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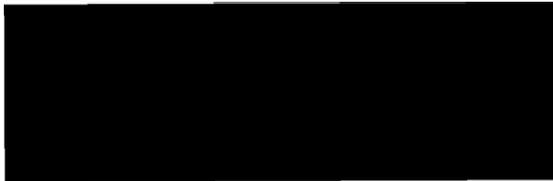
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 15 2009
SRC 07 155 52107

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:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had invested in a "new" commercial enterprise as defined at 8 C.F.R. § 204.6(e) or that he would create the necessary employment above the 14 full-time jobs that already existed at the business.

On appeal, counsel asserts that the regulation relating to the removal of conditions on residence, 8 C.F.R. § 216.6(4)(i), reveals that an alien may complete the establishment of the "new" commercial enterprise during the conditional period and that the petitioner's business plan adequately demonstrates that he will create at least 10 new jobs.

For the reasons discussed below, two precedent decisions not cited by counsel support his assertion that the petitioner need only demonstrate that he will expand the commercial enterprise during the two-year conditional period. Moreover, we concur with counsel that the business plan submitted explains the need for an additional ten employees. The record, however, lacks evidence of the petitioner's ownership and investment in the new commercial enterprise identified on the Form I-526, nor is the new commercial enterprise identified on the Form I-526 the wholly owned subsidiary of the company in which the petitioner did invest. Moreover, the record lacks evidence of the source of the funds invested by the petitioner's co-investors as required by 8 C.F.R. § 204.6(g). Finally, the record contains inconsistent evidence regarding the purchase of the hotel. Thus, the petition will be remanded to the director to resolve these issues.

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 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 that the commercial enterprise is "new" as defined at 8 C.F.R. § 2-04.6(e) and the creation of 10 new jobs.

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, Plaza Inn ABQ, LLC, Federal Employer Identification Number (FEIN) [REDACTED]. The petitioner does not assert that Plaza Inn ABQ is located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

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.)

The regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

The regulation at 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).

As stated above, 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. This amendment did not, however, eliminate the requirement that the commercial enterprise be

“new.” Thus, we find that 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises originally established by the petitioner or someone else prior to November 29, 1990.

The petitioner formed Plaza Lodging, LLC, not the commercial enterprise identified on the Form I-526, on November 15, 2006. Plaza Lodging, LLC and Lakewood International, LLC jointly purchased the Plaza Inn, a hotel. The petitioner then organized Plaza Inn ABQ, LLC to run the hotel although it does not appear that any significant assets, such as the hotel, were transferred to Plaza Inn ABQ, LLC. The petitioner has no direct interest in Plaza Inn ABQ, LLC; rather, it is owned by Plaza Lodging, LLC and Lakewood International, LLC. The petitioner concedes that the hotel was built prior to November 29, 1990. It is uncontested that the job creating business is the proper entity to be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Comm’r 1998). Thus, the issue is whether the petitioner or anyone else “established” the hotel purchased pursuant to the means discussed at 8 C.F.R. § 204.6(h) after November 29, 1990.

Initially, counsel asserted that the hotel employed eight full-time and 24 part-time employees prior to the petitioner’s investment, which counsel equates to 20 full-time employees. Counsel then asserts that the hotel now employs 26 full-time and five part-time employees, which counsel equates to 28 full-time positions. As 140 percent of 20 is 28, counsel concluded that the petitioner had already expanded employment by 40 percent. The regulation at 8 C.F.R. § 204.6(h)(3) requires an expansion of employment generally, not an expansion of full-time employment. We will not read extra language into that provision and note that a separate provision, 8 C.F.R. § 204.6(j)(4), still requires the petitioner to establish that he has created or will create 10 new full-time jobs. Thus, according to counsel’s initial assertion, employment at the hotel actually decreased from 32 to 31.

Counsel further asserted that the petitioner would expand the Earnings Before Interest and Amortization¹ (EBIDA) by more than 40 percent. EBIDA, however, has no relation to net worth, which is an accepted accounting term that means total assets less total liabilities. Barron’s Accounting Dictionary 295 (3rd ed. 2000). The record does not contain any past or projected balance sheets or tax returns, Schedules L, reflecting the commercial enterprise’s past or projected total assets and liabilities. Thus, the petitioner has not established what the enterprise’s net worth is and has not projected any increase in net worth in the next two years. In subsequent submissions, counsel has focused solely on the assertion that the petitioner will expand employment by more than 40 percent.

