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U.S. Department of Justice
Immigration and Naturalization Service

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

File: WAC-00-049-50402 Office: California Service Center

Date: 001 17 2002

IN RE: Petitioner:

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

IN BEHALF OF PETITIONER:



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 section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that she had established a new commercial enterprise, made a qualifying investment of lawfully obtained funds, or that she had or would create the necessary employment.

On appeal, counsel argues that the petitioner submitted sufficient evidence to document that her investment funds were placed at risk and derived from a lawful source. Counsel further asserts that the petitioner submitted two business plans, which adequately demonstrated that the petitioner's investment would create the necessary employment.

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, Century Elite International, Inc.,¹ not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

¹ In addition, as discussed below, the petitioner also claimed to have invested \$150,000 in a second, unrelated business, Natural Econometrics, Inc. On appeal, the petitioner submits a business plan for a third business, Steel Project. While counsel asserts that this business plan was submitted previously, it is not in the record and at no point has the petitioner previously claimed or documented an investment in Steel Project.

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 she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise identified on the Form I-526 petition is [REDACTED]. The petitioner is the sole shareholder of this company. On an attachment to the petition, the petitioner provided the following information:

Aside from investing \$550,000 into [REDACTED] [the petitioner] also invests \$150,000 into [an Internet multimedia broadcasting company,] Natural Econometric Incorporated, a California corporation incorporated in August 1994 doing business in San Francisco, California.

...

Investor, [the petitioner], is very interested in the project and recognized the potential of [an] Internet company. However, she is not willing to risk all her investment into this high risk venture. Therefore, she will invest an initial amount of \$150,000 with an option to invest an additional \$300,000 by December 2000 if [Natural Econometric, Inc.] is proven to be profitable.

The petitioner submitted the December 3, 1998 articles of incorporation and May 1, 1999 business license for [REDACTED]. The petitioner was the initial agent listed on the articles of incorporation for [REDACTED]. There is no evidence that [REDACTED] assumed the business of an operational company; thus [REDACTED] appears to be an original business.

The petitioner also submitted the August 12, 1994 articles of incorporation for Natural Econometric, Inc., (NEI). In addition, she submitted a cancelled check and stock certificate reflecting her purchase of \$150,000 worth of stock in NEI on November 30, 1999 and NEI's financial statements. In response to the director's request for additional documentation, the petitioner submitted the 1999 tax return for that company. The uncertified tax return reflects that [REDACTED] net worth increased from \$2,465 to \$132,941 during that year, well over 40 percent. The balance sheet indicates that the increase is due to the petitioner's investment. The unaudited comparison balance sheet separate from the business plan, however, is somewhat inconsistent, reflecting a net worth of \$27,072.13 as of December 31, 1998 increasing to \$150,293.07 as of December 31, 1999. While this document also reflects a 40 percent increase in net worth, the inconsistencies reduce the credibility of either document. Moreover, both documents, which list several assets as well as liabilities as of the beginning of 1999, are inconsistent with a second set of projected balance sheets in [REDACTED] Radio21 business plan which project no assets other than cash through 2002 and no liabilities until October 1999 and only accounts payable after that. 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).

In her final decision, the director stated:

The above-mentioned documentation reveals that the petitioner has initiated a business; however[,] for immigration purposes, the following will clearly indicate that the petitioner has not established a new commercial enterprise.

The only other discussion of "establishment" in the remainder of the decision is as follows:

The Service finds that the petitioner was to establish a commercial enterprise and invest the required amount and create employment. The Service has shown above that the petitioner has not invested the required amount as presumed by the petitioner. Furthermore, the petitioner has only speculated on a second investment into Natural Econometric Incorporated.

Although, the speculated investment in Natural Econometric Incorporated shows no part in this case, as a courtesy and to offer a response to the petitioner, the Service requested information in regards to the investment into Natural Econometric Incorporated. The petitioner responded with the following: The said investment is an in an [sic] existing enterprise. The petitioner indicates that he/she has invested \$150,000 in capital showing a 40% increase in its net worth "more than 40%[.]"

However, the establishment of a new commercial enterprise which includes a "new commercial enterprise resulting from a capital investment in an existing business" 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 . . . which the petitioner has not shown in this investment.

