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U.S. Department of Justice  
Immigration and Naturalization Service

U.S. DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE  
DIVISION OF PERSONAL FREEDOM

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



File: WAC-98-076-51428 Office: Vermont Service Center Date: JUL 11 2002

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:



Public Copy

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 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 that 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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed 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 determined that the petitioner had failed to demonstrate that he had invested the required amount of capital in a new commercial enterprise located in a targeted employment area or that he would create the necessary amount of employment.

On appeal, counsel argued that the petitioner created an original business located in a targeted employment area into which he invested the required amount of cash. Counsel further argues that the petitioner has already created employment.

The Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, dismissed the appeal. Specifically, the AAO concluded that the location where the petitioner was allegedly creating employment was no longer a targeted employment area at the time the petition was filed. In addition, the AAO concluded that the business plan, leases, tax returns, and letters from the individuals involved all indicated that the petitioner had not created an original business. As the petitioner had not expanded the existing business as of the date of filing, the AAO concluded that the petitioner had not established a new commercial enterprise as defined in the regulations. Further, the AAO concluded that the petitioner's claim to have received his invested funds as a gift was not sufficiently documented and noted several discrepancies in the tax returns that were not resolved by the uncertified amended tax returns submitted on appeal. Thus, the AAO concluded that the petitioner had not established a qualifying investment of his personal funds. In addition, the AAO concluded that the petitioner had not demonstrated the lawful source of his funds as the tax returns for the company which allegedly loaned the funds to the petitioner's father were problematic. Finally, the AAO concluded that since the business had not yet created the necessary 20 jobs for both the petitioner and his father to qualify under this program, the petitioner's failure to comply with the director's request for a more detailed business plan precluded a finding that the business would create the necessary jobs within two years.

On motion, the petitioner submits a list of 31 employees, including the petitioner, 30 Forms I-9 and W-4, the closing statement whereby the petitioner's father and his business partner in another business purchased the business property after the date of filing, the business' bank statements for 1998 through 2001, the petitioner's personal bank statements for 1998 through 2001, and checks reflecting advertising payments. Counsel asserts that "the recent taxes of the Petitioners [sic] indicate that \$1 million dollars has been invested to date. Please review the taxes and applicable materials." The petitioner, however, did not submit any new tax documentation on motion. Counsel also refers to the creation of 10 jobs.

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).

### **MINIMUM INVESTMENT AMOUNT**

The petitioner initially indicated 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, I.D. 3359, 2-3 (Assoc. Comm., Examinations, June 30, 1998) cited with approval in Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

On motion, counsel does not contest that employment is being created in an area no longer a targeted employment area at the time of filing. Thus, the minimum investment amount 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(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 Auto Group (UAG), in which the petitioner is allegedly a 50 percent shareholder.

As stated by the AAO, however, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, *supra*, at 10.

On the Form I-526, the petitioner indicated he had established a new commercial enterprise by creating an original business. The petitioner maintained this claim on appeal. In its decision, the AAO noted several documents which suggested that the alleged new commercial enterprise, UAG, incorporated on November 12, 1997, was merely an extension of [REDACTED] (BA). On motion, counsel continues to assert that UAG is an original business but also argues, if not, it is certainly "a substantial change in the expansion of the separate corporation."

As discussed by the AAO, the petitioner claims to have obtained the money as a gift from his father, who, in turn, obtained the funds from UBA, of which the father is a sixty-percent owner. [REDACTED] does business as [REDACTED] and is located at [REDACTED].

The petitioner claims to be a 50 percent owner of UAG, and claims to have invested \$500,000 on January 7, 1998. The petitioner submitted the minutes for the initial meeting, dated January 5, 1998, indicating that the issuance of 10,000 shares was authorized, 5,000 to the petitioner and 5,000 to his father. The record contains two stock certificates for 5,000 shares, one issued to the petitioner and one to his father, [REDACTED]. Both certificates are dated January 5, 1998.

As stated by the AAO, however, the record also contains evidence strongly suggesting that UBA actually owns UAG. The AAO noted correspondence from [REDACTED] fellow shareholder in UBA, [REDACTED] which refers to UAG as "our" corporation. Moreover, the "Financial Plan" portion of UAG's business plan, page 9, states, "the financial projections indicate that exit of [REDACTED] will be achievable in 5 years. The exit settlement will be in the form of investors equity will be converted to cash. [sic]" This discussion strongly suggests that UBA has an ownership interest in UAG.

