



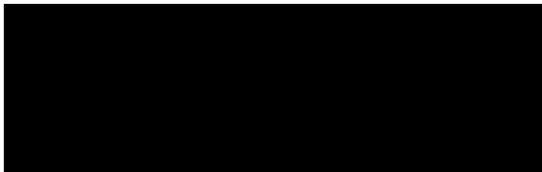
B7

U.S. Department of Justice

Immigration and Naturalization Service

Identification card deleted to
protect clearly identifiable
division of personal privacy.

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



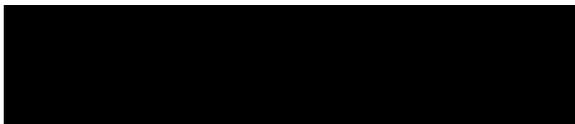
File: WAC-98-201-52237 Office: California Service Center

Date: 22 MAY 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, California 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 the investment of lawfully obtained funds sufficiently placed at risk in an ongoing entity. The director also determined that the petitioner's business plan did not satisfactorily explain how she would finance her business or that the business would create 10 continuous, permanent jobs. Finally, the director determined that the petitioner had "deferred" all management to another entity.

On appeal, counsel asserts that the petitioner has provided sufficient evidence of the lawful source of her funds, that the petitioner intends to continue her business indefinitely, that experts have vouched for the credibility of the petitioner's business plan's financing and employment projections, and that the petitioner will be actively involved in the management of the new commercial enterprise.

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, Fanyan, Inc., 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.

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:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.

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.

On September 29, 1997, [REDACTED] filed its articles of incorporation with the State of California. The petitioner obtained 500,000 of the ten million authorized shares on that date, and as the sole director of the corporation, she appointed herself the president, vice president, and secretary/treasurer of [REDACTED]

According to the two-page "business plan" submitted by the petitioner with her Form I-526, [REDACTED] initial business activity would be to participate in an investment program developed by [REDACTED], a real estate developer and contractor. The business plan stated that [REDACTED] had deposited \$500,000 into an escrow account with [REDACTED]. Upon approval of the petition, \$398,000 of the escrow funds would be used to purchase eight lots from [REDACTED] the remaining funds would be deposited into a [REDACTED] construction account to be used for the construction of single-family houses on the lots. [REDACTED] would not conduct any business activity unless and until the petition was approved. [REDACTED] anticipated selling one lot every three to four months, and the construction of each house would require five months. The partial build out/employment plan submitted with the business plan, however, projects that by the end of the first year, construction will only be beginning on the third house. The chart is cut off after month 19, at which point construction is projected to have started on house number five. The workers used to build the houses would be [REDACTED] employees, although Spencer would determine where each

employee would be placed; [REDACTED] president explained in a letter that construction services would be provided by [REDACTED] using [REDACTED] employees. Profits from construction would be divided 50-50 between [REDACTED] and [REDACTED].

The accompanying build out/employment plan and attached exhibit to the escrow instructions described eight lots in the Excalibur subdivision, lots, 12, 51, 52, 53, 54, 55, 56, and 58. The total sales price of the eight lots was \$398,000.

The undated escrow instructions stated that opening of escrow should occur on or before September 2, 1997 and that the condition of closing the escrow would be written confirmation that the Service had approved the petitioner's Form I-526. It is not clear how [REDACTED] was able to execute these instructions on or before September 2, 1997 when it supposedly did not come into existence until September 29, 1997.

On February 4, 1999, the director sent the petitioner a lengthy, detailed request for additional information. Among other issues, she advised the petitioner of the requirements of a comprehensive business plan, as set forth in Matter of Ho, Int. Dec. 3362 (Assoc. Comm., Ex., July 31, 1998). She pointed out discrepancies among the various documents submitted as to the intended number and type of workers that [REDACTED] would allegedly employ. She noted several references in the record to agreements between [REDACTED] and [REDACTED] and specifically requested "contractual agreements between [REDACTED] and all other entities." She noted that the escrow instructions had already expired.

