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U.S. Citizenship
and Immigration
Services

B7

FILE:

WAC 00 256 54656

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 10 2008**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the preference visa petition. Subsequently, the director issued a 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary 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.”

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 un rebutted, 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.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director’s realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* 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. *Id.* at 589. 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 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 and that he had created or would create the necessary jobs.

On appeal, counsel submits a brief. For the reasons discussed below, the petitioner has not overcome the director’s valid concerns.

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. The

petitioner filed the instant petition on September 5, 2000. The director approved the petition on November 1, 2001. On March 26, 2007, the director issued a notice of intent to revoke the approval of the petition. The petitioner responded. The director issued the final notice of revocation on May 23, 2007. The petitioner filed a timely appeal.

As the director reopened the matter after November 2, 2002 in order to revoke the approval of the petition, the petition was pending after that date. Thus, the petitioner need not demonstrate that he personally established a new commercial enterprise.

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, Montclair Metals, Inc., 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:

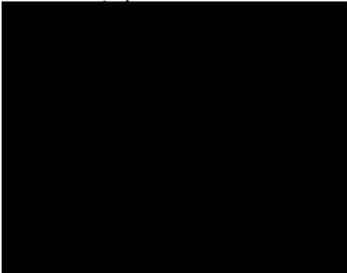
- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify 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.

On the Form I-526, the petitioner indicated that he had made an initial investment of \$130,000 on March 31, 1999 and a total investment of \$1,500,000. The petitioner submitted four stock certificates, issued by Montclair Metals to the petitioner on March 18, 1999, June 18, 1999, September 18, 1999 and December 1999 for 2,500 shares each. The record contains the Internal Revenue Service (IRS) Form 1120 U.S. Corporate Income Tax Returns for Montclair Metals for 1999 through 2003. These returns reflect common stock of \$250,000 at the end of 1999, increasing to \$1,000,000 in 2000 and continuing at that level. "Other current assets," however, increased from \$0 to \$751,000 in 2000. A review of Statement 4 characterizes \$750,000 of the company's current assets as a "Subscription Receivable." A subscription is an agreement to purchase a security. Barron's Dictionary of Accounting Terms 426 (3rd ed. 2000). Receivables are claims against

customers and others for money. *Id.* at 365. If collection is expected in one year or less, the receivables are classified as current. *Id.* As of the end of 2003, however, three years after the \$750,000 appeared as a current asset, Montclair Metals was still listing a subscription receivable of \$750,000 under current assets.

The record also contains transactional evidence tracing funds from several individuals and companies to Montclair Metals, the petitioner and his family. While counsel’s briefs reference the total amount transferred, 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 (Commr. 1998). Thus, we will only consider the final amount deposited with the new commercial enterprise after the deduction of wire transfer fees.

First the petitioner submitted his own bank statements for his China Trust account and Montclair Metals’ bank statements for China Trust account. These statements reflect checks or other debits and deposits consistent with the following transactions:

<u>Amount</u>	<u>Date</u>	<u>From</u>	<u>To</u>
\$60,000 ¹	March 12, 1999	Petitioner	
\$20,025	November 17, 1999	Petitioner	
\$4,000	November 23, 1999	Petitioner	
\$50,000	December 3, 1999	Petitioner	
\$100,000	December 13, 1999	Petitioner	
\$5,000	December 24, 1999	Petitioner	
<u>\$99,900</u>	January 12, 2000	Petitioner	
Total \$338,925			

The petitioner also submitted wire transfer advices documenting the following transfers to 

<u>Amount</u>	<u>Date</u>	<u>From</u>
\$59,984	March 26, 1999	
\$59,984	April 9, 1999	
\$59,985	April 23, 1999	
\$99,980	June 1, 1999	
\$2,300	May 5, 2000	
<u>\$29,985</u>	June 27, 2000	
Total \$312,218		

¹ Counsel asserts that the petitioner transferred \$69,500 to Montclair Metals on this date. Montclair Metal’s March bank statement reflects deposits for \$500 on March 10, 1999 and \$69,000 on March 12, 1999. The petitioner submitted a check issued on his personal account for \$60,000 and a “Cash in Ticket” for \$9,000. The petitioner has not traced the \$500 deposit or the \$9,000 “Cash in Ticket” to his personal funds. In fact, his personal China Trust account for March 1999 does not reflect additional debits of \$500 on March 10, 1999 and \$9,000 on March 12, 1999.

