



B7

U.S. Department of Justice

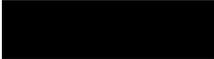
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File:



Office: Texas Service Center

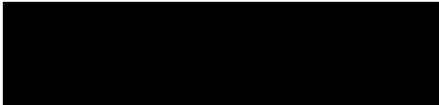
Date: JUL 6 2001

IN RE: Petitioner:



Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Acting Director
Administrative Appeals Office

DISCUSSION: The approved preference visa petition was revoked by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 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 established a new commercial enterprise, that he had invested the required amount of lawfully obtained capital, or that he would create the necessary employment.

On appeal, counsel argues that the petitioner expanded the net worth of an existing business, invested over \$1,000,000 through a small initial investment and the reinvestment of proceeds, and that the petitioner has already created 10 new jobs and will create more.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) 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
- (iii) 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 not 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.

ESTABLISHMENT OF A 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 . . . *which the alien has established . . .*" (Emphasis added.)

8 C.F.R. 204.6(e) states, "*New* means 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).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is United Deli Services, Inc., in which the petitioner is a 50 percent shareholder.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359, 10 (Assoc. Comm., Examinations, June 30, 1998).

On the Form I-526, the petitioner indicated that he had established a new commercial enterprise by creating an original business. The petitioner conceded, however, that United Deli, Inc. was incorporated on August 29, 1989, which is confirmed by the articles of incorporation in the record. The record further reflects that the petitioner purchased Downtown Deli, a preexisting business, on August 18, 1989. Thus, the record does not reflect that the petitioner created an original business after November 29, 1990.

Although the director requested additional evidence on February 19, 1998, he failed to address this issue and approved the petition on July 2, 1998.

On July 31, 2000, the director issued a notice of intent to revoke the approval of the petition. In his notice, the director noted that the petitioner had purchased an existing business, had not restructured or reorganized the business such that a new business resulted because the business was and continues to be a deli, and that the record contained no evidence of expansion.

In response, counsel asserts the petitioner established a new commercial enterprise by expanding the net worth of an existing business by 40 percent. Counsel notes that the petitioner indicated on the Form I-526 that the net worth of the business was \$185,000 at the time of the petitioner's

investment and \$815,000 at the time of filing. Counsel refers to an appraisal provided in support of the petition which estimates the fair market value, "the price for which a business would sell," for Downtown Deli to be \$815,000.

The director concluded that the appraisal was a " cursory analysis," and not a "comprehensive and in-depth analysis," and that the petitioner had not established the net worth of the company at the time of purchase. On appeal, counsel reiterates that the petitioner increased the value of the company from \$185,000 to \$815,000.

It is not clear where the petitioner arrives at \$185,000 as the initial value of the deli. The purchase price was \$150,000 and no balance sheets were provided. In addition, a petitioner must establish a new commercial enterprise after November 29, 1990. Thus, if a petitioner relies on the expansion of an existing business, the expansion must take place after November 29, 1990. The record contains no evidence of the value of the deli on November 29, 1990.

Regardless, the regulations specifically and unambiguously provide that an expansion of an existing business requires a 40 percent increase in *net worth*. Barron's Dictionary of Accounting Terms 295 (3rd ed. 2000) defines net worth as "total assets less total liabilities. . . . In a business, net worth represents the stockholders' equity." Thus, "net worth" is a clearly defined accounting term and other measurements of a business' success are simply not relevant under the regulations.