In response, the petitioner submitted an appellate brief from another attorney, [REDACTED] who is representing another investor also collaborating with [REDACTED] Enterprises. Counsel requests consideration of Mr. [REDACTED] legal arguments. The petitioner also submitted information regarding the Fresno housing market; approval letters for other I-526 petitions allegedly filed by investors collaborating with [REDACTED] Enterprises; an affidavit from Mr. [REDACTED] client regarding her own agreement with [REDACTED] Enterprises and intention to maintain a continuous business; a chart allegedly reflecting the number of lots purchased and sold by other investors collaborating with [REDACTED] Enterprises; a letter from [REDACTED] asserting that there will be no overlap of employees among [REDACTED] Enterprises, [REDACTED] and other immigrant investors collaborating with [REDACTED] Enterprises; a letter from [REDACTED] regarding the ability of a company developing one or two houses at a time to maintain 10 full-time employees; a labor and employment directive signed by Mr. [REDACTED] client and [REDACTED] Enterprises; and a model business plan for investors collaborating with [REDACTED] Enterprises. Counsel also asserted that the escrow agreement was being amended to extend the expiration date and that the petitioner would submit evidence of the amendment.

On July 27, 2001, the director issued a notice of intent to deny the petition, advising the petitioner that the Service interpreted full-time employment to mean continuous, permanent employment. The director stated that the petitioner's business plan did not appear to project the creation of 10 continuous, permanent jobs. The director further noted that, according to the profile of [REDACTED] Enterprises, it has been in business since 1973 and has constructed thousands of residential and commercial units. It and its subsidiaries have "annual business volumes" of \$78 million and employ over 100 persons. In contrast, each alien's company is projected to sell three to

four houses a year at an average price of \$160,000, or an annual sales volume of \$640,000. Aside from the question of whether Clovis could support a three- to ten-fold increase in the number of full-time construction workers, the director questioned whether it was realistic for each of the collaborating companies to have 10 direct full-time permanent employees when [REDACTED] and its subsidiaries, established builders with almost 122 times the annual sales volume, have only 100 employees who may not be full-time employees and who may not even be construction workers. Finally, the director questioned whether Spencer would have the resources to manage 300 to 1,000 construction workers belonging to 30 to 100 separate corporations, technically requiring separate attention, in addition to managing its own numerous employees and projects.

In response, counsel asserted that, in order to comply with the investor law, the petitioner was obligated to come up with a business plan that did not rely on independent contractors while Spencer is not similarly restrained. As [REDACTED] is able to rely on contractors, counsel argues, its direct employment numbers should not be used for comparison. Counsel also referred to the other investor projects which, he claims, are succeeding, as evidence that [REDACTED] has the capacity to manage the petitioner's employees. The petitioner submitted a second business plan for [REDACTED] which adopts the model plan submitted in response to the director's request for additional documentation. While counsel argues that the new plan is not intended to "revise" the initial plan, it calls for the construction of four houses per year, whereas the original build out/employment plan projected the construction of only three houses per year.¹ Finally, counsel asserted once again that an extension of the escrow agreement would be forthcoming.

The director concluded that the petitioner had not overcome her concerns and denied the petition on December 21, 2001. On appeal, counsel argues that neither the law nor the regulations require that full-time jobs be continuous or permanent. Counsel asserts that such an interpretation precludes the removal of conditions for any investor who replaces an employee due to termination or the employee's resignation. Counsel also asserts, however, that even if the Service does adopt such an interpretation, the petitioner plans to have a team of 10 to 14 employees. Counsel asserts that this office reviewed a revocation decision on the petition of another investor collaborating with [REDACTED] Enterprises who presented evidence of direct employment of an unspecified number of workers. Finally, counsel argues that the employment issue is best reserved for the removal of conditions stage.

First, we concur with the director's interpretation of full-time employment to mean **continuous**, permanent employment. While counsel challenges this interpretation on appeal, counsel's arguments are not persuasive. As stated above, counsel contends that such an interpretation precludes the removal of conditions for any investor who replaces an employee during the conditional period. The Service's position is not that a business must retain the same 10 individual employees, only that the investor must create 10 continuous positions. For example, a construction company relying on a framer as a full-time employee would need to demonstrate the continuous need for a skilled framer, not necessarily that the company continuously employed the same

¹ Counsel appears to go back and forth on this issue, claiming that the business will construct four houses per year when arguing the business will require 10 full-time employees and claiming that eight houses will take three years to construct when arguing that the business will continue past the two year conditional period.

individual framer. Not only must a particular position last beyond a given finite project, it must be full-time all the time. A federal court upheld the Service's interpretation of full-time employment as continuous, permanent employment in a case involving another investor collaborating with Spencer Enterprises. See Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 19 (E.D. Calif. 2001). As such, we will examine the record as to whether the petitioner has established that it is likely that she will create at least 10 full-time, continuous, permanent jobs.

