

U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
BUREAU OF PERSONNEL SERVICES

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B7

[Redacted]

FILE: SRC 04 061 50090 Office: TEXAS SERVICE CENTER

Date: AUG 19 2005

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)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Maui Johnson

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 (AAO) 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. Specifically, the director concluded that the petitioner was not personally and primarily liable on certain loans made by the new commercial enterprise, that the tax returns for the corporations making up the new commercial enterprise did not support the capital investment claimed, and that the investment would not be substantially complete by the time the petitioner sought to remove conditions, should the petition be approved.

On appeal, counsel argues that the petitioner is personally liable on the loans, that the tax returns would not reflect a transaction between shareholders and that a substantial amount of the investment will have been made by June 2006.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 *new* 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).

The record indicates that the petition is based on an investment in several businesses, collectively referenced as the "Guy and Gallard Group," although no such single entity exists. Specifically, there is no holding company for the several corporations and the limited liability company that make up this "group." The businesses are 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.

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).

On the petition, the petitioner claimed to have invested \$100,000 on April 27, 1995 and to have made a total investment of \$1,796,000. The petitioner breaks this investment down as \$750,000 for assets purchased for the business, \$900,000 in stock purchases and \$146,000 as "other."

The history of the "Guy and Gallard Group" is as follows. Another individual incorporated the initial corporation, ██████████ in 1993. According to the petitioner, by 1995 ██████████ had incurred \$700,000 in debts, \$605,000 of which was owed to ██████████. The petitioner submitted an April 28, 1995 agreement whereby ██████████ agreed to assign its loan to the petitioner for \$25,000.¹

On April 27, 1995, the petitioner signed a subscription agreement with ██████████ whereby he subscribed to 50 shares of the company stock for \$2,000 per share, \$100,000 in the aggregate.

In 1996, the petitioner incorporated ██████████ and ██████████, both doing business as a coffee shop or coffee bar according to their tax returns. In 1998, the petitioner incorporated ██████████, another coffee bar. In 1999, the petitioner incorporated ██████████, a final coffee bar. This corporation purchased what appears to have been an operating business, ██████████ Restaurant, for \$750,000 in 2001. Finally, also in 1999, the petitioner organized ██████████ a management company to handle the payroll of all of the coffee shops/bars. The petitioner submitted a letter from the New York Department of Labor advising that after reviewing the management agreement between ██████████ and ██████████ and ██████████ all of the units will be considered "singularly as 'an employer.'"

On August 16, 2001, the petitioner entered an agreement to purchase an option to buy ██████████ interest in GGFB and a stock purchase agreement to purchase ██████████ interest in the remaining companies discussed above and ██████████ and ██████████ are all also identified as "Entity Purchasers" in the stock purchase agreement.

We will discuss the evidence for each of the claimed investments separately.

\$100,000 Subscription Agreement

As stated above, the petitioner submitted a subscription agreement whereby he purchased 50 shares in ██████████ for \$2,000 per share or \$100,000 total. The petitioner initially submitted ██████████ 2002 tax return, listing the petitioner as the sole shareholder and reflecting \$152,000 in stock and \$5,000 in additional paid in capital. On April 26, 2004, the petitioner submitted the requested 1995 tax return for ██████████. That return reflects that in 1995, ██████████'s stock remained constant at \$52,000 with no additional paid in capital. ██████████'s stock did not increase until 2000, when it increased to \$152,000. The director concluded that the petitioner's claim to have invested \$100,000 in 1995 was not persuasive because it was not reflected on ██████████ 1995 tax return. On appeal, counsel asserts that the transaction does not appear on the 1995 tax return because the petitioner paid the other shareholder (then the sole shareholder) for the stock and, as such, "it was a transaction between two individuals."

¹ While this indebtedness assumed by the petitioner is not claimed to be part of his investment, we note that ██████████ 1995 tax return for the period beginning September 1, 1995 (the effective date of its election as an S corporation) and ending December 31, 1995 reflects total liabilities of \$337,666 as of September 1, 1995 and \$326,213 in liabilities at the end of 1995. Thus, as of September 1, 1995, ██████████ was not claiming the large liabilities the petitioner asserts that it had at least as of April of that year. The petitioner did not submit ██████████ tax return covering the period when the petitioner apparently assumed the loan of \$605,000.