Counsel does not address this issue on appeal. Nevertheless, as the director's discussion of this issue is minimal, we find further discussion is appropriate.

The plain language of the statute requires that a petitioner establish "a" new 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.

(Emphasis added.) NEI is not a wholly owned subsidiary of [REDACTED] and, in fact, is unrelated to that business. The problem with accepting two completely unrelated businesses as a single commercial enterprise for the entrepreneur program becomes evident where, as in this case, the petitioner appears to be claiming most of the employment will be generated from her relatively small investment in NEI, while claiming to have satisfied the "investment" requirement through an investment in a completely unrelated company. In such cases, as will be discussed in more detail below, the petitioner is unable to demonstrate a satisfactory nexus between the bulk of the investment and the bulk of the projected future employment creation.

In summary, while the petitioner created an original business with [REDACTED] and claims to have expanded NEI by 40 percent, it is not clear that we can consider the two entirely unrelated businesses as a single qualifying investment scheme whereby the investment will be responsible for generating the requisite employment. Regardless, the inconsistencies between the projected balance sheets, the unaudited 1998/1999 comparison balance sheet, and the uncertified tax returns diminishes the credibility of any of these documents.

INVESTMENT OF CAPITAL

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

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the petition, the petitioner indicated that she initially invested \$550,000 in May 1999, her total investment. She also indicated that she had invested \$290,000 cash, \$10,000 in assets purchased for the business, \$550,000 in stock, and \$150,000 as "other." On an attachment, the petitioner explained, as quoted above, that she had invested \$550,000 in [REDACTED] and another \$150,000 in NEI with an "option" to invest another \$300,000 in NEI.

Initially, the petitioner submitted wire transfer receipts and balance statements for her account at Sin Hua Bank in Hong Kong. These documents reflect that on December 17, 1998,² the petitioner transferred \$107,414.57 to her account number [REDACTED] at Wells Fargo; on February 10, 1999, the petitioner transferred \$297,952.55 to her account number [REDACTED] at Wells Fargo; and on April 10, 1999, the petitioner transferred \$621,128.30 to her account number [REDACTED] at Wells Fargo. The petitioner also submitted an April 13, 1999 bank letter from Wells Fargo indicating that the petitioner had a balance of \$1,028,254.38 in an unspecified money market account. In a second bank letter dated April 27, 1999, Wells Fargo indicated:

This letter is to confirm that \$700,000.00 was transferred from the consumer account of [REDACTED] of [the petitioner] to her business [REDACTED] checking account of [REDACTED] business market rate account of [REDACTED] and business portfolio market rate account of [REDACTED] on 4-20-99.

The petitioner also submitted a stock certificate issued to her on May 7, 1999 for 55,000 shares in [REDACTED]. On May 15, 1999, the petitioner rented 215 square feet to be used as an administrative office for the sale of medical equipment and bookkeeping for a restaurant. On May 18, 1999, [REDACTED] entered into a distributor agreement with J.D. Honigberg International, Inc. whereby they agreed that [REDACTED] would operate as J.D. Honigberg's sole distributor of a certain model of ventilator through May 18, 2000. The petitioner also submitted several [REDACTED] invoices for medical equipment sold to companies in China and freight documents.

In response to the director's request for additional documentation, the petitioner submitted another Wells Fargo letter reflecting the following transactions: on April 20, 1999, \$700,000 withdrawn from the petitioner's account [REDACTED] \$500,000 of which was transferred to [REDACTED] account [REDACTED] and \$100,000 of which was transferred to [REDACTED] account [REDACTED] on April 21, 1999, \$100,000 withdrawn from the petitioner's account [REDACTED] all of which was transferred to [REDACTED] account [REDACTED] and on November 9, 1999, \$431,000 withdrawn from the petitioner's account [REDACTED] and \$47,5000 withdrawn from the petitioner's account [REDACTED] \$450,000 of which was deposited into [REDACTED] account [REDACTED]. The letter noted that [REDACTED] is a business checking account while [REDACTED] and [REDACTED] are market rate accounts.

² The wire transfer receipt for this transaction is undated, but the corresponding balance letter is dated December 17, 1998.

