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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] Office: California Service Center Date: JUL 23 2003

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 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds in a targeted employment area or that he would create the necessary employment.

On appeal, counsel argues that the evidence establishes that the petitioner meets all of the requirements for the classification sought.

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 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's petition was pending on 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.

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

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

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

8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
>
> (ii) In the case of a high unemployment area:
>
> > (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
> >
> > (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

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

On the petition, the petitioner indicated that his investment was in USA Ventures, LLC, doing business in a targeted employment area, Desert Hot Springs California. In his initial cover letter, counsel stated, "Desert Hot Springs has a total population of 16,582 according to the most recent decennial census of the United States, [thus] it qualifies as a "rural area." The petitioner submitted census information from the U.S. Census Bureau confirming that Desert Hot Springs has a population of 16,582. The petitioner submitted permits issued to the mini-mart being purchased by USA Ventures, LLC reflecting an address o[redacted] Desert Hot Springs, California. The sales contract also identifies the business location as[redacted] The

petitioner also, however, submitted tax returns for the mini-mart filed by the previous owner and corporate documentation for USA Ventures, LLC all reflecting different addresses.

Despite counsel's specific statement that the petitioner had invested in a rural area, the director, in his intent to deny, stated that the petitioner had failed to specify whether he was investing in a rural or high unemployment area. In addition, the director requested an explanation of the various addresses.

In response, counsel asserted that the tax returns filed by the previous owner listed that owner's personal residence as the address on the tax return. Similarly, the petitioner listed his own address on USA Ventures, LLC corporate documentation. The petitioner submitted a letter from the Desert Hot Springs Chamber of Commerce confirming that the city had a population of 16,707.

While not entirely clear, in his final decision the director appears to have concluded, without explanation, that the petitioner had not invested in a targeted employment area. On appeal, counsel states simply that the city of Desert Hot Springs is bankrupt.

We find that the record adequately establishes that the job creating entity is located in Desert Hot Springs and that this city is a rural area. Therefore, the minimum investment amount is $500,000.

INVESTMENT OF CAPITAL

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere

intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

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

On the petition, part 3, the petitioner indicated that he had made an initial investment of $150,000 in October 15, 2001 and a total investment of $325,000. In the initial cover letter, counsel asserts that the petitioner and his brother have each invested a $325,000 nonrefundable deposit for the purchase of the ARCO gas station. Counsel further states that the petitioner and his brother will invest an additional $300,000 total as a closing payment and $50,000 for operating capital. Counsel indicates that the evidence demonstrating that the petitioner has placed sufficient funds at risk includes the petitioner's bank statements, bank statements for USA Ventures, loan documentation from Habib International Bank, and cancelled checks issued by the petitioner to USA Ventures.

The Asset and Liability Purchase and Sale Agreement, dated October 15, 2001, requires a nonrefundable deposit of $600,000, $300,000 to come from the petitioner. The funds were to be refunded only in the instance where the seller was unable to deliver free and clear title on the property. Payment is required regardless of whether the petitioner and his brother secured

financing. The sellers also financed $200,000 of the purchase price to be paid over three years. Finally, the agreement calls for a closing payment of $300,000 at closing or upon Escrow Termination on June 15, 2002. Article 5.2 provides that should escrow terminate, including because the petitioner is unable to obtain financing, the seller is entitled to retain the nonrefundable deposit and to receive the closing payment. Article 5.3 allows the petitioner to assign his obligations to a third party prior to closing. Article 5.6 provides that the risk of loss was with the petitioner during the escrow period.

On October 31, 2001, the petitioner secured a revolving loan for $175,000 from Habib American Bank to expire September 30, 2002. We note that not only does the loan documentation identify the petitioner personally as the borrower, the petitioner did not file the documentation to establish USA Ventures until November 30, 2001. Thus, we acknowledge that the assets of the new commercial enterprise do not secure the loan. [redacted] the petitioner's wife according to the addendum to the petition, provided $150,000 to the bank as a "cash collateral." [redacted] whose relationship to the petitioner is undocumented, provided an additional $25,000 cash collateral.

