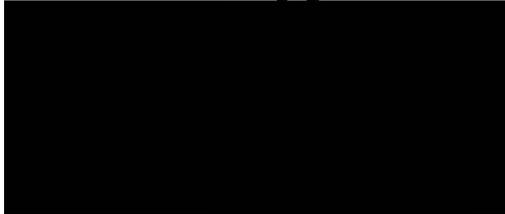


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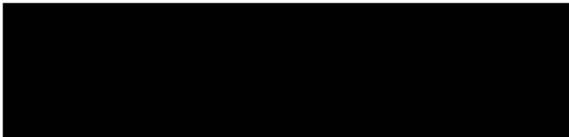
IN RE:

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.

*Mari Johnson*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 or that he would create the requisite employment for qualifying employees.

On appeal, counsel submits a statement. For the reasons discussed below, counsel does not overcome the valid concerns set forth in detail in the director's decision. Specifically, the record does not support and sometimes contradicts many of counsel's factual assertions. Further, counsel's repeated assertions that the petitioner's actions are legitimate, lawful, and business related are irrelevant. At issue is not whether the petitioner's business practices are lawful but whether they conform with the relevant statute and regulations. Ultimately, we cannot agree with counsel's assertion that the petitioner complied with the letter or the spirit of the law and regulations relating to the classification sought.

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> 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, DFH Network, Inc., hereinafter DFH, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

### **INVESTMENT OF CAPITAL**

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.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998).

On the petition, the petitioner claimed to have made an initial investment of \$265,000 on November 2, 1998 and a total investment of \$1,718,932.60. He also indicates that he owns 50 percent of DFH and that his salary is \$9,950 per month, or \$119,400 annually. On Part 4 of the petition, however, the petitioner indicated that the investment was composed of \$964,869.60 in a U.S. bank account and nothing else. The petitioner submitted credit advices, deposit slips and checks demonstrating the following transfers to DFH's Bank of America account [REDACTED]

<u>Source:</u>	<u>Amount:</u>	<u>Date:</u>
Petitioner, via Bank of New York	\$99,975	November 2, 1998
Petitioner, via Bank of New York	\$199,973.20	November 23, 1998
Petitioner, via Bank of New York	\$99,973.20	March 10, 1999
Petitioner, via [REDACTED]	\$149,973.20	April 20, 1999
Deposit, no source	\$100,000	June 17, 1999
Petitioner, via check ([REDACTED])	\$30,000	July 8, 1999
Petitioner, via check ([REDACTED])	\$20,000	July 29, 1999
Petitioner, via [REDACTED]	\$99,975	September 15, 1999
Deposit, no source	\$65,000	November 9, 1999
Petitioner, via [REDACTED]	\$100,000	February 4, 2000
Total	\$964,869.60	
Total traceable to the Petitioner	\$799,869.60	

On May 23, 2005, the director issued a request for additional evidence. The director noted that the petitioner had not established the source of the \$165,000, in the aggregate, deposited on June 17, 1999 and November 9, 1999. The director further noted that the petitioner had not submitted the back of the checks issued on July 8, 1999 and July 29, 1999. The director requested evidence tracing these funds from the petitioner to DFH and tax documentation.

In response, the petitioner resubmitted the transactional evidence discussed above. While the petitioner highlighted the deposit slips that correspond to the checks issued in July 1999, the petitioner did not submit copies of the back of the checks. The petitioner also failed to submit any new evidence regarding the source of the \$165,000 as requested. The petitioner submitted bank statements reflecting large deposits from [REDACTED]. Thus, the total clearly traceable to the petitioner remained \$799,869.60, less than the \$1,000,000 investment required.

The petitioner also submitted the 2004 Form 1120 U.S. Corporation Income Tax Return for DFH. Schedule L of the returns reflects \$10,000 in stock and \$1,400,000 in additional paid in capital for all shareholders. Schedule L further reflects \$295,365 in loans to shareholders. Statement 5 reflects that \$133,515 of this amount was a loan to the petitioner, increasing from \$99,608 the year before. Further, Schedule E reflects that the petitioner received \$436,185 in compensation in 2004, \$316,785 more than his stated salary on the petition. Even if the petitioner only received the \$397,685 listed on his Form W-2 for 2004, that is still \$278,285 more than his salary as listed on the petition. Finally, while statement 3 lists two individual shareholders, each owning 50 percent, Form 5472 lists four shareholders (two individuals and two corporations). Statements 9 and 10 purport to explain this attribution, providing that shareholder [REDACTED] owns 100 percent of [REDACTED] Corporation and the petitioner owns 100 percent of [REDACTED] Corporation. The stock ledger submitted initially, reflects that [REDACTED] Corporation and the petitioner own the only stock.

