

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

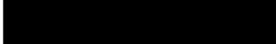
U.S. Department of Homeland Security
B7
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



File:  Office: Texas Service Center

Date: **MAY 29 2003**

IN RE: Petitioner: 

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)

ON BEHALF OF PETITIONER:



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 lawfully obtained funds or that he would create the necessary employment.

On appeal, counsel argues that the tax returns, invoices, and secured promissory note adequately demonstrate a qualifying investment, that the wages resulting from the petitioner's unauthorized employment were lawfully obtained, and that the business plan adequately demonstrates that the petitioner will have created at least 10 jobs within the next two years.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), 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).

The record indicates that the petition is based on an investment in a business, Audio Visual Communications, Inc. (AVC), 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.

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.

According to the business plan, the petitioner began an electronics business out of his home in 1995 and subsequently moved it to its own building. The petitioner incorporated AVC in March 1998. On the petition, the petitioner indicated that he had invested \$685,500 into AVC. In his cover letter, counsel also asserted that the petitioner had invested \$685,500 and would invest an additional \$390,000 in the next two years. Counsel further states: "Given the growth of Audio Visual Communications, Inc., it is likely to increase in value to one million dollars within the next two years." The additional investment funds would be spent as follows: \$320,000 for property for another store and \$70,000 for improvements. In response to the director's request for additional documentation, counsel makes similar claims, but alleges that the petitioner's investment at the time of filing actually totaled \$710,129.

We will first consider whether the petitioner established that he had already invested \$710,129 at the time of filing. The business plan included a summary of the funds allegedly "invested." In response to the director's request for additional documentation, counsel includes an amended summary as part of his brief. While some of the costs in these summaries could be considered capital expenses, such as remodeling costs, several of the items, such as inventory, taxes and advertising costs, are normal operating costs generally paid with proceeds once the business is operational.

The petitioner submitted invoices substantiating that the business incurred many of the expenses included in the summary. As other evidence of the petitioner's investment, counsel references a purchase of [REDACTED] 27 for \$130,000 in 1999. The record includes a settlement document for this property. The settlement document, dated July 15, 1999, reveals that AVC purchased this property and that the sellers gave AVC a mortgage for \$104,000 of the purchase price. Thus, AVC paid a \$5,000 deposit and an additional \$21,805 at closing. The record contains no evidence that the mortgage was not secured by the business property being purchased, as mortgages generally are, or that monthly payments were not paid by AVC's proceeds as a normal operating expense.

Further, the petitioner submitted his personal income taxes covering the period when the business was a sole proprietorship and AVC's corporate tax returns starting in 1998 as well as business balance sheets for 1998, 1999, and 2000. The petitioner's 1995 tax return, schedule C, reflects that the business incurred expenses of \$74,641 (cost of goods sold) and \$95,945 (other expenses). As this was the first year of business, even some expenses generally considered normal operating expenses can be considered capital expenses. The business, however, had gross receipts of \$188,019 and made a profit. Thus, at least some of the expenses even in 1995 were paid from ordinary proceeds, not capital. The business also turned a profit in 1996. Thus, any expenses listed on the 1996 schedule C were also paid from proceeds.

The petitioner's 1997 tax return includes not only schedule C, but also Form 4562. On the latter form, the petitioner depreciated costs for "nonresidential real property" placed in service in January 1997 with a basis of \$25,988. Schedule C, however, includes an expense of \$30,740 and still shows a profit for the company. As such, it appears this expense was paid from the company's proceeds.

As stated above, the petitioner incorporated AVC in 1998. Initially and in response to the director's request for additional documentation, the petitioner submitted AVC's corporate tax returns for 1998 through 2001. The 1998 corporate tax return, schedule L, reflects \$100 stock and \$85,503 in additional paid-in-capital. These numbers remain constant in 1999, 2000, and 2001. The total equity, including retained earnings, equaled \$95,085 at the end of 1998, \$108,319 at the end of 1999, \$129,652 at the end of 2000 and \$143,269 in 2001. The balance sheets as of December 31 of these years, however, are not consistent with the tax returns. The balance sheets provide the following information under equity:

	1998	1999	2000	2001
Petitioner	-\$21,016	-\$34,342	-\$57,280	-\$43,037
Opening Bal Equity	\$57,948	\$85,502	\$85,512	\$85,564
Retained Earnings	\$9,455	\$0	\$75,320	\$65,928
Net Income	\$43,612	\$65,965	\$95,903	\$46,012
Total Equity	\$80,544	\$126,481	\$199,476	\$154,468