The petitioner's Habib American Bank statement reflects two deposits of $100,000 each on October 26, 2001 and $175,000 from a new loan on November 7, 2001. On October 29, 2001, two checks for $100,000 were cashed and on November 7, 2001, a check for $175,000 was cashed. The petitioner submitted two cancelled checks; a November 6, 2001 check for $175,000 issued on his Habib American Bank account to USA Ventures, and a November 5, 2001 check for $150,000 issued on his Bank of America account. The Habib American Bank statement for USA Ventures reflects a $650,000 deposit on November 7, 2001, a $600,000 check cashed on November 9, 2001, and a check for $30,000 cashed on November 14, 2001.

In his request for additional documentation, the director noted that in order for the funds to be at risk, the petitioner must have "undertaken the necessary preparations to carry out the business of the commercial enterprise." The director cited *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998). The director also requested the closing documentation for the gas station. In addition, the director requested additional evidence tracing the invested funds from the petitioner to the new commercial enterprise and of the petitioner's assets securing the loan.

In response, counsel asserted that the petitioner had invested $325,000, $175,000 from a personal loan secured by the petitioner's interests in India and $125,000 remitted from India. We note that these amounts total only $300,000. Counsel continues that the petitioner's brother had also invested $325,000. Counsel further asserted that of the $650,000 transferred to USA Ventures, $600,000 was used for the at-risk, nonrefundable deposit with the sellers and $30,000 was used as operating capital. Finally, counsel asserted that within the two years following approval of the petition, the petitioner would invest an additional $225,000 to open and operate a restaurant on vacant land next to the gas station.

The petitioner's response, through counsel, is dated October 31, 2002, over four months after escrow was to terminate. Yet, the petitioner failed to submit the closing documentation for the alleged purchase of the gas station. We note that as evidence of the location of the gas station, the petitioner submitted the property tax bill for [redacted] dated September 20, 2002.

The bill was issued to Palm Mini Mart, Inc. in care [redacted] one of the alleged sellers. This document, dated three months after escrow was to terminate, raises questions regarding whether the petitioner did, in fact, purchase the gas station. The only new bank statement submitted is a Bank of America statement for Palm Mini Mart, Inc. covering November 2001. The statement does not reflect a deposit of $600,000. In fact, the largest deposit is for $30,000.

In his final decision, the director noted that the petitioner had failed to submit the closing statement or escrow account documentation requested. The director concluded that the petitioner had not demonstrated that he had placed the required $500,000 at risk.

On appeal, counsel asserts that the petitioner paid USA Ventures $325,000 as follows: $175,000 from Habib American Bank account 416021592 and $150,000 from Bank of America Bank account 429905245. Counsel then asserts that the petitioner borrowed $175,000, reflected in Habib American Bank account 437592001, to be used to expand business operations.

Counsel's summary is inaccurate as it counts the same $175,000 twice. According to the relevant Habib American Bank statement, the $175,000 deposited into Habib American Bank account 416021592 originated from loan 437592001. That $175,000 was subsequently transferred to USA Ventures as part of the $325,000 initial investment. The petitioner cannot now claim that the same loan proceeds are available and at risk for expanding the business operations.

Regarding the $175,000 loan, we would state our concern somewhat differently than the director. In his request for additional documentation, the director expressed concern that the petitioner had not demonstrated what assets secured the loan or whether any foreign assets securing the loan were amenable to seizure by a U.S. note holder. In response, counsel asserted that the petitioner's foreign business interests secured the loan. Contrary to the director's broad conclusion, the record does contain some evidence regarding the collateral for the loan. Specifically, the loan documents indicate that the petitioner's personal property secured the loan. While no evidence of these assets was submitted, the petitioner's wife and another individual provided personal guaranties with cash collateral. The guaranty agreements reflect that the bank is not obligated to pursue any remedies against the petitioner prior to seizing the cash collateral. Thus, counsel's assertion that the petitioner's foreign assets secure the loan, while unsupported, is immaterial. The bank would not need to seize assets overseas to collect on its loan in the event of default. Rather, it would only need to seize the cash collateral deposited with the bank itself. In *Matter of Ho*, *supra*, at 211, we have implied that joint spousal property can be considered part of the petitioner's assets placed at risk. It is not clear, however, that funds placed at risk by another individual of unknown relationship can also be considered the petitioner's risk. The ultimate source of the "cash collateral" is better discussed below as part of the "source of funds" section.