Counsel is not persuasive. The agreement is entitled "SUBSCRIPTION AGREEMENT" and the parties are identified as the petitioner and GGFB. Black's Law Dictionary 1441 (7th ed. 1999) defines "subscription" (as it relates to securities) as a "written contract to purchase *newly issued* shares of stock or bonds." (Emphasis added.) Nothing in the agreement suggests that it is other than a typical subscription agreement, that it represents an agreement between the petitioner and the sole shareholder at the time, [REDACTED], or that the petitioner is actually purchasing half of [REDACTED] shares. Thus, counsel has not explained why the purchase of newly issued stock, the type of transaction documented by a subscription agreement, is not reflected on the 1995 tax return. While the petitioner is the sole shareholder of GGFB as of the date of filing, at which time GGFB reflected \$152,000 in stock and \$5,000 in additional paid in capital, the discrepancy in 1995 diminishes the overall credibility of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director also questioned the transactional evidence of the stock purchase. On appeal, counsel asserts that the petitioner demonstrated sufficient deposits into his own account. The petitioner initially submitted a debit advice dated April 27, 1995 reflecting the transfer of \$100,000 from the petitioner's account at Chemical Bank to [REDACTED] Attorney at Law. The subscription agreement does not list [REDACTED] (or any other individual) as the escrow agent or agent for GGFB. In fact, the record contains no evidence connecting [REDACTED] GGFB, although Schedule E of the subsequent 2001 Stock Purchase Agreement discussed below identifies [REDACTED] as the petitioner's lawyer. Thus, we concur that the record lacks evidence that any of the \$100,000 was eventually deposited with GGFB and, thus, made available to the employment generating entity. Assuming the funds were paid to [REDACTED] as claimed, such funds do not constitute a contribution of capital to the new commercial enterprise, as required by the definition of "invest" provided at 8 C.F.R. § 204.5(e), and would not be available to the employment generating as required by *Matter of Izummi*, 22 I&N Dec. at 179.

In response to the director's request for additional evidence, the petitioner submitted deposit slips documenting deposits totaling \$87,212 between March 10, 1995 and April 27, 1995. The petitioner also submitted his own personal statement affirming that he borrowed \$26,000 from [REDACTED]. Counsel asserts that the remaining deposits are the result of credit card loans. Counsel asserts that the credit card statements are no longer available and submits credit reports for the petitioner and his wife. This evidence does not establish that the funds were transferred to GGFB. Whether it establishes the lawful source of these funds will be discussed below.

In light of the above, the petitioner has not established a \$100,000 investment in 1995.

\$750,000 purchase of assets for [REDACTED]

On April 17, 2001, [REDACTED] purchased the assets, telephone number and leasehold interest of [REDACTED] Restaurant for \$750,000. The purchase price was payable through \$75,000 at signing, \$225,000 at closing and \$450,000 through the execution by the purchaser, [REDACTED] of a series of negotiable promissory notes. The notes consisted of a \$48,000 note guaranteed by the petitioner, a \$64,000 note and a series of 120 \$4,246.48 notes. As indicated in the previous sentence, the petitioner issued a personal guaranty for only the \$48,000 note. Paragraph 3 of the agreement provides:

As security for the payment of the Notes, the Purchaser agrees to execute and deliver to the Seller a purchase money security agreement on Blumberg form A-77 with the annexed riders covering the collateral set forth therein, and the trade fixtures and equipment inventory now and hereafter located in the Premises, as well as appropriate Financing Statements (UCC-1's).