The director determined that the petitioner had failed to respond to the director's concern regarding the lack of evidence tracing the \$165,000 back to the petitioner. Thus, the director concluded that the transactional evidence reflected no more than \$799,869.60 traceable from the petitioner to DFH. The director further noted that while the Schedule L reflected over \$1,000,000 in equity, it did not establish that the petitioner personally contributed at least \$1,000,000 of that capital as the company has at least two shareholders. The director noted that while the petitioner need only be "in the process" of investing the full \$1,000,000, the full \$1,000,000 must be actually committed. The director concluded that the petitioner had not established a commitment of the full \$1,000,000.

In addition, the director noted that while DFH had a net income in 2004, it still had available a net operating loss of \$2,873,655 (according to Statement 2) and retained earnings of -\$2,315,605. Thus, the director concluded that while payment of a salary was reasonable, the petitioner's excessively large salary was tantamount to a removal of capital. Similarly, the director questioned the petitioner's removal of \$133,514 in loans.

On appeal, counsel asserts that the petitioner has provided "almost every financial record that DFH has" and that these records show that the petitioner "poured substantial monies, over a million Dollars, in creating this enterprise." Counsel acknowledges that funds were withdrawn, but asserts that such withdrawal is a common business practice and was done for legitimate business reasons. Counsel concludes that the petitioner "injected much more monies into the business than he occasionally withdrew to cover these withdrawals and [then] some."

Counsel's general assertions are not responsive to the specific concerns raised by the director and are not supported by the record. The director discussed the evidence at length, explaining both in the request for additional evidence and in the final decision why the transactional evidence did not trace at least \$1,000,000 back to the petitioner. Despite being notified on two occasions that the record contained no evidence of the source of the \$165,000, the petitioner has failed to address this deficiency. Thus, counsel's bare assertion on appeal that the evidence establishes that the petitioner "poured" over a million dollars into DFH is insufficient. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of*

*Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, counsel does not explain what type of legitimate business reasons might exist for removing hundreds of thousands of dollars in excessive wages and loans. Even assuming there were legitimate business reasons, the issue is not whether the petitioner is running a legitimate business but whether he has made \$1,000,000 of capital available to the employment generating entity. We concur with the director that the petitioner has not.

Contributing cash and then removing it in exchange for a promissory note to repay the amount is the functional equivalent of issuing a promissory note for the initial investment. A promissory note can constitute "capital" under 8 C.F.R. § 204.6(e) if the note is secured by assets owned by the petitioner. These assets must be specifically identified as securing the note. Furthermore, any security interest must be perfected to the extent provided for by the jurisdiction in which the asset is located, and the asset must be fully amenable to seizure by a U.S. note holder. *Matter of Hsiung*, 22 I&N Dec. 201, 202 (Comm. 1998). The petitioner did not submit the promissory note issued to DFH in exchange for the loan or any security agreement. Thus, we concur with the director that the petitioner has not demonstrated that those funds remain available and actually committed to DFH.

In summary, the petitioner has not provided transactional evidence tracing at least \$1,000,000 from his personal accounts to DFH. In addition, the tax returns do not support an equity investment of at least \$1,000,000 from the petitioner individually. Finally, the tax returns and Forms W-2 reflect significant sums removed as wages and loans. While the petitioner may have had a legitimate business reason for doing so, it remains that these funds are no longer available to the employment generating enterprise. For all of these reasons, the petitioner has not established a qualifying 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. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of 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).

The petitioner submitted a Turkish Commercial Registration entry reflecting that the petitioner was a shareholder of [REDACTED] Advertising and Broadcasting, LTD and that on May 12, 1999, the company’s capital increased from 200,000,000,000 Turkish Lira to 250,000,000,000 Turkish Lira (\$5,000,000 according to the document) and that his personal shares increased from 40,000,000,000 Turkish Lira to 50,000,000,000 Turkish Lira. The petitioner also submitted the 1997 Minutes of a shareholder meeting for [REDACTED] appointing the petitioner as president and listing the capital as 5,000,000,000 Turkish Lira (\$1,000,000 according to the document). A list of shareholders lists the petitioner’s personal shares at 4,595,900,000 Turkish Lira on January 2, 1997. On February 27, 1998, the petitioner was elected secretary of [REDACTED], with shares valued at 248,000,000 Turkish Lira. On August 4, 1997, the petitioner was elected secretary of [REDACTED] g and Agency, LLC with shares increasing to 4,454,000,000 Turkish Lira.

