



U.S. Citizenship
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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date:

MAR 31 2006

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 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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the preference visa petition. In connection with the petitioner's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner's initial attorney with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition by Alien Entrepreneur (Form I-526). The Administrative Appeals Office (AAO) remanded the matter back to the director on appeal. The director subsequently issued two NOIRs and a final NOR. The matter is now before the AAO on certification. The director's decision will be affirmed.

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). Ultimately, the director concluded that the petitioner did not demonstrate a qualifying investment of lawfully obtained funds in a "new" commercial enterprise or submit a credible business plan documenting the likelihood of creating the necessary jobs. For the reasons discussed below, we concur with the director. While the issue of whether the business is "new" may seem technical, the petitioner's failure to sustain an investment anywhere near the required amount at any time, including prior to November 29, 1990, renders the petitioner ineligible under even the most generous interpretation of the statute and regulations.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Id. (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5). The director approved the petition on September 22, 2000. The petitioner subsequently attended an interview at the Los Angeles District Office relating to his application to adjust status. Based on that interview and the petitioner's responses to requests for additional evidence,

the District Office forwarded the matter back to the director for review. On February 23, 2004, the director issued a NOIR. On May 28, 2004, after consideration of the petitioner's response, the director revoked the approval of the petition. On appeal, [REDACTED] argued that the petitioner was deprived of counsel at his adjustment interview because [REDACTED] was not advised of the scheduled interview and the petitioner was not advised of his right to counsel.

The AAO noted the following chronology. As of the date of appeal, the most recent Form G-28, Notice of Entry of Appearance, filed by [REDACTED] was dated April 24, 2001. Subsequently, on November 26, 2001, [REDACTED] submitted a Form G-28 signed by the petitioner. The regulation at 8 C.F.R. § 292.4(a) provides that substitution may be permitted "upon notification of the new attorney or representative." On November 29, 2001, the Los Angeles District Office, advised the petitioner of his December 6, 2001 interview. The notice states "ATTORNEY NOTIFIED: [REDACTED] Thus, contrary to the allegations made on appeal, the District Office properly advised the petitioner's then current representative of the scheduled interview.

On September 30, 2002, a third attorney, [REDACTED] entered her appearance with a properly executed Form G-28. This was the most recent Form G-28 in the record at the time of the appeal. The record did not contain a withdrawal from that attorney. Thus, the AAO concluded that [REDACTED] was the proper attorney of record at the time the notice of February 23, 2004 NOIR was issued.

The AAO noted that the director, however, issued the notice of intent to revoke the approval of the petition to [REDACTED]. The AAO determined that this was clearly in error, although [REDACTED] filed a response. The director also issued the final decision to [REDACTED] who then filed the appeal.

The AAO concluded that the director did not properly serve the notice of intent to revoke on the attorney of record. *See* 8 C.F.R. § 292.5(a). As such, the AAO remanded the matter to the director for proper service of the notice of intent to revoke on [REDACTED].

On June 27, 2005, the director issued a new NOIR to [REDACTED] who submitted a response. In his response, [REDACTED] asserts that he is, in fact, the attorney of record and that the director did not err in issuing the February 23, 2004 NOIR to him. On August 10, 2005, the director issued a second NOIR to [REDACTED]. Acknowledging the director's confusion as to the proper attorney of record, [REDACTED] submitted a newly executed Form G-28. On September 29, 2005, the director properly issued the NOR to [REDACTED], then the attorney of record based on the new Form G-28. The director certified that decision to this office. In response, [REDACTED] requested additional time in which to submit a brief. Subsequently, counsel, [REDACTED] filed a brief with a properly executed Form G-28.

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. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As

the petitioner's appeal was pending after November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the commercial enterprise in which the petitioner invested is "new" is still relevant, however, as a petitioner must still demonstrate an investment in a "new" commercial enterprise and 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 a business, Film-Mex Entertainment, Inc., established on September 17, 1999, hereinafter FME (1999). The petitioner indicated that FME (1999) is 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.

NEW COMMERCIAL ENTERPRISE

As quoted above, section 203(b)(5)(A)(i) of the Act, as amended, 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).