Plaza Lodging, LLC and Lakewood International, LLC purchased the hotel in January 2007. In response to the director’s request for additional evidence, the petitioner submitted payroll documentation for the hotel for June 2006 through August 2007. In December 2006, the last period for which the prior owner calculated payroll, the hotel employed 31 employees total. On April 24 2007, when the petition was filed, the hotel employed 36 employees. In August 2007, the most recent payroll available, the hotel employed 37 employees. As 140 percent of 31 is approximately

¹ Counsel simply uses the acronym “EBIDA.” EBIDA stands for Earnings Before Interest Depreciation and Amortization. See www.investopedia.com/terms/e/ebida.asp (accessed December 24, 2008 and incorporated into the record of proceedings).

43, the employment at the hotel had not increased by 40 percent as of the date of filing or even August 2007.

Citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971), the director concluded that the petitioner had not established the commercial enterprise as "new" as of the filing date. On appeal, counsel notes that an alien who adjusts status based on an approved Form I-526 receives only conditional status and must petition to remove those conditions pursuant to the regulation at 8 C.F.R. § 216.6. As noted by counsel, the regulation at 8 C.F.R. § 216.6(c)(4)(i) requires an alien to submit evidence that the commercial enterprise was established, which may include tax returns. Counsel concludes that this requirement would be unnecessary if the commercial enterprise already had to be established at the Form I-526 stage. Tax returns, however, would not necessarily demonstrate the type of restructuring or expansion mandated under 8 C.F.R. § 204.6(h). As the regulations at 8 C.F.R. §§ 204.6(h) and 204.6(j)(1) require so much more evidence than the regulation at 8 C.F.R. § 216.6(c)(4)(i), we are not persuaded that the regulation at 8 C.F.R. § 216.6(c)(4)(i) resolves this issue.

Counsel further notes that *Matter of Katigbak*, 14 I&N Dec. at 49, does not involve section 203(b)(5) of the Act or a section of law that leads to conditional status. Counsel is not persuasive in suggesting that *Matter of Katigbak*, 14 I&N Dec. at 49, has no relevance to section 203(b)(5) of the Act. Significantly, it was cited in *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998) for the proposition that an alien must establish eligibility as of the date of filing. Nonetheless, while not referenced by counsel, *Matter of Izummi*, 22 I&N Dec. at 198, contains language that supports counsel's position. In 1998, an alien still had to personally establish the new commercial enterprise. Section 203(b)(5) of the Act (1990). In *Matter of Izummi*, the alien had purchased an interest in a partnership that he had not created, AELP. The AAO concluded that because the alien had not created the partnership, he must "demonstrate that he *will* restructure or reorganize AELP to the degree that a new business *will* result, or he must demonstrate that he *will* expand AELP's net worth or number of employees by 40 percent." *Id.* at 198. (Emphasis added.) *Matter of Izummi*, 22 I&N Dec. at 198, is a designated precedent decision which is binding on this office except as modified or overruled by later precedent. 8 C.F.R. § 103.4(c).

Similarly, in *Matter of Soffici*, 22 I&N Dec. at 166, the AAO noted that the alien had purchased an existing hotel. The AAO stated that it is the job creating business that must be examined in determining whether a new commercial enterprise has been created and noted that the alien did not "claim that he *will* expand the hotel by 40 percent." (Emphasis added.) This decision has also been designated as a precedent and is binding on this office. 8 C.F.R. § 103.4(c).

In light of the above, we withdraw the director's finding that the alien must document that he has already expanded the net worth or employment by 40 percent as of the date of filing. The business plan projects hiring an additional 20 employees as of January 1, 2008, which would increase the employment at the hotel by 40 percent. Thus, we withdraw the director's conclusion that the record before him did not project that the commercial enterprise would be sufficiently expanded in two years.

That said, January 1, 2008 has now passed. Thus, on remand, the director may inquire as to how the business plan has progressed.

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).

The December 2006 payroll for the previous owner shows 10 full-time employees. The most recent payroll for the hotel, covering August 2007, shows 26 full-time employees. The petitioner, however, must create at least 10 full-time continuous, permanent positions. *Id.* Seasonal employees cannot be included. *Id.* We note that in August 2006, the previous owner employed 18 full-time employees. The petitioner has not demonstrated how many of the new positions are seasonal and how many are permanent.

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. 206, 213 (Comm’r 1998). 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 initially submitted a business plan projecting that superior marketing, renovations and a new Chinese restaurant would warrant the hiring of an additional 19 to 20 employees. In his request for additional evidence, the director provided the requirements for a sufficient business plan as set forth in *Matter of Ho*, 22 I&N Dec. at 213, but did not explain what was deficient about the business plan submitted.

