



U.S. Citizenship  
and Immigration  
Services

B7

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: FEB 05 2009  
SRC 06 263 51614

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

*John F. Grissom*  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition, which 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 and that he had created or would create at least 10 *new* jobs.

On appeal, counsel submits a brief and documentation, much of which was already part of the record of proceeding. For the reasons discussed below, while counsel asserts that the director's decision was arbitrary and capricious, we find the director's reasoning to be legally and factually sound. While the director failed to cite *Matter of Soffici*, 22 I&N Dec. 158 (Commr. 1998), her statutory and regulatory analysis is fully compliant with that precedent decision.

The 21<sup>st</sup> 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 petition was filed 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. Thus, the portion of *Matter of Soffici*, 22 I&N Dec. at 166-68, that deals with this issue is still relevant.

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] 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.

**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).

The petitioner organized [REDACTED] May 12, 2006. [REDACTED] then purchased two dry cleaning businesses. On October 20, 2006, the director issued a request for additional evidence, asserting: "The petitioner is investing in existing laundromats."

In response, counsel asserts that the director misunderstood the "corporate structure and legal status of [REDACTED]" Counsel notes that [REDACTED], a limited liability company, "did not exist prior to May 12, 2006." Counsel further notes that [REDACTED] purchased all of the assets of the two laundromats. Counsel continues:

**Both previous owners sold on the condition that their companies would cease to exist.** [REDACTED] did not join the previous owners in business and did not simply take over the running of the business. Neither previous owner is involved in any way, shape or form in [REDACTED] By purchasing all of the assets of the previous companies, [the petitioner] ended the corporate lives of the other two companies. Thus, it is incorrect to state that the Petitioner 'invest[ed] in two existing laundromats.' In effect, [the petitioner] extinguished the two businesses and created a new one.

Alternatively, counsel asserts that the previous corporate owners were both established after November 29, 1990 and that neither location existed as a laundromat prior to November 29, 1990. The petitioner submitted the asset purchase agreements for the two locations, the lease assignments, documentation regarding the formation of the selling corporations and letters from the landlords affirming that the locations were not laundromats prior to November 29, 1990.

The director's final decision evaluates the petitioner's investment as an investment into two existing businesses.

On appeal, counsel reiterates prior assertions. Counsel is not persuasive. *Matter of Soffici*, 22 I&N Dec. at 166, involved a newly incorporated corporation that purchased a hotel from its previous owners. As in the case before us, the previous owners did not retain any ownership interest in the hotel. In that case, the AAO stated:

Although [REDACTED] was incorporated in 1997, it is the job creating business that must be examined in determining whether a new commercial enterprise has been created. The [REDACTED] purchased by [REDACTED] had been in operation for approximately 24 years and was an ongoing business at the time of purchase. [REDACTED], doing business as [REDACTED], has merely replaced the former owner.

*Id.* We see no material difference between the fact pattern in that case and the one in the matter before us. In the matter before us, both asset purchase agreements characterize the sellers as operators of laundromats in the present tense. Both agreements also reference the purchase of "goodwill," the businesses' reputation that increases the ability to earn income in excess of the income that could be expected from a collection of assets. Black's Law Dictionary 703 (7<sup>th</sup> ed. 1999). The agreement with [REDACTED] explicitly states that the seller will continue to conduct business through the closing date. Thus, it is clear that [REDACTED] purchased two ongoing existing businesses.

In light of the above, we will consider the petitioner's investment as the purchase of existing businesses. Moreover, the petitioner's purchase of two laundromats and continuation of the businesses as laundromats was not a sufficient restructuring such that the businesses were newly established. "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. at 166.

Thus, the petitioner must establish that the laundromat businesses were established by someone in one of the ways set forth in the regulation at 8 C.F.R. § 204.6(h), quoted above, after November 29, 1990. The petitioner submitted two letters relating to this issue. First, [REDACTED] Proprietor and Manager of [REDACTED] asserts in a letter dated November 28, 2006, that he has managed [REDACTED] since before the location had a laundromat and that, to the best of his knowledge, the first laundromat opened less than ten years ago. In addition, [REDACTED] Property Manager of [REDACTED]

██████████, asserts that he manages ██████████ and that his records reflect that the first laundromat in that location was opened in 1999.

Thus, the petitioner has established that the laundromats are “new” as defined at 8 C.F.R. § 204.6(e). Nevertheless, in considering whether or not the petitioner has created 10 “new” jobs, we must take into account that the petitioner purchased two ongoing, existing businesses.

### **EMPLOYMENT CREATION**

The regulation at 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.