In addition, the petitioner submitted Florida Intangible Tax Returns for Corporations as of January 1, 1999 and January 1, 2000. On these returns, the petitioner indicated that the corporation had 100 outstanding shares with a "just value" of \$950.85 per share in 1999 and \$1,083.19 in 2000. According to *Black's Law Dictionary* 871, 1549 (7th ed. 1999), "just value" is another term for "fair market value," defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." Thus, the fair market value of the petitioner's stock was \$95,085 in 1999 and \$108,319 in 2000.

The director concluded that the petitioner had not established that he accumulated sufficient income to account for a personal investment of \$710,129 and that he had not established that he had paid taxes on the business income reinvested into the new commercial enterprise. On appeal, counsel notes that the petitioner submitted tax returns, reflecting that both AVC and the petitioner paid taxes on all profits.

Counsel misunderstands the director's concerns. The director was not concerned that the petitioner or AVC had failed to pay taxes on profits. Rather, the director was concerned that the petitioner was counting as his investment the proceeds offset by normal operating expenses on which neither AVC nor the petitioner was lawfully required to pay taxes. The issue is not whether the petitioner failed to pay taxes, but whether the business' proceeds or gross income spent by the business on normal operating expenses can be considered the petitioner's personal investment.

The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v.*

INS, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

It is acknowledged that the commercial enterprise in *De Jong* was a corporation, and not a sole proprietorship. Regardless, a reinvestment of proceeds is simply not an infusion of new capital into a business. Certainly the personal assets of a sole proprietor are at risk and can be seized by a creditor. In addition, unlike a corporation, the owner of a sole proprietorship who reinvests the profits of the business is being taxed on those profits. As stated above, however, while the company was still a sole proprietorship the petitioner deducted normal operating business expenses on Schedule C, and, thus, was not taxed on any proceeds not included in the company's profits. While the petitioner paid taxes on profits in 1995, 1996, and 1997, that money constituted the bulk of his personal income. As such, at least some of that money was spent on personal living expenses, and was not reinvested into the business.

We note that a federal court, in an unpublished decision, has upheld our interpretation of "invest" as applied to a sole proprietorship. In *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003), the court stated:

The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing *Miriam-Webster Online* omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

Id. at 4-6.

Moreover, \$285,899 of the petitioner's alleged investment, plus however much was spent on inventory after March 1998, occurred after the petitioner incorporated AVC. As noted by the court in *De Jong*, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Thus, any reinvestment of proceeds by AVC cannot be considered the petitioner's personal investment.

As stated above, AVC purchased property for \$130,000, \$104,000 of which was borrowed from the seller. Money borrowed by the new commercial enterprise and secured by its assets, even if guarantied by the petitioner, cannot be considered the petitioner's personal investment. *Matter of Soffici*, 22 I&N Dec. 158, 162-163 (Comm. 1998). In addition, loan payments on mortgages are normal operating expenses.

Any business, if operated long enough, could accumulate \$1,000,000. The use of proceeds to pay normal operating costs and to slowly grow a business over several years is not the type of infusion of capital contemplated by the regulations. Moreover, the tax returns and balance sheets are consistent with this view. While inconsistent with each other, both the tax returns and balance sheets reflect equity less than \$160,000 at all times, with any increase resulting from profits and not a capital contribution by the petitioner. Thus, these financial statements do not support the petitioner's claim to have already invested \$710,129 at the time of filing.

Even if the petitioner had established an investment of \$710,129 at the time of filing as claimed, he would still need to establish that he had irrevocably committed at least an additional \$289,871 as of that date. As evidence that the petitioner was actively in the process of investing \$1,000,000 and had irrevocably committed the full \$1,000,000 at the time of filing, the petitioner submitted an "Investment and Subscription Agreement" and a promissory note. In the subscription agreement, the petitioner agrees to purchase securities of \$1,000,000 in AVC. The petitioner would pay \$685,000 initially in cash or cash equivalent, \$160,000 within one year of approval of the instant petition, and \$160,000 within two years of approval of the instant petition. The agreement permits the annual payments to be made in cash equivalent. The promissory note provides:

The obligations of the Maker set forth herein are not secured by the assets of the Corporation, the new enterprise, but by the personal assets of the Maker which are identified in the attachment hereto, an[d] the Maker is personally and primarily liable for the obligations undertaken herein.

