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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 2 5 2006
SRC 05 076 50696

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition, which 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.

On appeal, counsel asserts that the petitioner demonstrated a qualifying investment and provided transactional documentation tracing the funds to a lawful source. While the petitioner resolves some of the director's concerns on appeal, we uphold the director's decision. We further find that the tax returns of the new commercial enterprise are grossly inconsistent internally and with each other and do not reflect a qualifying equity investment by the petitioner.

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
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> (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, [redacted] LLC, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward.[1] Thus, the required amount of capital in this case is $1,000,000.

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[1] **The petitioner has never asserted that** [redacted] Framing is located in a targeted employment or rural area. Initially, the petitioner submitted a letter from Bette Davidson, Executive Director of the Henryetta Chamber of Commerce asserting that Henryetta, Oklahoma, located in Okmulgee County, had a population of 5,906 in 1994. According to the definition of rural at 8 C.F.R. § 204.6(e), however, a rural area cannot be within either a Metropolitan Statistical Area (MSA) as designated by the Office of Management and Budget (OMB) or any city or town having a population of 20,000 or more. In response to a request for additional evidence, counsel indicated he was unable to obtain the relevant information from OMB. While we are under no obligation to do so, we have reviewed the list of MSAs as designated by OMB available at www.census.gov, which reveals that Okmulgee County is part of the Tulsa MSA. As such, it cannot be considered rural as defined in the regulations.

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:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (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 Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *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).

Throughout the proceedings, the petitioner has asserted that his business in Turkey, Oil and Gas Marketing Company (OGS), is the source of the funds transferred to [redacted]. The petitioner also submitted evidence of his ownership in OGS and its profit since 1992. As evidence tracing the path of the funds, the petitioner submitted documentation of numerous wire transfers from Turkey to the petitioner's personal account and to two of Pro-Street Framing's accounts. Of the $865,677 transferred from Turkey to the petitioner's personal account, $30,000 is from Beker

Ozbulut, $396,858 is from Talat Erdem and $112,000 is from Of the $197,973 transferred from Turkey directly to , $49,000 is from Mr. , $49,000 is from Mr. , with the remaining $99,973 from the petitioner.

The petitioner submitted affidavits from the three individuals identified above all asserting that they worked for OGS and transferred funds to the petitioner from his *personal* account in Turkey. Mr. claims to be an accountant and Mr. purports to be a director, Mr. claims to be only a driver for OGS. The director rejected these affidavits as evidence that the funds transferred by these individuals were transferred from the petitioner's personal funds. On appeal, counsel asserts that no employment records exist and the affidavits should be sufficient.

Even assuming these individuals work for OGS, it is not clear why they would have the authority to transfer funds from the petitioner's *personal* account as claimed. We note that the wire transfers originate from and The account numbers for these Turkish accounts are not listed in the documents provided. The petitioner did not provide statements for his personal accounts in Turkey reflecting withdrawals consistent with the transfers made by and Without such evidence, the petitioner cannot establish that these transfers originated from his personal accounts as claimed in the affidavits.

The director also concluded that the evidence of OGS' finances could not establish the petitioner's personal income. On appeal, counsel asserts that Turkey has no income tax and, thus, income tax returns are not available. Counsel further asserts that the petitioner's statement of net worth should serve as evidence of his financial status.

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

> (i) *General*. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.
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> (ii) *Demonstrating that a record is not available*. Where a record does not exist, the applicant or petitioner must submit an original written statement on government letterhead establishing this from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available. However, a certification from an appropriate foreign government that a document does not exist is not required where

> the Department of State's Foreign Affairs Manual indicates this type of document generally does not exist. An applicant or petitioner who has not been able to acquire the necessary document or statement from the relevant foreign authority may submit evidence that repeated good faith attempts were made to obtain the required document or statement. However, where the Service finds that such documents or statements are generally available, it may require that the applicant or petitioner submit the required document or statement.

The petitioner has not complied with the above regulation in establishing that individual income tax returns do not exist in Turkey. Moreover, the petitioner has not submitted secondary evidence of his individual income such as an employment contract or pay stubs. Finally, the petitioner's self-serving statement regarding his own net worth has little evidentiary value. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190).

For the reasons discussed above, the petitioner has not demonstrated how he lawfully accumulated the invested funds or adequately traced them back to his personal accounts.