The petitioner submitted Form UCC-1 listing GSTC as the debtor. In response to the director's request for additional evidence noting that GSTC, and not the petitioner, was the purchaser, counsel notes that the petitioner signed the contract and cites cases where officers of a corporation were held liable for contracts they signed individually as well as in their capacity as an officer, or issued a personal guaranty. The petitioner submits the promissory notes used to obtain the down payment funds. Specifically, [REDACTED] and the petitioner jointly and severally promised to pay [REDACTED] \$22,947. The petitioner signed this note as an officer of all the corporations and individually. In addition, [REDACTED] borrowed \$200,000 from [REDACTED]. The petitioner and "the Guy and Gallard Group" individually and collectively guaranteed the loan. The petitioner also signed this note in both his official capacity and as an individual. The petitioner also submitted checks issued by [REDACTED] to [REDACTED] (October 2001 through August 2002) and [REDACTED] (October 2001 through November 2003).

The director noted that the regulation at 8 C.F.R. § 204.6(e) provides that the assets of the new commercial enterprise may not secure any of the indebtedness claimed as an investment and that all of the promissory notes were guaranteed by the corporations in addition to the petitioner. On appeal, counsel merely reiterates the assertions made in response to the request for additional evidence.

Counsel has not overcome the director's concerns. As noted by the director, a corporation is a separate legal entity. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Counsel challenges the citation of these cases because they are not immigrant investor cases, yet counsel then cites New York corporate law cases. While the cases cited are not immigrant investor cases, Citizenship and Immigration Services (CIS) routinely relies on the separate legal entity principal set forth in those decisions in immigrant investor cases as it is a relevant and universal principal of corporate law. In fact, the AAO has held that corporate income was not the same as personal income in an immigrant investor case. *Matter of Izummi*, 22 I&N Dec. at 195. More relevant to the situation before us, the AAO also held that "a loan obtained by a corporation is not the same as a loan obtained by an individual." *Matter of Soffici*, 22 I&N Dec. 158, 162 (Comm. 1998). While we acknowledge head notes are not as authoritative as the actual text, head note 2 states that the "petitioner and the corporation are not the same legal entity." *Id.* at 158. Thus, the AAO has recognized the importance of this principal in precedent decisions involving the classification sought.

Regardless, we do not question the principal set forth in the cases cited by counsel that an officer of a corporation can make himself personally liable on a corporate obligation by signing the obligation as an individual or executing a personal guaranty. Clearly, the petitioner personally guaranteed the down payment funds borrowed from [REDACTED] and [REDACTED] a total of \$222,947. While counsel is incorrect that the petitioner also guaranteed the entire remainder of the \$750,000 purchase price for [REDACTED] Restaurant, he did personally guaranty the \$48,000 note to the seller. Counsel discusses at length how the petitioner personally guaranteed the various company obligations, but does not similarly support his assertion that the petitioner is "primarily" liable as required by the regulation at 8 C.F.R. § 204.6(e)(definition of capital.)

In a case involving the purchase of a hotel by a corporation, the AAO held:

Even if it were assumed, arguendo, that the petitioner and Ames Management were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital." *See* 8 C.F.R. § 204.6(e).

The AAO then noted that while the petitioner in that case had personally guarantied the loan, that guaranty did “not change the character of the mortgage.” As the assets of the corporation in that case primarily secured the mortgage, the AAO found that the indebtedness could not be considered a qualifying investment by the petitioner.

Thus, none of the funds used to purchase Ashby’s Restaurant can be considered part of the petitioner’s personal investment. We note that [REDACTED] not the petitioner, made all of the payments on these loans. While the petitioner has not argued that these payments constituted part of the petitioner’s remuneration by [REDACTED] we note that in 2002 alone, [REDACTED] paid [REDACTED] \$13,760.96 and [REDACTED] \$77,061.64. These amounts, plus the \$103,920 paid to [REDACTED] in 2002 that the petitioner does claim was part of his remuneration from [REDACTED] (discussed below), amounts to \$194,742.60, more than the petitioner’s remuneration in that year. Thus, it is clear that [REDACTED] and not the petitioner, repaid the loans. In fact, we note that Supplemental Page 4 of [REDACTED] 2002 tax return reflects a \$165,647 debt to [REDACTED] demonstrating that [REDACTED] considers the liability its own.