The attachment includes the petitioner's home address, private bank account, stocks worth approximately \$26,000, a money market account worth \$1,200, an IRA, and various foreign stocks worth "at least \$12,000." In response to the director's request for additional documentation, the petitioner submitted the settlement documentation for his residence reflecting a purchase price of \$135,639.31 and a mortgage of \$133,200; an exhibit described as the petitioner's money market account but containing annuity statements for the petitioner and his wife, each with a current surrender value of \$1,623.14; the petitioner's IRA statement reflecting a fair market value of \$5,765.62; the petitioner's wife's IRA statement; and a Danish investment statement addressed to the petitioner's wife with no translation and no documentation of the exchange rate. We note that the promissory note only reflects that the Maker's personal assets secure the promissory note. The petitioner signed the note; his wife did not. Thus, accounts owned solely by the petitioner's wife do not secure the promissory note.

Finally, the promissory note provides that interest shall only accrue in the event of default and that:

Such default shall not be deemed to have occurred and any such interest shall not commence to run, however, unless and until the written notice thereof is given by the Corporation to the Maker.

As evidence of how the additional capital will be spent, counsel references a contract to purchase 575 State Road 50 for \$320,000. The petitioner submitted a contract for this property dated July 27, 1996. The contract references a Small Business Administration (SBA) Loan for \$288,000, indicates that the terms of the contract must be accepted by July 31, 1996 and that closing must occur by October 31, 1996. In response to the director's request for additional documentation, the petitioner submitted a September 30, 1996 letter from Bank First advising the petitioner of its approval of an SBA loan for \$332,000. The letter provides:

As collateral, we will hold the first lien on the real estate being purchased and the vacant land, [and] a second mortgage on your home. The business assets, equipment, furniture, inventory, etc., will also be a part of the collateral securing the loan.

The attached loan summary provides:

COLLATERAL

First Mortgage on Commercial Real Estate	\$320,000
2 nd Mortgage on home, approximate equity \$60,000	60,000
First Security Interest in Other Business Assets (UCC-1)	82,600
Total Collateral	<u>\$462,600</u>

As noted by counsel, *Matter of Izummi, supra*, at 191-194, provides that a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that he has placed his assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. *Matter of Hsiung*, 22 I&N Dec. 201, 203-204 (Comm. 1998) Otherwise, the note is meaningless.

The petitioner's promissory note to pay AVC cannot be considered capital or evidence that the petitioner is actively in the process of investing. The most obvious flaws are that the record contains no evidence that AVC's interest in the collateral has been perfected, that the foreign stocks are amenable to seizure by a U.S. note holder, or that the assets have an adequate fair market value. More specifically, there is no evidence that AVC has recorded its interest in the petitioner's house.¹

¹ The Fund Commitment documentation submitted on appeal relating to the petitioner's 2002 purchase of property appears to list all of the petitioner's mortgages, including the petitioner's

Were Bank First to ultimately loan the \$322,000 to the petitioner, its own interest in the petitioner's house would supercede AVC's interest if that interest is not properly recorded. The record contains no evidence regarding Danish law regarding amenability of Danish stocks to seizure by a U.S. note holder or as to what expenses would be involved.

Most significantly, the record does not establish that the assets have an adequate fair market value. While the petitioner purchased his home for \$135,000 in 1993, the house was subject to a \$133,200 mortgage. According to the Bank First SBA loan documentation, the petitioner only had \$60,000 of equity in his home in 1996. The Fund Commitment documentation submitted on appeal regarding the petitioner's purchase of property in 2002 suggests that the petitioner may have taken out a second mortgage on his home in 1998, further reducing the equity in his home. Regardless, the petitioner has not demonstrated the amount of equity in his home as of the date of filing. As stated above, the petitioner's annuity has a current surrender value of \$1,623.14; the petitioner's IRA statement has a fair market value of \$5,765.62; and the value of the Danish investment or the balance of the petitioner's personal account at Bank First are undocumented. Moreover, funds in bank accounts can easily be dissipated. Unless the funds exist in escrow account or trust account in favor of AVC, no guarantee exists that the money contained in accounts would remain there for the entire period of the promissory note. *Matter of Izummi, supra*, at 192.

