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FILE: [REDACTED]
SRC 04 078 52977

Office: TEXAS SERVICE CENTER Date: OCT 04 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.

Robert P. Wiemann

9 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 requisite employment.

On appeal, counsel does not personally identify any specific factual or legal error by the director. Rather, counsel submits a letter from the petitioner attempting to address the director's concerns. The petitioner submits numerous documents, most of which were already part of the record of proceeding and addressed by the director.

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

Prior to evaluating the petitioner's eligibility, it is instructive to review the petitioner's claimed investment. While the petitioner indicated on the Form I-526 petition that he established State Realty Corp. in 2002, the petitioner actually incorporated State Realty in New York in 1997. The corporation purchased a building, which it sold in August 2002. A few days later, the corporation purchased a building in Kentucky. According to the petitioner's loan application and an appraisal, the building was built in 1924 as a hotel and was converted to mixed use in 1976. The petitioner claims the purchase of and repairs to this building in 2002 constitute a qualifying investment.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise" (Emphasis added.)

The regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

The regulation at 8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

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. This amendment did not, however, eliminate the requirement that the commercial enterprise be “new.” Thus, we concur with the director that the regulation at 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

As stated above, the loan application reflects that the building was built as a hotel in 1924 and converted to mixed use in 1976. The appraisal submitted affirms this information, but only specifically covers the ownership history of the building since 1998. Specifically, in 1998, the previous owner purchased the building for \$7,850,000 and made repairs worth an unknown amount. In 2002, the petitioner purchased the building at a foreclosure sale for \$5,100,000. The petitioner signed a Use Agreement with the Department of Housing and Urban Development (HUD), committing State Realty Corp. to \$565,933.73 in repairs within 18 months.

In response to the director’s request for additional evidence, the petitioner asserted that the building increased in value by 50 percent. The regulation, however, does not reference market value. Rather, the regulation requires a 40 percent increase in “net worth,” a common accounting term defined as “total assets less total liabilities.” Barron’s Dictionary of Accounting Terms 295 (3rd ed. 2000). The director concluded that the petitioner had not established the net worth or number of employees prior to purchasing the building; thus, he could not establish that he increased either.

On appeal, the petitioner states that the recent appraisal reflecting a market value of \$9,300,000 demonstrates that the petitioner has made the business “new.” As stated above, however, the regulations do not permit us to look at market value. Rather, we must look at audited balance sheets or federal tax returns, Schedule L, to determine the “net worth” of the business. The petitioner has submitted the corporation’s tax returns for 2002, the year State Realty Corp. purchased the employment generating entity, the building. Schedule L of

this return reflects a year-end net worth (assets less liabilities) of \$84,245 (\$1,907,221 in total assets less \$52,976 in loans from shareholders and less \$1,770,000 in mortgages, notes and bonds payable in one year or more). Without a subsequent tax return or audited balance sheet, however, we cannot determine the net worth of State Realty Corp. at a later date. Thus, the petitioner has not established that the net worth has increased at all, let alone by 40 percent.

In light of the above, we concur with the director that the petitioner has not established that he reorganized or expanded the new commercial enterprise. The law, however, no longer requires that the petitioner personally have established the new commercial enterprise. Thus, the petitioner need only demonstrate that someone reorganized or expanded the employment generating entity after November 29, 1990. The director, however, failed to request such evidence. As we concur with the director's other bases of denial, however, we need not remand the matter to the director to request evidence as to whether any prior owner reorganized or expanded the building after November 29, 1990.

INVESTMENT OF CAPITAL

The regulation at 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.

The regulation at 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 claimed to have invested \$5,313,333 on August 15, 2002 and to have invested a total of \$6,128,933 as of the date of filing. The petitioner claimed to have purchased \$9,800,000 in assets for the business, using \$4,020,000 in debt financing. The petitioner indicated "N/A" for stock purchases even though the business is organized as a corporation. The petitioner, however, submitted no supporting documentation at that time. In response to the director's request for supporting documentation, the petitioner claimed that his investment included the \$5,100,000 purchase price of the building, financed with two mortgages totaling \$4,000,000, \$262,288 in completed repairs and \$303,645.36 in pending repairs. The petitioner also listed a mortgage refinance fee and \$981,281 in mortgage payments made.

