U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B1

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 30 2005

SRC 05 007 51733

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.

Mari Johnson

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 meet the employment creation provisions. Specifically, the director determined that the petitioner had not demonstrated that the new commercial enterprise was a troubled business or that the petitioner was maintaining previous employment.

On appeal, counsel asserts that the director made an "uncharacteristic legal error." The petitioner submits additional evidence relating to the financial situation of the new commercial enterprise prior to the petitioner's purchase of that 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 filed the petition after November 2, 2002, he need not demonstrate that he 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 unless investing in a troubled business as defined in the regulation 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 a business, [redacted][1] 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.

The regulation at 8 C.F.R. § 204.6(j)(4) states:

---

[1] The petitioner indicated on the Form I-526 petition that the name of the new commercial enterprise was [redacted] The record, however, contains no evidence that the business is incorporated. Rather, the record contains a partnership agreement. All of the remaining evidence reflects that the name of the business is [redacted]

(i) To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

The regulation at 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.

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. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

The regulation at 8 C.F.R. § 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

On the petition, the petitioner indicated that he had purchased an existing business, but that there were no employees at the time of his investment. He further indicated the business then employed 33 "full-time" workers. In his cover letter, counsel asserted that the petitioner had "saved" 33 jobs. Counsel further asserted that "future expansions and investments are anticipated once he takes full management over his investment."

The petitioner submitted a letter from Vice President for the of The asserting that the company served as the asset manager for the purchased by the petitioner prior to the purchase and that at "the time of sale, only 43 employees remained on the payroll." The petitioner submitted payroll records for reflecting the following information:

Period	Number of Employees	Number of Full-time Employees (70+ hours)
6/26-7/9/04	33	4
5/1-5/21/04	33	6[2]
3/20-4/9/04	33	13[3]

In her October 30, 2004 request for additional evidence, the director requested a clarification of the claim that the petitioner saved 33 jobs as the letter from Mr. asserting that there were 43 employees at the time of sale. The director further noted that the payroll records reflected fewer than 33 full-time jobs and that the number of full-time employees was decreasing. The director acknowledged the submission of documentation for 10 qualifying employees, including Forms I-9 and employment records prior to and after the investment, and a comprehensive business plan. The director further stated:

> If the business has been established through a capital investment in a troubled business, you must submit evidence that: 1) the business meets the definition of a "troubled business;" and 2) the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. *Submit photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan.*

(Emphasis added.) Rather than submit all of the evidence specifically requested, the petitioner submitted evidence that . purchased the hotel with a $9.2 million mortgage on July 31, 1998, that Avalon subsequently defaulted on that mortgage and that Midland Loan Services purchased the hotel at auction for $3,915,000 on February 1, 2000. As counsel notes, subsequently

---

[2] The director concluded this number was seven.
[3] The director concluded this number was 15.

purchased the hotel in February 2004 for $2,066,949.03. Counsel asserts that this evidence demonstrates "a net loss of about 23.5% in net worth" during a 24-month period.

Finally, the petitioner submitted the December 12, 2003 employment records for Prism Hospitality, LP relating to the address of the new commercial enterprise. Counsel now asserts that Prism managed the hotel until Midland Loan Services could sell it. The record contains no evidence of a relationship between Prism and Plasencia. The employment records reveal 50 employees, 13 of whom worked full-time. Counsel asserts, however, that the petitioner maintained the employment at the time of investment because the petitioner "inherited no employees" because at the time of sale, "Prism's management contract ended and the management staff was recalled."

The director noted that the definition of "troubled business" requires a comparison of financial losses to net worth. The director further noted the lack of evidence regarding the hotel's losses during a 12- or 24-month period prior to filing the petition. Finally, the director rejected the argument that there were no jobs at the time of investment.

On appeal, counsel asserts that the director should not have "isolated" losses from net worth. Counsel further asserts that the purchase price in an arms length transaction is a fair assessment of net worth and that the "loss" in net worth is a matter of subtraction. Counsel's assertions are not persuasive in light of the unambiguous accounting terms used by the regulations. Both "net loss" and "net worth" are common accounting terms with very specific definitions. Net worth is "total assets less total liabilities." Dictionary of Accounting Terms 295 (3rd ed. 2000). Thus, this number must be obtained from a balance sheet and may not be inferred from the market value, even in an arms length transaction. Net loss is the "amount by which total costs and expenses exceed total revenue for the accounting period." *Id.* at 293. Thus, while it is plausible that during a given period, a company's net worth might decrease by its net loss if its assets, liabilities and capital otherwise remained unchanged, it is not necessarily the case. For example, a shareholder could withdraw his capital, potentially decreasing net worth during a year that the company showed a profit. Thus, we will not infer the exact net loss from the decrease in market value.

