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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: [redacted] Office: Texas Service Center Date: MAR 10 2003

IN RE: Petitioner: [redacted]

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

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office 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 a qualifying investment of his own personal, lawfully obtained funds or that he had or would create the requisite employment.

On appeal, counsel argues that the evidence demonstrates the petitioner's personal investment, that the petitioner's unauthorized employment should not be a consideration, and that the petitioner has already created 17 jobs.

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

> (i) 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
>
> (ii) 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).

On the petition, the petitioner indicated that the new commercial enterprise is Stay With Us, Inc. In counsel's cover letter and based on the record as a whole, it is clear that the petitioner is including another corporation, Act IV, Inc., doing business as Jeeves Management. The record indicates that neither business is 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.

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 he had invested $1,052,772.38 as of December 27, 2000. As stated above, the record reflects that the petitioner's claim to eligibility rests on his investment in two separate corporations On the petition, the petitioner listed only and indicated that it was involved with "holiday home management and travel." however, is the management business, providing cleaning, yard and pool maintenance, and rental services to homeowners who do not live in their Florida homes year round. Alternatively, ppears to be a passive real estate investment business. The business license indicates that the company engages in "short term rental" activities. The petitioner submitted evidence that he and his wife had personally purchased seven vacation properties for a total of $645,174.12 between May 1996 and June 1999. One of the properties was financed with a $93,000 loan. The petitioner transferred all seven properties to on December 27, 2000. As the transfer of these properties constitutes the contribution of assets, the relevant inquiry is their fair market value as of December 27, 2000. The petitioner submitted a "Details of Properties" indicating the 2000 assessed value and the estimated selling price for each property. Subsequently, purchased an additional two properties for a total of $218,026.07. As the corporation itself purchased these properties, the relevant value is the purchase price, not the fair market value at a later date. The 2000 tax return for eflects no wages, $100 in capital, and $717,708 in shareholder loans.

The petitioner also submitted the 1998 tax return reflecting $12,792 in wages, $500 in stock, $0 in additional paid-in capital, and $13,770 in shareholder loans balance sheet as of December 31, 1999 reflects long term liabilities of $107,833 and stock of $500 balance sheet as of November 30, 2000 reflects $0 long-term liabilities and $500 issued stock. The balance sheets as of December 31, 1994 and 1995 are somewhat more ambiguous. Under capital, the 1994 balance sheet lists both the petitioner and his wife as having $7,754 each in "accum. adj." and the 1995 balance sheet lists both the petitioner and his wife as having $31,441 each in "accum. adj." This term is not defined in Barron's Dictionary of Accounting Terms, (3rd ed. 2000). Moreover, proceeds that are not removed from the corporation, taxed to the petitioner, and reinvested into the corporation cannot be considered the petitioner's personal investment. *See De Jong v. INS,* (E.D. Texas January 17, 1997). The relevant inquiry is how much the petitioner infused into the business.

On April 25, 2002, the director requested evidence of any loans used to purchase the vacation properties and noted that the 2000 tax return for Stay With Us reflected over $700,000 in shareholder loans.

In response, counsel asserted that the funds were invested, not merely loaned to the corporation. The petitioner submitted evidence that urchased an additional two properties after the date of filing. As the record does not reflect that the money used to purchase these properties was irrevocably committed to the corporation as of the date of filing, the petitioner cannot include the funds used to purchase these properties as part of his qualifying investment as of the date of filing. The petitioner also submitted evidence that in September 2001 he borrowed $112,383 secured by property and in December 2001 he borrowed $113,045 also secured

In addition, however, the petitioner submitted evidence that the $93,000 mortgage was fully repaid on September 20, 2001. Further, the petitioner submitted Internet property searches reflecting appraised values for the properties. We will consider the appraised values of those properties purchased by the petitioner and quitclaimed to The uncertified appraised value was $132,013 in 2002. This information also reflects, however, that the petitioner received $100 from consideration for the quitclaim deed. In addition, the materials reflect the following certified values as of October 28, 2001: $84,468 $62,022 for $98,726 $90,142 for 113 $156,969 and $161,612 This information reflects that the petitioner did not receive any consideration for the quitclaim deeds for these properties when transferring them to The total value of these properties amounts to $687,226. If we accepted that the properties did not significantly accrue in value between December 27, 2000 (the date of contribution to October 28, 2001 (the appraisal date), the transfer of these properties reflects the infusion of that amount of capital less the $100 received for the transfer less the remaining mortgage as of December 27, 2000.

