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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



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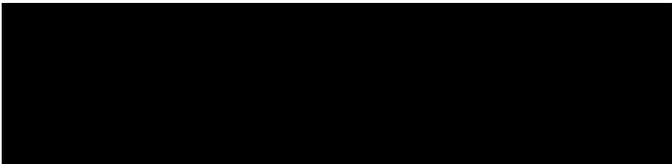
File: [Redacted] Office: Vermont Service Center

Date: MAY 2 2001

IN RE: Petitioner: [Redacted]

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 should be
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

Robert P. Wiemann, Acting Director
Administrative Appeals Office



DISCUSSION: The approved preference visa petition was revoked by the Director, Vermont Service Center, and the appeal was summarily dismissed by the Associate Commissioner for Examinations on appeal. The case will be reopened on Service motion and the petition will be denied.

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 approved the petition on June 10, 1998.

Section 205 of the Act provides:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

Upon review of the approved petition, the director determined that the petitioner had failed to demonstrate his eligibility. On July 12, 1999, the director issued a notice of intent to revoke, concluding the petitioner had not demonstrated that he had established a new commercial enterprise in a targeted employment area, invested the required amount of lawfully obtained capital, or met the employment creation requirement.

On August 6, 1999, the petitioner responded to the director's notice. The director considered the petitioner's response and issued a final notice of revocation. In his final notice, dated October 26, 1999, the director conceded the petitioner had established a new commercial enterprise in a targeted employment area, but had not overcome the director's other concerns.

On appeal, counsel argues the director did not follow proper procedure in revoking the petition, misstated the facts of the case, and misapplied the law.

On December 8, 2000, this office summarily dismissed the appeal. The record, however, contains a brief submitted by counsel in support of the appeal. The case, therefore, will be reopened on Service motion and the appeal will be reviewed on its merits.

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, [REDACTED] located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$500,000.

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.

In support of the petition, prior counsel alleged the following investments:

1. \$80,000 obtained from a loan from the petitioner's father used to purchase a \$75,000 business certificate of deposit.

2. \$107,016.34 obtained from a loan from Martin Burn Associates used to purchase office supplies.

3. \$62,799.48 obtained from the loan from Martin Burn Associates used to pay rental costs.

4. \$110,000 obtained from a loan from the petitioner's father used, along with the remaining \$5,000 from the initial investment, to purchase a \$115,000 business certificate of deposit.

5. \$10,000 obtained from a loan from the petitioner's father and an additional \$40,000 of the petitioner's savings used to purchase a \$50,000 certificate of deposit.

6. \$146,000 obtained from a loan from the petitioner's sister and simply deposited in the corporation's account.

In support of the initial petition, the petitioner submitted checks issued by the petitioner to the corporation: \$80,000 on February 7, 1996, \$110,000 on March 11, 1996, and \$50,000 on April 3, 1996. The petitioner also submitted several statements for certificates of deposits purchased by the corporation at [REDACTED] \$75,000 on February 22, 1996, \$115,000 on March 12, 1996, and \$50,000 on April 4, 1996. The record contains other statements confirming that the petitioner combined these funds into one certificate of deposit worth \$251,000 on June 7, 1996. The final statement is for a certificate of deposit worth \$155,182.27 maturing December 18, 1996. The petitioner also submitted cancelled checks issued by the petitioner to the corporation: \$5,000 on October 3, 1997, \$25,000 on October 16, 1997, \$26,000 on October 16, 1997, \$25,000 on October 16, 1997, \$5,000 on October 16, 1997, \$20,000 on October 27, 1997, and \$40,000 on November 20, 1997.

The petitioner also submitted a non-notarized letter from his father indicating that the father had loaned the petitioner \$200,000 to be repaid, "when he sees fit," and that the father will not look to the corporation for repayment. The petitioner further submitted a promissory note dated December 1, 1996 whereby the petitioner promised to pay [REDACTED] \$300,000 with the final payment due September 2002, and a receipt for payments made by [REDACTED] to [REDACTED] Inc. Finally, the petitioner submitted cancelled checks issued to him by his sister for \$15,000 on October 15, 1997, \$93,000 on October 15, 1997, and \$50,000 on November 19, 1997.

