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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] SRC 06 262 51419

Office: TEXAS SERVICE CENTER Date: NOV 03 2008

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
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 and that he had established that he would create the necessary employment.

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

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, Homa Investment Group, LLC (HIG), 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). Thus, the petitioner must demonstrate a nexus between his

investment in HIG, which proposes to build a retail center, and the employment generating entities, identified as a Subway restaurant and Western Union check cashing business to be operated as two of the 17 retail center businesses. The petitioner has not explained whether HIG or a separate business entity owned by the petitioner would manage the two businesses that are proposed as the main employment generating entities.

The petitioner indicated on the Form I-526 petition that he had made an initial investment of \$290,000 on June 15, 2005 and had made a total investment of \$860,000. This amount is significantly less than the \$1,000,000 required. In his cover letter, prior counsel asserted that the petitioner intended to invest an additional \$140,000 which would derive from a future sale of property in Iran or from the petitioner's earlier investment in Sani, Inc.

Prior counsel provided a chart breaking down the petitioner's claimed investment of \$860,000. 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). We will discuss each entry and the evidence relating to that entry below.

June 7, 2005 transfer of \$1,000 and June 15, 2005 transfer of \$4,000, characterized as: "Direct cash deposit" and "Deposit."

These transfers are documented only as deposits on HIG's Palm Bank statement. The source of these funds is not identified. Thus, these funds cannot be considered the petitioner's personal investment.

June 16, 2005 transfer of \$290,000 characterized as "From personal account in Canada."

The petitioner submitted a wire transfer receipt and bank statements reflecting a June 16, 2005 transfer of \$290,000 from the petitioner's bank account in Canada to HIG's Palm Bank account. This investment is properly documented as an infusion of cash by the petitioner.

August 10, 2005 and August 17, 2005 transfers of \$50,000 each characterized as " [REDACTED] (names of brokers stated on the statements)."

The petitioner submitted HIG's Palm Bank statement for August 2005. This statement reflects incoming wire transfers from "[REDACTED]" on August 10, 2005 for \$49,943 and [REDACTED] on August 17, 2005 for \$49,961.08. While counsel implies these identified sources are the petitioner's "brokers" the record does not confirm any relationship between the petitioner and "[REDACTED]" and "[REDACTED]". Thus, these funds cannot be considered the petitioner's personal investments.

March 2, 2006 transfer of \$380,000 characterized as "From personal account in Canada."

The petitioner submitted a wire transfer receipt documenting the transfer of \$380,092 from the petitioner's Canadian account to [REDACTED]'s Compass Bank account on February 27, 2006. The petitioner also submitted a bank check issued by Compass Bank to Palm Bank on March 2, 2006 and a March 10, 2006 letter from the Palm Bank with supporting loan documentation verifying that [REDACTED] had paid off HIG's \$375,381.70 mortgage. The director noted that this mortgage was secured by HIG's assets and, thus, concluded that the \$380,000 could not be considered part of the petitioner's personal investment. The director, however, appears not to have taken into consideration that the petitioner, with his own personal funds, paid off the mortgage. We concur with the director that the funds initially derived from the mortgage in August 2005, which allowed HIG to purchase a tract of land, would not count as the petitioner's personal investment in August 2005. The petitioner's act of paying off that mortgage *with his own personal funds* in March 2006, however, does constitute a qualifying investment. Thus, we are satisfied that the petitioner has demonstrated an additional infusion of \$380,000 into HIG as of March 2006.

March 30, 2006 and April 4, 2006 transfers of \$40,000 and \$20,000 characterized as "From personal account in Canada (to brother's account to [REDACTED])"

Prior counsel indicated that a transfer of \$60,000 had to be routed through the petitioner's brother and divided due to domestic laws regarding transfers from Iran. The petitioner submitted several documents relating to these transfers. Specifically, the petitioner submitted a wire transfer receipt documenting the transfer of \$60,000 from the petitioner's Canadian account to the account of [REDACTED] on March 14, 2006. The record also contains a wire transfer receipt for the transfer of \$60,000 from [REDACTED] to HIG's Palm Bank account on March 16, 2006. This transfer, however, never occurred; HIG's Palm Bank statement for March 2006 does not reflect a deposit of \$60,000. HIG's March statement does reflect a deposit of \$40,000, however, these funds were transferred by [REDACTED]. The record contains no evidence of any relationship between [REDACTED] and [REDACTED] or evidence that [REDACTED] transferred any funds to [REDACTED]. HIG's April statement reflects a deposit of \$20,000 on April 4, 2006, but the record does not document the source of these funds. In light of the above, the evidence does not establish that the \$60,000 transferred to HIG at the end of March and the beginning of April represents the petitioner's personal investment.