Despite the director's specific concern that the record did not contain either the closing statement for the purchase of the gas station or evidence tracing the petitioner's funds into an escrow account or to the seller, the petitioner fails to submit such evidence on appeal. We concur with the director's concerns on this issue. As stated above, as of September 2002, the State of California still believed that the seller, [redacted] was the owner of the gas station property. The

petitioner has not demonstrated that the escrow termination date was extended. Whether or not the petitioner received his $300,000 deposit back, he has not demonstrated that those funds were or will be used by USA Ventures to purchase a business.

Even if USA Ventures closed on the gas station property after the date of filing, the record does not reflect that any funds beyond the $325,000 transferred to USA Ventures as of the date of filing were at risk as of that date. While counsel is correct that the petitioner need only be actively in the process of investing, the full amount must be fully committed to the commercial enterprise at the time of filing. As stated by the director, a promissory note can constitute evidence that the petitioner is actively in the process of investing. Counsel asserts that this case does not involve a promissory note, and the record contains no evidence of a secured promise by the petitioner to pay USA Ventures. In fact, according to counsel's appellate brief, the $175,000 to be used for the future investment are the same funds already contributed. Thus, not only were the funds not fully committed at the time of filing, we cannot conclude that the petitioner's intention to contribute the remaining $175,000 is even credible.

SOURCE OF FUNDS

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

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, *supra*, at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.*

Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, counsel asserted that the funds set aside to fulfill the petitioner's obligations under the purchase agreement were obtained by a personal loan from Habib International Bank secured by the petitioner's interest in an overseas company and the petitioner's personal funds. The petitioner submitted the loan documentation. As stated above, the documentation submitted reveals that the loan is secured by unidentified personal assets of the petitioner and a cash collateral contributed by the petitioner's wife and another individual.

The petitioner also submitted the Certificate of Incorporation Consequent to Name Change for Toubro Industries Limited reflecting that the corporation was originally incorporated on May 7, 1998. The petitioner is listed as a subscriber and business director. As of June 6, 1999, Toubro had equity shares worth 52,504,000 rupees outstanding. Letters from the Ludhiana Stock Exchange reflects that Toubro Industries Limited is listed on that exchange.

Finally, the petitioner submitted tax returns reflecting gross income of 105,000 rupees in 1996-1997, 105,000 rupees in 1997-1998, 100,000 rupees in 1998-1999, 343,940 rupees in 2000-2001, and 344,480 rupees in 2001-2002. While the petitioner did not submit any foreign currency exchange information, that information is readily available on the Internet. Using the currency exchange rates for January 1 of the above years reflects the following income in dollars: $2,924.79 for 1996-1997, $2,678.57 for 1997-1998, $2,352.94 for1998-1999, $7,364.88 in 2000-2001, and $7,132.09 in 2001-2002.[1]

In his request for additional documentation, the director requested additional evidence "to clearly show a link or connection between his purported overseas stockholdings and personal funds and the capital investment in the United States." In response, counsel stated:

> Out of the $325,000 invested so far by the Petitioner, $175,000 has come from the loan from Habib American Bank. The balance $150,000 has been obtained by him partly from his savings in India and partly from Toubro Infotech and Industries Limited.

The petitioner submitted evidence of bank accounts held by Toubro Infotech and Industries Limited. In his final decision, the director concluded that the documentation submitted in response to his request for evidence related to the petitioner's company and not the petitioner personally.

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[1] The exchange rate for dollars to rupees on January 1, 1997 was 1:35.9, on January 1, 1998 was 1:39.2, on January 1, 1999 was 1:4.5, on January 1, 2001 was 1:46.7, and on January 1, 2002 was 1:48.3.

On appeal, counsel merely reiterates that the petitioner is a 20 percent shareholder of Toubro Infotech and Industries Limited, a successful public company. The petitioner does not submit any new documentation.

We concur with the director's concerns. As stated in the previous section, the Habib American Bank statement for the petitioner's account reflects two deposits of $100,000 each on October 26, 2001. The statement does not reflect the source of these deposits. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain any transactional evidence, such as cancelled checks, credit advices or wire transfer receipts reflecting the source of either deposit.