The record contains the corporate tax returns for 1994, 1995, and 1996. The returns, schedules L, reflect that while the stock in the deli remained constant at \$7,500, the net worth of the business increased from negative \$2,097 in 1994 to positive \$8,559 in 1996. The expansion, however, must be due to the petitioner's infusion of new capital. While the returns show retained earnings in the beginning of 1994, no additional retained earnings, positive or negative are included. The changes in net worth appear to result solely from changes in paid-in capital or surplus, all negative numbers until the end of 1996. As paid-in capital or surplus is generally capital above issued stock or beyond the par value of stock, the petitioner must provide some explanation for the negative numbers. Regardless, the record does not reflect that the net worth increased due to an increase in capital contributed by the petitioner. As will be discussed below, the record contains no evidence that the petitioner infused any new capital into the business after November 29, 1990. Therefore, any expansion which occurred after that date cannot be credited to the petitioner's investment. As the establishment must take place after November 29, 1990, any expansion which took place prior to November 29, 1990 is not relevant.

As with the expansion of net worth, a 40 percent expansion of employment must take place after November 29, 1990 and prior to the date of filing to be considered as a qualifying establishment of a new commercial enterprise. According to the petitioner, the deli had four employees at the time of filing; however, the number of employees as of November 29, 1990 is unknown. Therefore, the petitioner has not established that he increased employment at an existing business by 40 percent.

In light of the above, the petitioner has not demonstrated that he established a new commercial enterprise.

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 Form I-526, the petitioner indicated that he had initially invested \$185,000 in December 1991 and a total of \$4,000,000. In the accompanying brief, counsel asserted that the petitioner initially invested close to \$200,000 and had increased his investment to \$1,400,000.

The petitioner submitted the following documentation:

1. 1989 wire transfer applications reflecting the transfer of £223,718 from the United Kingdom to the personal accounts of the petitioner and his brother;
2. May 1989 cashier checks totaling \$93,338.62 issued to several businesses, including Rosen, Inc.;
3. Personal checks totaling \$6,500 issued by the petitioner's brother between February and March 1989;
4. A personal check issued from an account owned jointly by the petitioner and his brother for \$5,500;
5. A list of "investments" for 1994 which appear to be normal operating expenses for the year;
6. Income statements for the deli from 1994 through 1996;
7. An appraisal for the business;
8. Corporate tax returns for 1994, 1995, and 1996 reflecting stock of \$7,500, paid-in-capital of no more than \$1,059, and a shareholder loan of \$97,472;
9. A promissory note and security agreement regarding a loan of \$50,000 to the petitioner from Edward Fecik;
10. Document regarding the sale and financing of a business located at 124 S.E. First Street by Edward Fecik, d/b/a Downtown Deli, to the petitioner reflecting a purchase price of \$150,000, a deposit of \$14,000, and a loan of \$50,000;
11. Documentation regarding the May 1, 1989 sale, financing, and lease assignment of First Floor Restaurant located at 3101 Federal Highway by Rosen, Inc. to B. Mistry, Inc. for \$118,000;
12. Numerous invoices and bank statements relating to the deli; and
13. Stock certificate "3", undated, issued to the petitioner for 500 shares in United Deli Services, Inc.

On February 19, 1998, the director requested additional evidence that the petitioner had invested the requisite \$1,000,000. In response, counsel asserted that the petitioner had reinvested the profits of the business. The petitioner submitted a letter from his accountant [REDACTED] who confirmed the petitioner's shareholder profits were all reinvested; bills and cancelled checks; bank statements and deposit slips; and two photocopies of stock certificates. One of the stock certificate submitted at this time was another copy of stock certificate number "3," however, while the document is a photocopy, it bears a date, March 15, 1994, added in original ink. The

second certificate appears to be certificate "4," is also dated March 15, 1994 and certifies the ownership of 500 shares in United Deli Service by the petitioner's brother [REDACTED]

On July 2, 1998, the director approved the petition. On July 31, 2000, the director issued a notice of intent to revoke, questioning whether the 1989 transactions represented the petitioner's personal funds and noting that the reinvestment of proceeds is not an investment unless distributed to the petitioner first.