The initial business plan does not call for 10 continuous, permanent jobs. While individual workers may work 35 hours or more during a given week, their jobs are not continuous. The petitioner's initial build out/employment plan reveals that the numbers of each category of employee will fluctuate up and down by month. For example, while the plan projects three framing employees during September 1998, it projects zero framing employees two months later. During the following months, the number of framing employees increases to three, drops to one, increases to three, drops to two, etc. Given the purported prohibition against working for ██████████ or for any other alien's company, a framing employee of ██████████ could find himself without any job at all during several of the months allegedly required to build all eight houses. His intermittent employment is no better than seasonal employment. The numbers of employees required in the other categories reflect similar fluctuations. Therefore, any jobs created by Fanyan would not qualify as permanent, full-time positions. The new plan submitted in response to the director's intent to deny notice does not include a build out/employment plan and calls for the building of four houses per year whereas the initial plan contemplates only three houses per year.

The materials submitted in response to the request for additional documentation relating to Mr. ██████████ client, including her affidavit and the agreements into which she entered with ██████████ Enterprises, are irrelevant to the petitioner's business intent and are not evidence that the petitioner has entered into similar agreements with ██████████ Enterprises. The chart demonstrating that other investors with similar business plans have sold houses and continue to expand their own businesses through the purchase of new lots is not persuasive that the petitioner's proposed business would be able to maintain 10 continuous jobs. The record does not include the employment records of the other investors. As such, the fact that other investors have constructed houses is not evidence that ██████████ can manage the additional employees required for all the investors to qualify as the record remains absent evidence that the approved investors have all hired 10 permanent, continuous employees each.

██████████ an experienced developer, asserts that the petitioner's proposed business can be expected to employ 10 full-time employees. He asserts that each home requires 3,500 to 4,500 hours per house, and, according to Mr. ██████████ thus, four houses per year will require 10 to 12 employees working 35 hours per week. The math does not support Mr. ██████████ assertion. Three thousand five hundred hours multiplied by four houses per year divided by 52 weeks in a year equals 269.23 hours per week, or 26.92 hours of work per week for 10 employees. Even if 4,500 hours are used per house, the result is 34.6 hours of work per week for 10 employees, assuming no employee works more than 35 hours. Moreover, as stated above, the petitioner's initial build out/employment plan projects the construction of only three houses per year. Moreover, Mr. ██████████ formula does not account for whether employees in a single trade will be required full-time continuously every week.

As the director pointed out, the president of ██████ has stated that ██████ "like many builder-developers, employs construction workers only when their skills are needed for specific building projects." Although the build out/employment plan states that ██████ will create employment in the categories of site & concrete, framing, utility, clean-up, and administration ██████ president explains instead that the ██████ workers will "generally" be in the concrete, framing, finish carpentry, masonry, and roofing trades. He specifies that only employees in positions that require a minimum of 35 hours per week are counted as "full-time" and that seasonal or part-time employment is not being counted. The intermittent employment contemplated is as temporary as seasonal employment, which Mr. ██████ appears to concede is not qualifying.

The petitioner states that, in the beginning, a mix of ██████ employees and subcontractors will construct the first houses; the work of the subcontractors will be phased out and be performed by additional ██████ employees on later houses. ██████ will act like a temporary agency in that it will provide its employees to ██████ but the ██████ employees will work only on ██████ lots. The petitioner presents a letter from a builder in ██████ who states, "I am also aware of ██████ plan to manage workers who are employed directly by his investors to construct houses on lots they own. While this is not currently a common practice in the industry, it has been used successfully by myself and other builders." The builder did not elaborate as to the number and circumstances of these rare instances.

As stated above, the petitioner claims that the employees will be direct employees of ██████ in that they will be paid by Fanyan and Fanyan will maintain their employment records. The build out/employment plan submitted by the petitioner states that the positions will be in the categories of site & concrete, framing, utility, clean-up, and administration.² The petitioner indicates that approximately 30 aliens have already made investment arrangements with ██████ and potentially as many as 100 more could join in the future. This means an increase of 300 to 1,000 construction jobs in Fresno.

That ██████ maintains a permanent staff of only 100 is relevant despite their use of independent contractors. Construction workers are generally hired for a particular job and are not retained as direct employees. They are contractors for a reason. The petitioner has failed to demonstrate how her highly unusual proposed business practice is in the business interests of ██████ as opposed to having been devised simply to meet a requirement for an immigration benefit. As such, the Service is not convinced that the plan is both credible and has been entered into in good faith.