The regulation at 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. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff’d* 345 F.3d 683 (9th Cir. 2003) (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 U.S. Citizenship and Immigration Services (USCIS) 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.*

In *Matter of Soffici*, 22 I&N Dec. at 167, the AAO noted that a worksheet documenting the employment at the hotel at the time of that petitioner’s investment reflected 29 employees. The AAO then concluded that the documentation reflecting that the hotel currently employed 20 employees did not establish the addition of 10 new, full-time positions.<sup>1</sup> Thus, this decision makes it clear that where the petitioner purchases an existing business, even if it replaces the former ownership, the petitioner must demonstrate 10 new jobs beyond those positions that existed at the time of sale.

On the Form I-526, the petitioner indicated that there were no employees when he made his investment, that the new commercial enterprise now employed five employees and that he would create an additional five positions. The director noted that the petitioner had purchased existing laundromats and requested evidence that the petitioner had created or would create 10 employment positions in addition to those that existed when he made his investment.

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<sup>1</sup> The AAO also noted that the petitioner had not even demonstrated the maintenance of the positions prior to the sale, which would only have been permissible evidence of job creation if the petitioner in that case had invested in a troubled business. See 8 C.F.R. § 204.6(j)(4)(ii).

In response, counsel notes that neither asset purchase agreement contains a provision relating to the disposition of employees. Counsel explains that the absence of such provisions is because both businesses “were family-owned and operated and all work required by the businesses were performed by the owners or their family members in an effort to reduce costs.” Counsel further asserts that while the businesses sporadically hired part-time help, at the time the petitioner purchased these businesses, neither had any employees. Thus, counsel concludes that all employees at the laundromats represent new employment positions.

The petitioner submitted a business plan explaining the need for seven employees and an amended business plan asserting that in order to encourage proper use of the facilities by customers and address the concerns of night managers working alone, the laundromats would actually require 14 employees. The amended plan indicates that turnover has been an issue and that while the company has hired 18 employees, it never had more than 12 working at any one time. The amended plan also suggests that, at least in the past, some employees were not placed on the “official payroll.”

The petitioner also submitted ten Forms I-9 and a payroll statement for an undefined period ending December 3, 2006 reflecting ten employees. If the records reflect a one-week period, all employees worked at least 35 hours. If the records reflect a typical two-week period, however, none of the employees worked the requisite 70 hours to be considered full-time as defined at 8 C.F.R. § 204.5(e). Moreover, this payroll record, which shows each employee being paid \$7 per hour, is not consistent with the amended business plan that states each employee receives minimum wage with managers earning between 25 and 50 cents more per hour.

The director concluded that even if the laundromats were previously family owned and operated businesses, the family members were likely to have been paid employees and that the petitioner had still failed to submit evidence establishing the number of employees at the time of his investment. Thus, the director concluded that the petitioner had not demonstrated that he had created or would create an additional 10 jobs.

On appeal, counsel notes that the original business plan indicated that seven employees were required to staff the laundromats with one employee at all times. Counsel then asserts that the amended plan “called for an expansion of the laundromats’ hours of operation and a dramatic increase in its services over the next year” which would require an additional four employees. Specifically, counsel asserts that the petitioner is considering adding shoe repair services, additional vending machines and an automatic teller machine (ATM). Counsel reiterates his prior assertions that neither laundromat previously employed any employees, asserting that requiring documentation from the previous businesses is unreasonable.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). It is the petitioner’s burden to meet every element of eligibility, including the creation of 10 new jobs. The

replacement of one employee with another employee does not demonstrate the creation of a new job regardless of whether the original employee was a family member of a previous owner or not. The business plan states that the bare minimum staffing level, one employee at each location at a time, requires seven employees. Contrary to counsel's implication, the business plan does not suggest that the petitioner greatly expanded the hours of either location. The plan suggests that the larger location was already being operated 24 hours a day and the petitioner added only a single hour to the smaller location. Given this information, counsel's unsupported assertion that the two previous owners did not employ any employees is insufficient.

Nor do we find that the director's requests were unreasonable. Given that the petitioner's purchase of the laundromats immediately preceded the filing of the petition, it appears that the petitioner's investment was conducted with the intent to seek benefits pursuant to section 203(b)(5) of the Act. As the statute unambiguously requires the creation of 10 jobs, the petitioner was on notice of that requirement and could have negotiated for the company's current employment records or, if the company truly had no employees, tax returns showing no wages or cost of labor. The regulations relating to establishing the expansion of an existing business, 8 C.F.R. § 204.6(j)(1)(iii), or that a business is a "troubled business" as defined at 8 C.F.R. § 204.6(e) clearly contemplate that evidence from predecessors-in-interest, such as employment records or evidence of net worth, will be required to demonstrate eligibility.