Thus, the fair market value of the promissory note is far less than the \$320,000 pledged by the petitioner. Moreover, as no interest occurs on the note unless the petitioner defaults and is so advised of the default, the future value of the \$320,000 to be fully paid in two years is far less than \$320,000 today. We cannot conclude that a third party would pay \$320,000 for assignment of the note.

Finally, the petitioner has not demonstrated that he has the funds to pay his obligation on the promissory note or that the additional expenditures in the next two years are reasonable. As evidence of the petitioner's ability to pay the \$320,000 pledged, counsel references the Bank First loan. First, the letter from Bank First is from 1996. The record contains no evidence that the Bank is still offering the loan. Moreover, the letter indicates that the loan would be partially secured by the assets of the business. Thus, the funds could not be considered the petitioner's personal investment. See *Matter of Soffici, supra*, at 162-163.

Even if the petitioner personally borrowed the funds from Bank First and invested them into AVC, it would still constitute an investment of indebtedness, not cash. If the term "indebtedness" in the definition of "capital" only referred to a promise by the petitioner to pay the new commercial enterprise, as was the case in *Matter of Izummi, supra*, and *Matter of Hsiung, supra*, then the definition in its entirety would be absurd. The definition precludes "indebtedness" secured by the new commercial enterprise. Secured loans are secured by the assets of the promisor or a co-signer, and never the promisee. For example, if party A owes

1993 mortgage on his home. While the documentation lists the original 1993 mortgage and a subsequent 1998 mortgage from SunTrust Bank Central, it does not list any recorded interest held by AVC. This documentation also suggests that AVC's interest in the petitioner's home might be superceded not only by the original 1993 mortgage, but also by a 1998 mortgage.

money to party B, it would make no sense for party B to risk his own assets as security. In the event of default by party A, party B would owe himself. As such an arrangement is utterly irrational, there would be no reason for the regulations to address it. Since the regulations *do* preclude indebtedness secured by the assets of the new commercial enterprise, it is clear that "indebtedness," as used in 8 C.F.R. § 204.6(e), is not limited to the petitioner's promise to pay the new commercial enterprise, but includes third party loans. Thus, whether the petitioner or AVC borrows the funds from Bank First, the assets of AVC cannot even partially secure the loan in order for the funds to constitute the petitioner's personal investment.

Regarding whether the petitioner can be expected to actually purchase [REDACTED] 50, again, the contract is from July 1996 and indicates that closing must have occurred by October of that year. It is not clear that the property is still available for purchase. Moreover, three years later after considering the purchase of that property, AVC purchased the property at [REDACTED] 27, considered above, ostensibly to build a new store. Given the chronology, it appears that purchase may have superceded the petitioner's plans to purchase [REDACTED] 50. The petitioner has not demonstrated that the store at [REDACTED] 27 has opened. Upon review of the record, we cannot conclude that it is reasonable that in the next two years, the petitioner will not only open the store at [REDACTED] 27 (already purchased), but also spend \$320,000 to purchase property for a third store. The business plan references a new store, but is extremely vague about the address of that store. The business plan makes no reference to opening a third store within two years.

In light of the above, the petitioner has not demonstrated that he had invested the \$710,129. In addition, the promissory note for the remaining funds is not adequately secured and cannot serve as evidence of capital or that the petitioner is actively in the process of investing the remaining funds. Finally, the petitioner has not demonstrated that the method by which he plans to acquire the remaining funds would constitute a personal investment by him.

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*, 22 I&N Dec. 206, 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*, 229 F. Supp. 2d 1025, 1040 (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 noted by the director, the petitioner’s tax returns reflect the following income: \$50,275 in 1995, \$58,393 in 1996, \$74,196 in 1997, \$95,098 in 1998, in 1998, \$129,028 in 1999, \$116,810 in 2000, and \$111,940 in 2001. The director noted that the petitioner had been working without authorization since 1996 and concluded that income derived from unauthorized employment was not lawfully obtained. The director further concluded that the petitioner’s income could not account for an investment of over \$600,000 and the petitioner’s living expenses. As stated above, the director further noted that any proceeds reinvested prior to paying taxes on that income could not be considered the petitioner’s personal investment.

On appeal, counsel asserts that the Legal Immigration and Family Equity Act (LIFE Act), Pub. L. 106-553 (2000) removes unauthorized employment as a basis of ineligibility to adjust status. We acknowledge that, were the petition approvable, the petitioner’s unauthorized employment would not make him inadmissible. The petitioner’s admissibility is not at issue at this stage, however. Had the petitioner accumulated significant wealth before working without authorization and invested those funds, his subsequent unauthorized employment would not be relevant to the adjudication of the petition.