In response, the petitioner submitted a more detailed business plan. The director concluded that the business plan did not “clearly show that upgrades and improvements to the hotel would require the services of at least 10 additional full-time employees.” The director did not, however, explain why the petitioner’s assertions that a new Chinese restaurant would not require additional employees were not credible.

That said, the business plan projects that all new employees, including the new restaurant staff, would be hired as of January 1, 2008, a date which has passed. The petitioner's response to the director's request for additional evidence, received in August 2007, includes invoices for renovations, none of which involve the construction of a new restaurant.² Moreover, the renovations and construction of a new restaurant call for an investment of an additional \$300,000. The record contains no evidence that the petitioner has these additional funds that could be invested or, if not, the projected lawful source of those funds. Thus, on remand, the director shall request evidence as to the progress of the projections in the business plan and the source of any additional funds to be invested. The director shall also inquire as to the number of new employees who will be seasonal employees. Also, if the director has specific concerns regarding the business plan, he may raise those.

ADDITIONAL ISSUES TO BE RESOLVED ON REMAND

The regulation at 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 new commercial enterprise identified on the Form I-526 is Plaza Inn ABQ, LLC. The petitioner, however, invested his funds into Plaza Lodging, LLC, which jointly purchased the hotel with Lakewood International, LLC. Exhibit A to the Articles of Organization for Plaza Inn ABQ, LLC reveals that the Lakewood International, LLC and Plaza Lodging, LLC are the only two members of Plaza Inn ABQ, LLC. Thus, the petitioner has no interest in the new commercial enterprise identified on the Form I-526. Even if we were to consider Plaza Lodging, LLC as the new commercial enterprise due to the petitioner's investment in that entity, Plaza Inn ABQ, LLC is not a wholly owned subsidiary of Plaza Lodging, LLC. Thus, under those circumstances, Plaza Inn ABQ, LLC could not be considered part of the new commercial enterprise. 8 C.F.R. § 204.6(e) (definition of commercial enterprise). While not previously requested by the director, the federal tax returns for both companies, including all schedules, would document ownership in each company as well as the capital accounts of the members. The returns would also reflect salaries paid by each company and

² We have reviewed the hotel's website, <http://www.plazainnabq.com/>. The only dining referenced is a continental breakfast at the hotel and JB's Family Restaurant located "adjacent" to the hotel which serves "comfort food," including pot roast and chicken taco salad rather than Chinese food. See <http://www.plazainnabq.com/dining/index.cfm> (accessed on April 7, 2009 and incorporated into the record of proceeding).

the companies' assets and liabilities, indicating whether the invested funds had been made fully available to the job creating entity as required by *Matter of Izummi*, 22 I&N Dec. at 179.

In addition, the regulation at 8 C.F.R. § 204.6(g)(1) permits multiple investors, including those who are not seeking classification under section 203(b)(5) of the Act, but requires "that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means." The record does not contain, and the director never requested, evidence of the lawful source of the funds invested by [REDACTED] and Lakewood International, LLC.

Finally, the record is inconsistent regarding the purchase of the hotel. Lakewood International, LLC signed the initial purchase agreement for the hotel on September 6, 2006. The "Amended and/or Supplemented Escrow Instructions" dated December 5, 2006, amended the buyer's vesting provisions to include Plaza Lodging, LLC as tenants in common with Lakewood International, LLC. The Deed of Trust for the mortgage lists both Lakewood International, LLC and Plaza Lodging, LLC. The record, however, contains two closing statements prepared January 9, 2007 for a closing on January 5, 2007, one listing the buyer as Plaza Lodging, LLC and the other listing the buyer as Lakewood International, LLC. The total consideration listed in the two statements differs. The record does not explain this discrepancy.

In light of the above, the matter is remanded to the director to request the following:

- Current employment documentation including payroll documents and quarterly employer returns,
- Evidence of the petitioner's commitment to construct a new Chinese restaurant, which had been projected to have been completed by January 2008,
- If the Chinese restaurant has not been completed, evidence that funds had been committed to fund the construction of the restaurant as of the date of filing,
- Evidence of the source of funds invested by [REDACTED] and Lakewood International, LLC,
- Federal tax returns, including all schedules, for both Plaza Inn ABQ, LLC and Plaza Lodging, LLC, back through 2006, and
- Evidence explaining the two inconsistent closing statements.

After considering the petitioner's response, if any, the director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.