Finally, the 2001 tax return for GSTC does not support the petitioner’s characterization of the purchase of the restaurant. Schedule L reflects a \$100,000 equity investment, \$312,500 in shareholder loans and \$504,895 in long-term mortgages notes and bonds. Thus, it appears that GSTC considered at least \$504,895 of the debt its own and, even if the petitioner is considered to have contributed any cash above \$100,000, it was lent to GSTC. As stated above, the regulations do not permit a loan to the company as a qualifying investment. 8 C.F.R. § 204.6(e)(definition of invest).

In light of the above, the petitioner has not established that the purchase of [REDACTED] Restaurant constitutes a qualifying investment. Even if we were to accept the \$100,000 stock purchase reflected on GSTC’s 2001 Schedule L, and the petitioner has not demonstrated an infusion of cash or qualifying indebtedness to explain this amount, that amount is far less than the \$750,000 claimed.

\$800,000 Stock Purchase Agreement

On August 16, 2001, the petitioner and certain “Entity Purchasers,” entered into a Stock Purchase Agreement with [REDACTED] as the seller. The terms of that agreement will be discussed below. First, however, it is instructive to list the “Entities” and “Entity Purchasers” defined in Schedule A of the agreement. [REDACTED] GGFB, RRCTG and [REDACTED] were 100 percent owned by the petitioner and [REDACTED] and constitute the “Entity Purchasers.” GST, GSTC and Red Bird Food Co., Inc., of which the petitioner and [REDACTED] were the majority shareholders, were the remaining “Entities.” [REDACTED] does not appear to be a member of the Guy and Gallard Group. Hence, any investment into that corporation is not an investment into the new commercial enterprise.

Section IV of the agreement provides:

WHEREAS, (i) [the petitioner] wishes to purchase 100% of Seller’s interest in certain of the Entities, (ii) each of the Entity Purchasers so identified in Schedule A wishes to acquire 100% of Seller’s equity interest in such Entity, and (iii) [the petitioner] wishes to acquire an irrevocable option to purchase 100% of Seller’s equity interest in GGFB, (Inc., (“GGFB”) all upon the terms and conditions hereinafter provided. . . .

The following subparagraph begins on the bottom of page 2:

1. Disposition of Seller's Equity Interest in the Entities. As detailed below, Seller hereby sells or grants an option to purchase 100% of his equity interest in each of the Entities – comprising his ownership interest in shares of corporate stock and membership interests in limited liabilities companies, in each case being one-half of the combined equity interests of Purchaser and [the petitioner] disclosed in Schedule A “Seller's Equity”)

- a. Entity Purchasers. Each of the Entity Purchasers so identified in Schedule A hereby purchases, and Seller hereby sells, 100% of Seller's Equity in each such Equity Purchaser.
- b. [REDACTED] Seller hereby grants to [the petitioner] an irrevocable option to purchase 100% of Seller's Equity interest in GGFB, Inc. for \$10 (the “Option”) in accordance with the terms set forth below.
- c. [The petitioner]. [The petitioner] hereby purchases, and Seller hereby sells, 100% of Seller's Equity in each of the Entities listed in Schedule A other than those provided for in subparagraphs a and b above.

The agreement provides that the petitioner and the Entities are jointly and severally liable for the full purchase price of \$800,000 and is signed by the petitioner individually as well as on behalf of the Entities. The security for the agreement is a purchase money security interest in the property sold [REDACTED] interest in the Entities), a corporate guaranty secured by a pledge of each Entity's assets and a collateral assignment of the petitioner's life insurance policy. In addition, the petitioner “will pay or cause the Entities to pay, certain indebtedness of the Entities owed to members of Seller's family.”

The schedule of payments for the \$800,000 is 183 semi-monthly payments of \$4,330 commencing September 1, 2001 (the first two to be paid at closing), five annual installments of \$40,000 commencing January 11, 2005 and the remaining balance on September 11, 2009.

The accompanying promissory note signed by the petitioner individually and on behalf of the Entities contains the following statement:

Notwithstanding the foregoing, [the petitioner] acknowledges that his obligation to pay amounts due and becoming due under this Note are primary and not secondary and that his obligation shall not be diminished or abated because of the fact that any other party shall be the nominal purchaser of Seller's equity interest in the Entities.

