



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF B-S-

DATE: MAY 3, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) § 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference employment based classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Associate Director, Field Operations Directorate, denied the petition on behalf of the Immigrant Investment Program Office (IPO). The Associate Director concluded that the Petitioner had not established that the investment vehicle qualified as a “new” commercial enterprise and that he had created or would create the necessary number of full-time jobs.

The matter is now before us on appeal. In his appeal, the Petitioner submits a brief addressing both bases of the Associate Director’s decision.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national investor may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. This job creation should generally occur within two years of the foreign national’s admission to the United States as a Conditional Permanent Resident. Specifically, section 203(b)(5)(A) of the Act, as amended, provides that a foreign national may seek 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 implementing regulation defines the term "new" as meaning "established after November 29, 1990." 8 C.F.R. § 204.6(e). The same regulation defines a commercial enterprise as:

[A]ny 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.

Regarding the entities that may comprise a new commercial enterprise, the regulation at 8 C.F.R. § 204.6(h) provides:

The establishment of a new commercial enterprise may consist of:

- (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).

Further, the regulation at 8 C.F.R. § 204.6(j)(1) requires specific evidence to show that a new commercial enterprise has been established by the Petitioner in the United States consisting of:

- (i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;
- (ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the state or municipality does not issue such a certificate, a statement to that effect; or
- (iii) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth, number of employees.

Moreover, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence required to show the necessary job creation as follows: photocopies of relevant tax records, Forms I-9, Employment Eligibility Verification, or other similar material for 10 qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite 10 jobs, the Petitioner must offer a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(B). 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, *Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

Finally, the regulation at 8 C.F.R. § 204.6(e) defines "employee" as an individual who provides services directly to the commercial enterprise and excludes independent contractors. The same regulation describes "qualifying employee" as a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States. The definition excludes the Petitioner, the Petitioner's spouse, sons, or daughters, or any nonimmigrant. Section 203(b)(5)(D) of the Act characterizes full-time employment as "employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position."

II. ANALYSIS

The petition is based on an investment in [REDACTED] (the NCE),¹ which the Petitioner maintains he created as a new business. As the NCE is within a targeted employment area, the required amount of capital in this case is \$500,000. The NCE owns and operates two gas stations located in [REDACTED] Michigan. After issuing a notice of intent to deny (NOID) and considering the Petitioner's response, the Associate Director denied the petition finding that the Petitioner did not submit evidence demonstrating that the NCE was new. Specifically, the Petitioner did not show the two gas stations the NCE purchased were formed after November 29, 1990. The Associate Director also concluded that the Petitioner had not proven the number of existing jobs at the gas stations prior to his investment, and therefore could not illustrate how many jobs his investment had created.

On appeal, the Petitioner indicates that the Associate Director erred in his interpretation that the gas stations were not made new through bankruptcy proceedings, and that the evidence already in the record shows the NCE will create the requisite number of jobs by the end of the two-year period. As part of our *de novo* authority, we have reviewed the entire record of proceedings before us. For the reasons discussed below, we agree with the Associate Director that the Petitioner has not demonstrated that he established a new commercial enterprise as defined in a relevant precedent. Nor did he document that at least 10 qualifying positions have been or will be created due to his investment in the NCE.

A. New Commercial Enterprise

The Petitioner offered the NCE's Articles of Organization establishing its formation on [REDACTED]. On [REDACTED], 2013, the NCE purchased two gas stations from [REDACTED]. The purchase agreement was for a "Project" rather than assets. It included inventory and required the separate execution of a land contract with [REDACTED] and a product supply agreement with [REDACTED]. The Petitioner maintained that [REDACTED] acquired the assets of both gas stations in [REDACTED] 2013 through the bankruptcy court, after being liquidated in Chapter 11 bankruptcy proceedings. He also argued the only assets were buildings, fuel pumps, tanks, and equipment, and affirmed that [REDACTED] did not transfer its employees to the NCE. Within the NOID response and on appeal, it is the Petitioner's position that the purchase of the gas stations was the creation of an original business, and not an expansion or a restructuring of another business. On appeal, he states: "A close review of [the NCE's] creation and asset sale documentation unequivocally show[s] that [the NCE] is a new commercial enterprise." He continues that had the Associate Director requested the bankruptcy proceedings, those materials would have resolved the issue.

While the Petitioner requests that if we find that corroboration of the bankruptcy is necessary, we remand the matter to the Associate Director to issue a request for evidence (RFE) for those items, he

¹ For the reasons discussed in this decision, the Petitioner has not resolved whether this business qualifies as "new" as defined in relevant legal authorities. Nevertheless, as the Petitioner identified this company as the new commercial enterprise on which the petition is based, we will refer to it as the NCE for ease of reference.

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does not provide them on appeal or explain their absence. While the Petitioner relies on the formation date of the NCE, it is job-creating entity that is relevant. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998). Specifically, *Soffici* examined a situation where the corporate investment vehicle purchased a [REDACTED] an ongoing business that had been in operation for approximately 24 years. *Id.* After noting that the newly formed corporation in that case had merely replaced the former owner and had not restructured or reorganized the hotel (it remained a [REDACTED] the decision concluded that the Petitioner had not created a new commercial enterprise. *Id.* Just as the investor in the *Soffici* decision did not show that the job-creating entity was new as defined in the regulation, neither has the Petitioner in the present case.