Regarding NEI, the petitioner submitted a cancelled check issued to NEI on November 30, 1999 for \$150,000, a stock certificate for 3,000 shares issued to the petitioner, and a "Funding Plan" for NEI's 21Radio project. The Projected Balance Sheets in the Funding Plan reflect starting cash of \$800,000 prior to October 1999 but no paid-in-capital at that time through 2002. The net worth prior to October 1999 is listed as \$800,000 which decreases to \$771,618 in October 1999, \$743,236 by November 1999 and \$714,854 by December 1999.³ As discussed above, these projections are inconsistent with the Comparison Balance Sheet which reflects capital of \$3,600.34 and a net worth of \$27,072 as of December 31, 1998 and capital of \$153,600 and a net worth of \$150,293.07 as of December 31, 1999.

In response to the director's request for additional documentation, the petitioner submitted NEI's 1999 tax return that, as stated above, was somewhat inconsistent with the comparison balance sheet submitted initially. The tax return reflects that capital stock increased from \$3,600 to \$153,600 that year. The petitioner also submitted a Business Outline that provided:

[The petitioner], shareholder of Natural Econometric Inc. already invested \$150,000 for the following purposes:

- Designed a Beta site
- Conducted survey on Internet users' buying habits
- Produced different audio contents to test Internet users' preference
- Established working relations with record companies in Hong Kong

The director concluded that the \$200,000 transferred into [REDACTED] money market accounts were not sufficiently "at-risk." The director further concluded that the petitioner's investment of \$150,000 into NEI was well below the \$1,000,000 minimum investment amount.

On appeal, counsel notes that funds in a money market account are liquid and available. He further asserts that the invoices show that the business is operational.

Both the director's automatic dismissal of money placed in money market accounts and counsel's assertion that a petitioner need only demonstrate a deposit into a corporate account are an oversimplification of the issue. 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 herself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, 22 I&N 206, 209-210 (Comm. 1998). Even if a petitioner transfers the requisite amount of money, she must establish that she placed her own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

³ The implication on these financial statements that NEI had yet to begin its multimedia activities prior to October 1999 is contradicted by NEI's website, www2nei.com, which indicates that the multimedia activities began in 1996.

It is acknowledged that, unlike the petitioner in Matter of Ho, this petitioner has an operating business. Regardless, the case stands for the proposition that all the funds must be at risk. Matter of Ho, 22 I&N at 210, 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.

Contrary to counsel's assertion on appeal, the petitioner has never submitted a business plan for or a financial analysis of its projected business costs and income. Nor has the petitioner submitted tax returns certified by the Internal Revenue Service which would reflect amortized start-up expenses. Nor has the petitioner submitted evidence of the company's start up expenses other than the \$333 security deposit for the lease. While money placed in a liquid money market account over which the petitioner exercises sole control could be considered at risk if the petitioner has already committed such funds to future capital expenses, the record in this case contains no evidence of what capital expenses have been or will be over the next two years. The record indicates that only commitments are to serve as a distributor for a single company for one year and a month-to-month lease with monthly rental of \$333. Such commitments are utterly insufficient documentation that capital expenses will amount to anything approaching \$1,000,000. Money deposited with a grossly overcapitalized business cannot be said to be at risk. Thus, while the director should have discussed the lack of evidence of past and future capital expenses for her basic concern regarding the money deposited with the corporation is valid. The petitioner's failure to submit tax returns and a business plan for what is alleged to be her major investment while she submits such documentation for her minor investment is unexplained.

Moreover, on the petition, the petitioner only claimed to have purchased \$550,000 worth of stock. While the petitioner has transferred additional funds to it is not clear that the remaining funds can be considered capital as defined in the regulations. Without an audited balance sheet or certified tax returns, we cannot determine whether the additional funds were invested as capital or loaned to the business. As stated above, 8 C.F.R. 204.6(e)(definition of invest) precludes loans from a petitioner's investment.

