retain overall responsibility for management of the investment. The management company provides day-to-day management services but all corporate policy decisions, financial and budgetary matters, staffing determinations and long term planning are conducted by the principals, including [the petitioner]. Further, [the petitioner] has specific oversight for the nutrition and food services component of the facility which is a critical function for the elderly population served by the facility.

The director determined that this statement did not overcome his concerns. While we do not find that contracting a management company necessarily precludes management by the owners of a business, there are

several factors in this case that lead us to conclude that the petitioner's claim to be taking part in the management of the company is not credible.

First, while the director was not entirely accurate that [REDACTED] tax return show [REDACTED] the sole owner of Sunny Days, that return does contain an unexplained anomaly. Both the 1998 and 1999 tax returns in the file contain two Schedules K-1 for [REDACTED] one for [REDACTED] and one for [REDACTED]. These schedules reflect that [REDACTED] owned 51 percent of the company and that [REDACTED] owned 49 percent. The only inference in the 1999 tax return that these numbers are not accurate is that [REDACTED] sustained 100 percent of the company's loss, with his capital account decreasing from \$16,324 to -\$417,156 while the petitioner's capital account remained at \$429,785. Article VI of the Operating Agreement for [REDACTED] paragraph 1.1(a), provides that profits and losses of the company shall be allocated among the Members in accordance with their respective percentage interests. The record contains no explanation or agreement to explain the allocation of 100 percent of the loss [REDACTED]. Regardless, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the agreement with Welcome Hotels is not an arms length transaction [REDACTED] the majority owner of [REDACTED] and the director of [REDACTED] as the organizer of [REDACTED] and is the founder of [REDACTED] was already managing the [REDACTED] personally leased the first three floors of [REDACTED] before assigning his interest to [REDACTED] involvement in both [REDACTED] and [REDACTED] and their extensive experience in the hospitality industry according to their brief biographies in the record suggest that they will be the ones making the policy decisions regarding [REDACTED]. The record contains no evidence that the petitioner has any experience in this area and the documents purporting to establish her managerial duties are ambiguous and inconsistent.

While the petitioner signed the management agreement as the [REDACTED] the record contains no evidence that she holds that position. The only company resolution in the record regarding her position appoints her as the Chief Administrative Officer and [REDACTED] as [REDACTED]. The petitioner's employment contract includes several job duties that appear to overlap with [REDACTED] responsibilities with the exception of the vague duty to provide assistance to the General Manager with policy formation and implementation. Given the record as a whole, we concur with the director's concerns on this issue.

² The petitioner's name is handwritten while the title is typed.

³ According to publicly available information at the [REDACTED] official website, www.secretary.state.nc.us/corporations, Sunny Days filed annual reports in 2001 and 2002, both listing [REDACTED] as the sole manager of the company.

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.

Beyond the director's final decision,⁴ the petitioner has not demonstrated an at-risk investment. The petitioner submitted evidence of a February 3, 1998 disbursement of \$941,312.64 from a client trust fund. Those funds were deposited with [REDACTED]. On August 11, 1998, the petitioner's attorney transferred the funds to three attorney client accounts at [REDACTED]. One account was in the petitioner's name, the second account was in the name of [REDACTED] and the third account was in the name of the petitioner's son. On August 12, 1998, the petitioner's attorney transferred \$500,000 (the \$478,368.41 in the corporate account plus an additional \$21,631.59 from the petitioner's account) to [REDACTED]. Counsel asserts that these funds were used to pay [REDACTED] first year of rent upfront, reducing that amount from \$630,000 to \$500,000. In support of this assertion, the petitioner submitted the initial lease between [REDACTED] personally and [REDACTED] personally, both already involved with [REDACTED] and [REDACTED]. The May 28, 1997 lease provides that rent for the 70 rooms will be \$750 per room per month, or \$630,000 per year. [REDACTED] increases would occur after the first year. The modification of that lease, dated August 15, 1998, assigns the landlord rights to [REDACTED] and the tenant rights to [REDACTED]. It also provides that [REDACTED] will accept \$500,000 up front in lieu of the \$630,000 for the year paid monthly. Unaudited financial statements reflect \$582,032 in member's equity and \$458,333 in prepaid rent as of September 30, 1998 and no rent payments in 1999, resuming in 2000.