Moreover, the petitioner does not appear to be creating any net employment. The lots to be purchased are already owned by ██████ Enterprises, which will be managing the development on these lots whether the petitioner contributes capital to this venture or not. In response to the director's request for additional documentation, the petitioner submitted an "Index of Random

² As far as the claim that one to two employees would work in administration, it should be noted that ██████ business office is located in the office suite occupied by ██████. The president of Spencer has agreed to provide ██████ with non-exclusive use of office facilities and support services to ██████. The record suggests that any administrative work would be performed by ██████ employees.

Photos By Lot” which provides the development, lot number, the “builder company,” the buyer of the completed house, the selling price, and whether construction has been completed. The index reveals that one of the lots listed on the escrow agreement, lot 58 at the Excalibur subdivision, does list Fanyan as the “builder company” but also indicates that the house was under construction and had been sold to a buyer. Subsequently, the petitioner submitted evidence that the escrow agreement, which listed the deeds to the lots specified as closing documents to be deposited into escrow, had been extended until December 31, 2002. Similarly, a map of the Excalibur development reflects that another one of the petitioner’s lots, lot 12, is one of the models, which must have been one of the first houses constructed at the site. Besides raising issues as to the credibility of the escrow agreement and the extensions, the sale of the petitioner’s lots raises concerns that the petitioner is not creating any net employment. If the petition is never approved, the construction on the lot will still continue. On the other hand, if the petition is approved shortly after construction begins, then one of two things will occur: either the workers will lose their jobs because [REDACTED] employees are not permitted to be former [REDACTED] employees, or, if the workers are contractors of Spencer, they will merely be transferred on the books to [REDACTED]. In either case, no net employment is created.

Finally, we disagree with counsel that this question is not proper for our consideration at the form I-526 stage. Where a business plan does not credibly project the need for 10 full-time employees the Service need not wait and see if the business performs better than is credibly expected during the conditional period.

The petitioner has failed to establish that Fanyan would create 10 or more direct, full-time, permanent employment positions within two years, and for this reason, the petition must be denied. The proposed employment positions are clearly intermittent at best.

COMMERCIAL ENTERPRISE

8 C.F.R. 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

The initial business plan noted that the petitioner had deposited \$500,000 for the purchase of eight lots and the construction of houses upon those lots. The business plan further states, “it is anticipated upon the completion of each home sold by the Company, additional land will be purchased for development through the reinvestment of returned capital.” The escrow agreement indicates that Spencer “will” deposit into escrow the grant deeds for the eight lots specified on

the attachment and that the petitioner "has deposited or will deposit" into escrow the \$500,000. The escrow agreement indicates that the price for all eight lots is \$398,000 and that the remainder will go into a general construction account when escrow closes. The Consent In Lieu of Organizational Meeting of Board of Directors of [REDACTED] indicates that it is the intention of the corporation to purchase eight lots from [REDACTED] Enterprises and to contract with [REDACTED] to use at least 10 of its employees for the development of the lots. The document then states, "the corporation shall vigorously pursue other opportunities to provide construction services and to make investments." Richard [REDACTED] of [REDACTED] Enterprises states in his initial letter, "participants in our investment program are a source for [REDACTED] Enterprises, Inc. of moderately priced capital for short to mid-term use (2-3 years)." He further indicates that no construction will begin until the investor's I-526 petition is approved.

On February 4, 1999, the director requested that the petitioner submit "contractual agreements between [REDACTED] and all other entities." In response, the petitioner submitted an affidavit from another investor collaborating with [REDACTED] regarding her own intent to continue the business after the construction of the eight houses, a chart allegedly reflecting the number of lots purchased and sold by other investors collaborating with Spencer, and a model business plan for investors collaborating with [REDACTED]. The plan references an "agreement for Cooperative Development" with [REDACTED] that is not in the record.

In her notice of intent to deny, the director questioned whether [REDACTED] was formed for the "ongoing" conduct of business. In response, counsel refers to the initial business plan which anticipates future investments and asserts that it has always been the petitioner's intention to continue the business after two years. The petitioner submits a new business plan adopted from the model plan submitted previously which contains a five year profit and loss projection. In her final decision, the director concluded that the petitioner had not resolved this issue.

On appeal, counsel argues that the regulations do not provide a definition of "ongoing" and that the dictionary definition is "being actually in progress." Counsel notes that no entrepreneur can ever guarantee that a business will last more than two years and that the eight lots will take three years to develop. Counsel argues that the record contains no evidence that the petitioner has any intention to end her investment after two years and notes that other investors have continued to invest past their initial eight lots.