The Entities' Security Agreement, Schedule F, however, reveals that the security interest set forth in the agreement “shall secure each and every claim which Seller may have against any Entity and/or [the petitioner], including, without limitation, obligations under the Stock Purchase Agreement and the Notes issued thereunder.” The attached UCC financing statements reveal that the collateral discussed in the security agreement consists of the assets of the Entities. Of those Entities, only [REDACTED] is not part of the new commercial enterprise.

Matrat's 2002 tax return, Schedule E, reflects that [REDACTED] compensated the petitioner \$143,520. In the supplemental information to his individual tax return, the petitioner indicated that his Form W-2 Wage and Tax Statement income was \$39,600 and that his “other compensation” was \$143,520. In response to the director's request for additional evidence, the petitioner submitted his 2002 Form W-2 Wage and Tax Statement from [REDACTED] reflecting only \$36,400 in wages. Counsel asserts that the balance of the petitioner's

remuneration is represented by checks issued from [REDACTED] to the [REDACTED]. According to the checks submitted, in 2002 [REDACTED] paid [REDACTED] \$103,920, [REDACTED] \$8,962.25 and [REDACTED] \$5,170.55, for a total of \$118,052.80.

In response to the director's concern that the full amount of the purchase price would not be paid until well after the petitioner's conditional period, should the petition be approved, counsel asserts that if conditional residence were granted in June 2004, as of June 2006, the petitioner would have paid a total of \$744,415.20, calculated from the \$100,000 stock purchase in 1995, \$484,960 (bimonthly payments of \$4,330), \$80,000 (two payments of \$40,000 in January 1995 and 1996), \$5,000 to [REDACTED] closing, \$57,533.40 (36 monthly payments of \$1,598.15 to [REDACTED] and \$16,921.80 (36 monthly payments of \$470.05 to [REDACTED]).

The director concluded that over two years, only \$287,840 would be paid on the promissory note: 48 semimonthly payments of \$4,330 plus two annual payments of \$40,000. Citing *Matter of Izummi*, 22 I&N Dec. at 194 for the proposition that nearly all of the money must have been invested by the end of the conditional residence period, the director concluded that the payment schedule was non-qualifying. The director also questioned whether the petitioner's life insurance policy was sufficient security as it was not worth its face value except upon the petitioner's death; thus, the petitioner did not risk the full \$100,000 of his own capital in assigning it to [REDACTED]. The director rejected counsel's assertion that the payments to the [REDACTED] constituted a contribution by the petitioner as he would not be taxed on those funds. The director cited *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) and *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003) for the proposition that company proceeds, untaxed at the individual level, cannot constitute a qualifying contribution of capital.

On appeal, counsel reiterates previous assertions regarding the amount paid on the purchase price as of June 2006, states that unpublished opinions are not binding on CIS, and asserts that the instant case is more persuasive than the cases cited by the director.

Before analyzing the evidence, we note that while unpublished federal court opinions are not binding on CIS, such opinions that have upheld our interpretation of our regulations may be cited to demonstrate that our interpretations have withstood at least some judicial scrutiny.

We concur with the director that the \$800,000 stock purchase agreement is problematic. First, while not discussed by the director, the agreement is somewhat ambiguous, but appears to imply that at least some of the Entities themselves are repurchasing their own stock back from [REDACTED]. The petitioner himself appears to be only purchasing an option to purchase [REDACTED] interest in GGFB. That said, subparagraphs (a) and (b) of section (1) of the agreement appear to conflict with regard to GGFB as GGFB is an Entity Purchaser, apparently defined as an entity repurchasing its own stock from [REDACTED], in which the petitioner also retains an option to buy [REDACTED] interest. The record does not resolve this peculiarity. Regardless, any repurchase of stock by an Entity in which [REDACTED] has an interest is not a contribution of capital by the petitioner.