In his notice of intent to revoke, the director stated that the record did not establish how all of the funds were utilized by the corporation, and requested additional bank statements, stock ledgers, audited financial statements and certified tax returns.

In response, the petitioner submitted what are alleged to be all of the corporation's bank statements from February 1996 through March 1998; copies of checks drawn on the corporation's accounts for more than \$10,000; audited financial statements; the stock ledger and stock certificate; Internal Revenue Printouts regarding the corporation and corporate tax returns for 1996, 1997 and 1998.

The bank statements reflect a business money market account, number [REDACTED] Bank (which appears to have become [REDACTED] in September 1996) as of February 1996 and a business

checking account as of August 1997. The money market account had a maximum balance of \$255,796.45 on November 8, 1996. The 1996 withdrawals and deposits correspond with the purchases of business certificates of deposit submitted previously. On January 2, 1997, however, the corporation issued a check for \$156,527.85 to the petitioner. On August 1, 1997, the majority of the funds remaining in the money market account were transferred to the checking account. On August 26, 1997, the statements show a domestic fund transfer of \$100,000 to an unknown source. The remaining statements reflect total balances in the tens of thousands of dollars.

The financial statements reflect that as of December 31, 1998, the corporation had only \$17,946 in the bank, total assets of \$246,206, a loan from the petitioner for \$56,528, no stock, and paid-in-capital of \$390,000. The financial statements further reflect that as of December 31, 1997, the corporation had only \$315,000 in paid-in-capital and no stock. The tax returns reflect similar information. Finally, the stock certificate and stock ledger fail to indicate the consideration paid for the shares of stock issued to the petitioner.

The director concluded that the petitioner had not established a capital investment of more than \$390,000, that any investment must be reduced by the amount loaned back to the petitioner, that the petitioner had not demonstrated that his personal assets were at risk because the terms of the loans from his father were unknown, and that the reserve funds were not available to the employment-creating entity.

On appeal, counsel notes that the regulations do not list balance sheets or tax returns as evidence of investment. Thus, counsel concludes that the director erred in requesting and relying upon the numbers reflected on the balance sheets. Counsel argues the petitioner has demonstrated that \$500,000 was contributed to the corporation and that is sufficient to establish the petitioner's investment. Regarding the balance sheets, counsel asserts that they omitted approximately \$110,000 in office equipment purchased by the petitioner through [REDACTED] or the \$63,000 in rent paid by [REDACTED] in exchange for the promissory note executed by the petitioner. Finally, counsel argues that the terms of any loans are only relevant when the investor executes a promissory note to the business, and is irrelevant where the investor obtains his funds through a third party loan.

The petitioner submits two letters from the accountant asserting that he was unaware of the arrangement between the petitioner and [REDACTED] and that he mistakenly listed the petitioner's stock as paid-in-capital. The petitioner also submits a Focus Report for November 1999 allegedly submitted to the

[REDACTED] reflecting \$367,111 net capital, no paid-in-capital, and \$500,000 in capital stock.

Balance Sheets

While the regulations do not expressly list financial statements as evidence of a petitioner's investment, the regulations specifically state the petitioner must provide evidence of money transferred to the business *in exchange for stock*. Thus, it is clearly insufficient to simply provide evidence of money transferred to the business. The audited balance sheets provided by the petitioner unambiguously indicated no outstanding stock and paid-in-capital of only \$315,000 as of December 31, 1997 and \$390,000 as of December 31, 1998.

The accountant claims to have been unaware of the arrangement whereby the petitioner executed a promissory note in behalf of [REDACTED] the petitioner's other company, or that that company paid the first year's rent and equipment costs of the corporation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

The accountant's explanation is insufficient to overcome the inconsistency between the petitioner's claimed investment and the audited balance sheet. The Focus Report for November 1999 is for nearly one year later and cannot overcome the information provided on the audited balance sheet reflecting the financial status of the corporation just prior to the date of filing.¹

Finally, counsel's argument that balance sheets do not properly reflect the petitioner's investment because they reflect the company's loss in the initial year is not persuasive. Outstanding stock and paid-in-capital values are not reduced by losses, which merely affect the net worth. As the director relied upon the values provided for the corporation's stock and paid-in-capital, and not the net worth values, we do not find any error.