First, counsel provides no citation for his "dictionary definition" of ongoing. Webster's Ninth New Collegiate Dictionary 825 (1986) defines "ongoing" both as "being actually in progress," and as "continuously moving forward." The first definition does not appear to help the petitioner as her business is not in progress, but pending. Moreover, the second definition makes considerably more sense in the context of the regulation. It would make no sense to require a petitioner to establish a *new* commercial enterprise to engage in conduct that was *already* in progress. We concur with the director that a petitioner must establish that her business is committed to more than a set number of transactions.

It is acknowledged that no business is guaranteed to continue beyond two years. Whatever the petitioner's current intention and the time period for which she has projected profits and loss, it remains that, absent an affirmative action by her to purchase more land, her business and the jobs

she may have created, will end after the construction of the eighth house. A typical business, on the other hand, has continuing obligations. While every store must restock its inventory to continue, the closing of a store involves the winding up of the business, the selling of assets and the satisfaction of outstanding obligations. It is an active process. The fact that three (out of 16) aliens have decided to continue beyond two years does not necessarily mean that this petitioner would elect to continue. Furthermore, the chart reveals that some of the aliens are significantly behind their projected schedules. The owner of Y&M Alliance, Inc., for example, has been a conditional permanent resident since June 1997 and has sold only two out of eight lots.

Even if the petitioner chose to continue investing in [REDACTED] Enterprises, given the highly questionable nature of the employment strategy proposed by the petitioner, it does not appear that there is any incentive for the petitioner to continue to operate [REDACTED] with direct employees after the conditional period. While there is no requirement that an investor continue to employ 10 workers after having her conditions removed, with a true ongoing entity, the continuation of a return on the investor's capital will be dependent on the investor maintaining her employees, creating a continuing incentive to run an employment-generating business. In this case, the entire scheme appears created to make a passive investment into an existing business appear to be a qualifying investment in a new business. Once the conditional period is over, there would be no incentive not to revert to a passive investment scheme whereby the petitioner or [REDACTED] simply invests capital into [REDACTED] Enterprises.

In light of the above, we concur with the director that the petitioner has not sufficiently established that her business meets the regulatory definition of a commercial enterprise as it was not formed for the ongoing conduct of lawful business.

CAPITAL AT RISK

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

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)(2) states:

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.

The regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, she must establish that she placed her own capital at risk.

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

Cited with approval in Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001).

The director discussed several issues with the path of the petitioner's funds under this heading. Those issues will be discussed below as they relate to the lawful source of the petitioner's funds. The director also expressed concerns regarding whether any borrowed funds had been adequately secured. The record does not currently reveal that the petitioner borrowed any of the funds deposited in Fanyan's account. As discussed below, however, the petitioner has not provided adequate documentation establishing that the funds deposited with Fanyan are her own.

The undated escrow agreement requiring escrow to open on or before September 2, 1997, indicates that the title company is Central Title Company and that the funds would be deposited there. The petitioner also submitted a letter from [REDACTED] dated July 7, 1998, indicating that the title company was changed from Central Title Company to First American Title Company on or about May 1, 1998. The petitioner further submitted a letter from First American Title Company asserting that they received three payments "from and on behalf of a [REDACTED] Inc. client known as [REDACTED] Inc." The three payments are listed as \$5,000 on September 2, 1997, \$420,000 on September 15, 1997, and \$75,000 on October 27, 1997. These dates are all prior to May 1, 1998 when First American Title allegedly became the escrow agent. Furthermore, the relationship between [REDACTED] Enterprises or [REDACTED] and Land Development Strategies is not established in the record. In addition, the record does not contain the new escrow agreement which provides First American Title with its instructions. The amendments submitted on appeal purport to amend the agreement dated September 2, 1997. The escrow agreement in the record is undated, but Mr. Spencer claims to have switched title companies in May 1998. As such, there should be a new escrow agreement dated on or about that date.

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 record does not resolve the identity of the escrow agent or whether any escrow agreement with First American Title still exists.

Moreover, the agreement provides that Spencer agrees that it "will" deposit the deeds to the property identified on the attached list whereas the petitioner agrees that she will or has deposited the money. Spencer is given the right to waive the deposit of the full \$500,000. The purpose of an escrow account is to facilitate a sale by placing the deed and the money in the hands of a third party. In this case, neither the petitioner nor Spencer had to deposit anything for

the escrow to open. This flaw becomes obvious as it appears that [REDACTED] has constructed a model on one of the plots supposedly set aside for the petitioner and entered into a sales contract on another. As such, it appears that the deeds to these lots are not with the escrow agent.