Second, as is clear from the director's concern regarding the lack of a sufficient increase in capital in 2001 and 2002, a purchase of stock from another shareholder, whereby the value of the stock accrues to the seller (a withdrawing shareholder), is not an "investment" as defined in the regulation at 8 C.F.R. § 204.5(e). Specifically, an investment involves a contribution of capital to the new commercial enterprise. Counsel is correct that a purchase of stock from another shareholder would not be reflected as an increase in stock on the company's tax return. That such a transaction would not appear as a contribution of capital on a balance

sheet, however, is not helpful to the petitioner. Rather, it emphasizes that the funds allegedly invested were not made available to the employment generating entity, as required by *Matter of Izummi*, 22 I&N Dec. at 179.

We note that, while not raised by counsel, [REDACTED] 2002 tax return does appear to document the stock purchase agreement, just not as an increase in capital. Specifically, Schedule L includes "other assets" increasing from \$958,902 to \$977,389. Statement 5 breaks down these assets, including "deferred compensation / buy out" decreasing from \$952,731 to \$848,811, a difference of \$103,920. Supplemental Page 4 reflects that the company's long term liabilities includes \$671,311 characterized as "notes payable / buy out." Finally, Supplemental Page 3 reflects officer compensation of \$39,600 as "W-2" earnings and \$103,920 as "other compensation." Given the above information on the tax return, it would appear that [REDACTED] has incurred a "buy out" liability of \$671,311 (as of December 31, 2002) to [REDACTED] under the stock purchase agreement. In addition, the petitioner's option to purchase those stocks is being reflected as a long term asset (account payable) to [REDACTED] with the \$942,731 in that account decreasing by \$103,920 to reflect [REDACTED] payments to [REDACTED] out of the petitioner's compensation.

As the petitioner included the \$103,920 compensation on his tax return and paid taxes on those funds, we concur with counsel that *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) and *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003) do not apply. The ultimate result of the stock purchase agreement, however, involves no net increase in cash or capital to [REDACTED]. Specifically, the \$103,920 it deducts from the petitioner's wages it owes (and has consistently paid) to [REDACTED] and the member interest it purchases from [REDACTED] accrues to the petitioner. Moreover, the petitioner's remuneration from the new commercial enterprise more than doubled in 2001, the year he executed the stock purchase agreement. Thus, the extra compensation appears to be so-called "sweat equity," defined as "financial equity created in property by the owner's labor in improving the property." Black's Law Dictionary 1461-1462 (7th ed. 1999). As quoted above, the definition of capital set forth in the regulation at 8 C.F.R. § 204.6(e) includes cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur. "Sweat equity," or interest in the company awarded for work performed, is not included in the regulatory definition of capital.

Third, according to *Matter of Izummi*, 22 I&N Dec. at 191-194, a promissory note can either be considered capital in and of itself or it can be considered evidence that the petitioner is "in the process of investing" other capital. If the former, the AAO stated that the note must be valued at fair market value in United States dollars. *Id.* at 191. The question is what a third-party would pay, considering any discounts on the face value to reach the present value of the note. *Id.* at 193. The present value of the note, payable through 2009, would be far less than the full \$800,000. If the latter, as stated by the director, the petitioner must demonstrate that nearly all the money is payable within two years. *Id.* at 193-194.

While the director fails to consider payments made on the purchase price prior to the filing date of the petition, counsel's characterization of the amounts that will have been paid as of June 2006 is also in error. First, the petitioner has not sufficiently demonstrated his \$100,000 claimed investment in 1995 for the reasons discussed above. Second, counsel includes payments to [REDACTED]'s family. The stock purchase agreement does not include these payments as part of the [REDACTED] and the petitioner's obligation on these payments is only to pay them *or* cause the Entities to pay them. As the petitioner is not obligated to make those payments and [REDACTED] the actual entity making those payments, we will not consider them as the petitioner's personal investment into [REDACTED] defined above as a contribution of capital. Those payments are above the \$103,920 paid to [REDACTED] and deducted from the petitioner's remuneration.