As the petitioner has not established that she has invested more than \$550,000 into or that the full \$550,000 was applied or will be applied to capital expenses, the \$150,000 allegedly invested into NEI cannot raise the petitioner's investment to the requisite \$1,000,000 even if we considered NEI to be part of the new commercial enterprise.⁴ Moreover, the petitioner has provided no receipts or other evidence of how her "invested" funds were used by NEI. The explanation in the Business Outline is insufficient evidence that the petitioner's funds are being

⁴ The petitioner's "option" to invest another \$300,000 into NEI is not an irrevocable commitment secured by the petitioner's own assets. As such, those funds are not at risk.

used for capital expenses by NEI. The outline does not even break down how much money has or will be spent on each of the elements for which her money will allegedly be used.⁵

In light of the above, the petitioner has not established a qualifying, at-risk investment of \$1,000,000.

SOURCE OF FUNDS

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

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

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

⁵ A review of NEI's website reveals that it is also an immigration consultation and visa administration company.

Initially, the petitioner submitted certificates from United Laboratories, Ltd.⁶ confirming that [REDACTED] the petitioner's spouse, was the China Regional President of the company and that his employment contract provided for a bonus equal to 30 percent of the company's annual profits. United Laboratories also asserted that Mr. [REDACTED] annual income amounted to RMB 10,124,109.64 in 1998 and RMB 13,185,170.14 in 1999. These income certificates include an attestation from the Guangdong Sunny Law Office certifying the validity of the certificates. The attestations do not explain how the law office has first hand knowledge of the petitioner's income. In response to the director's request for additional documentation, the petitioner submitted her marriage certificate documenting her marriage to Mr. [REDACTED]

The director concluded that without Mr. [REDACTED] tax returns and evidence of the exchange rate for the Yuan, the petitioner could not establish the lawful source of her funds.

In response, counsel asserts that the exchange rate is .1208. Thus, Mr. [REDACTED] two year income of RMB 23,309,279.78 amounts to \$2,815,761. In addition, counsel asserts that individuals do not pay income tax in China.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has not provided translated copies of the Chinese tax code to support his assertion that individuals do not pay income taxes regardless of income. Regardless, the petitioner has not submitted United Laboratories' tax returns. As such, the implication that the company's profit was over \$77,000,000 (which would be required for the petitioner's 30 percent bonus to be \$23,309,279.78) for 1998 and 1999 in the aggregate is not supported in the record beyond the assertion of the company itself. The petitioner has also failed to provide transactional documentation reflecting the transfer of such large sums of money from United Laboratories to Mr. [REDACTED]. It is noted that an unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business was found to be insufficient documentation of source of funds. Matter of Ho, *supra*, at 211.

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

⁶ NEI's website identifies United Laboratories as a company to which it will submit products as part of its business consulting services.

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.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho, 22 I&N at 213, states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials

and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

On the petition, the petitioner indicated that [REDACTED] had two employees and would add an additional eight employees in the next year. On the attachment, the petitioner asserted that NEI had one part-time employee and seven independent contractors. The petitioner further indicated that NEI's 21Radio.com radio project would create 24 jobs in the first year, 30 by 2001, and 35 jobs by 2002.

The petitioner submitted a business plan for NEI only.⁷ The plan stated:

21Radio first start with a Chief Executive Officer, a Chief Financial Officer, two consultants, a creative director, a program manager, an art director, an Advertising & Promotions Manager, a sales and marketing manager, two web designers, three web programmers, eight part-time disc jockeys, a technician, and a clerk. The total head count is 24.

The personnel plan calls for an increase to 30 persons within the next 12 months. There is an additional increase to 35 by the end of 2002. Most of the new head count will go into sales, audio production, marketing, web production and business development.

As stated above, the projected balance sheets supporting the projected employment are not persuasive since they reflect no assets other than cash and no liabilities other than accounts payable.

On January 20, 2001, the director requested "tax records pertaining to the employee; Form I-9 or other similar documentation for ten qualifying employees" or a comprehensive business plan for both [REDACTED] and NEI. In response, the petitioner submitted four Forms I-9 for [REDACTED] one of which reflects that the employee is a nonimmigrant, and six Forms I-9 for NEI, one of which reflects that the employee is a nonimmigrant. The petitioner also resubmitted NEI's business plan and submitted NEI's 1999 tax return reflecting wages of \$15,096, which can account for fewer than two employees working full-time at minimum wage.

The director concluded that Forms I-9 are insufficient as they do not demonstrate the number of hours worked or even that the employee worked at all. The director further noted that the petitioner had failed to submit a business plan for [REDACTED]. Thus, the director concluded that the petitioner could not demonstrate that she would meet the employment creation requirement.