The petitioner submitted an uncanceled check from [REDACTED] alleged to be the petitioner's brother-in-law, issued to Central Title Company on September 2, 1997; a September 13, 1997 unapproved wire transfer application for the transfer of \$420,000 from [REDACTED] to West America Bank; a printed receipt dated September 15, 1997 for a wire transfer of \$420,000 from [REDACTED] to West America Bank, account 248 019 028 belonging to Central Title; and an October 25, 1997 approved wire transfer application for \$75,000 from [REDACTED] to West America Bank.

As discussed earlier, one of the eight lots that the petitioner claims [REDACTED] is in the process of purchasing for \$421,000 is already under construction and committed to a buyer and another lot appears to be the site of a completed model. As construction already commenced on these lots with independent contractors and employees of [REDACTED] the purchase of these lots by [REDACTED] will not create any employment and any money used to purchase those lots cannot be considered part of the petitioner's investment. See generally Matter of Izumii, I.D. 3360 (Assoc. Comm. Examinations) July 13, 1998) (concluding reserve funds not used to generate employment are not properly invested). The sales prices of the six remaining lots total only \$302,000.

The petitioner's business plan calls for \$79,000 to be placed in the construction account. In response to the director's concern that \$79,000 would not be sufficient to purchase materials and labor for the construction of a single house, the petitioner has submitted much evidence to support her claim that the cost of building the first house would be less than \$79,000; because of the "draw system" of paying for construction, the actual cost outlay might be as low as \$64,000. [REDACTED] plans to build only one house at a time, and the profits from the sale of the first house would be reinvested and be more than adequate to pay for the construction of the subsequent houses.³ If this is true, then the extra amount of \$96,000 that would result from [REDACTED] inability to purchase all eight lots is completely unnecessary to accomplish [REDACTED] business goals, and that amount could not be considered to be "at risk."

In addition, 8 C.F.R. 204.6(e) states that all capital must be valued at fair market value in U.S. dollars. The petitioner has furnished no evidence as to the fair market value of the lots that she claims Fanyan will purchase as inventory. It would be inappropriate for the petitioner and Spencer to agree, for example, that the lots would be sold at artificially high prices simply so the petitioner could meet the minimum capital requirement without having to purchase more lots than would be necessary for Fanyan to keep busy for two and a half years.⁴ While the petitioner could argue that

³If more than one lot is sold initially, [REDACTED] has agreed to advance the construction costs to Fanyan.

⁴[REDACTED] also has an interest in selling the lots for higher than fair market value. [REDACTED] acknowledges that it needs cash to build houses and explains that the banks will lend only up to a certain portion. If [REDACTED] were to sell the lots for inflated prices, it could obtain more cash than it could from a bank.

any price set between a willing buyer and willing seller is by definition the fair market value, the transaction here between the petitioner and [REDACTED] is not an arms-length transaction. The petitioner has failed to establish that the purchase of the six remaining lots represents an investment of as much as \$302,000 of capital.

In the letter of July 7, 1998, the vice president of First American Title stated: "Since deposit sums are not segregated by client, I sincerely hope that this specific affirmation as to [REDACTED] will be sufficient for your needs." This commingling of funds presents several problems. It is difficult to trace funds deposited by each alien as well as to track funds purportedly withdrawn on behalf of each alien.

In her February 4, 1999 letter, the director questioned whether the funds placed in escrow were immediately and irrevocably committed to [REDACTED] for job-creation purposes upon approval of the petition. If they were not, they could not be considered to be at risk. In fact, the [REDACTED] investment plan does not place funds immediately at risk for job-creation purposes. Upon approval of the petition, funds would be released from escrow to purchase lots from [REDACTED] and the balance would be placed in a construction account. The construction account would not be used, however, until a lot was sold to a retail buyer.

By way of illustration, one could examine the case of a manufacturer of frozen dinners who purchases a large quantity of meat and equipment. His money is at risk and he must employ workers to produce the finished product; he risks loss if he fails to follow through on his business plan or if a sufficient amount of the finished product is not sold.⁵ In contrast, in the petitioner's case, the hiring of the employees is contingent upon the sale of the lots; until that time, the petitioner risks nothing. If the petitioner chose not to sell the lots, no employment creation would occur and no funds would be placed at risk.⁶ Land speculation is not the type of profit-generating, employment-creating activity contemplated by 8 C.F.R. 204.6(e) (definition of "invest"). Considering that the six lots are located in Spencer subdivisions, it is not known if Spencer would be willing to purchase the lots back from the petitioner if she so chose; however, the issue of repurchase need not be explored at this time.