The word “employee” is handwritten on the wire transfer advice from [REDACTED] and the word “cousin” is handwritten on the wire transfer advice from [REDACTED]. The petitioner submitted a signed statement from [REDACTED] asserting that he was “entrusted” by the petitioner to transfer \$120,000 to Montclair Metals. The petitioner also submitted a signed statement from [REDACTED] of the Fulton Company stating that his company was “instructed” by the petitioner to transfer \$60,000 to Montclair Metals on April 23, 1999 and that the funds were “not payment to our company nor for any other purposes other than transferring funds to Montclair Metals, Inc.”

The record also contains wire transfer advices documenting the following transfers to the petitioner’s China Trust account:

<u>Amount</u>	<u>Date</u>	<u>From</u>
\$99,980	February 22, 2000 ²	[REDACTED]
\$99,980	May 9, 2000	[REDACTED]
\$49,980	June 7, 2000	[REDACTED]
\$99,980	July 31, 2000	[REDACTED]
\$99,985	November 15, 1999	[REDACTED]
\$99,980	December 10, 1999	[REDACTED]
\$149,980	January 14, 1000	[REDACTED]
\$49,980	June 14, 2000	[REDACTED]
\$49,985	November 2, 2000	[REDACTED]
\$99,980	June 18, 2000	[REDACTED]
\$31,982	June 23, 2000	[REDACTED]
\$19,269.66	September 5, 2000	[REDACTED]
\$24,633.77	September 15, 2000	[REDACTED]
\$30,000	October 4, 2000	[REDACTED]
\$14,216.59	January 5, 2001	[REDACTED]
\$1,547	January 8, 2001	[REDACTED]
\$3,000	April 2, 2001	[REDACTED]
Total	\$1,024,459.02	[REDACTED]

The word “aunt” is handwritten on the first wire transfer advice from [REDACTED]. The record contains no evidence that any of these funds other than the \$338,925 referenced above were transferred to Montclair Metals. The record also lacks evidence that the remaining funds were still available to be transferred to Montclair Metals. The petitioner’s most recent bank statement is for March 2000, before most of the funds were transferred to the petitioner. As noted in footnote 2 of this decision, the initial funds from [REDACTED] were transferred out to an unknown entity the day after they were transferred to the petitioner.

² The petitioner’s February 2000 bank statement reflects that these funds were transferred out to an unspecified entity the next day, February 23, 2000. Thus, the petitioner has not demonstrated that these funds remained in his account or were transferred to Montclair Metals.

Finally, in response to the director's notice of intent to revoke the petition, the petitioner submitted evidence of transfers into accounts held by his son and wife. All of these transfers postdate the filing of the petition in 2000. The petitioner must establish his eligibility as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The director concluded that the petitioner had not established the deposit of more than \$578,425 into Montclair Metals' account and that only \$298,426 of those funds could be traced back to the petitioner. The director questioned the nature of the funds transferred to the petitioner's son and wife; for example whether those funds were a gift or a loan. The director also questioned whether the deposited funds were "at risk."

On appeal, counsel asserts that the \$578,425 the director accepted as having been transferred to Montclair Metals was sufficiently at risk because the petitioner retained no personal control over the funds and they were placed at the disposal of an operational business. Counsel further asserted that "a detailed list of the evidence being submitted" in response to the notice of intent to revoke characterized the funds from [REDACTED] and [REDACTED] as "given to the petitioner." Counsel cites a non-precedent 1997 decision by this office for the proposition that a gift may be the source of a qualifying investment. Counsel makes no attempt to address the director's concern that, according to the director's calculations, only \$298,426 of the funds transferred to Montclair Metals can be traced back to the petitioner other than to note that the petitioner submitted evidence that he sold property. The property sale, however, relates to the next issue, whether the petitioner lawfully accumulated the necessary funds to invest.