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.
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> * * *
>
> *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;
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> (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;
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> (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;
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> (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 $510,000 on July 27, 1998 and a total of $1,022,918. The petitioner indicated that he had purchased $510,000 of stock and had transferred $512,918 in property from abroad. The petitioner submitted the operating agreement for [redacted] Framing indicating that he would provide $10,000 per ownership unit, for a total of $510,000, for start-up capital. The other owne[redacted], contributed $490,000 in services. The petitioner also submitted[redacted]'s Form 1065 income tax returns, including schedules K-1 for 1998 though 2003. Throughout the proceedings, the petitioner has also submitted several bank statements for his personal account and business accounts, cancelled checks and wire transfer documents.

The director noted that the some of the funds transferred from overseas were from three individuals other than the petitioner. While the petitioner had submitted affidavits from the individuals affirming that they worked in various capacities for the petitioner's overseas business and transferred the funds from the petitioner's personal account in Turkey, the director concluded the affidavits were insufficient evidence that these funds constituted the petitioner's personal investment. On appeal,

counsel asserts that no employment records for the Turkish company are available and that the assertions of the petitioner and the individuals who wired the money should be sufficient.

The record reflects the following transfers from the petitioner:

From the petitioner's Bank of Oklahoma account:

To Bank of Oklahoma:

$200,000 in August 1998.
$125,000 in October 1998
$15,000 in September 1999
$340,000 Total

To First National Bank account:[2]

$50,945 in March 1999
$40,000 in April 1999
$20,000 in May 1999
$10,000 in June 1999
$35,000 in July 1999
$5,000 in August 1999
$160,945 Total

To American Exchange Bank account:

$15,000 in October 1999
$5,000 in October 1999
$10,000 in January 2000
$30,000 in April 2000
$60,000 in August 2000
$80,000 in October 2000
$20,000 in November 2000
$220,000 Total

Several of the above payments were initially evidenced by checks made out to the Bank of Oklahoma. On appeal, the petitioner submits the bank checks and deposits demonstrating that all of the above funds were transferred to the three listed accounts. Thus, the petitioner has overcome that concern expressed by the director.

[2] This account was listed solely as account as of March 1999.

Transferred by the petitioner from Turkey:

To American Exchange Bank account:

$48,980 in May 2000
$30,965 in June 2000
$79,945 Total

To s First National Bank account:

$99,973 in December 1998

Thus, the total transferred directly from the petitioner to is $900,863. The petitioner demonstrated that and transferred an additional $98,000 directly to First National Bank account in November 1998, bringing the total deposited with to $998,863.

The record, however, does not establish that these funds were all part of the petitioner's equity investment in An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

As noted by the director in the initial request for additional evidence, the October 4, 2004 balance sheet for the petitioner reflects a $510,000 equity interest in and a $517,918 loan to , $136,595 of which had been "withdrawn." As discussed above, the definition of "invest" at 8 C.F.R. § 204.6(e) excludes loans to the new commercial enterprise as part of a qualifying investment. Moreover, the tax returns and schedules K-1 are inconsistent with each other in 2001 and sometimes inconsistent year to year. Regardless, they do not reflect an equity investment of $1,000,000

Schedule:		1998	1999	2000	2001	2002	2003
M-2	Capital Balance at Beginning of Year	$0	$122,865	$164,890	$416,533	$363,160	$295,849
	Capital Contributed During Year	$486,299	$0	$62,000	$0	$0	$0
	Gain/Loss	($16,580)	$0	$0	($53,373)	($67,311)	$3,954
	Capital Balance at End of Year	$469,719	$122,865	$226,890	$363,160	$295,849	$299,803
K-1*	Balance Beginning of Year	$0	$0	$0	$60,000	$185,212	$150,883
	Contributed	$486,299	$0	$60,000	$0	$0	$0
	Withdrawn	$0	$0	$0	$0	$0	$0
	Share of gain/loss	($82,907)	$0	$0	($27,220)	($32,913)	$2,017
	Balance End of Year	$478,009	$0	$60,000	$32,780	$152,299	$152,900

* Petitioner's Schedule K-1 only.

The record contains no explanation for the drop in capital on both schedules between the end of 1998 and the beginning of 1999 or the inconsistent numbers regarding capital between the Schedules M-2 and the Schedules K-1 in 1999 and 2000. The record also does not explain why the petitioner's capital account balances for the end of the years 2001 and 2002 do not match the beginning balance for the following years. Finally, while not apparent from the numbers listed above, the company's assets do not equal its liabilities and equity in 1998 and 1999 as mandated by accepted accounting principles.[3] The returns reflect capital contributions in 1998 and 2000 only despite the numerous transfers in 1999 and 2000. The contributions listed on the Schedules K-1 total $546,299, far less than the $1,000,000 required.

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 the above inconsistencies.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not 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.

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[3] Barron's Dictionary of Accounting Terms 295 (3rd ed. 2000) defines net worth, or equity, as "total assets less total liabilities."