As further evidence that the petitioner personally financed the above purchases, with the exception of $93,000 the petitioner submitted the following cancelled checks:

1. A May 20, 1996 official check regarding "Jeeves" to Southern Title for $39,082.
2. A May 20, 1996 check from the petitioner to Southern Title for $426 regarding
3. A May 27, 1997 check from the petitioner to 100% Real Estate for $500 regarding
4. A July 2, 1997 check from the petitioner to Barnett Bank for $47,317 regarding
5. An October 29, 1997 check from the petitioner to 100% Real Estate for $500 regarding
6. A November 19, 1997 check from the petitioner to Land Title and Survey, Inc. for $74,700.
7. A December 1, 1997 check from the petitioner to Southern Title of Central Florida for $65,000.
8. A March 31, 1998 check from the petitioner to Icardi and Icardi Trust Account for $20,000.
9. A May 19, 1998 check from the petitioner to Icardi and Icardi Trust Account for $120,809.
10. A May 27, 1998 check from the petitioner to Barnett Bank for $11,248 regarding a property sold by the petitioner in 1999 (prior to the date of filing) according to Form 1099-S in the record.
11. A May 27, 1998 official check regarding "Jeeves" to Southeast Title Group for $61,248.

12. A June 9, 1999 check from the petitioner to First American Title Insurance Company regarding [redacted] for $26,215.
13. Two June 2000 checks from Stay With Us to Stewart Title Company regarding [redacted] $1,000 and $63,333.
14. A December 18, 2000 check from [redacted] the Greater Florida Title Company for $1,000.
15. A January 3, 2001 check from [redacted] Bank of America regarding [redacted] for $147,156. The banks statements for this account reflect that the check was not cashed until after the petitioner deposited the funds listed in item 16 below.
16. January 2001 checks from the petitioner [redacted] amounting to $155,000.
17. October 2001 checks from [redacted] to Bank of America regarding the purchase of property after the filing date.
18. September 2001 checks from the petitioner for the purchase of property after the filing date.

Finally, the petitioner submitted his personal tax returns as well as those for [redacted] 2001 tax return, schedule L, reflects $34,297 in year-end assets, consistent stock of $500, no additional paid-in capital and negative $5,720 in shareholder loans at the end of the year. The 2001 tax return [redacted] schedule L, reflects $974,336 in end of the year assets, consistent stock of $100, no additional paid-in capital, and shareholder loans increasing from $717,708 to $1,004,220.

The director reiterated the concerns raised in his request for additional documentation and concluded that the petitioner had "not demonstrated that he has made a qualifying investment of his own money."

On appeal, counsel notes that the petitioner purchased several properties [redacted] Counsel refers to the petitioner's tax returns, asserting that they demonstrate that the petitioner has "current total assets of $1,006,633.00 consisting of $34,297.00 in the company known as [redacted] and the sum of $974,336 in [redacted]

Counsel's statement mischaracterizes the information on the tax returns. First, the petitioner's tax returns do not reflect his capital investment into either corporation, only his income from those corporations. Second, a corporation can acquire assets in many ways other than through funds acquired as capital. Thus, the corporations' assets are irrelevant other than to demonstrate the acquisition of such assets. What is significant is the source of the funds used to purchase those assets. As noted by the director in his request for additional evidence and incorporated into his final decision, the tax returns reflect that the bulk of the $1,000,000 allegedly invested was actually loaned to [redacted]

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).

On appeal, the petitioner attempts to resolve the issue of the significant shareholder loans and negligible capital reflected on the corporate tax returns. Specifically, he submits amended tax returns for 2000 and 2001 reflecting that additional paid-in capital increased from $0 to $714,407 in 2000 and from that amount to $974,336 in 2001.

These amended returns are insufficient to resolve the issue of the whether the petitioner invested or loaned the bulk of the transferred property and funds. First, the amended returns submitted are not certified as filed with the Internal Revenue Service. Thus, there is no evidence that the petitioner actually filed these amended returns. Moreover, the petitioner only submitted amended returns for Act IV. an S-Corporation. The Forms K-1 submitted with the tax returns submitted in response to the director's request for additional documentation reflect that the petitioner and his wife own 100 percent is not a holding company In fact, 26 C.F.R. § 1.1361-1 (b) and (f) precludes S-corporations from having corporate shareholders. Therefore, it is not clear how amending tax returns could resolve the issue of money loaned Moreover, the amended returns reflect $974,336 in "other investments" not reflected original return. Schedule L requires that a schedule of such investments be attached. The petitioner did not submit such a schedule. Thus, the new returns raise new unresolved questions regarding the petitioner's alleged investment.