In the request for additional evidence, the director requested the official currency exchange rate for U.S. dollars to Turkish Lira in May 1999, noting that current exchange rates suggest that the U.S. dollar amounts provided in the translations are grossly inaccurate. The director also noted the lack of evidence of the petitioner’s level of income. In response, counsel responded that it is not possible to get the exchange rate for May 1999 but that all of the transfers to DFH were in U.S. dollars. Counsel asserts that the petitioner “is a very wealthy and respected person in Ankara, Turkey.” Counsel further asserts that the petitioner’s Turkish businesses are lawful. The petitioner submitted no new documentation.

The director concluded that the petitioner had failed to resolve the currency exchange issue. The director further concluded that the petitioner had not established his income from his businesses or that he sold the businesses to acquire the funds to invest in DFH.

On appeal, counsel asserts:

We have shown clearly that [the petitioner] owns TV broadcasting companies and newspaper publications in Turkey. These TV channels are viewed by millions of people and the newspapers are read by hundreds of thousands of people in Turkey. [The petitioner] is a well known and respected entrepreneur in Turkey. He has created hundreds of jobs in Turkey. He is a wealthy person and does not hesitate to invest his own legally earned monies in creating new enterprises.

As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. A letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is insufficient documentation of source of funds, especially where the record lacks evidence that the shares were sold and of the petitioner's level of income. *Matter of Ho*, 22 I&N Dec. at 211.

Historical exchange rates, including the U.S. dollar/Turkish Lira exchange rate, are available at [www.oanda.com](http://www.oanda.com). According to this website, the petitioner's shares in Enformasyon Advertising and Broadcasting on May 12, 1999, 50,000,000,000 Turkish Lira, were worth \$126,867. His shares in [REDACTED] on January 2, 1997, 4,595,900,000 Turkish Lira, were worth \$42,436.70. His shares in [REDACTED] on February 27, 1998, 248,000,000 Turkish Lira, were worth \$1,081.36. Finally, his shares in [REDACTED] Advertising and Agency, LLC on August 4, 1997, 4,454,000,000 Turkish Lira, were worth \$27,514.20. Assuming the petitioner held stock in all of these companies at one time, without selling his shares in one company to purchase shares in another, his shares would not be worth more than \$197,899.26. Thus, even if he sold these shares prior to investing in DFH, they could not account for the amounts invested in DFH let alone the full \$1,000,000 required.

In light of the above, the petitioner has not demonstrated that his shares in foreign companies were worth more than \$200,000. Moreover, there is no evidence that he sold these shares in order to obtain the funds allegedly invested in DFH. Finally, the record contains no income tax returns or other evidence of the petitioner's income for the five years prior to investing in DFH. As such, the petitioner has not established how he lawfully accumulated the amounts purportedly invested in DFH.

### **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.*

On the petition, the petitioner indicated that there were four employees at the time of investment and 23 currently. The petitioner claimed responsibility for 11 of the new employees. The petitioner submitted a Quarterly Wage and Withholding Report for the fourth quarter of 2001 reflecting 20 employees in October, 21 in November and 21 in December. The director requested evidence of the number of employees at the time of the petitioner's investment and evidence that the employees were qualifying as defined at 8 C.F.R. § 204.6(e), quoted above. In response, the petitioner submitted the Quarterly Wage and Withholding Report for the fourth quarter of 2004 reflecting 18 employees in October, 19 in November and 20 in December and 24 Forms W-2 issued by DFH in 2004. The petitioner also submitted 21 Forms I-9 for individuals other than the petitioner, none of which are signed by an authorized representative of DFH as required at the bottom of Section 2. Only seven of the individuals who received Forms W-2 for 2004 continued working in the fourth quarter of that year and are still listed on the Quarterly Wage and Withholding Report. The petitioner did not submit 2004 Forms W-2 for thirteen of the individuals listed on the 2004 fourth quarter Quarterly Wage and Withholding Report.