On appeal, the petitioner also attempts to establish the hotel's net worth and net losses through unaudited financial statements prepared by an accountant [redacted] who concedes basing the financial statements on information received from [redacted] The petitioner provides no basis for concluding that [redacted] has any firsthand knowledge of this information for the years prior to its purchase of the hotel.

The new financial statements include a profit and loss statement "as of 12/31/2003." This characterization is unhelpful, as a profit and loss statement should cover a specific accounting period, not a date certain. *See id.* at 221 (definition of income statement, which is another term for a profit and loss statement according to this definition). We will presume that this statement covers the 12-month period ending December 31, 2003. The statement reflects a net loss of $624,950. While the accountant concedes that "retained earnings" are "equity," his balance sheet includes retained earnings under the heading of liabilities. As noted by the accountant, the retained earnings decreased from -$499,191 at the beginning of 2003 to -$1,124,141 at the end of that year, a decrease equal to the net loss during that period. Mr [redacted] concluded that the "cumulative retained earnings (equity) of the entity dropped by 28.71% at the end of 2003." Mr. [redacted] explains that he determined this percentage of loss "using a depreciation rate of twenty years straight line (less land) and an interest cost of 7% on a note balance of $3,915,000 as reported on the deed of trust." Mr. [redacted] provides a chart supporting his conclusion.

Mr. [redacted] assertion that the hotel's equity dropped by 28.71 percent may be true, but it does not establish that the entity was a troubled business as defined in the regulations. The regulation requires that the net loss, alleged to be $624,950 during a 12-month period, be at least 20 percent of the net worth before the loss. The net worth before the loss was a negative number, according to Mr. [redacted] $499,191. Twenty percent of a negative number, however, is a negative number. This problem is more than semantic. It is clear that the regulations require that the size of the loss relate to the size of the net worth; thus, a company with a larger net worth must suffer a larger loss to be considered troubled. (A company with a pre-loss net worth of $5,000,000 must suffer a loss of $1,000,000 to be considered troubled while a company with a pre-loss net worth of $5,000 need only suffer a loss of $1,000 to be considered troubled.) This concept breaks down for companies with a negative net worth. As such, the unfortunate reality is that the regulations simply do not provide a meaningful method for determining whether a business with a negative net worth qualifies as a "troubled business." While this may be a weakness with the regulations as written, this office does not have the authority to reject or revise the regulatory definition of "troubled business." We are bound by the regulation as written, with little interpretive discretion when the language of the regulation is so unambiguous.

Regardless, even if there were a means for determining that the hotel was a troubled business at the time of investment, we concur with the director that the petitioner has not demonstrated the maintenance of all 43 jobs referenced in the letter from Plasencia. Counsel is not persuasive in asserting that all of those jobs failed to exist with the termination of Prism's contract. At issue is the number of positions, not who fills them. Regardless, a comparison of the names of Prism's employees with the names of Perfect Hospitality's employees reveals that the vast majority of employees remained at the hotel after the purchase. It is clear that Perfect Hospitality purchased an operational business. Thus, even assuming that Perfect Hospitality purchased a troubled business, the petitioner must establish that he will maintain the positions that existed at the time of investment. While the troubled business regulations do not distinguish between full-time and part-time positions, the statute clearly favors full-time positions. As such, the decrease in full-time positions at the hotel is of concern.

While not raised by the director, the regulation at 8 C.F.R. § 204.6(j)(4)(ii) provides that if the employment-creation requirement will be met through preservation of employment in a troubled business, the petitioner must submit a "comprehensive business plan." 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 maintain the jobs.

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, the decision 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 record does not include a business plan, merely counsel's unsupported assertion that the petitioner plans "future expansions and investments." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, we cannot determine whether it is reasonable to conclude that the petitioner has the potential to maintain any employment for two years.

Finally, the petitioner failed to provide Forms I-9 for its employees as requested by the director in her request for additional evidence. As such, we cannot determine whether these 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.

ORDER: The appeal is dismissed.