The petitioner submitted evidence that he incorporated State Realty Corp. on April 2, 1997. On the petition, the petitioner claims to own a 100 percent interest in State Realty Corp. The petitioner submitted State Realty's 2002 U.S. Income Tax Return for an [REDACTED]. The petitioner's Schedule K-1 indicates that he owns 100 percent of the corporation. In 2004, however, seven individuals, including the petitioner, signed a General Partnership agreement listing [REDACTED] as the name of the partnership. According to Article 1.03, the partners are alleged to be "the original partners from the formation of the business in 1997." Article 1.05 provides:

The intent of the Partnership is to provide for its member a means to define and identify the [sic] their respective rights and obligations in and to their investments in real estate properties owned and operated by [REDACTED] a New York corporation. Each member of the Partnership is an investor in the property owned by said corporation, and each member may, from time to time, make additional investments in the real property owned and managed by [REDACTED]. It is understood between the partners that upon qualification of a partner to become a shareholder of [REDACTED] said partner may become a shareholder in said corporation and may hold shares in said corporation in proportion to said member's interest in the Partnership.

While the partnership agreement is dated after the 2002 tax return, it references partners from 1997. While an [REDACTED] may be taxed similarly to a partnership, in other respects, such as the liability of partners versus shareholders, an [REDACTED] is quite different from a partnership. Thus, the general partnership agreement referencing partners from 1997 is inconsistent with the corporate information. It is incumbent upon the

petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved how the new commercial enterprise is organized or how many individuals have contributed capital and, thus, have an interest in it. If other individuals have contributed capital, we cannot credit the petitioner with all of [REDACTED] capital.

The petitioner submitted a Qualified Exchange Trust Agreement whereby [REDACTED] agreed to use the proceeds of the sale of its property in New York to purchase other property of like-kind to reduce the tax consequences of the sale. The "Exchangor" is Chicago Deferred Exchange Corporation (CDEC). On August 8, 2002, [REDACTED] sold a building in New York for \$875,000, with the proceeds payable to CDEC. CDEC confirmed receipt of \$834,823.25 on August 9, 2002. [REDACTED] then purchased the alleged new commercial enterprise, a building in Kentucky, for \$5,100,000. On August 14, 2002, the petitioner requested that CDEC wire \$833,823.25 to a [REDACTED] and [REDACTED] client account. The petitioner also submitted postal money orders reflecting a total of \$25,600 payable to [REDACTED] and [REDACTED]. [REDACTED] is listed as the purchaser of the money orders. A January 21, 2003 letter from [REDACTED] of [REDACTED] and [REDACTED] acknowledges receipt of the \$25,600 "in cash with respect to the closing of your corporation's acquisition of Kentucky Towers." Mr. [REDACTED] further advised that the firm "filed IRS Form 8300 with the Internal Revenue Service" relating to the transaction.

The petitioner submitted the closing statement for the purchase of Kentucky Towers dated August 15, 2002. The statement reflects that all payments were made to the [REDACTED] and [REDACTED] PLC client account and that the funds were dispersed from this account to HUD at closing. Prior to closing, [REDACTED] had paid deposits amounting to \$286,176.75. The record contains no transactional evidence for these deposits. The funds dispersed at closing derived from the following sources: \$4,000,000 from [REDACTED], \$833,823.25 from CDEC and \$25,600 and \$19,148.50 from [REDACTED]. The Use Agreement with HUD requires that the [REDACTED] make approximately \$565,933.73 in repairs within 18 months. A letter dated April 7, 2004 reflects that as of that date, only 47 percent of the repairs were complete.

The petitioner submitted loan agreements, security agreements and financing statements evidencing loans for \$3,800,000 and \$200,000 from [REDACTED]. While the petitioner executed personal guaranties for both loans, they are primarily secured by Kentucky Towers, an asset of [REDACTED]. A February 15, 2004 mortgage payment issued to [REDACTED] is drawn on State Realty's account.