Of most concern, however, is a Notice of Issuance of Shares dated January 5, 1998, filed with the State of California, reporting the issuance of 10,000 shares, \$1 per share, of UAG stock to United Brothers Auto Sales. The record contains no evidence that UAG reported the issuance of shares to the petitioner and his father to the State of California or that UAG authorized more than 10,000 shares. The AAO was concerned that the petitioner provided conflicting information to the State of California and this Service regarding the ownership of UAG. In addition, the original 1998 tax return for UAG, Schedule K, was incomplete regarding ownership of UAG. While the petitioner submitted an amended tax return on appeal, the AAO, citing Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988), concluded that an uncertified tax return could not overcome the discrepancies above. Counsel does not address this ownership issue on motion and the petitioner does not provide a certified tax return for UAG or evidence that UAG has advised the State of

California that the stock is, in fact, owned by the petitioner and his father as claimed to this Service.

On the Form I-526 petition, the petitioner listed the address of UAG as [REDACTED]. This address also appears as the principal business office on the Statement by Domestic Stock Corporation, filed with the State of California on January 5, 1998 and the Notice of Issuance of Shares. The minutes of the January 5, 1998 shareholder's meeting states:

After some discussion, the location of the principal office of the corporation for the transaction of the business of the corporation was fixed pursuant to the following resolution, adopted, on motion duly made, seconded and unanimously carried:

RESOLVED: That No. [REDACTED]  
 City of [REDACTED]  
 Zip [REDACTED] be and the same hereby is  
 designated and fixed as the principal office for the transaction of the  
 business of this corporation in the County of Los Angeles, State of  
 California.

Furthermore, the business plan contains language suggesting that the incorporation of UAG was merely an expansion of UBA. At page 10, the plan states, "we have 8 sales people in one territory located in [REDACTED] California." This location is reiterated on page 13 of the business plan.

UAG's business plan, dated November 29, 1997, contains several references to the expansion of UBA.

On March 3, 1999, the director requested additional documentation. Specifically, the director noted that UAG appeared to be a continuation of UBA, quoted the regulations regarding "establishment" and requested a lease for the business location and the insurance policy. In response, counsel argued that UBA continued as a separate business and that UAG operated from a separate location which the petitioner had leased and sublet to UAG. The petitioner submitted the lease between [REDACTED] (one of UBA's shareholders) and the petitioner's father as tenants and [REDACTED] Toyota as landlord, and the alleged sublease between [REDACTED] and the petitioner's father as "landlord" and UAG as "tenant." Both leases are dated June 1, 1998. An April 14, 1999 letter from [REDACTED] to [REDACTED] of [REDACTED] Toyota requests the landlord's authorization for the sublease, asserting, "with the tax year of 1998 coming to an end, our CPA has advised us to sublease the property on [REDACTED] California [REDACTED] from [the petitioner's father] and [REDACTED] to our corporation name- [REDACTED] [REDACTED]"

The AAO concluded that the dates on these documents are troubling. Specifically, the fact that the lease and sublease would both take effect on the same date and that [REDACTED] and [REDACTED]

waited so long to obtain approval of the sublease from Toyota when the original lease requires permission from West Covina to sublet the property.

On motion, the petitioner submits evidence that the petitioner's father and purchased this property on July 7, 2000. The father appears to have contributed \$308,475, Mr. 7,500, and UAG \$50,000 in addition to the \$892,500 loan. The bank letter regarding the loan is addressed to the father and Mr. This evidence, revealing that the shareholders of UBA purchased UAG's business location, is not helpful to the petitioner's claim that UBA has no interest in UAG. It is not clear why Mr. would contribute \$37,500 for the purchase of property for a business in which he has no interest.

The director and the AAO both questioned the letters from UBA's and UAG's insurance company indicating that a single policy had been issued by accident and that separate billing would soon commence.

On appeal, counsel argued that, unlike the petitioner in Matter of Soffici, the petitioner in this case did not purchase an existing business. Counsel argues that UBA continues to operate with its own employees and does not have the same ownership as UAG. The petitioner submits a letter from CPA, who completed the amended taxes submitted on appeal. Dr. asserts that UBA and UAG are separate businesses although they both do business as Super Remate de Autos, which Dr. likens to a franchise arrangement. She notes that as a franchise, Super Remate de Autos pooled advertising and insurance costs of two separate businesses.