The issue is whether the petitioner’s income, much of which is listed as wages after the petitioner’s work authorization expired, was lawfully obtained. We concur with the director that any wages earned after the petitioner’s work authorization expired was not lawfully obtained. We cannot conclude that Congress intended to encourage aliens to work without authorization in the United States in order to accumulate their investment funds.

In response to the director's concern that the petitioner's income was insufficient to account for a significant investment in addition to living costs, counsel states only that the petitioner and his wife "earned substantial income which was mostly committed to the enterprise." Without supporting documentation of how the petitioner supported himself and his family, we cannot conclude that most of the petitioner's unremarkable income on which he paid taxes went to AVC. As discussed in great detail above, the record does not support counsel's assertion. Rather, the record reflects that the amount of stock and paid-in-capital did not increase after 1998. For the reasons discussed above, we concur with the director that the reinvestment of business and corporate proceeds cannot be considered the petitioner's personal investment.

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:

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.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1039 (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* 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.

On the petition, the petitioner indicated that the business had one full-time employee at the time of his initial investment and that the business currently had ten full-time employees “excluding” the petitioner and his immediate family members. The petitioner further indicated that AVC would create an additional five to ten jobs. In his brief, counsel also asserted that the business had “10-11 full time employees.” The business plan asserts that an additional four people will be employed at the new location being planned and that an additional two people will be hired once the existing location adds a closed garage and workshop.

Initially, the petitioner submitted Forms I-9, 941 and W-2 for 1995 through 2000. The Forms 941 for 2000 indicate that AVC had seven employees as of March 12, 2000. AVC issued 11

Forms W-2 in 2000, two of which were issued to the petitioner and his wife and another four of which do not reflect full-time employment at minimum wage.

In response to the director's request for additional documentation, counsel asserted that AVC "met the employment creation requirement" in June 2001, although AVC only currently employed seven full-time employees. The petitioner submitted similar documentation for 2001 as well as state wage and withholding reports for the first, second and fourth quarters of year. Additionally, the petitioner submitted a new business plan with similar employment projections as the initial plan. The new documentation reveals that AVC issued 13 Forms W-2 in 2001, two of which were issued to the petitioner and another five of which do not reflect full-time employment at minimum wage. The wage and withholding reports for 2001 reflect that AVC had the following employees: 10 in January, 12 in February, 12 in March, 11 in April, 12 in May, 11 in June, and nine in October, November, and December. Two of the above employees in each month were the petitioner and his wife. Of the seven employees other than the petitioner and his wife who worked at AVC during the last quarter of 2001, only five of them worked full-time. Five employees in the first quarter and four employees in the second quarter also did not receive wages consistent with full-time employment at minimum wage. Thus, in the second quarter, which includes the month that counsel implies AVC had ten full-time employees, only six of those employees other than the petitioner and his wife worked full-time.

The director concluded that AVC did not employ at least ten employees full-time in 2001. On appeal, counsel reasserts that AVC had ten full-time employees "as of June 30, 2001" and has seven full-time employees currently. Counsel also claims that a "comprehensive business plan showing the need for new hires was enclosed."

We concur with the director that the record does not reflect that AVC has ever employed at least ten full-time employees in addition to the petitioner and his wife. We acknowledge that the director should have considered whether the petitioner's business plan was credible. We will do so now.

The projections for additional employment are based on the petitioner's plans to open a new store and build an enclosed garage and workshop at the current store. As evidence that the petitioner is planning to open a new store, the petitioner submits loan approval documents and a sales contract from 1996 for [REDACTED] 50 and settlement documentation for [REDACTED] 27. The record contains no evidence that the option to purchase [REDACTED] 50 or the financing loan offer remained valid at the time the petition was filed, nearly five years later. AVC purchased [REDACTED] 27 in 1999 and has not documented any business activity at that site since that time.

The expansion of the existing store is only projected to create three full-time positions. While the petitioner claims to have seven full-time employees currently, the record reflects that only five of those employees (other than the petitioner and his wife) work full-time. Thus, the creation of three additional jobs would be insufficient to meet the job creation requirements. Moreover, the petitioner's mischaracterization of AVC's current employment reduces the overall credibility of his business plan.



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.