Transfer of Funds to the Corporation

Even if we only examined the transactional documentation as urged by counsel, the petitioner has not demonstrated an investment of

¹ Counsel's argument that the petitioner need only sustain the investment after the petition was approved is not on point as the December 31, 1997 balance sheet reflects paid-in-capital just prior to the date of filing.

\$500,000. The record contains checks reflecting the petitioner transferred \$411,000 to the corporation between February 7, 1996 and January 5, 1998. The issue of whether reserve funds required by SEC regulations are unavailable to the corporation is moot as the regulations do not require funds in reserve accounts and the record does not demonstrate that the petitioner maintained such accounts. The agreement between the corporation and its clearinghouse merely requires a net capital of \$150,000, not a reserve account of \$150,000. Moreover, the business certificates of deposit identified as reserve accounts no longer existed at the time of filing.

Between February 7, 1996 and January 1997, the petitioner transferred \$240,000 to the corporation. The petitioner submitted numerous money market bank statements and certificate of deposit bank statements reflecting the movement of these funds between the money market account and new certificates of deposit. On January 2, 1997, however, the corporation issued a check for \$156,529 to the petitioner which he deposited in his account number [REDACTED]. On January 3, 1997, the statement for that account reflects a "miscellaneous debit" of \$200,000. The January corporate bank statements do not show a deposit for that amount. Therefore, it does not appear that the petitioner returned those funds to the corporation. On August 26, 1997, the corporation transferred \$100,000 to an unknown account and on August 29, 1997, the corporation transferred an additional \$30,000 to an unknown account. Thus, \$286,527 of the petitioner's claimed investment were removed from the corporation and cannot be traced to business expenses.

In support of the petition, the petitioner included a "Cash Deposit Analysis" which indicates the petitioner withdrew \$156,527 as a loan on January 2, 1997 and an additional \$100,000 on February 27, 1997. The balance sheets only reflect a loan of \$6,528 from the corporation to the petitioner as of December 31, 1997. If the payments made to the corporation between February 1997 and January 1998, \$171,000, constituted a partial repayment of the loan to the petitioner, it cannot be considered additional invested capital. Thus, as stated by the director, it appears the petitioner is attempting to count funds twice.

Even if the petitioner considered the subsequent \$171,000 new capital, and not partial repayment of his loan, it remains that at least \$256,527 of the petitioner's investment actually consists of an alleged promise to pay the corporation. In his discussion of third party loans, counsel concedes that loans to the enterprise must be secured by the petitioner's personal assets according to Matter of Hsiung I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998). The record, however, does not contain the promissory note(s) or any other evidence that the loans are secured by the

petitioner's personal assets or that the terms meet the requirements set forth in Matter of Hsiung.

A petitioner cannot avoid the secured loan requirements by first depositing the funds into the account of the new commercial enterprise and then borrowing them back. The result, an investment consisting of a promise to pay, is the same; the funds are not available to the enterprise. Thus, the petitioner cannot include the \$256,527 borrowed from the corporation as part of his investment.² In addition, as stated in Matter of Hsiung, an unsecured promise to repay the funds cannot be considered evidence that a petitioner is actively in the process of investing.

Finally, counsel's argument that the petitioner preserved the corporation's capital by borrowing the funds instead of paying himself a salary is not persuasive. While all the facts would have to be examined, it is not clear that a petitioner could claim an investment of \$500,000 after removing half of it one year later and prior to commencing business operations, claiming the funds as his personal salary.

Third Party Loans / Assets at Risk

In addition, the record does not reflect that the petitioner's personal assets are at risk. On appeal, counsel argues that while indebtedness to the new commercial enterprise must be secured by the assets of the petitioner, indebtedness to a third party need not be so secured. Counsel relies on Matter of Hsiung, *supra*. Counsel notes that Matter of Hsiung was concerned that unsecured indebtedness to the enterprise risked an "investment" where the enterprise does not have access to the invested money. Counsel argues that, unlike that situation, where the petitioner borrows funds from a third party the money is immediately available to the enterprise. Thus, concludes counsel, such indebtedness need not be secured.

