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U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA 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

Robert P. Wiemann, Director
Administrative Appeals Office

Administrative Appeals Office
U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

DISCUSSION: The preference visa petition was denied by the Director, California 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 a qualifying investment of lawfully obtained funds in a targeted employment area. The director further questioned whether the petitioner had established that he would create the requisite jobs in the next two years.

On appeal, the petitioner submits additional documentation.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), 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).

MINIMUM INVESTMENT AMOUNT

On the petition, the petitioner indicated that the petition is based on an investment in a business, Skyline Food and Gas/Hilltop Liquors (hereinafter Skyline Food) not located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. The petitioner, however, submitted documentation suggesting that the business, located in Dolores County, Colorado, is located in a rural area. On appeal the petitioner has clarified that he seeks the reduced minimum investment amount due to investing in a targeted employment area.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

- (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any

city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), cited with approval in *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

Initially, the petitioner submitted a table of the population estimates for Colorado counties, including Dolores County. The estimated population for that county in July 2000 is 1,844. In his request for additional documentation and final decision, the director concluded that the petitioner had not adequately documented the source of this data. On appeal, the petitioner submits estimates for Colorado counties for April 1, 2000, July 1, 2000, July 1, 2001, July 1, 2002, and July 1, 2003. The highlighted estimates for Dolores County are 1,852 or below. The table indicates that the source of the data is the U.S. Census Bureau. The Warranty Deed, however, indicates that the location of the business, 27963 Highway 184, while in Dolores City, is in Montezuma County. The Sales Tax license issued to Skyline Food is from the County of Montezuma. Thus, the relevant population statistics are for Dolores City in that county.

While the population for all of Montezuma County since 2000 is over 20,000, the regulation quoted above provides that what is relevant is whether Montezuma County is in a Metropolitan Statistical area and whether Dolores City has a population of 20,000 or more. A list of all Metropolitan Statistical Areas (MSAs) is available at www.census.gov. Through that site's "factfinder," the population of a city is also available. This information reveals that Colorado includes four MSAs: Boulder, Colorado Springs, Denver-Aurora, Grand Junction, and Greeley.

Those MSAs include the following counties:

<u>Boulder</u>	<u>Colorado Springs</u>	<u>Denver-Aurora</u>	<u>Grand Junction</u>	<u>Greeley</u>
Boulder County	El Paso County	Adams County	Mesa County	Weld County
		Teller County	Arapahoe County	
		Broomfield County		
		Clear Creek County		
		Douglas County		
		Elbert County		
		Gilpin County		
		Jefferson County		
		Park County		

Montezuma County is not included. Moreover, the "factfinder" function reflects that the City of Dolores has a population of approximately 857. Thus, Dolores City in Montezuma County is a rural area as defined in the regulations. Specifically, it is not either within an MSA or located in a city or town with a population of 20,000 or more. Thus, the minimum investment amount in this case is \$500,000.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien

entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998).

On the petition, the petitioner indicated that he had invested \$500,000 initially on August 13, 2002 with a total investment of \$635,000 as of the date of filing, October 3, 2003. The petitioner also indicated that he owned 100 percent of the business. The petitioner further indicated that the business had \$6,904 in cash, \$635,000 in assets purchased for the business, and \$100,000 in debt financing.

The petitioner submitted a settlement statement dated August 13, 2002 whereby the petitioner and [REDACTED] purchased the location of Skyline Food, [REDACTED] for \$636,756.58. The settlement statement reflects a \$5,000 deposit, a \$100,000 bank loan from Vectra Bank, and \$528,771.45 due at closing. The Deed of Trust also submitted confirms that the \$100,000 loan from Vectra Bank was secured by the property at [REDACTED]. A letter from Vectra Bank dated October 8, 2002 acknowledges a deposit from [REDACTED] in Cambodia on August 9, 2002. A statement from that bank reflects a wire transfer of \$501,980 received August 9, 2002 and debits of \$5,000 on July 19, 2002, \$76 on July 31, 2002, and \$500,000 on August 12, 2002.