We acknowledge that the petitioner submitted invoices and export documentation indicating that Montclair Metals is already engaging in business. Thus, the \$338,925 transferred by the petitioner to Montclair Metals could be said to be at risk. Contrary to counsel's assertions on appeal, however, the vast majority of the funds were transferred to the petitioner. The petitioner does still maintain personal control over those funds. We acknowledge that the \$750,000 subscription receivable noted on Montclair Metals' tax returns implies an agreement to invest an additional \$750,000. The agreement, however, is not part of the record. Moreover, the petitioner has not submitted evidence that the business requires an infusion of an additional \$750,000 or that Montclair Metals has committed those funds to a capital expense. As quoted above, the regulation at 8 C.F.R. § 204.6(j)(2) provides that evidence of a 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. Rather, the alien must show actual commitment of the required amount of capital.

Finally, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, 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. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The record contains no affidavits from most of the individuals who transferred funds to the petitioner and Montclair Metals

explaining the nature of those transfers. The vague statements from [REDACTED] and [REDACTED] that they were “entrusted” or “instructed” to transfer the funds do not explain how they came to control funds belonging to the petitioner if, in fact, those funds were the petitioner’s to invest.

In light of the above, the petitioner has only established a transfer of \$651,143 into Montclair Metals’ account. Only \$338,925 of those funds were transferred by the petitioner. The transfer of funds by 12 individuals, one of whom is only identified by a Bank of America account, and a company makes it extremely difficult to confirm that the funds are indeed the petitioner’s personal funds to invest. While the tax returns reflect \$1,000,000 in capital beginning in 2000, the corresponding increase in assets was a \$750,000 subscription agreement, indicating that the petitioner had not actually invested the full \$1,000,000. Thus, the petitioner has not established a completed personal investment of at least \$1,000,000.

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 (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. at 165

(citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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) *aff’d* 345 F.3d 683 (9th Cir. 2003) (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).

As stated above, the petitioner has not provided sufficient evidence explaining his relationship to the 12 individuals and the company who transferred funds to the petitioner and Montclair Metals. We will now examine whether the petitioner has demonstrated the lawful accumulation of \$1,000,000. The petitioner submitted the corporate license for [REDACTED] Enterprise Company, Ltd. in Taiwan reflecting the petitioner as the representative. The business is capitalized at NT\$5,000,000 (\$150,234).³ Evidence 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 where no evidence of income or the sale of assets is submitted. *Matter of Ho*, 22 I&N Dec. at 211. The petitioner also submitted evidence that his wife and he both own property in Taiwan. The petitioner owns eight parcels of farmland, one “original” piece of property, one piece of property designated as “construction,” two forest parcels and one “dryland” parcel.

Subsequently, the petitioner submitted sales contracts for the sale of the petitioner’s wife’s property to [REDACTED] for NT\$15,000,000 (\$434,909)⁴ on September 21, 1998 and [REDACTED] Construction Company for \$15,450,000 (approximately \$576,493)⁵ on April 10, 1993. The petitioner also submitted his IRS Form 1040 U.S. Individual Income Tax Returns for 1999 and 2000 reflecting adjusted gross income of \$5,000 in 1999 and \$30,025 in 2000. In the notice of intent to revoke, the director noted that the petitioner’s income on his U.S. tax returns was insufficient to account for the accumulation of \$1,000,000 and that the petitioner had not submitted foreign tax returns documenting his income, including from capital gains, or traced the funds allegedly invested back to the proceeds of the sale of property.

In response, the petitioner submitted the 2002 through 2005 business income tax returns for China Titanium Aluminum Company, representative [REDACTED], and the 2002 through 2005 business income tax returns for An Titanium Company, representative [REDACTED]

The petitioner also submitted his joint tax returns for 1997, 1998 and 1999. The total income, including capital gains from property sales, was NT\$546,835 (\$17,020.80)⁶ in 1997, NT\$29,250,000

³ Since the corporation license is not clearly dated, the U.S. dollar amount was determined as of December 1, 2008 at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceeding).