The AAO concluded that the documentation submitted on appeal failed to address the numerous references to expansion in the business plan. The AAO rejected Dr. comparison to a franchise, noting that the record does not contain any franchise agreement between UBA and UAG. Nor does the situation where two corporations who share a majority shareholder operate under the same name in two locations and use the same official address seem remotely analogous to the relationship between Burger King Corporation and its various franchise restaurants. That UBA and UAG maintain separate employment rosters for the two locations is not persuasive as to the separate identities of the companies. The AAO noted that as late as January 1999, UAG was still using UBA's address as its official address on its Forms 941 and quarterly reports. On the petition itself, filed in January 1998, and in the business plan, prepared in November 1997, the petitioner indicated UAG had 8 employees. Yet, the lease for West Covina did not exist until June 1998. The change of address on the amended 1998 tax returns does not resolve prior inconsistencies. While the facts in this case may be somewhat different from Matter of Soffici, where a corporation bought out an operating business, that case makes it very clear that the Service must look at the functional entity creating the employment, and not the legal entity registered on paper. That the petitioner chose to incorporate a new legal entity to carry out the alleged expansion of UBA is not determinative. All of the evidence, including the petitioner's own business plan, reveals that UAG is an extension of UBA, and not an original business. Some of the evidence, namely the notice of stock issuance and Rene Farjeat's correspondence, even suggests that UAG is a subsidiary of UBA.

In light of the above, the director and the AAO both concluded that UAG was not an original business. As discussed above, the petitioner has not submitted anything on motion to address the numerous and serious discrepancies in ownership discussed above. In fact, the bank statements reflect that UAG did not change its business address with its bank until November 1999. Therefore, the AAO's previous conclusion regarding the creation of an original business is affirmed.

The AAO went on to consider (as did the director) whether the petitioner might have reorganized UBA. The director concluded that the UAG performed the same services as UBA, car sales and repair, and, thus, the petitioner had not reorganized the business such that he created a new business. The director further concluded that the petitioner had not established a 40 percent increase in employment or net worth by the time of filing.

The AAO concurred with the director that UAG is performing the same services as UBA. Counsel does not challenge this conclusion on motion. Thus, the petitioner has not reorganized UBA such that a new business was created.

Regarding expansion, the AAO noted that the law states that a petitioner must be seeking to enter the United States to engage in the management of a new commercial enterprise which he has established. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner must have already established the business at the time of filing. The record does not contain any evidence that UAG had any employees prior to August 1998. Thus, the petitioner had not expanded employment by 40 percent by January 1998 when the petition was filed. As discussed by the AAO in a subsequent section of its decision, the tax returns, schedules L submitted contain numerous problems which were not resolved on appeal. Thus, the AAO was unable to determine the net worth of UBA or UAG before or after the petitioner's "investment."

On motion, the petitioner does not submit evidence of a 40 percent increase in employment as of the date of filing or resolve the inconsistencies in the tax returns discussed at length by the AAO. Nor does counsel address those inconsistencies. Counsel merely asserts that if the Service relies on precedent decisions issued after the date of filing, it should also accept documentation submitted after the date of filing. While the Service will consider documentation submitted after the date of filing, that documentation must establish the petitioner's eligibility as of the date of filing. Id., See also Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998).

In light of the above, we will not disturb the AAO's previous determination that the petitioner has not 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.

As stated above, counsel does not contest on motion that the minimum investment amount in this case is \$1,000,000. By referencing a \$1,000,000 investment by "petitioners" in his brief on motion, however, counsel appears to be including the petitioner and his father, who both transferred \$500,000 to UAG. 8 C.F.R. 204.6(g), while permitting multiple investors, requires that each investor invest the required amount. As such, the petitioner cannot pool his \$500,000 with his father's. Regardless, for the reasons stated below, the petitioner has not established that his transfer of \$500,000 to UAG constituted a qualifying investment of his own funds.

In his initial brief, counsel asserted that the petitioner's father, [REDACTED] obtained a loan from UBA, in which he is the 60 percent owner. Counsel asserted that [REDACTED] invested \$500,000 of the borrowed funds into UAG and gifted the remaining \$500,000 to the petitioner. The AAO did not contest that the bank statements in the record reflected the transfer of \$1,000,000 to the petitioner's father, the father's subsequent transfer of \$500,000 to the petitioner, and the final transfer of \$500,000 from the petitioner to UAG.