The director noted that the petitioner jointly purchased the business with [REDACTED] and concluded that the record lacked sufficient evidence that the petitioner was responsible for the full investment.

On appeal, the petitioner submitted a letter from Vectra Bank asserting that a wire transfer of \$501,980 was deposited into a joint account held by the petitioner and [REDACTED], account number [REDACTED]. The letter continues: "On August 13, 2002, an 'Official Check' for \$528,771.45 was made out to and delivered to [REDACTED] Title Company." The letter does not, however, state that the official check was issued on the petitioner's joint account. In support of this letter, the petitioner submitted a wire transfer receipt documenting the transfer of \$501,980 from Sokimex to account [REDACTED]. The petitioner resubmits the statement for that account documenting the deposit and a debit of \$500,000 on August 12, 2002. Finally, the petitioner submits a copy of the official check, reflecting that the remitter is "Skyline Food and Gas."

The evidence is insufficient to establish that the petitioner made an equity investment of at least \$500,000. The record lacks transactional evidence tracing the funds from the petitioner's joint account with Mr. [REDACTED] to the account from which the official check was debited.

More significantly, assuming the funds used to purchase the store originated from the petitioner, he must also demonstrate that the transaction was an equity investment. Debt arrangements with the new commercial enterprise are non-qualifying. 8 C.F.R. § 204.6(e)(definition of invest). The petitioner indicated on the petition that Skyline Food is a corporation, but provided no articles of incorporation or corporate tax return.² If organized as a corporation, Skyline Food's tax returns should be available and would demonstrate the petitioner's capital contribution to the company (Schedules K-1 if a Subchapter S corporation and/or Schedule L for all corporations). The record also lacks audited balance sheets that would also demonstrate the petitioner's equity interest in Skyline Food. If, despite the claim to be a corporation and [REDACTED] apparent interest in the company, the company is actually organized as a sole proprietorship, the business' finances

¹ Sok Import Export Company, or Sokimex, is a Cambodian company in which the petitioner is a 45 percent owner.

² Colorado's official website, www.sos.state.co.us, does not confirm that a corporation by the name of Skyline Food and Gas currently exists in good standing. Specifically, there are no results for "Skyline Food and Gas" and "The Skyline Foods Corporation" was dissolved November 1, 1999.

would be reflected on the petitioner's personal tax returns. The record, however, lacks any stock certificates, ledgers, tax returns or audited financial statements that might resolve these issues.³

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 Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. at 195. 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). 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*, 22 I&N Dec. at 211. These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted the 1999, 2000 and 2001 Cambodian tax returns for [REDACTED], reflecting that the petitioner is the 45 percent owner of that company. The petitioner also submitted a bank letter asserting that Sokimex has credit available of over \$10 million.

³ While the director did not specifically request these documents, we need not remand the matter as we concur with the director's concerns relating to the issues discussed below and the petitioner has not overcome or adequately addressed those concerns.

The director noted the lack of exchange rates and transactional evidence tracing the path of the funds from Sokimex to Skyline Food. The director further concluded that since a corporation is a separate legal entity from its shareholders, the petitioner could only be credited with 45 percent of the funds transferred by Sokimex.

On appeal, the petitioner submits the transactional evidence discussed above and a certification from Sokimex that it issued the following dividends to the petitioner: \$1,029,126 in 1999; \$1,236,225 in 2000; \$1,916,611 in 2001; \$2,274,920 in 2002; and \$2,038,958 in 2003.