⁷ Counsel's index of exhibits does not mention a second business plan.

On appeal, counsel argues that the director only requested tax documentation *or* Forms I-9 and asserts that the petitioner submitted two business plans with the initial petition which counsel asserts are being resubmitted as exhibits "P" and "Q." Finally, counsel states:

Petitioner then submitted a Steel Project plan to document her intention to participate in this project and hired 30 to 40 qualified US workers. Petitioner also submitted another business plan 21 Radio.com to outline her intention to participate in an Internet business that will hire an additional 24 qualified US workers. Petitioner participates in this project by investing \$150,000 into Natural Econometric Inc. The Service again failed to address these business plans.

Exhibit "P" is the business plan for Steel Project and exhibit "Q" is the business plan for NEI. At no time, including on appeal, has the petitioner submitted any type of business plan for CEI. In fact, only on appeal does counsel even allege that the petitioner is submitting a business plan for [REDACTED] and the exhibits referenced pertain to other companies.

Regardless of how the director worded the request for additional documentation, Matter of Ho, supra, at 212, provides that Forms I-9 are not evidence that an employee is working and working full-time. Despite being notified of this obvious fact in the director's denial, the petitioner has refused to submit evidence that these employees are working and working full-time, such as payroll documentation and quarterly wage and withholding reports. Thus, the petitioner has not overcome the director's concerns, with which we concur for the reasons discussed in Matter of Ho.

Moreover, the petitioner has only submitted four Forms I-9 for [REDACTED] and six Forms I-9 for NEI, eight of which are for qualifying employees. The petitioner has not submitted any documentation regarding employment at Steel Project. Thus, even if we accepted that NEI was part of the new commercial enterprise, the petitioner has not yet created 10 employment positions and must submit a comprehensive business plan.

As stated above, the record, including the documentation submitted on appeal, does not include a business plan for [REDACTED]. As such, the director did not err in failing to consider this absent document. Without a business plan, the assertion on the Form I-526 petition that [REDACTED] will create an additional eight jobs is not credible. As stated above, [REDACTED] has only leased 215 square feet of office space and is only committed to one year of distributing for a single company.

The director never stated that the petitioner had failed to submit a business plan for NEI, but does not appear to have considered that document since the petitioner only invested \$150,000 in that business. In this case, where the petitioner has "invested" \$1,000,000 into [REDACTED] and \$150,000 into NEI, the petitioner cannot establish a nexus between the alleged investment and the employment creation by projecting that NEI will eventually hire 10 employees. It is insufficient to invest the required amount into a business that generates almost no employment and invest almost no money in a business that will allegedly create the requisite employment. The investment and employment creation requirements cannot be met separately with two separate

businesses. The law specifies that the petitioner must be seeking to enter the United States to manage *a* business in which she has *both* invested the required amount *and* through which she will create employment. While some cases may, on a case-by-case basis, warrant looking at two businesses, we do not find that this petitioner has established that her alleged investment, 93 percent of which went to ██████ is related to the projected employment creation at NEI.

Even if we considered NEI's business plan, it is not credible. The plan projects 24 employees increasing to 30 employees in 2000. Yet, NEI's 1999 tax returns reflect wages which can account for full-time employment of fewer than two employees. Even if we accepted the six Forms I-9 submitted in 2000, the fact that NEI had only hired 25 percent of the work force projected suggests that the employment projections are not credible.⁸ Moreover, the petitioner has not established how many employees NEI had prior to the petitioner's investment. Any employees already working for NEI in November 1999 cannot be attributed to the petitioner's November 30, 1999 investment. See Matter of Hsiung, 22 I&N 201, 205 (Comm., 1998).

Finally, the record contains no evidence that the petitioner has invested any money into Steel Project or even that it is a viable business established by the petitioner. Thus, we need not consider the business plan for that "project."

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.

⁸ Moreover, it is noted that NEI is an immigration consulting business. It is also a business consulting firm. If NEI has encouraged other EB-5 investors to invest in its company, the petitioner would need to establish how many new employees would be attributable to her. See 8 C.F.R. 204.5(g)(2).