A review of the Forms I-9, four of which are for individuals not listed on the 2004 Quarterly Wage and Withholding Report and for whom no 2004 Forms W-2 were submitted, reveals that only eight of the individuals are United States citizens or lawful permanent residents. The Form I-9 for one of the U.S. citizens does not list what documents were reviewed to confirm that status. Two of the lawful permanent residents were not listed on the fourth quarter Quarterly Wage and Withholding Report and the petitioner did not submit Forms W-2 for these two individuals. The remaining 13 individuals who are not lawful permanent residents or United States citizens have temporary work authorization; at least one such authorization appears to have expired on June 13, 2001 even though the individual is listed on the 2004 fourth quarter Quarterly Wage and Withholding Report. Further, at least five of the 13 individuals are in the United States pursuant to nonimmigrant visa petitions filed by DFH, according to the approval notices submitted by the petitioner. The record lacks evidence that the remaining six, those who are not lawful permanent residents or U.S. citizens and

for whom nonimmigrant approval notices were not submitted, are *immigrants* lawfully authorized to be employed in the United States including, but not limited to, conditional residents, temporary residents, asylees, refugees, or aliens remaining in the United States under suspension of deportation.

The director discussed all of the above evidence in detail and concluded that the petitioner had not demonstrated the creation of ten new positions, beyond the four initially listed on the petition, for *qualifying* employees as defined at 8 C.F.R. § 204.6(e). On appeal, counsel states:

In fact, at the beginning almost 15 people were employed in-house by DFH. Most of these employees were either US Citizens or Permanent Residents. Yes, some Turkish nationals also were employed but these nationals were specifically drawn from Turkey because of their background in Turkish broadcasting and their ability to communicate in Turkish and English. These key employees were in the USA with legitimate and appropriate Visas and paid income taxes as provided by law.

Counsel further asserts that while employment fluctuated, it never went below 10 employees and that DFH now employs 25 individuals. Counsel then discusses at length the indirect employment DFH is allegedly creating.

Once again, the record does not support counsel's assertions. In addition, much of counsel's discussion is irrelevant to the director's concerns, explained in detail in the director's decision. First, as stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. It is the petitioner's burden to establish exactly how many of the current employees at DFH are qualifying. The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) requires Forms I-9 or other similar documentation to establish that the employees are qualifying.

The petitioner only submitted Forms I-9 for seven of the individuals listed on the 2004 fourth quarter Quarterly Wage and Withholding Report. Of those seven Forms I-9, only *one* reflects that the employee is a United States citizen. The remaining Forms I-9 for lawful permanent residents and U.S. citizens are for individuals who received Forms W-2 in 2004 but no longer worked for DFH in the fourth quarter of that year or are undocumented to have ever worked for DFH. As noted by the director, 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. *Matter of Ho*, 22 I&N Dec. at 212. Significantly, the petitioner did not submit Forms I-9 for 14 of the individuals listed on the 2004 fourth quarter Quarterly Wage and Withholding Report other than the petitioner himself. Thus, the record does not support counsel's assertion that "most" of DFH employees are "qualifying" as defined at 8 C.F.R. § 204.6(e). In fact, the record only establishes that six of the 2004 employees were qualifying, only one of whom remained an employee in the fourth quarter of that year.

In addition, the fact that DFH may have legitimately and lawfully petitioned for nonimmigrant employees is irrelevant. The director did not question the legitimacy of these hires and neither do we. At issue, however, is not whether DFH legitimately hired employees who do not meet the

definition of “qualifying” set forth at 8 C.F.R. § 204.6(e), but whether DFH also hired sufficient qualifying employees. The record does not establish that it did or that the petitioner has a *comprehensive* business plan documenting a future need for *qualifying* employees. We note that incorporating subsidiaries, as the petitioner has done, cannot serve to meet the comprehensive business plan requirement discussed above.

Finally, counsel’s lengthy discussion of indirect employment is irrelevant. Indirect employment can only be considered in the context of petitions filed under the regional center pilot program pursuant to Public Law 102-395, Section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 USC 1153 note), as amended by Public Law 106-396, Section 402 of the Visa Waiver Permanent Program Act, 2000, and the regulation at 8 C.F.R. § 204.6(m). The petitioner is not claiming to have invested in a designated regional center.

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.