In response, counsel asserts:

The petitioner has invested more than the required one million dollar amount in the enterprise. The petitioner has made an at-risk investment in the enterprise in the amount of \$145,836 from the proceeds of the sale of the petitioner's business in England. The petitioner also submitted copies of wire transfers through Bank Atlantic totaling 185,918 pounds from England to an account for [REDACTED] and [the petitioner]. That amount is the equivalent of \$271,702.26 U.S. dollars. The petitioner also submitted copies of cashiers' checks from 1989 totaling \$93,356.62 made out as part of his investment. The petitioner submitted evidence that he purchased inventory and stock for the company after he bought it. The petitioner submitted the inventory for 1994, 1995, and 1996, which resulted in an investment of \$769,575. He also submitted copies of checks as evidence of deposits made on the commercial enterprise totaling \$12,000. Some of the checks were written when the account had only [REDACTED] name on them. An affidavit from [REDACTED] is submitted as Exhibit A.

The director concluded the petitioner's claimed investment consisted of a loan impermissibly secured by the assets of the deli, funds wired from the United Kingdom which had not been conclusively demonstrated as the petitioner's personal funds, and the reinvestment of the deli's proceeds.

On appeal, counsel asserts on the I-290B, "Although much of our client's investment was reinvestment of his company's earnings, the I.N.S. has erroneously decided that such investments should not count towards the statutory requirements." In his brief, counsel reiterates the argument quoted above.

As stated by the director, in order for proceeds to be considered an investment by the petitioner, it is necessary that the petitioner be able to show that the proceeds were allocated to him, taxed, and then reinvested. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. Any moderately successful business operated long enough will produce aggregate profits of \$1,000,000. Furthermore, a petitioner must be personally and primarily liable for the capital invested. In Johannes De Jong v. INS, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997), the court

reviewed another Form I-526 denial and concluded, "finding that Plaintiff was not personally and primarily liable for the capital reinvestment by [REDACTED] is a reasonable determination."

As nearly all of the petitioner's claimed investment resulted from the reinvestment of proceeds, which is not a qualifying investment of personal funds, an in-depth discussion of the remaining funds is not necessary. Furthermore, the funds invested for the purchase of the business were invested prior to November 29, 1990, and cannot be considered part of a qualifying investment. In addition, the tax returns reflect a stockholder loan of \$97,472 as early as 1994, stock of only \$7,500, and negative paid-in-capital until 1996. Thus, much of the funds contributed initially may have been loaned to the corporation as opposed to invested. As quoted above, 8 C.F.R. 204.6(e) excludes debt arrangements with the new commercial enterprise from the definition of investment.

Moreover, some of those 1989 funds were paid to Rosen, Inc., the corporation which sold an entirely separate restaurant to [REDACTED]. While counsel asserts that [REDACTED] changed its name to [REDACTED], that assertion is not supported by the record. There are no articles of amendment changing the name of [REDACTED] to [REDACTED]. In fact, [REDACTED] has its own articles of incorporation. Nor are there stock certificates reflecting that [REDACTED] is a wholly owned subsidiary of [REDACTED] or vice versa. Therefore, any funds invested in [REDACTED] or the First Floor Restaurant cannot be considered an investment in the new commercial enterprise. As the funds transferred to the United States in 1989 and used to purchase either the deli or the First Floor Restaurant are not part of a qualifying investment, the ownership of those funds need not be analyzed.

In light of the above, neither the reinvested proceeds or the funds used to purchase the deli can be considered a qualifying investment. The stock certificates submitted in response to the request for additional documentation purport to document an investment of \$500 on March 15, 1994. Even if we accepted that documentation, the record does not reflect a qualifying investment of more than \$500, nowhere near the \$1,000,000 required. The record contains no evidence that the petitioner has irrevocably committed the remaining \$999,500 to the business. While the petitioner asserted that he would renovate the restaurant in January 1998, a legitimate capital expense, the record contains no evidence that these renovations were completed, what they cost, or how they were financed. Thus, the petitioner has not demonstrated that he has invested or is actively in the process of investing \$1,000,000.

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:

- (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, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. 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, CIV-F-99-6117, 22 (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).