⁴ According to the exchange rate for September 21, 1998 at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceeding).

⁵ According to the exchange rate for November 1, 1993, the earliest available date, at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceedings).

⁶ According to the exchange rate for December 1, 1997 at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceedings).

(\$903,894)⁷ in 1998 and \$374,000 (\$11,814.90)⁸ in 1999. The director acknowledged the new evidence but concluded that the petitioner had not submitted sufficient documentation of the sale of property, including escrow and closing statements.

On appeal, counsel asserts that *Matter of Soffici*, 22 I&N Dec. at 164, provides that a sales contract is sufficient evidence that invested funds derive from a lawful source. We concur with counsel that the purchase agreement and the 1998 tax return reflecting capital gains in the amount on the sales contract establish the sale of the property for the price specified in the 1998 agreement. As stated above, however, the petitioner must trace the source of his funds. *Matter of Izummi*, 22 I&N Dec. at 195.

The record contains no evidence that the funds from the property sale in 1993 were still available in 1999 when the petitioner began investing. The sale in 1998 resulted in funds far less than \$1,000,000. Moreover, the petitioner's regular income (not including the capital gains from the property sale in 1998) in 1997, 1998 and 1999 is not indicative of income that would allow the petitioner to own the amount of property he and his wife own. Finally, while the property sale may cover the \$338,925 transferred from the petitioner to Montclair Metals, the remaining funds transferred to the petitioner and Montclair Metals derive from 12 individuals and one company. The petitioner has not explained why the sale of his wife's property in 1998 would result in 12 individuals and one company having control over his personal funds. The funds do not trace back to the purchaser of the property, [REDACTED]

In light of the above, the petitioner has not sufficiently established the lawful source of the "invested" funds.

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.

⁷ According to the exchange rate for December 1, 1998 at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceedings).

⁸ According to the exchange rate for December 1, 1999 at www.oanda.com (accessed December 1, 2008 and incorporated into the record of proceedings).

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 at 1039 *aff'd* 345 F.3d at 683 (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 U.S. Citizenship and Immigration Services (USCIS) 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 Form I-526 petition, the petitioner indicated that there were no employees when he made his investment, that he had created three jobs and that he would create an additional 10 jobs. The petitioner submitted two Forms I-9 and quarterly returns for the third quarter of 1999 reflecting two employees during every month. The petitioner also submitted an August 11, 2000 business plan. The plan projected that the "majority" of the 12 necessary employees would be hired by the end of 2001. The plan called for a president, vice president, three purchasing managers, one accountant, one receptionist and five warehouse workers.

In support of the petitioner's Form I-485 Application to Register Permanent Residence or Adjust Status, based on the petition before us, the petitioner submitted Montclair Metals' 2000 through 2003 tax returns and quarterly employer returns for the final quarter of 2003 and the first three quarters of 2004. The returns do not reflect that Montclair Metals has consistently employed 10 full-time employees. Rather, they reflect the following employees including the petitioner, who earned wages consistent with full-time employment at California's 2004 minimum wage of \$6.75:⁹

<u>Quarter</u>	<u>Employees Per Month</u>	<u>Potential Full-Time Employees</u> ¹⁰
4 th 2003	9, 9, 8	2
1 st 2004	8, 8, 8	2
2 nd 2004	2, 2, 4	2
3 rd 2004	9, 9, 10	9

In the notice of intent to revoke, the director concluded that the record did not establish that the petitioner had hired three full-time employees or would hire an additional ten. The director requested evidence of current employees and their status in the United States. In response, the petitioner submitted 11 Forms W-2 issued by Montclair Metals in 2003, one of which was issued to the petitioner and corresponds with the officer compensation listed on Montclair Metals' 2003 tax return. Of the remaining 10 Forms W-2, only one reflects annual wages of more than \$2,000 and even that Form W-2 reflects wages of only \$14,400. The petitioner also submitted Montclair Metals 2004 Form W-3 reflecting that the company issued 11 Forms W-2 during 2004. The petitioner also submitted quarterly returns for 2004 and amendments to those forms. Despite the director's explicit request for 2006 quarterly returns, the most recent evidence provided related to 2004. Failure to

⁹ According to www.dir.ca.gov/Iwc/MinimumWageHistory.htm (accessed December 1, 2008 and incorporated into the record of proceedings).