May 3, 2006 transfer of \$25,000 characterized as "From personal account in Canada (to brother's account to Homa)."

The petitioner submitted a wire transfer receipt for a transfer from the petitioner's Canadian account to [REDACTED] for \$25,000 on May 1, 2006. The petitioner also submitted bank statements reflecting that in May 2006, the petitioner closed HIG's bank account at Palm Bank, transferring the remaining funds in that account to a new account for HIG at Compass Bank. The May 2006 bank statement for HIG's Compass Bank account reflects a May 3, 2006 deposit of \$25,000. While a May 2006 statement for [REDACTED]'s account at Compass bank reflecting a debit of \$25,000 would have further documented the path of these funds, we are satisfied that the \$25,000 deposited with HIG's Compass Bank account represents an infusion of cash by the petitioner.

In light of the above, the petitioner has demonstrated an infusion of \$290,000 in June 2005, \$380,000 in March 2006 and \$25,000 in May 2006, for a total infusion of \$695,000 as of May 2006. We acknowledge that HIG's 2005 Internal Revenue Service Form 1065, U.S. Return of Partnership Income, Schedule K-1 Part N indicates that the petitioner contributed \$376,409 in capital in 2005.

In response to the director's request for additional evidence, the petitioner submitted Deposit Statements from First State Bank addressed to HIG advising of transfers by the petitioner's daughter of \$120,090 on October 30, 2006 and \$31,390 on September 8, 2006. The petitioner also submitted a March 23, 2007 contract between HIG and [REDACTED] whereby HIG granted [REDACTED] the exclusive right to negotiate leases for the finished shopping center and a March 28, 2007 agreement between HIG and Classic Builders for construction of a shopping mall. While the contract with Classic Builders reflects a cost of \$2,200,000, the record contains a March 30, 2007 loan for \$2,500,000 from Wachovia Bank. A settlement statement reflects that this loan is a mortgage secured by HIG's property.

The petition was filed on September 5, 2006. While the petitioner need only be in the process of investing the requisite amount, the regulation at 8 C.F.R. § 204.6(j)(2) requires evidence that the petitioner has placed the required amount of capital at risk and that the full amount is committed to the new commercial enterprise. The regulation further states that evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment is insufficient. Moreover, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175.

At the time of filing, the petitioner claimed to have invested \$860,000, only \$695,000 of which is sufficiently documented. Even if we accepted that the petitioner had invested the full \$860,000 as of the date of filing, and the record does not show that, the petitioner must demonstrate that the remaining \$140,000 was fully committed as of the date of filing. A mere intent to invest the remaining \$140,000 is insufficient. The record does not establish that the \$140,000 was in an irrevocable escrow account or otherwise committed. The record does not contain any contracts predating the filing of the petition whereby the petitioner had committed those funds to a development firm or other contractor. The petitioner did not even contract for the construction of the shopping center until after the petition was filed. Thus, we cannot consider the \$151,480 transferred to HIG after the date of filing.

Finally, even adding the \$151,480 to the \$695,000 already documented as invested, the petitioner cannot demonstrate an investment of at least \$1,000,000.

On appeal, counsel notes that the petitioner personally guarantied the \$2,500,000 loan from Wachovia Bank. The regulation at 8 C.F.R. § 204.6(e) (definition of capital) provides that the petitioner must be personally and primarily liable and that the assets of the new commercial

enterprise cannot secure any of the indebtedness. As HIG's property secures the \$2,500,000 mortgage, the petitioner's personal guaranty cannot transform the loan into a qualifying investment. See *Matter of Soffici*, 22 I&N Dec. 158, 162-63 (Commr. 1998).

In light of the above, the petitioner has not demonstrated a qualifying investment of at least \$1,000,000 as of the date of filing.

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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, an unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211. 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).

As stated above, the record only traces back to the petitioner the transfers of \$290,000, \$380,000 and \$25,000 as of the date of filing and \$120,090 and \$31,390 after that date, for a total of \$846,480. As noted by the director, the petitioner's 2005 Canadian tax return shows total family income of only \$19,339.13 Canadian or USD \$16,592.¹ Thus, this income cannot account for the petitioner's accumulation of \$1,000,000 or even \$846,480.

The petitioner submitted a personal affidavit asserting that he was part owner of property sold in 2003 for approximately \$2,000,000 and that he transferred approximately \$400,000 to Canada. 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). While the petitioner submitted documentation, it does not support his assertions.