The director concluded the petitioner had not demonstrated the source of the funds transferred to the United States. As stated above, however, those funds were not properly invested after November 29, 1990 and the remaining "invested" funds were admittedly the funds of the commercial enterprise and cannot be considered qualifying capital. As the record contains no evidence of a qualifying investment beyond, at most, \$500, the source of the alleged invested capital is moot.

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:

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

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

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*, CIV-F-99-6117, 19 (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.

On the Form I-526 the petitioner indicated there were no jobs when he initially made his investment, that he had created four jobs, and that he would create an additional 12 to 15 jobs. The petitioner submitted 1989 payroll records for [REDACTED] four Form I-9s, and a two page business plan. In his business plan, the petitioner asserted that the deli was currently open from 10:30 a.m. to 2:00 p.m., but would expand its hours to 6:00 a.m. to 10:30 p.m. The petitioner also indicated that he would renovate the deli in January 1998 to increase the seating from 125 to 275. While the petitioner submitted the petition in December 1997, one month before the renovations were to occur, he submitted no contracts with construction companies for the renovations. The petitioner projected the need for eight full-time waitresses, six part-time waitresses, four cashiers, six cooks, four dishwashers, two people to oversee the salad bar, three people to bus tables, two delivery people, and one person to answer phone calls and faxes.

In response to the director's February 19, 1998 request for additional documentation, the petitioner submitted no additional documentation regarding employment. While the renovations should have begun one month prior, the petitioner submitted no evidence of any renovations.

On July 31, 2000, the director issued a notice of intent to revoke, concluding that the petitioner had failed to demonstrate the number of jobs when he first made his investment and that the business plan was not comprehensive. In response, counsel asserted that the deli was an owner/son operation when the petitioner purchased it and that the petitioner had created 10 new jobs even before his petition was approved in July 1998. The petitioner submitted 10 Forms I-9 and an organizational chart.



In his final decision, the director noted the lack of evidence regarding the number of employees when the petitioner purchased the deli and concluded that the petitioner had not demonstrated the creation of 10 new jobs. On appeal, counsel simply reiterates his prior assertions.

A petitioner must demonstrate the creation of 10 new jobs after November 29, 1990. The record does not indicate how many employees the deli had on that date. Thus, it is not clear how many total employees the petitioner must demonstrate.

Even if we were to accept that the petitioner need only demonstrate that he has or will create a total of ten jobs at the deli, the record does not indicate that he has or will do so. As stated in Matter of Ho, supra, at 8, Forms I-9 do not indicate that an employee is currently working or that he or she is working full-time. The record does not contain quarterly wage and withholding reports reflecting the total number of employees or payroll records reflecting the number of hours worked by each employee. The petitioner only submitted 1989 payroll records for B. Mistry, Inc., which appear to be for the First Floor Restaurant, not the Downtown Deli. Thus, the petitioner has not established that the Downtown Deli currently employs 10 full-time employees.

The business plan submitted by the petitioner is not comprehensive. Even in response to the director's notice of intent to revoke and on appeal, the petitioner has not provided any evidence, such as invoices, of the alleged renovations which were to take place in January 1998 and increase seating. The record also contains no evidence the petitioner has extended the deli hours. The only menu in the file is the lunch menu, which does not list the deli's hours. Moreover, the business plan includes a floor plan for the proposed renovations which includes 30 indoor tables. The business plan fails to adequately explain the need for eight full-time waitresses, four part-time waitresses, and four cashiers for only 30 indoor tables and a few outdoor tables. Nor does the plan adequately explain the need for six full-time cooks. Finally, the business plan did not include approximate hiring dates for all of the employees. As of the appeal, according to counsel, the deli only employed two dishwashers, three chefs/cooks, one busboy, a beverage distributor, two waitresses, and a cashier. As discussed above, even the employment of these employees is not completely documented and their hours are unknown.

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

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.