¹⁰ As the regulation at 8 C.F.R. § 204.6(e) (definition of full-time) requires working 35 hours per week and a quarter has 13 weeks, minimum wage (\$6.75 per hour) multiplied by 35 hours per week multiplied by 13 weeks equals \$3,071.25.

submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On that basis alone, the petition may not be approved.

The new quarterly returns provide different information than the ones submitted in support of the petitioner's adjustment application. Specifically, the petitioner submitted two separate quarterly returns for the first quarter of 2004, one showing two employees in each month and the other showing seven employees for each month, including the two listed on the other return. The petitioner also submitted three separate quarterly returns for the second quarter of 2004, one reflecting employment increasing from two to four, the second reflecting employment increasing from seven to nine and the third reflecting employment increasing from six to eight. Once again, the list of employees on each return overlaps. Finally, the petitioner submitted a single quarterly return for the third quarter of 2004 reflecting employment increasing from eight to nine.

The petitioner submitted two unsigned and undated Forms DE 938 amending Montclair Metals' fourth quarter quarterly return for 2004. Each form adds three employees, none of whom show sufficient wages to account for full-time employment at minimum wage for the full quarter. The petitioner also submitted two signed Forms DE 938 for the second quarter of 2004, apparently signed July 3, 2004, amending the quarterly return to add five employees total, none of whom could have worked full-time at minimum wage for the full 13 weeks. The petitioner also submitted one unsigned and undated Form DE 938 amending Montclair Metal's first quarter quarterly return for 2004 by adding one employee but no wages. None of the documentation submitted establishes that Montclair Metals consistently employs at least 10 workers full-time, especially recently after 2004 **when evidence of any employment is lacking. Moreover, the evidence is inconsistent.** 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. at 591-92. The record does not resolve the inconsistencies between the quarterly returns submitted for the same period.

The petitioner did submit an employee list dated April 17, 2007. While the list includes 33 names, 26 of those employees had been terminated. The information does not confirm how many of the remaining seven employees work full-time.

On appeal, counsel asserts that the petition was initially supported by a business plan. Counsel concludes that since the petition was previously approved, the business plan must be presumed sufficient. Counsel questions the director's authority to revisit the issue and asserts that the director did not identify any deficiencies in the business plan.

Counsel is not persuasive. As stated previously in this decision, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590 (citing *Matter of Estime*, 19 I&N Dec. at 450). The business plan calls for the majority of the jobs to be created by the end of 2001. The 2004 employer quarterly returns submitted in support of the petitioner's adjustment application, cast doubt on the credibility of the business plan as Montclair Metals had still not

created at least 10 full-time permanent jobs for qualifying employees. The director properly raised the issue of job creation in the notice of intent to revoke the approval of the petition. Thus, the director was justified in using this issue as one of the grounds to revoke the approval of the petition.

The director expressly requested 2006 employer quarterly returns, which the petitioner did not submit. Even if the petitioner had submitted the evidence on appeal, we would not have been able to consider it. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533, 537 (BIA 1988).

The regulation at 8 C.F.R. § 204.6(j) states that the petitioner may be required to submit evidence deemed appropriate by the director in addition to the evidence specified in the regulations. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). It remains that the petitioner has not demonstrated that he has met the goals stated in the business plan or otherwise created at least 10 full-time permanent positions for qualifying employees. As the petitioner's failure to meet the goals stated in the business plan reduces the credibility of that plan, the petitioner has not established that he has created or will create the necessary employment.

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.