As stated above, the 2002 amendments to the statutory framework of the EB-5 Alien Entrepreneur program, eliminate the requirement that the alien personally establish the new commercial enterprise but do not eliminate the requirement that the commercial enterprise be "new." Thus, we find that 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.

Also as stated above, on the petition the petitioner indicated that the new commercial enterprise was FME (1999), Federal Employer Identification Number (FEIN) [REDACTED] established on September 17, 1999. In the initial cover letter, [REDACTED] asserted that FME (1999) was established to develop, produce and acquire movies and television programming. The petitioner claimed to have invested \$550,000 on October 4, 1999 and a total of \$1,150,000. The petitioner submitted the articles of incorporation, filed on September 17, 1999 and a letter from the Internal Revenue Service (IRS) issuing Film-Mex Entertainment, Inc. a FEIN.

The petitioner submitted a letter from accountant [REDACTED] asserting that the investment was the result of a loan from [REDACTED] (hereinafter ARC), FEIN [REDACTED] also owned by the petitioner. Subsequent evidence reveals that [REDACTED] is a director of ARC. In response to a request for evidence, the petitioner submitted the bank statements for ARC reflecting the same address as FME (1999).

In response to the numerous requests for evidence and the NOIRs, the petitioner has submitted the following evidence relating to this issue:

1. The articles of incorporation for [REDACTED] filed December 14, 1989 (hereinafter FME (1989)) FEIN [REDACTED]
2. Evidence ARC was incorporated in 1992.
3. The Agreement to Merge FME (1989) and ARC dated December 12, 1996, whereupon FME became a division of ARC. FME continued to acquire copyrights and maintain bank accounts in its own name after the merger.
4. Separate payroll documents for ARC and FME (1999).
5. Several distribution agreements and licensing documentation for both ARC and FME (1989).

In response to the initial NOIR, [REDACTED] asserted that FME (1989) and ARC operated from different addresses and never shared assets, liabilities or revenues. On appeal, [REDACTED] asserted

that FME (1989) was concerned with Spanish language titles and ARC was concerned with English language titles. The director consistently concluded that the incorporation of FME (1999) did not create a "new" commercial enterprise and that the record lacked evidence that the petitioner reorganized or expanded an existing commercial enterprise.

On certification, counsel asserts that the petitioner formed a "new" commercial enterprise by incorporating FME (1999) and that the petitioner demonstrated this business to be a separate business by submitting the articles of incorporation, issuance of a separate FEIN, tax returns and payroll documents. Counsel asserts that the director erred in looking beyond this corporation at the petitioner's other companies in the same industry.

The controlling authority on this issue is *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998).

That case provides:

Although Ames Management was incorporated in 1997, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. The [redacted] Lodge purchased by [redacted] had been in operation for approximately 24 years and was an ongoing business at the time of purchase; [redacted], doing business as [redacted] has merely replaced the former owner.

Id. at 166. Thus, the fact that the petitioner filed articles of incorporation to create a new corporation on paper is not determinative. FME (1989) existed prior to November 29, 1990 and cannot be considered "new." It merged with ARC in 1996. We note that the petitioner has never claimed that ARC, a separate corporation created in 1992, is the new commercial enterprise. Rather the act of incorporating FME (1999) with an investment in 1999 is claimed to be the creation of a new business. The petitioner has not satisfactorily demonstrated that the incorporation of FME (1999) constituted a new FME corporation separate from the FME division under ARC. Merely undoing the 1996 merger is not the creation of a new job-creating business. As the job creating business was not deemed new in *Matter of Soffici*, the decision continues:

[The petitioner] does not claim that he will expand the hotel by 40 percent as provided in 8 C.F.R. 204.6(h)(3). The petitioner has not shown the degree of restructuring and reorganization required by 8 C.F.R. 204.6(h)(2); the hotel has always been a Howard Johnson and is still a Howard Johnson today. A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership. Therefore, it cannot be concluded that the petitioner has created a new commercial enterprise.

While the petitioner has attempted to distinguish FME (1989) and FME (1999) from ARC, the petitioner has not explained how FME (1999) is distinguishable from FME (1989), subsequently a separate division within ARC that kept its own name, bank accounts and copyrights. Thus, we are unable to determine whether, by incorporating FME (1999), the petitioner expanded, reorganized or restructured the FME division under ARC in 1999.