The fact that the precedent decisions dealt with loans to the enterprise and not third party loans in no way implies the precedent decisions condoned unsecured third party loans. While unsecured third party loans may not involve the same problems as loans to the enterprise, such as the enterprise's access to the funds, unsecured third party loans involve other problems.

An unsecured third party loan is problematic because the petitioner has not placed any of his net worth at risk as required by 8 C.F.R. 204.6(j)(2). A loan does not increase a petitioner's net worth.

² If the \$171,000 transferred to the corporation were loan payments, then the remaining \$85,527 loan balance has similarly not been demonstrated as secured by the petitioner's assets.

While the petitioner receives money, he also has an obligation to repay that money. Thus, investing the proceeds of a loan is a contribution of indebtedness, which must be secured according to 8 C.F.R. 204.6(e) (definition of capital). See Matter of Soffici, I.D. 3359 (Assoc. Comm. Examinations, June 30, 1998) at 6.

It is significant that, in this case, not only are the loans from the petitioner's father, sister, and Martin Burn Associates unsecured, the record contains insufficient evidence that the petitioner will have the means to repay the loan.

Moreover, the record contains insufficient evidence that the funds were loaned to the petitioner by his father. The June 19, 1997, non-notarized letter from the petitioner's father merely states that he loaned the petitioner \$200,000 to be repaid "when he sees fit." The record, however, contains evidence the petitioner's father transferred considerably more than \$200,000 to the petitioner. The record contains checks issued by the petitioner's father to the petitioner dated December 21, 1995 for \$200,000, March 11, 1996 for \$110,000, and September 25, 1996 for \$12,000. The earliest bank statement for the petitioner submitted, January 1996, shows only a balance of \$148.44. The petitioner allegedly began investing in February 1996. The statement for that month is missing from the record. It appears, therefore, that the initial \$200,000 contributed by the petitioner's father may not have been invested into the corporation. As the letter from the petitioner's father only references a loan of \$200,000, the nature of the remaining funds contributed by the petitioner's father is unknown.

In light of the discussion above, the petitioner has not demonstrated an investment of \$500,000 as required.

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).

In support of the petition, the petitioner submitted checks issued by his father and his sister to himself and a letter from his father asserting he had loaned funds to the petitioner.

On May 7, 1998, the director requested additional evidence of the source of the petitioner's funds. In response, the petitioner submitted copies of several checks issued to the petitioner's father by companies for the purchase of business supplies, a check issued by the petitioner's wife to herself, two checks issued by the petitioner to himself, and two bank checks issued to the petitioner. The wife's check is dated July 30, 1996 and the remaining checks are all dated December 1997. The checks are alleged to represent personal loans.

In his notice of intent to revoke, the director concluded the petitioner had not established how the petitioner's father and sister accumulated their funds.

In response, the petitioner resubmitted checks issued to the petitioner's father as well as invoices. The petitioner also provided a chart summarizing the checks which total \$169,991. Finally, the petitioner submitted evidence that on October 10, 1997, the petitioner's sister sold stock purchased on July 19, 1996 for \$98,397.

The director noted the record did not resolve how much of the funds transferred to the petitioner's father were available to the father and how much covered the costs of the goods sold. The director also noted that the record did not establish where the petitioner's sister obtained the funds used to purchase the stock in 1996. Finally, the director noted that [REDACTED] was a separate legal entity and, thus, the funds contributed by that company could not be considered the petitioner's personal funds.

On appeal, counsel argues that the director should not have inquired into the lawfulness of the lenders' funds. Counsel further argues that, regardless, the petitioner has established that the lenders all acquired their funds lawfully. The petitioner submits evidence of the father's ownership of [REDACTED] a newspaper article referencing the father as a distributor in [REDACTED] the father's appointment as a special police officer in Calcutta, and a letter of reference from the [REDACTED] Ltd.

Regarding the funds from his sister, the petitioner provides an affidavit from her and evidence that she acquired stock in [REDACTED] through exercising an employee stock option for \$1,800, thus realizing a capital gain of \$96,597 in 1997.