The AAO, however, concluded that the petitioner had not demonstrated that the funds were his personally. First, the AAO questioned the unsigned "sample gift letter" purportedly reflecting that the \$500,000 was a gift from father to son. The AAO noted that, without a signature, this document is not probative evidence of anything, and raises additional issues. The AAO also noted that the letter contained a reference to "your father *or myself*," indicating that the petitioner's father is the one person who cannot be considered to have authored the letter. Finally, the AAO noted that the letter was ambiguous regarding whether the funds had to be invested in UAG. If so, the AAO concluded, the arrangement was a bailment, not a gift.

Counsel does not address these concerns on motion and the petitioner submits no new evidence regarding [REDACTED] intentions.

In addition to whether the petitioner's "gifted" funds could be considered an investment of his personal funds, the AAO also considered whether those funds were properly invested into UAG. While the AAO did not contest that the petitioner deposited the funds with UAG, it noted that a petitioner must demonstrate that the funds were properly invested as capital. The AAO further noted that even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

The AAO listed several inconsistencies and concerns with the initially submitted 1998 tax return for UAG, many of which were also raised by the director. For example, Schedule K was incomplete, failing to reflect whether any entity owns 50 percent or more of the corporation. Nor was there an attached statement reflecting the ownership of UAG. Schedule L reflected no common stock by the end of 1998, retained earnings went from \$354,215 to \$2,097,419 (a difference of \$1,743,204) while Schedule M-1 showed a net loss of \$95,626. Schedule L also reflected \$1,038,919 in "buildings and other depreciable assets." The depreciation for these assets was listed as \$203,175 on Schedule L and on Form 1120, line 20. Finally, the depreciation schedule reflected a \$1,000,000 investment loan. Line 20 indicates that the

depreciation must come from Form 4562. The instructions for Form 4562 do not provide for the depreciation of loans. Nor did Schedule L reflect a loan to or from shareholders, any current liabilities, or more than \$494,680 of accounts receivable.

Citing Matter of Ho, *supra*, the AAO concluded that the assurances from the new accountant and the submission of an uncertified amended tax return for 1998 was insufficient to overcome the discrepancies discussed above. The AAO specifically stated:

[T]he record contains no evidence that the amended tax returns were actually filed with the IRS. Regardless, the amended returns submitted do not include Schedule L. Thus, the petitioner has still not presented a Schedule L which reflects an investment of \$1,000,000.

Despite this clear and unambiguous language, the petitioner does not submit certified tax returns or a certified Schedule L on motion. Rather, counsel refers to the petitioner's tax returns. It is not clear how the petitioner's tax returns, had they been submitted, would resolve the serious inconsistencies discussed above in UAG's tax return. In light of the above, the petitioner has not overcome the AAO's concerns. Thus, the record does not establish that the petitioner invested his own personal funds, put his own assets at risk, or made a qualifying investment of capital into UAG.

Citing Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), the AAO also determined that the record did not reflect that, at the time of filing, any business activity had taken place. The AAO noted that UAG did not obtain its sublease until at least June 1, 1998, nearly five months after the petition was filed. The record does not contain any contracts with suppliers or business licenses for the West Covina address. The letters regarding advertising contracts are all dated from 1999. No employees were hired until August 1998. Counsel does not specifically address this issue on motion. It is noted that the advertising checks submitted on motion are dated October 1998 or later, and cannot establish any business activity prior to that date.

### **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, supra, at 6; Matter of Izumij, supra, 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 AAO stated that even if the record established that the petitioner received his “invested” funds as a gift, the inquiry into the lawful source of investment funds does not end upon a petitioner’s claim that his funds include a “gift.” In a footnote, the AAO discussed the potential for abuse if the Service made no inquiry into the source of the gifted funds.

The AAO then discussed at length the discrepancies in the record regarding the “loan” to the petitioner’s father whereby he apparently acquired the funds to give to the petitioner. The AAO noted that whether the “gift” was from UBA directly or through a loan to Mr. [REDACTED] the petitioner must demonstrate the lawful source of those funds. Specifically, the AAO noted several discrepancies in UBA’s tax returns. The AAO stated:

Without certified tax returns and a credible, supported explanation for the unprecedented profits and tax-exempt interest, it is not clear how UBA acquired the \$1,000,000 allegedly lent to the petitioner. The problems with UBA’s tax returns are not addressed on appeal. Regardless, UBA allegedly loaned \$1,000,000 to Mr. [REDACTED] in early 1998. Without 1998 tax returns for UBA, certified by the Internal Revenue Service, including Schedule L (which would reflect any loans to shareholders) the record cannot verify the alleged loan from UBA to Mr. [REDACTED]

Despite this clear and unambiguous language, the petitioner does not submit UBA's certified tax returns on motion or other documentation addressing the AAO's concerns. Rather, counsel simply states:

Enclosed herein [as] new evidence is the receipt of filed taxes with [the] IRS. This shows that taxes has [sic] been paid on the source of funds over the years. Therefore, the sources of funds are legitimate and should be taken into account.