In addition to the petitioner's failure to demonstrate that his contribution of property and funds constituted a qualifying investment, only checks numbered above in this decision as 2 through 10, 12, and 16 represent funds spent by the petitioner prior to the date of filing. These checks amount to only $521,715.[1] The checks numbered 13 and 14 above cannot be clearly traced to the petitioner as they were issued before the record reflects that the petitioner contributed money Item number 15 was paid for with the funds deposited in item number 16 above and cannot be considered twice. doing business as had been operating since 1992. Thus, any funds may have spent on the purchase of property have derived from profits and cannot be considered the petitioner's personal investment.

Finally, beyond the decision of the director, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998). The record reflects that Act IV is the sole employment-generating entity. is merely a passive real estate investment company that appears to be a client of Passively investing in a client corporation of the company that is generating the employment is insufficient. The law requires an investment in "a" new commercial enterprise. While in some situations it may be appropriate to consider two or more related corporations that are not wholly-owned subsidiaries

[1] The actual amount is slightly higher as we did not consider the fractions of dollars included on the checks.

of a single corporation, this case demonstrates the difficulty in such considerations. A petitioner cannot meet the investment and employment requirements separately in two different businesses. Yet, in this case, generating all of the employment while the vast majority of the petitioner's "investment" is was incorporated in 1992 and had an established reputation prior to the petitioner's incorporation 2000. The petitioner has not demonstrated that any growth in employmen resulted from the petitioner's 2000-2001 "investment" into Thus, the record fails to establish a sufficient nexus between the petitioner's alleged investment and the jobs created.

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:
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> (i) Foreign business registration records;
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> (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*, 22 I&N Dec. 201, 210-211 (Comm. 1998); *Matter of Izummi, supra*, at 195. 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).

Initially and in response to the director's request for additional documentation, counsel acknowledged that the petitioner worked without authorization after his nonimmigrant status expired in 1995. Thus, the director concluded that any investment of funds earned while employed without authorization could not be considered lawfully obtained.

On appeal, counsel argues that the director is precluded from pursuing this line of inquiry since the Life Act permits individuals who worked without authorization to adjust status. Counsel further argues that only some of the petitioner's income derived from unauthorized salaries.

We reject counsel's first argument but accept the second one. The Legal Immigration Family Equity Act (Life Act Amendments), Pub. L. No. 106-554, 114 Stat. 2763 (2000), allows an alien who is otherwise ineligible to adjust status under Section 245(a) due to Section 245(c)(8)(relating to aliens employed without authorization) to adjust status under Section 245(i) if an immigrant visa petition was filed on his behalf prior to April 30, 2001. This provision allows the alien to adjust status despite having worked without authorization. This provision does not suggest that the alien's employment is no longer considered to have been unlawful; it merely disregards this violation for adjustment of status purposes. Nothing in the Life Act Amendments suggests that all income derived from unauthorized employment must be considered lawfully obtained for purposes of 8 C.F.R. § 204.6(j)(3).

Nevertheless, the fact that the petitioner worked without authorization does not preclude him from demonstrating that he obtained the "invested" funds from a different lawful source. We approach this consideration warily, however. Unlawfully obtained income, even if not directly contributed to the new commercial enterprise, still allows the petitioner to contribute his legitimate funds that might otherwise be necessary for living expenses. We do not believe that Congress intended to allow the adjustment of aliens who have derived income through illegal activities but can trace the invested funds to legitimate sources. It is not uncommon for even the most serious criminals to have legitimate businesses. We note that money is fungible; once funds from different sources are pooled in a single account, it is not possible to determine which funds derived from which source. While we can imagine a situation where an alien who has worked without authorization inherits $1,000,000 and directly transfers those funds to the commercial enterprise, we do not have such a clear path in this case.

With the above considerations in mind, we will consider the evidence submitted. Initially, the petitioner failed to submit any evidence of how he accumulated the $1,000,000 allegedly invested. On April 25, 2002, the director requested evidence relating to this requirement. In response, counsel asserted that the funds allegedly invested derived from the petitioner's income and a credit line secured by his own house. The petitioner submitted his personal tax returns and bank statements of his credit line. The tax returns reflect that the petitioner and his wife earned $24,000 in wages and $93,408 in business income in 2001; $12,000 in wages, $104 in interest, and $93,349 in real estate and business income in 2000; $6,000 in wages, $283 in interest, and $78,806 in real estate and business income in 1999; no wages, $91 in interest, and $109,879 in

real estate and business income in 1998;[2] and no wages, $33 in interest, and $258,249 in real estate and business income in 1997. The petitioner's credit line statements are all from 1998, 1999, and 2000. They reflect that he borrowed $70,000 prior to May 1998, paid it off in April 1999, borrowed an additional $26,215.91 in May 1999, and paid that off in March 2000.