Further, while the director concluded that the petitioner's personal tax returns were illegible, we were able to read the gross income levels listed above. This minimum income level cannot account for the accumulation of $150,000, let alone the additional $175,000 needed to repay the loan or the $175,000 remaining funds that must have been fully committed to the commercial enterprise at the time of filing. While the petitioner has submitted evidence regarding Toubro Infotech and Industries Limited's income, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). As stated in *Matter of Izummi*, *supra*, at 195, evidence regarding the income level of the petitioner's corporation says nothing about the petitioner's income.

Finally, while not discussed by the director, the petitioner cannot establish the lawful source of his funds simply by demonstrating that they are borrowed funds. In order to constitute capital, the borrowed funds must be secured by the assets of the petitioner. Thus, in order to establish the lawful source of his funds, the petitioner must establish the lawful source of the assets used to secure the loan. To hold otherwise would make any inquiry into the lawful source of a petitioner's funds meaningless, since that individual could essentially "launder" any unlawfully obtained funds by using them as collateral for a loan from a legitimate institution. While we allege no such malfeasance in this case, the petitioner has not demonstrated the source of the cash collateral contributed by his wife and the other individual.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

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

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

> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Finally, 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1039 (E.D. Calif. 2001)(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 the Service 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, supra. 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. at 213.

Initially, on part 5 of the petition, the petitioner claimed that there were 6 employees at the time of his investment and that he would create an additional 10. In his cover letter, counsel indicated that the petitioner's brother, who has also invested $325,000 into USA Ventures, would also be seeking benefits under this program. The petitioner submitted a business plan calling for the addition of a repair shop, car wash, and smog test center by the first half of the second year. That plan called for 10 employees in the first year (nine at the gas station and one at the smog check/car wash) increasing to 21 by the end of the second year.

In his request for additional documentation, the director requested an allocation agreement between the petitioner and his brother, noted that the petitioner could not cause a net loss of jobs when investing in a preexisting business, and concluded that the business plan did not meet the requirements set forth in *Matter of Ho, supra*, quoted above.

In response, counsel asserted that the petitioner's brother was not seeking benefits under this program. The petitioner submitted a signed affidavit from his brother confirming this assertion.[2] Counsel further asserted that the petitioner's new business plan projected an additional 12 employees and that the petitioner would begin work on the restaurant immediately upon approval of the petition. The new business plan includes three phases, the addition of a proposed fast food restaurant, the addition of a service center and car wash, and the addition of a food court and entertainment plaza. Section 6.0 of the plan calls for an "immediate" increase from five to eight employees. The plan further projects a need for 12 employees within six months. Section 6.1 calls for an increase to 15 employees by the end of 2005.

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[2] Bureau records show no Form I-526 filed by the petitioner's brother.

The director concluded that the business plan was insufficient because it did not provide whether the projected employees would be full or part-time and did not include job descriptions. On appeal, counsel asserts: "In addition to the Managers listed, at least 7 service employees will be hired[,] including 2 mechanics, 2-3 servers, 2 cashiers, and general laborers. With a Subway store, service center and food court established within two years after approval of the petition the business will have hired more than 10 full[-]time employees."

The record contains no evidence that the petitioner has obtained the necessary permits or financing to expand the business as proposed. The petitioner has not submitted any contracts with construction companies or fast food franchises such as Subway. Thus, the petitioner has not established that it is reasonable that he will be able to create the required number of jobs within two years. Moreover, the plan with the most supporting information calls for a total of 15 employees. According to the claim on the original petition, there were six employees when the petitioner made his investment. The petitioner must create 10 new jobs. A total of 15 employees would amount to the creation of only nine new jobs. Counsel's statement on appeal that an additional seven employees will be needed is unsupported, lacks credibility, and renders the previous business plan less credible. The petitioner has not credibly explained why a Subway store inside a gas station would require cashiers and servers. Further, if all of the employees listed on the business plan are managers, the petitioner has not provided a credible explanation for why a gas station that in 2001 had a total of six employees would immediately require five full-time managers.

Finally, as stated above, the petitioner has not demonstrated that he has purchased the gas station or that escrow has been extended so that he may still do so. Thus, the record does not establish that the proposals in the business plan are even still possible.

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.