The petitioner also submitted a request for a \$6,300,000 three-year interest only bridge loan to cover repairs during the 18-month gap between current and stabilized occupancy after the repairs. [REDACTED] also secured a \$25,000 revolving credit line.

Finally, the petitioner submitted State Realty's 2002 tax return, including Schedule L. Schedule L reflects only \$1,000 in stock and \$108,881 in additional paid-in-capital in addition to \$52,976 in loans from shareholders.

The director concluded that none of the evidence demonstrated a contribution of capital from the petitioner. The director stated that amounts paid by the corporation itself could not be credited to the petitioner and noted that the 2002 tax return did not reflect sufficient capital.

On appeal, the petitioner now asserts that, not including the mortgage he invested \$1,876,110. The petitioner notes that he is still obligated to make repairs mandated by HUD. The petitioner further asserts that the

\$833,823.25 wired from CDEC, the \$150,000 down payment and the \$141,483 line of credit are more than the required \$1,000,000. The petitioner appears to argue that he should be credited with the full purchase price because an [REDACTED] is not taxed like a regular corporation; rather, the profits and loss pass through to the shareholder. Yet, the petitioner concedes that due to [REDACTED] exchange of one building for another of like-kind, neither the corporation nor he had to pay any taxes on the capital gains from selling the first building. Finally, the petitioner asserts that the full capital was not reflected on the 2002 return because the business only purchased the building three months prior.

The petitioner submits [REDACTED] bank statements for 2004. These statements have no relevance to the petitioner's claimed investment in 2002. Regardless, a corporation can obtain funds from sources other than its shareholders, such as loans and income (rent, in this case). Thus, demonstrating expenditures by the corporation is not evidence of the petitioner's personal contribution of capital to the corporation.

The petitioner also submits a letter from [REDACTED] an attorney for HUD. Ms. [REDACTED] recounts the information on the closing statement, none of which is contested. At issue is whether the purchase of a building with debt financing and the proceeds of the sale of a prior building constitutes a personal investment by the petitioner.

While the petitioner submits a letter from [REDACTED] affirming the conditions of the mortgage, the petitioner no longer claims that the \$4,000,000 borrowed from [REDACTED] is part of his investment and we find that it is not. Regardless of the petitioner's personal guaranty, the assets of [REDACTED] secure the loans. The definition of capital, quoted above, precludes any consideration of indebtedness secured by the assets of the commercial enterprise. *See also Matter of Soffici*, 22 I&N Dec. 158, 162-163 (Comm. 1998).

The petitioner, however, is not persuasive that State Realty's exchange of one building for another should 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 or the purchase of a new asset with the sales proceeds of an old asset. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds or the exchange of one asset for another. 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 or the exchange of one asset for another. *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 corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

Regardless of how an [REDACTED] is taxed, a reinvestment of proceeds is simply not an infusion of new capital into a business. Unlike a regular corporation, the shareholders of an [REDACTED] who reinvest the profits of the business are being taxed on those profits. As stated above, however, the petitioner was not required to pay taxes on the capital gains on the sale of the first building. Moreover, the record does not establish how much of the proceeds were profit as the original purchase price for the New York business is unknown.

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 Mirriam-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. Thus, the use of proceeds from the sale of one building to buy another is not an investment by the petitioner. The record contains no transactional documentation, such as cancelled checks or wire transfer receipts, documenting the transfer of any funds from the petitioner's personal accounts to [REDACTED] any of the company's creditors, the contractors making the repairs or the entity that sold Kentucky Towers to State Realty Corp.

In addition, the petitioner's explanation for the minimal capital listed on the 2002 tax return is not persuasive. First, the petitioner claims to have made a sufficient investment in August 2002. Thus, the fact that the new building had not been an asset of [REDACTED] for more than a few months is irrelevant. Any capital invested in August 2002 should be reflected in the 2002 tax return. Further, the petitioner fails to submit any subsequent returns for [REDACTED] that might reflect a greater investment.