In calculating the amounts paid on the purchase price, we must keep in mind that a petitioner must demonstrate eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*; 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner must establish that the petition was approvable when filed, and that the full investment would be nearly complete two years after that date. Assuming the agreement closed in September 2001, the payments as of the date of filing, December 24, 2003, would be for 28 months. Fifty-six semimonthly payments of \$4,330 would be \$242,480. In the following two years, up to December 2005, an additional \$207,840 in semimonthly payments and the first annual payment of \$40,000 would be owed, bringing the total to \$490,320, less than half of the requisite investment amount of \$1,000,000. Moreover, the agreement provides that each payment “shall be applied first to interest accrued to the date of payment and then to principal.” Thus, the \$490,320 calculated above includes eight percent interest that accrues to Mr. [REDACTED], not the new commercial enterprise. Thus, even if we found that the purchase of stock from another shareholder constituted a contribution of capital to the new commercial enterprise, an illogical conclusion for the reasons discussed above, clearly any interest paid to [REDACTED] cannot be considered a contribution of capital to the new commercial enterprise. Thus, we concur with the director that the petitioner has not established that nearly the full purchase price will be payable within two years of the date of filing.

Furthermore, we concur with the director that the petitioner is not adequately putting his own assets at risk. Counsel does not address the director’s concern that the assignment of the petitioner’s life insurance policy constitutes insufficient security for the full \$800,000 purchase price for [REDACTED] interest. Moreover, as discussed above, while the petitioner may be personally and even primarily liable on the promissory note, the assets of the new commercial enterprise (in addition to those of [REDACTED].) secure the petitioner’s personal obligation on the note. The definition of capital at 8 C.F.R. § 204.6(e), quoted above, states not only that the petitioner must be personally and primarily liable on any indebtedness, but *also* that the assets of the new commercial enterprise upon which the petition is based may *not* be used to secure *any* of the indebtedness. As the assets of new commercial enterprise do secure the promise to pay the full \$800,000, the note itself is not evidence of a qualifying investment as defined in the relevant regulations.

Finally, we note that an unspecified percentage of the \$800,000 purchase price is for the purchase of Mr. [REDACTED]’s interest in [REDACTED], which is not part of the new commercial enterprise. Thus, any payments relating to that company cannot be considered part of the petitioner’s investment into the new commercial enterprise.

In light of the above, of the \$800,000 claimed, at best the petitioner can be considered to have invested the \$242,480 actually paid from his remuneration as of the date of filing. As the note itself is not evidence of an investment or that the petitioner is actively in the process of investing, we cannot consider any other payments due on that note.

Equity listed on tax returns

Finally, the director listed the stock and additional paid in capital listed on the tax returns of [REDACTED], [REDACTED] and [REDACTED], concluding that even failing to consider the lack of transactional evidence of investment, the amounts on the tax returns represented no more than \$832,000 in equity among all the companies. Counsel’s only response to this issue is her earlier statement that a stock purchase from a shareholder would not be represented as an increase in capital.

As stated above, while we concur with counsel’s statement, that proposition is not helpful to the petitioner. Rather, counsel’s assertion merely reinforces our conclusion that the petitioner has not contributed cash or

other capital to the employment generating entities as required pursuant to the definitions of “invest” and “capital” set forth in the regulation at 8 C.F.R. § 204.6(e).

Regardless, for the reasons discussed above, the petitioner has not demonstrated a qualifying investment of more than \$242,480.

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*, 22 I&N Dec. 169, 195 (Comm. 1998). 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).

The director concluded that the petitioner had not demonstrated income that could account for the accumulation of \$1,000,000. Counsel does not respond to this concern on appeal.

We note that the bulk of the claimed investment is loans the petitioner will purportedly pay over several years. The most significant issue regarding eligibility is the non-qualifying nature of the various agreements, not the contribution of cash of undocumented origin.

That said, we concur with the director's conclusion, expressed earlier in his decision, that the petitioner had not established the source of the \$100,000 allegedly transferred to GGFB in 1995. The petitioner's personal statement that he borrowed these funds from another individual and credit card companies is insufficient. The record lacks transactional evidence documenting the transfer of funds from either [REDACTED] the credit card companies. The record also lacks evidence of an agreement between [REDACTED] and the petitioner or that the petitioner has the lawfully acquired assets to repay the loan.

In light of the above, the petitioner has not demonstrated the lawful source of the \$100,000 allegedly invested in 1995.

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).