We acknowledge that the petitioner submitted a business plan. A credible business plan, however, is evidence of future employment plans, rather than evidence of employment already created. The single payroll submitted to the record for an unspecified number of weeks ending December 3, 2006 does not establish that [REDACTED] employed 10 full-time employees. Moreover, as stated above, the wages listed on the payroll are inconsistent with the wages claimed in the business plan. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Forms I-9, while evidence relating to whether any employees are qualifying, cannot establish that the employee is actually employed or employed full-time. *Matter of Ho*, 22 I&N Dec. at 212. Given the above inconsistencies, the business plan is not entirely credible. Moreover, the plan only affirms a need for 14 employees plus and additional two janitorial and repair staff that may not be permanent full-time employees. As the original plan indicated that seven employees at the minimum were required to staff the laundromats, it is not clear that 14 employees would represent the creation of 10 new jobs.

In light of the above, the petitioner has not established that he has created or will create 10 new full-time positions.

### **SOURCE OF FUNDS**

The regulation at 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.

Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Matter of Izummi*, 22 I&N Dec. 169, 195 (Commr. 1998). 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 Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 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*, 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).

The record establishes that the petitioner won a large lottery prize from the New York State Lottery in 2004. After taxes, the prize amounted to more than \$5,000,000. Thus, the petitioner has established that he had the resources to make a \$500,000 cash investment. As stated above, however, the petitioner must provide documentation tracing the path of his funds. *Matter of Izummi*, 22 I&N Dec. at 195. However reasonable it may be to presume that the petitioner is the source of the funds, it is the petitioner’s burden to trace all funds back to his personal account. *Id.*

The asset purchase agreement and Notice of Sale, Transfer or Assignment in Bulk for the purchase of [REDACTED] from [REDACTED] reflect that the purchase price was \$180,000. The agreement also indicates that the seller’s lawyer for the transaction was [REDACTED]. The petitioner’s attorney for the transaction was [REDACTED]. The petitioner submitted three checks from an attorney trust account with [REDACTED] all issued on June 6, 2006. The checks were issued to [REDACTED] for [REDACTED].

\$194,300, "[REDACTED]" for \$3,359.16 and the New York State Department of Taxation and Finance for \$628.13. The petitioner also submitted a check from [REDACTED] to Vested Business Brokers for \$18,000 also dated June 6, 2006.

The asset purchase agreement between the petitioner and [REDACTED] reflects an original purchase price of \$330,000, amended to \$320,000. While the original agreement called for the petitioner to obtain financing from Alliance, a subsequent amendment indicated that the petitioner would pay cash. The petitioner also submitted the lease assignment for the location identifying [REDACTED] as the landlord. The petitioner submitted the following checks:

<u>Date:</u>	<u>Issued by:</u>	<u>Issued To:</u>	<u>Amount:</u>
June 8, 2006	[REDACTED]	[REDACTED]	\$1,250
June 8, 2006	[REDACTED]	[REDACTED]	\$77,468.90
June 8, 2006	[REDACTED]	[REDACTED]	\$5,258.23
June 8, 2006	[REDACTED]	[REDACTED]	\$4,258.23
June 8, 2006	[REDACTED]	[REDACTED]	\$1,256.25
June 8, 2006	[REDACTED]	[REDACTED]	\$28,500
June 9, 2006	[REDACTED] Trust Account	Vested Business Brokers	\$32,000
June 9, 2006	[REDACTED]	[REDACTED]	<u>\$11,787</u>
Total:			\$161,778.61

The petitioner also submitted a check issued by [REDACTED] to the petitioner on June 8, 2006 for \$4,000. As these funds were transferred to the petitioner, they cannot be considered part of an investment by the petitioner.

The director concluded that the checks relating to [REDACTED] did not total \$320,000 and noted the lack of evidence tracing the funds in the attorney trust account back to the petitioner.

On appeal, counsel reiterates that the asset purchase agreements establish the purchase price for each laundromat and notes that purchase contracts are acceptable evidence of an investment pursuant to 8 C.F.R. § 204.6(j)(2)(ii). Counsel concludes that the contracts, which provide the purchase price and the parties, are sufficient evidence of the petitioner's investment. In a footnote, counsel acknowledges that one check appears to have been omitted from the record but asserts that the absence of this check "should not, however, disproportionately taint the rest of the convincing and credible evidence of the business's purchase price." The petitioner does not, however, submit a copy of this previously omitted check on appeal. Finally, counsel concludes that the petitioner's signature

on the Asset Purchase Agreements, Bills of Sale and escrow agreements establish that the petitioner was the only source of the funds.

As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Regardless of how “reasonable” it is to conclude that the funds in escrow were transferred there by the petitioner, it is the petitioner’s burden to provide evidence tracing the path of those funds, such as cancelled checks or wire transfer receipts. Without such evidence, the petitioner cannot meet his burden. *Matter of Izummi*, 22 I&N Dec. at 195.

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.