While a petitioner need not show that funds borrowed from an independent lending institution were lawfully acquired by that institution, when funds derive from family or friends, the Service may inquire into the source of those funds. Any petitioner intending to conceal the true source of his funds, such as, for example, criminal or other unlawful activity, or earnings not subjected to appropriate taxation, could offer the convenient explanation that the funds were obtained from a relative or friend. Presenting a corroborating statement from a family member or "friend" would not be difficult, nor would transferring the funds first to the family member's account and then documenting their transfer into a newly established account belonging to the petitioner.³ The Service is entitled to inquire into the source of a petitioner's purported assets and does not require affirmative evidence that he, or the person ultimately providing the funds, is or has been engaged in criminal activity.

The record now demonstrates the source of the sister's funds. Assuming the petitioner's father operates a sole proprietorship,

³ The petitioner should not interpret this as an accusation that he has engaged in wrongdoing with respect to the source of his funds; rather, this is an explanation of why the Service cannot merely accept without further question every claim that funds were provided by a relative or friend and, therefore, lawfully obtained.

however, the mere payment of outstanding invoices is not evidence that the sole proprietorship produced a profit of that amount. The petitioner has not provided any evidence of the father's operating costs. Thus, the payment of \$169,991 to the father in the course of business does not indicate the business produced profits of that amount. While the evidence submitted on appeal indicates that the petitioner's father operates a business in Calcutta, is a special police officer, is a member of the [REDACTED] and maintained a bank account with undisclosed balances, the record contains no evidence that he lawfully accumulated over \$322,000 in assets, the amount actually transferred to the petitioner.

Further, the petitioner has not provided the tax returns or financial statements for [REDACTED]. While we disagree with the director that those funds are not the petitioner's personal funds (they were clearly loaned to the petitioner), the petitioner has failed to document that [REDACTED] has lawfully accumulated \$300,000 of assets available to be loaned to the petitioner. The record fails to establish what type of business [REDACTED] conducts or even that it exists beyond paper.

In addition, although the loans to the petitioner's father and sister have no due date, the final payment on the \$300,000 loan from [REDACTED] is due September 2002. The petitioner has not demonstrated that he has \$300,000 in assets to repay the loan. As such, the petitioner has not demonstrated that he will be able to repay the loan with lawfully obtained funds.

Finally, the petitioner has also submitted checks issued to him purportedly reflecting personal loans and evidence of a civil monetary award. Review of the bank statements, however, indicates that these funds were not the source of the petitioner's alleged investment. As such, their source is not relevant.

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.

The director concluded the petitioner had not established that his part-time employees or the independent contractors were qualifying and had failed to submit a business plan as required.

As noted by counsel, the record reflects that the corporation has at least 10 full-time employees. In addition, the petitioner did submit a business plan. Thus, the petitioner has met the employment-creation requirement.

PROPER REVOCATION PROCEDURE

Counsel argues broadly that the director improperly revoked the petition by not providing the petitioner the opportunity to respond to the revocation grounds.

First, counsel argues that the director improperly granted only 30 days to respond to the notice of intent to revoke. Counsel cites 8 C.F.R. 103.2(b)(8) for the proposition that the director should have provided 12 weeks to respond. The cited provision refers to requests for additional evidence, not notices of intent to revoke. Nowhere do the regulations require that a petitioner be afforded 12 weeks to respond to a notice of intent to revoke. Therefore, we conclude the director did not act improperly in affording the petitioner only 30 days.

Second, counsel refers to an admitted factual error in the notice of intent to revoke and concludes the director relied on facts from another case. Admittedly, the notice of intent to revoke at one point refers to the new commercial enterprise as a garment manufacturer. The remainder of the notice, however, clearly refers to the instant case. The error was not repeated in the final revocation and cannot undermine the entire notice of intent to revoke.

Finally, counsel asserts the director raised issues not raised in the notice of intent to revoke in the final revocation notice. This assertion is not supported by the record. In the notice of intent to revoke, the director raised concerns regarding the petitioner's investment and the source of his funds. While the director noted the deficiencies in the petitioner's rebuttal evidence, he did not raise new issues.

CONCLUSION

In light of the petitioner's failure to establish a qualifying investment or the source of his funds, 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 Associate Commissioner's decision dated December 8, 2000 is vacated. The petition is denied.