The petitioner has failed to demonstrate that she has invested, or is in the process of investing, the requisite amount of capital. Not only are there inconsistencies regarding the escrow account, but the money is not at risk. For this reason, as well, the petition must be denied.

SOURCE OF FUNDS

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

⁵Such a petitioner would have undertaken meaningful, concrete business activity as required by Matter of Ho, supra.

⁶Y&M Alliance, for example, sold only two of its eight lots after being in business for 22 months.

(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).

As stated above, the petitioner submitted an uncanceled check from [REDACTED] alleged to be the petitioner's brother-in-law, issued to Central Title Company on September 2, 1997; a September 13, 1997 unapproved wire transfer application for the transfer of \$420,000 from [REDACTED] to West America Bank; a printed receipt dated September 15, 1997 for a wire transfer of \$420,000 from [REDACTED] to West America Bank, account 248 019 028 belonging to Central Title; and an October 25, 1997 approved wire transfer application for \$75,000 from [REDACTED] to West America Bank.

The petitioner also submitted what is alleged by counsel to be evidence that the petitioner's spouse, [REDACTED] sent \$500,000 to his brother for the investment. The exhibit referenced by counsel is prefaced with a translator's certification, but the only item translated is [REDACTED] name. The first document appears to be a receipt for a deposit account worth RMB 615,000. The petitioner failed to provide a currency exchange, but the U.S. dollar amount is approximately \$19,000. The remaining two documents of the exhibit appear to be transfer receipts but the photocopy is so poor

as to make the documents nearly illegible. The first of these two remaining documents appears to be dated October 7, 1997 and represents the transfer of what appears to be 458,100,000 in an unknown currency (presumably RMB given the amount) from someone with the last name of [REDACTED] (the first name does not appear to be Jinqi) to an illegible beneficiary in Minnesota. The second document dated June 7, 1996 concerns the amount of \$220,000 and [REDACTED] account number from which the funds were transferred to Central Title. The remitter appears to be Beijing Jinbo Car-Industry, but, as stated above, the record contains no complete translation of the document. The final document appears to represent the transfer of an unknown amount on an unknown date from Beijing Jinbo Car-Industry by order of [REDACTED] to [REDACTED]. This final document is almost completely illegible.

While the director focussed on the discrepancy between the petitioner's claim to have invested funds saved by her husband and the documents reflecting money transferred by the petitioner's brother-in-law, the petitioner has always claimed that her husband transferred funds to his brother who then transferred the funds to the title company. Without legible, translated documents, however, the petitioner cannot establish the source of her funds. In addition, if a company transferred the funds to [REDACTED] the petitioner must demonstrate that the funds were those of her husband, and not the company.

Moreover, while the petitioner has submitted documents regarding her husband's business interests, they do not appear to account for the accumulation of \$500,000. The record reveals that [REDACTED] the deputy general manager of Beijing [REDACTED] Automobile Decoration Industry, a company established in 1988 with RMB 10,000,000 capital. The petitioner submitted an agreement for reward distribution which doesn't reflect Mr. [REDACTED] personal reward from the company. The balance sheet for what appears to be 1995 reflects profits available for distribution of RMB 16,581,320, of which RMB 13,187,871 or \$1,585,081 was distributed. It is not clear how much of those funds were distributed to the petitioner's spouse

The petitioner also submitted the business license for [REDACTED] Clean and Maintenance Co., Ltd., established in 1993, listing the petitioner's spouse as the vice chairman of the board. The petitioner also submitted the 1995 and 1996 financial statements for this company which do not reflect the petitioner's salary or the distribution of dividends. In fact, the 1996 documents are not translated beyond the title of the document. The record does include a partial translation of a Form of Profit Distribution for [REDACTED] Washing and Maintenance Co, Ltd. This document indicates that the company awarded RMB 78,181.33 (\$9,397) in employee bonuses and distributed RMB 1,042,417.73 (\$125,291). The record does not reveal how much of this money was distributed to the petitioner's spouse.

The petitioner also submitted a certification that her spouse owns property in Beijing. The translation does not indicate the worth of this property or whether there is any mortgage on the property. Regardless, the petitioner does not claim that her spouse sold the property to fund her investment and the record contains no evidence of the sale of this property.