Counsel does not indicate whose tax return he is referencing. As stated above, the petitioner did not submit any new tax documentation on motion. Regardless, the AAO never stated that UBA failed to file a tax return or pay any taxes. Rather, we noted the discrepancies on the tax returns themselves, and the lack of evidence that the petitioner's father had paid taxes on his 60 percent of UBA's alleged income of more than \$3,000,000. In addition, we noted that without the 1998 tax return including Schedule L, the record did not support the petitioner's claim that his father received a \$1,000,000 loan from UBA. Neither counsel nor the petitioner have sufficiently addressed the AAO's concerns on this issue. Thus, the petitioner has not adequately shown the source of any funds given to him by his father.

### **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).

The petitioner indicated on the petition that there were no jobs at the time of his investment, that there were eight jobs at the time of filing, and that he expected to create an additional 15 jobs. The AAO noted that, as the petitioner and his father were both seeking eligibility from their investment in UAG, the petitioner must demonstrate the creation of 20 jobs.

The director concluded that the business plan submitted was insufficient and did not meet the requirements quoted above. On appeal, counsel asserted that since jobs had already been created, a business plan was not required. Dr. [REDACTED] echoed this sentiment. The AAO disagreed, stating that only where a petitioner has already created all the necessary jobs is a business plan unnecessary. In this case, the petitioner must still demonstrate that another five jobs will be created if he and his father are to qualify. In a footnote, the AAO noted that the petitioner had not submitted evidence that he and his father had agreed to allocate the first ten employees to the petitioner. The AAO further noted in the footnote that, without payroll records, it was not clear that all fifteen workers were employed full time. Thus, the AAO concluded that a business plan meeting the requirements set forth in Matter of Ho, supra, was necessary and that the petitioner had failed to submit a qualifying business plan.

On motion, the petitioner submits 30 Forms I-9 and W-4 and a list of 31 employees including the petitioner. Counsel asserts, "it is clear that more than 10 new jobs has [sic] been created." Once again, despite the clear language in the AAO's previous decision regarding the necessity of payroll records to demonstrate the number of hours worked, the petitioner failed to submit such documentation. As such, it is not clear how many of the 30 employees work full time. Moreover, a list of employees prepared by an unknown entity is of little evidentiary value. The petitioner has not submitted Forms 941 and wage and tax withholding statements to verify the number of employees. Even if we concluded that the petitioner has now created the necessary

jobs, for the reasons discussed above, the petitioner has not demonstrated a qualifying investment.

Finally, in a concluding section in his brief on motion, counsel states that he is “curious” that the Service has denied the petition, as the petitioner has demonstrated an investment of the necessary amount and created the necessary jobs. Counsel asserts that the “technicalities of interpretation of the law” has resulted in the Service’s decisions. Counsel asserts that the petitioner’s business is “the largest car sales company in the United States” and that it runs advertisements on Channel 22. The petitioner submits several checks issued to Channel 22. At no point has the Service contested that UBA and UAG are operational. Rather, the record reveals that, however convoluted, UAG simply represents UBA expanding its own operations with its own funds. While UBA may have routed the funds through the petitioner’s bank account, UBA appears to be the ultimate source of the funds used to start up UAG. It appears that, regardless of the petitioner’s participation, UBA would have expanded to the new site and hired additional employees. The major shareholders of UBA ultimately purchased UAG’s business location. Thus, contrary to counsel’s assertion, the petitioner does not meet either the letter or the spirit of the law. Moreover, both the director and the AAO noted numerous inconsistencies in the documentation submitted. The AAO specifically noted the lack of documentation which might resolve these inconsistencies, such as a Notice of Issuance of Shares reflecting shares purchased by the petitioner and his father as claimed and certified by the State of California and certified tax returns for UBA and UAG. The petitioner has failed to resolve these issues or submit the specified documentation and instead submits voluminous bank statements with no relevance to the issues raised.

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 sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

**ORDER:** The Associate Commissioner’s decision of October 1, 2001 is affirmed. The petition is denied.