Unless the petitioner is the beneficiary of a legitimate windfall, the petitioner must, at the very least, demonstrate significant income that could account for the accumulation of $1,000,000 (after living expenses). The only year in which the petitioner earned this level of income is 1997. The record does not reflect that the petitioner's income in 1997 was typical of his income in previous years. While the regulations only require five years of tax returns, in a situation where the petitioner began purchasing property in 1996 and is unable to demonstrate consistent significant income after that date, we cannot conclude that the petitioner's income prior to 1997 can account for the accumulation of $1,000,000. We note that the petitioner's interest income is not indicative of large amounts of savings and that the petitioner shows no investment income other the than real estate we have already considered.

Finally, while counsel refers to the petitioner's bank statements as evidence of the petitioner's lawful source of funds, the statements do not identify the source of the deposits.

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:
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> (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
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> (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

[2] We took these numbers from the amended Form 1040 but note that the numbers on the Form 1040X for 1998 differ. The Form 1040X for 1998 reflects that when the petitioner amended his taxes he decreased his adjusted gross income from $169,650 to $127,090.

> from the new commercial enterprise. . . . This definition shall not include independent contractors.
>
> *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.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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 Bureau to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

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

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

The petitioner indicated on the petition that he had created four jobs and would create an additional six. The petitioner submitted a list of employees for 2001. The list includes three full-time employees in addition to the petitioner and his wife and two part-time employees. The petitioner also submitted an organization chart reflecting a manager, bookkeeper, accountant, "guest services," "cleaners 1," "cleaners 2," and several contractors and subcontractors for pool, yard, pest, and other maintenance. In support of these documents, the petitioner submitted Act IV's 1998 tax return reflecting wages of $12,792, five Act IV Forms W-2 for 1999, four such forms for 2000, and several Forms 1099-MISC for 1999. The 2000 tax returns do not reflect any wages. Finally, the petitioner submitted a 1995 business plan The plan, while detailing all services, provides little in the way of employment projections other than to assert that a manager will be hired in February 1995 and that an unspecified number of additional housekeeping staff, an office administrator and a receptionist will be needed in May 1995. The petition was filed in May 2001, at which time had four employees. The business plan does not project an additional six employees in the following two years.

The director requested additional evidence that the petitioner had or would create the necessary 10 jobs. In response, counsel asserts the "entity used to pay its employees and laborers and wage earners" and employs 17 workers. In support of this assertion, the petitioner submitted corporate tax returns; employee and contractor lists; six 2001 Forms W-2, including the petitioner's; and Forms 1099-MISC. Act IV's 2001 tax return reflects $24,000 in officer compensation and $55,814 in wages. The 2001 tax return reflects no officer compensation and no wages. The list of employees reflects that only one employee in addition to the petitioner is "current." The Florida quarterly wage reports for 1999 through 2001 reflect between two and six employees, including the petitioner.

The director concluded that this documentation did not establish that the petitioner had already created 10 jobs. On appeal, counsel reiterates employs 17 people and references previously submitted documentation.

As quoted above, the regulatory definition of employee specifically provides, "this definition shall not include independent contractors." Initially, counsel asserted that pool maintenance and pest control services had to be contracted because individuals performing such services must be licensed by the State of Florida. Regardless of the reason, we are bound by the plain language of the regulations. The regulations specifically exclude independent contractors from the definition of employees. Any individual receiving remuneration reported on a Form 1099-MISC is an independent contractor. Thus, the petitioner has not created jobs for 10 employees as defined in the regulations. The record does not contain a business plan projecting that Act IV will need 10 direct employees in the next two years.

In addition, while not discussed by the director, the petitioner failed to submit Forms I-9 establishing that his employees are qualifying employees. Finally, as discussed above, the vast majority of the petitioner's "investment" is a passive real estate investment with no relation to employment creation. The record does not demonstrate how the purchase and rental of existing

vacation property creates any new jobs, even for which was already performing services for homeowners other than the petitioner.

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.