The director is correct that a corporation is a separate legal entity from its shareholders, *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). Moreover, the earnings of Sokimex do not establish the petitioner's personal earnings. See *Matter of Izummi*, 22 I&N Dec. at 195. Nevertheless, the director's ultimate conclusion regarding the petitioner's alleged investment does not follow from this separation principle. The fact that a corporation is a separate legal entity means that had Sokimex itself invested in Skyline Food, the petitioner could not be credited with any of that investment. Thus, the director's 45 percent analysis is flawed. Nevertheless, on appeal, the petitioner has now submitted evidence suggesting that Sokimex issued him dividends of over \$1,000,000 in each of the following months: December 1999, December 2000, and December 2001.⁴ Once a dividend is issued from the corporation to the shareholder, those funds become the assets of that shareholder. Any investment of those funds is the personal investment of the shareholder, not the corporation that issued the dividend.

The tax returns for Sokimex suggest the company was capable of issuing such large dividends. Sokimex reported net income⁵ of approximately \$4,000,000 in 2001, \$2,600,000 in 2000, and \$2,200,000 in 1999. We note, however, that the submission of the petitioner's tax returns would have been more persuasive evidence that the petitioner actually was paid those large dividends as his personal income. Moreover, without Skyline Food's tax returns, the petitioner cannot establish that he, and not Sokimex, is the actual holder of the equity interest in Skyline Food.

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)

⁴ The remaining dividends occurred after the petitioner's alleged investment and cannot be considered the source of those funds.

⁵ While the petitioner has still not provided an exchange rate, the exchange rate for the U.S. dollar to Cambodian Riels was approximately 1:4,000 during 1999 through 2003 according to www.oanda.com.

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.

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.*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

Finally, Forms I-9, verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as pay stubs and payroll records showing the number of hours worked, a petitioner cannot meet his burden of establishing that he has created full-time employment within the United States. *Id.* at 212.

On the petition, the petitioner indicated that he had purchased an existing business. While the law no longer requires that an alien personally establish the new commercial enterprise, the issue of whether he purchased an existing business is still relevant to the issue of job creation as a petitioner must demonstrate that he has created 10 new jobs. On the petition, the petitioner also indicated that the store employed six workers at the time of investment, that Skyline Food currently employed eleven workers, and that another eight jobs would be created.

The petitioner submitted three employment applications dated after the petitioner's alleged investment and the handwritten payroll information for eleven employees. A review of the payroll information reveals that only five of the employees consistently worked full-time.

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*, 22 I&N Dec. at 213. 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.

The petitioner did not initially submit a business plan. In his request for additional documentation, the director requested evidence of the number of employees at the time the store was purchased, Forms W-2, pay stubs, and federal and state quarterly withholding reports. In his final decision, the director concluded that the petitioner had not established that the employees working at Skyline Food were qualifying or that any jobs had been created by the petitioner’s investment. The director further stated that the business plan submitted did not justify the hiring of five additional employees. We find no business plan in the record.

On appeal, the petitioner submits 12 Forms W-2 issued by Skyline Food to its employees in 2003. These forms reflect wages sufficient to cover full-time employment at minimum wage for only three of those employees. The remaining employees earned less than \$7,000 for the year, with most of those employees earning only a few hundred dollars during the year.

On appeal, counsel requests an unspecified amount of time to submit a business plan and Forms I-9. As of this date, approximately five months after the appeal was filed, this office has received nothing further. Regardless, 8 C.F.R. § 204.6(j)(4)(i)(B) placed the petitioner, who is represented by counsel, on notice that a business plan is required if 10 new positions have not already been created. Moreover, in the present matter, the petitioner has been put on notice of the lack of a business plan and Forms I-9 and has been given an opportunity to respond to that deficiency. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Under the circumstances, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted a business plan and Forms I-9 to be considered, he should have submitted the document initially or in response to the director's request for evidence. *Id.* Thus, even if we had received a business plan on appeal, we need not consider it at this stage.

Finally, we note that the petitioner's entire alleged investment was used to purchase an existing business. The record reveals no available cash for capital improvements. The petitioner has a heavy burden to establish why it is likely that an existing convenience store, with no capital improvements, will create 10 new full-time jobs in two years.

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.