Further, the Petitioner has not provided the formation documents relating to either gas station; he only submitted the contracts between the NCE and [REDACTED]. The Associate Director identified the need for the Petitioner to establish when each gas station came into existence within the NOID. The purpose was so he might determine if the NCE and underlying businesses met the regulatory definition of a “new” commercial enterprise. 8 C.F.R. § 204.6(e) (definitions of new and commercial enterprise). In response to the NOID, the Petitioner maintained that [REDACTED] is the NCE and it purchased the two gas stations. The Petitioner did not offer a discussion or corroboration of the date upon which each gas station was created either in response to the NOID or on appeal as required. Uncorroborated affirmations do not meet his burden of proof. *Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Even if the Petitioner had verified that the gas stations had gone through and completed bankruptcy proceedings, he has not documented that the subsidiaries ceased operations and became inactive. A company may continue to run its day-to-day operations under Chapter 11 of the Bankruptcy Code to reorganize the business in an attempt to become profitable.² Ultimately, the Petitioner has not shown the creation date for the job-creating entities, the gas stations the NCE purchased. He has also not documented that the gas stations completed the referenced Chapter 11 bankruptcy proceedings. Therefore, he has not established that the NCE, including the job-creating entities, constitute a commercial enterprise that is new as defined within the regulation at 8 C.F.R. § 204.6(e). *See also Soffici*, 22 I&N Dec. at 166.

B. Job Creation

Regardless of whether the NCE qualifies as “new” by beginning operations or being expanded or restructured after November 29, 1990, the Petitioner must still show that his investment will create new jobs. *Matter of Hsiung*, 22 I&N Dec. 201, 204-05 (Assoc. Comm'r 1998). As quoted above, the regulation at 8 C.F.R. § 204.6(j) stresses future jobs created by the investment. While the regulations allow for job preservation, they do so only where a petitioner invests in a troubled

² See <https://www.justice.gov/ust/bankruptcy-information-sheet-0>, accessed on April 25, 2016, a copy of which is incorporated into the record of proceeding.

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business. 8 C.F.R. § 204.6(j)(4)(ii). The Petitioner does not say he has invested in a troubled business and does not provide the requisite financial documents to show the necessary net loss as compared with the net worth prior to the loss. *Id.*; 8 C.F.R. § 204.6(e) (definition of troubled business). Accordingly, at issue is whether the NCE will create 10 positions that did not exist prior to the Petitioner's investment.

The Petitioner indicated in the petition that it had nine full-time employees and provided Forms I-9, Employment Eligibility Verification, payroll records relating to March 2014 through April 2014, and the NCE's business plan. The Associate Director notified the Petitioner that the evidence was not sufficient within the NOID. Within his decision, the Associate Director explained that at least seven of the nine employees worked part time, and questioned whether the NCE actually employed [REDACTED] as it did not appear he was performing services for, and receiving remuneration from, the NCE.

Also within his decision, the Associate Director focused on the lack of evidence demonstrating that the job-creating entities were new. Specifically, he discussed that the Petitioner had not proven that the jobs were created because of his investment in the NCE, as the record reflected both gas stations were operational and paid monthly wages to their employees prior to the NCE making the purchase.³ The Associate Director noted that the Petitioner had not documented the number of existing employees at the time the NCE purchased the stations; accordingly, he could not show how many of the positions were new and were a result of his investment in the NCE. The Associate Director also indicated that filling existing positions with new employees did not make them new. The record lacked proof exhibiting the number of positions in existence before the NCE purchased the stations, which precluded the Petitioner from verifying how many positions were new and were a result of his investment.

On appeal, the Petitioner states that the evidence provided with the initial petition filing shows the projected job creation. The Petitioner properly notes that if the NCE has not already hired the requisite employees, the job creation described in 8 C.F.R. § 204.6(j)(4)(i)(B) must occur during the conditional residence period. The business plan filed with the Form I-526 should reasonably demonstrate that the requisite number of jobs will be created by the end of a 30-month period.⁴ As discussed above, the Petitioner has not corroborated the number of existing employees at the time he purchased the gas stations. Accordingly, he has not confirmed the number of new jobs he must create.

³ The Associate Director referenced "evidence" showing monthly wage payments of \$7,274 prior to the sale. The NOID response listed [REDACTED] profit and loss statement, which would reflect wage payments; however, that document is not in the record. Regardless, the record does not show that [REDACTED] operated without employees at the time the NCE purchased the gas stations.

⁴ USCIS Policy Memorandum PM-602-0083, EB-5 Adjudications Policy 19 (May 30, 2013), <http://www.uscis.gov/laws/policy-memoranda>.

The Petitioner also states within the appeal that the Associate Director's conclusion that the business plan is not credible is purely subjective and relies on the assumption that his employees filled the jobs that the previous owner created. It is the Petitioner's burden, however, to demonstrate that his investment meets all regulatory requirements. As the record reveals that he purchased existing gas stations and their inventory in a contract that mandated he enter into a product supply agreement with the existing supplier, he must provide some corroboration of his position that these preexisting gas stations with inventory had no employees at the time of his investment. *Soffici*, 22 I&N Dec. at 165.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not demonstrated that he established a new commercial enterprise. Nor did he document that, due to his investment in the NCE, at least 10 qualifying positions have been or will be created.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of B-S-*, ID# 16375 (AAO May 3, 2016)