Finally, the petitioner submitted several bank documents including her spouse's passbook reflecting balances between \$246.27 and \$23,949 (the largest deposit reflected is for only \$13,814), and the following deposit accounts: \$10,000 in the petitioner's first U.S. currency

account, \$15,000 in the petitioner's second U.S. currency account, RMB 615,000 (\$73,918) in the petitioner's RMB account, \$10,000 in her spouse's U.S. currency account, RMB 223,000 (\$26,803) in the spouse's RMB account, and \$30,000 in the account of [REDACTED]. The record does not reflect the relationship between the petitioner and [REDACTED]. Moreover, these statements are from different dates, many after the investment was allegedly made, and cannot demonstrate the funds available to the petitioner and her spouse in September and October 1997. Regardless, these amounts cannot account for a \$500,000 investment.

MANAGEMENT

8 C.F.R. 204.6(j)(5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

- (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
- (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
- (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

Initially, the petitioner submitted the Certificate of Organization and the Consent in Lieu of Organizational Meeting for [REDACTED] reflecting that the petitioner is the sole director, president, vice president, secretary and treasurer of [REDACTED]. The petitioner also submitted the initial business plan which called for the cooperation of [REDACTED] and [REDACTED] regarding employment but did not specify the petitioner's management role.

In response to the director's request for additional documentation, which did not raise the issue of management but requested all contracts between Fanyan and any other entity, the petitioner submitted an affidavit from another investor collaborating with [REDACTED] regarding her own intention to be involved in the management of her company, a letter from John McCann of [REDACTED] Enterprises discussing the management arrangements with [REDACTED] Enterprises and the history of management by other investors collaborating with [REDACTED] a Labor and Employment Directives statement signed by [REDACTED] and the petitioner on behalf of [REDACTED] and the model business plan discussed above.

In the notice of intent to deny, the director noted that the petitioner was still in China, questioned whether the petitioner had sufficient experience to run a development company, and concluded that the petitioner had “deferred” her authority to [REDACTED] to manage the employment generating activity.

In response, counsel notes that the regulations only require that an investor be engaged in policy decisions and need not manage the day-to-day operations, which the petitioner has assigned to Spencer Enterprises. The petitioner submitted her own business plan which adopts the management responsibilities of the model plan. Those responsibilities are as follows:

- A. Participation in the formulation of the business plan and ongoing policies for the Company;
- B. Inspection and selection of lots for purchase as initial inventory and ongoing replacement inventory;
- C. Overseeing the conduct of business by the sales and construction manager;
- D. Reviewing and analyzing routine management reports and financial statements provided by our general manager;
- E. Calling and conducting shareholders and board of directors meetings at the Company headquarters in Fresno, California;
- F. Making timely decisions regarding price changes, sales, or other policy or business strategy, including acquisition of additional land inventory;
- G. Deciding whether to continue the relationship with Spencer Enterprises, Inc., in the future or select another management contractor;
- H. Deciding whether to engage in other forms of business pursuit; and
- I. Approving significant departures from existing house plans or methods of operations and construction.

The director concluded in her final decision that the petitioner had not overcome the concerns expressed in the notice of intent to deny.

It is acknowledged that, according to the regulations, a petitioner can submit evidence that she is serving as a director or officer of a corporation to meet this requirement. In the instant case, however, the corporation appears to be a shell corporation through which the petitioner is capitalizing Spencer Enterprises. [REDACTED] himself, as quoted above, acknowledges that the plan was devised to supply Spencer Enterprises with additional, short-term capital. Richard [REDACTED] incorporated [REDACTED] and was the initial agent, suggesting that the petitioner may have granted Mr. [REDACTED] a power of attorney to conduct the corporation’s affairs. Any authority

delegated to Mr. [REDACTED] or [REDACTED] Enterprises by power of attorney can not be attributed to the petitioner. 8 C.F.R. 204.6(j) provides that the director may request evidence in addition to that specified in the regulations. The director in this case specifically requested all contracts between [REDACTED] and all other entities. The petitioner has had three opportunities to comply with this request, in response to the request for additional documentation, in response to the notice of intent to deny and on appeal. Yet, the petitioner has not submitted the agreement between [REDACTED] and [REDACTED] setting forth the management arrangements or the power of attorney agreement authorizing Mr. [REDACTED] to incorporate Fanyan. As such, the petitioner has not submitted the evidence requested by the director to address this issue. Thus, we concur with the director that the petitioner has not established that she will be actively involved in the management of the employment-generating business activity.

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.