Further, while the funds initially invested into [REDACTED] in 1997 might be more persuasive, the record contains no evidence of that investment. Moreover, as noted above, the petitioner has not resolved the issue of whether there were other investors in 1997, as implied in the 2004 General Partnership Agreement.

Finally, we acknowledge that [REDACTED] is committed to future repairs. The petitioner, however, has sought bridge financing to cover these repairs and, in that request, asserted that rent income will eventually cover those repairs. Thus, the petitioner has not established that he personally will fund these repairs or even that he has sufficient lawfully obtained funds available to personally fund those repairs.

In light of the above, the petitioner has not established a qualifying investment in 2002 as claimed or thereafter. While the petitioner may have invested some funds in 1997 when he incorporated [REDACTED] Corp., he has not documented such an investment.

SOURCE OF FUNDS

The regulation at 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 only evidence submitted to meet this requirement is a single tax return for the petitioner. On his 2002 tax return, the petitioner listed an adjusted gross income of only \$2,714. The director acknowledged that the source of the alleged investment was the sale of a building, but noted that the record did not establish that the petitioner individually sold it. The director concluded that the petitioner’s income could not establish sufficient income to account for the accumulation of the necessary \$1,000,000.

On appeal, the petitioner reiterates that he was not required to pay taxes on the proceeds of the sale of the New York building because they were used to purchase the Kentucky building.

As stated above, the petitioner cannot be credited with State Realty’s exchange of one asset for another. Thus, the fact that those proceeds are legitimately not reflected on the petitioner’s personal tax return is irrelevant. The issue is how the petitioner obtained the funds to capitalize State Realty in 1997, the ultimate source of the proceeds in 2002. To hold otherwise would allow a petitioner to use unlawful funds to purchase an initial asset and demonstrate lawful source of funds by exchanging that asset, essentially “laundering” those funds. We do not allege such a motivation in this matter; we merely offer the example as an explanation for why the ultimate source of funds must be demonstrated. The record lacks any evidence of the petitioner’s income prior to 1997. Thus, the petitioner has not met his burden.

EMPLOYMENT CREATION

The regulation at 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.

The regulation at 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).

The petitioner claimed on the petition to have created 10 full-time jobs. In response to the director's request for additional evidence, the petitioner submitted blank quarterly wage reports and payroll statements. The statements reflect that in October 2003, [REDACTED] employed seven workers, two of whom worked full-time. In the pay period ending September 30, 2004, the petitioner employed six employees, three of whom worked full-time. In the pay period ending October 15, 2004, the petitioner employed only four employees total. The record includes an unexplained overlapping payroll statement for the period September 21, 2004 through October 4, 2004 where State Realty paid only one employee for four and one half hours. The employee on this statement appears on the overlapping statements.

The director concluded that the petitioner had not established how many employees were working prior to the purchase of Kentucky Towers, how many employees were currently working full-time and how many employees were qualifying. On appeal, the petitioner asserts that there were no employees at the time of purchase and that State Realty has created 10 full-time jobs. He also, however, notes that he need not meet the employment generating requirements yet. The petitioner submits 17 Forms W-2 for 2004 and payroll records for 2005.

Forms W-2 cannot establish how many full-time employees were employed at any one time. The payroll statements for February and March 2005 reflect payment to six employees, two of whom worked less than full-time and one of whom was terminated. Thus, the petitioner has not established that he currently employs

ten full-time workers. Regardless, his claim that the former owner terminated all employment prior to the sale is unsubstantiated. Thus, he has still not established how many employees were employed by the prior owner in July 2002, prior to the sale in August 2002.

While it is true that the petitioner need not have created 10 jobs as of the date of filing the Form I-526 petition, 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.” 8 C.F.R. § 204.6(j)(4)(i)(B). To be considered comprehensive, a business plan must be sufficiently detailed to permit Citizenship and Immigration Services (CIS) 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*, 22 I&N Dec. at 213. 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. The petitioner failed to submit a 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.