In light of the above, the petitioner has not demonstrated an investment in a “new commercial enterprise.”

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.

As stated above, the petitioner initially claimed to have made an investment of \$550,000 on October 4, 1999 and a total investment of \$1,150,000. The petitioner submitted his October 1999 bank statement reflecting deposits of \$550,000 on October 4 and \$600,000 on October 25. The petitioner also submitted checks issued on the same dates to FME (1999) for these amounts. The bank statements reflect that these checks were cashed. As stated above, Mr. Harary asserts that these funds originated from a loan from ARC. In response to the request for additional evidence, the petitioner submitted ARC's bank statements reflecting withdrawals of \$550,000 on October 4, 1999 and \$600,000 on October 25, 1999. The petitioner also submitted an October 1999 bank statement for FME (1999) reflecting the deposits of \$550,000 and \$600,000. The petitioner submitted ARC's federal income tax returns for 1992 through 1998, all of which reflect fluctuating loans to the shareholder.

In response to inquiries in relation to the petitioner's adjustment application, the petitioner submitted an investment summary, claiming that he invested \$20,000 into FME (1989) derived from a \$28,000 loan from Interstate bank. The petitioner also submitted tax returns for FME (1989), ARC and FME (1999). The tax returns for FME (1989) reflect \$15,161 in stock and no additional paid-in-capital. The final return for FME (1989) is 1996. ARC repaid a \$101,500 loan to the petitioner in 1995 and in 1996, ARC's stock rose from \$70,000 to \$235,160. More significantly, in 1999, ARC's loans to shareholders increased from \$83,780 to \$1,242,494, consistent with the petitioner's claims. In 2000, however, the petitioner returned all but \$163,382 to ARC (loans to shareholders decreased from \$1,242,494 to \$163,382). The return of the borrowed funds is consistent with the tax returns for FME (1999). In 1999, FME (1999) listed \$50,000 in stock, no additional paid-in-capital and a loan from shareholders of \$1,100,400. In 2000, however, the petitioner recovered the entire loan from FME (1999) (loans from shareholders decreased from \$1,100,400 to \$0) but stock and paid-in-capital remained the same (\$50,000 and \$0). The most obvious change in assets between 1999 and 2000 is the decrease in cash from \$878,325 to \$13,149, suggesting that FME (1999) never utilized the bulk of the loan from the petitioner before returning the funds in less than one year. Schedule L for 2001 shows no increase in stock or additional paid-in-capital.

Finally, regarding the original bank loan in 1989, the petitioner submitted evidence of a \$28,000 credit line, but no evidence he had borrowed at least \$20,000 against that credit line. Specifically, as of November 27, 1989, \$20,552.25 of the \$28,000 was still “available.”

In the NOIRs and NORs, the director concluded that the petitioner had merely loaned the bulk of the money to FME (1999), investing no more than \$50,000, and that even those funds were likely the reinvestment of proceeds. The director also questioned the petitioner’s claim to have borrowed \$20,000 in 1989.

The petitioner’s various attorneys have challenged the director’s concerns regarding the reinvestment of proceeds but have never rebutted the director’s concerns regarding the non-equity loan to FME (1999). The attorneys have also asserted that Interstate Bank no longer exists and that evidence of the 1989 loan is no longer available. On certification, counsel asserts that the petitioner has maintained his status as a nonimmigrant investor, implying that this status and the “solid pattern of his source of income and investment practices since his entry in 1983” should be accepted as evidence of his qualifying investment.

Counsel is not persuasive. The petitioner’s nonimmigrant status does not require an investment of \$1,000,000, the immigrant status sought does. Compare Section 101(a)(15)(E) of the Act and 8 C.F.R. § 214.2(e)(2) with Section 203(b)(5) of the Act and 8 C.F.R. § 246. Regardless, it must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. See e.g. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing nonimmigrant petitions than immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner’s qualifications). Moreover, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

First, the petitioner has not established that the funds transferred to FME (1999) at its inception, above the original \$15,161 investment in FME (1989), were not merely the gradual growth in equity from retained earnings by FME (1989), including while a division of ARC.