On page three of the director's request for additional documentation, the director requested "evidence that the money is being actively invested in the enterprise, not just sitting in a personal or corporate account. The evidence must clearly demonstrate that it is the petitioner's capital that has been placed at risk." In response, counsel referenced the lease modification. The director did not raise the issue in his final decision.

The record lacks any evidence that the \$500,000 was transferred from the [REDACTED] account. Moreover, the lease and modification thereof lack credibility. First, it [REDACTED] and [REDACTED] both affiliated with the [REDACTED] that initially proposed converting the first three floors of the [REDACTED] into assisted living. The record contains no explanation for why they chose to charge themselves rent of \$630,000. Regardless, the lease is not an arms length transaction. Thus, we cannot evaluate whether the \$630,000 or \$500,000 represents the true value of the lease. While the financial statements reflect no rent payments in 1999, the total rent payments in 2000 are only \$273,750. The record contains no explanation as to why the rent dropped so significantly in that year.

⁴ 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. [REDACTED] 299 F. Supp. 2d 1025, 1043, (E.D. Calif. 2001).

Further, the record contains no explanation of how the \$500,000 were actually used for the benefit of the assisted living facility and job creation. As stated above, it appears that [redacted] and [redacted] already had access to the Days Inn building and were planning the facility as early as 1997. In fact, Schedule 1 of the Operating agreement lists [redacted] contribution to Sunny Days as the fully executed lease of May 28, 1997. The record contains no evidence that [redacted] after receiving the petitioner's \$500,000, spent that money on capital expenses for the assisted living facility. Thus, assuming the petitioner actually paid the rent, and the record contains no transactional evidence that she did [redacted] may have simply taken the petitioner's money for himself without using those funds for job creation. As such, the petitioner has not established a qualifying investment.

Relating to whether the petitioner invested the full \$500,000, 8 C.F.R. § 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) The director denied the petitioner's previous petition because, at the time of filing, the petitioner's corporation had made the investment into [redacted] which was not a wholly owned subsidiary of [redacted]. As noted 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). It is not clear that the petitioner's dissolution of [redacted] has resolved this issue. If we still consider the petitioner's \$500,000 investment in [redacted] in August 1998 as the investment, the problems noted by the director in the previous petition remain. If we consider the investment at the time of dissolution, it is not clear that the petitioner invested the full \$500,000. Even assuming a legitimate agreement in 1999 whereby the losses of [redacted] were all allocated to [redacted] the value of [redacted] capital account decreased in 1998 to \$429,785. The record contains no evidence that [redacted] capital account had increased to \$500,000 or above by [redacted] the date the petitioner dissolved [redacted] and assumed its assets.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

Finally, as stated above in footnote 1, we contacted the [redacted] at the phone number on the petition. The receptionist confirmed that we had reached the [redacted] in Thomasville, but advised that the [redacted] assisted living facility was no longer there. We also called information and were advised that there is no listing in Thomasville for a [redacted] assisted living facility. The petitioner has not advised us that the business has changed locations. Thus, it appears that the new commercial enterprise no longer exists. Section 216A of the Act provides that an alien entrepreneur shall be considered at the time of obtaining the status of an alien lawfully admitted for permanent residence to have obtained such status on a conditional basis. The

alien must file a petition to remove conditions within 90 days prior to the second anniversary of obtaining conditional residence and demonstrate that she has sustained her investment. As the business appears to no longer exist, the petitioner would have nothing to sustain during any conditional residency period.

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.