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

corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

We note that a federal court, in an unpublished decision, has upheld our interpretation of “invest” even as applied to a sole proprietorship. While not binding, the court’s reasoning may be given due consideration. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). 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 Merriam-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. We concur with the director that the record lacks evidence of an infusion of new capital into FME (1999). Rather, the funds transferred to FME (1999) at its inception ultimately derive from ARC, which included FME (1989).

More significantly, we concur with the director that the Schedules L for FME (1999) reflect no more than a \$50,000 equity investment. The petitioner has never rebutted the director’s concern that the definition of invest at 8 C.F.R. § 204.6(e) requires an equity investment and explicitly precludes loans to the new commercial enterprise.

Moreover, while not specifically raised by the director, it is clear that the petitioner did not even maintain his \$1,100,400 loan to FME (1999). The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Matter of Ho*, 22 I&N Dec. 206, 209 (Comm. 1998). Even if a petitioner transfers the requisite amount of money, he must establish that he placed his/her own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001)(citing *Matter of Ho*). In less than a year, the petitioner had withdrawn the entire amount of funds loaned in 1999. Thus, even if we were to consider those funds “invested,” they were never at risk.

In light of the above, we concur with the director that the petitioner has not demonstrated a qualifying at-risk equity investment of at least \$1,000,000. The record reflects an investment of no more than \$50,000 into FME (1999), the claimed new commercial enterprise.

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 source of the petitioner’s initial investment into FME (1989) is claimed to be a \$28,000 line of credit. The source of the petitioner’s initial investment into FME (1999) is claimed to be a loan from ARC. Even where the funds are traced to a loan, the petitioner must demonstrate that he has the lawfully acquired assets to secure and repay the loan. The petitioner submitted his personal tax return for 2000 reflecting dividends of \$10,000 and business income of \$34,452. The petitioner also submitted his personal tax returns for 1985, 1987, 1988 and 1989 reflecting adjusted gross income of

\$86,322, \$22,385, (\$9,710) and \$24,566 respectively. The petitioner has not demonstrated income that can account for the accumulation of assets sufficient to secure the \$1,242,494 from ARC. Moreover, the petitioner has not submitted evidence of over \$1,000,000 in personal assets that he could have used to repay the loan without withdrawing the funds from FME (1999), which is what he ultimately did. As such, these withdrawn funds cannot be considered the petitioner's personal equity investment into FME (1999), the claimed new commercial enterprise.

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).

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 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 initially claimed on the petition that he had created six jobs and would create a total of 29 jobs. The petitioner submitted six Forms W-4 and Forms I-9. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as pay stubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full-time employment within the United States. *Matter of Ho*, 22 I&N Dec. at 212.

In response to subsequent requests for evidence, the petitioner submitted payroll documents and quarterly wage and withholding reports. These documents reflect between one and four employees between 1999 and the third quarter of 2001, not all of whom could have worked full time at minimum wage according to their quarterly wages. According to the quarterly wage and withholding report for the final quarter of 2001, the number of employees jumps from four to eleven employees in December of that year. The quarterly report reflects wages for the full quarter. Thus, an examination of the wages cannot reveal if all eleven could have worked full time for no less than minimum wage during December. The petitioner failed to submit payroll records covering December 2001 or later. The director determined that although the petitioner submitted a business

plan detailing a need by FME (1999) for at least ten employees in the next two years, the staffing record for FME (1999) suggested that the projections in the business plan were not reasonable.

The petitioner's attorneys have correctly noted that the petitioner need not demonstrate that he has already created ten jobs and that the petitioner has submitted a business plan. On certification, counsel asserts that the director failed to acknowledge that "the company" employed 15 workers "at a given time" and asserts that the business plan submitted is credible.

As discussed at the outset of this decision, the petitioner must demonstrate the creation of ten *new* jobs. Shuffling jobs from FME (1989) to ARC and then FME (1999) does not create a net gain in employment. Without comparison payroll documents from ARC prior to the incorporation of FME (1999), we cannot determine whether the removal of FME (1999) from under ARC created any net jobs.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The petition is denied.