In response to the director's request for additional evidence, the petitioner submitted evidence regarding the sale of properties in Iran and a letter with certified translation from Mehdi Shahsavari, an Iranian attorney, stating:

- According to Article 61 of the Civil Procedure Code of the Public and Revolutionary Courts of Law, the price of the Object of Claim regarding the prosecution expenses, is the same amount as mentioned in the Petition.
- On the basis of Clause (G) of Article 12 of the Law in respect of the collection of Public Revenues as well as its instance of expenditure in specific instances, the price of the Object of Claim is the same as the price mentioned by the Petitioner and that the charges of prosecution equals to the price of the transactions concluded for the properties, which is obviously less than the real price.

This letter is purportedly submitted in support of the assertion that the property sales documents reflect a smaller sales price than the actual sales price. It is not apparent from this poor translation that the sales price on an Iranian sales document is less than the amount paid to the seller ("charges of prosecution" paid to some other entity are not income to the seller) or, if it is, by how much. Thus, we will look at the actual sales price listed on the sales documents. Moreover, as the petitioner did not provide evidence of the exchange rates for the relevant dates or any exchange rates at all, we have calculated the U.S. dollar amounts as indicated in the footnotes below.

¹ According to the exchange rate for December 31, 2005 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

The first sales document is for property sold by the petitioner, his wife and children and five other individuals on November 22, 2003 for Rls 1,299,000,000 or \$164,430,² far less than \$2,000,000. Moreover, as the petitioner owned this property with five other unrelated individuals, he must demonstrate how much he personally received from this sale. The petitioner's Iranian bank statements show no deposits in November 2003 and show deposits of Rls 500,000,000 (\$63,291.10)³ on December 16, 2003. Thus, the petitioner has not demonstrated that he received a sum large enough to cover his investment from the sale of this property.

The second sales document is for property sold by the petitioner and his immediate family on August 24, 2005 for Rls 112,021,988 or \$14,180.⁴ The petitioner's Iranian bank statements show no transactions (including credits) between August 22, 2005 and March 5, 2006. The petitioner also submitted evidence of property he continued to own in Iran, but this evidence cannot establish the source of the funds he already invested.

The petitioner also submitted several employment letters. The N [REDACTED] Company confirms that the petitioner worked there as a managing director from September 30, 2001 through at least September 26, 2004, the date of the letter. The [REDACTED] Company confirms that the petitioner worked there from April 1991 through at least November 2001, the date of the letter, starting out as a head of project control and finishing as a managing director. Neither of these letters indicates the size of the petitioner's salary during this time. The petitioner also submitted a letter from Copal International Group in the United Arab Emirates confirming that the petitioner worked there as a marketing manager from March 23, 2003 through at least July 12, 2004, the date of the letter. This letter states that the petitioner's salary was Dhs 15,000 (\$4,085.52)⁵ per month during this time. This wage amounts to an annual salary of \$49,026.24.

The petitioner also submitted a "Notice of Changes in [REDACTED]" dated July 10, 1999 confirming the petitioner's ownership of shares worth Rls 928,000 (\$530,286)⁶ in that company. As stated above, it is insufficient to merely establish that the petitioner held an interest in a company. *Matter of Ho*, 22 I&N Dec. at 211. The record does not establish the petitioner's income from this investment or that he sold this interest. Finally, the petitioner submitted an August 25, 2004 letter from [REDACTED] Financial Advisor for TD Canada Trust, advising that the petitioner has over \$400,000 in assets with that company. This letter cannot establish how the petitioner acquired these assets.

² According to the exchange rate for November 22, 2003 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

³ According to the exchange rate for December 16, 2003 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

⁴ According to the exchange rate for August 24, 2005 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

⁵ According to the exchange rate for July 12, 2004 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

⁶ According to the exchange rate for July 10, 1999 provided at www.oanda.com (accessed October 16, 2008) and incorporated into the record.

The director concluded that the petitioner had not established how much income he had received while in Iran. On appeal, counsel cites *Matter of Izummi*, 22 I&N Dec. at 194-95⁷ for the proposition that only reasonable evidence should be required to demonstrate the lawful source of the alien's funds and should not be "onerous." In *Matter of Izummi*, however, the AAO found that the deposit receipts submitted did not document the source of the deposited funds and that corporate earnings do not establish individual earnings. *Id.*

Counsel further asserts that the petitioner traced his funds back to the sale of property in Iran and to "past legitimate business activities and investments by establishing a reasonable and believable 'paper trail' of funds." Counsel notes that the petitioner provided evidence of his employment in Iran and bank statements for Iranian and Canadian accounts. Thus, counsel concludes that the petitioner provided substantial documentation and, thus, did not simply go "on the record."

We acknowledge the above documentation. That documentation, however, does not establish that the petitioner ever earned more than \$50,000 annually or that he sold property worth more than \$165,000, not all of which would have been paid to the petitioner as five other unrelated parties jointly owned the property with the petitioner prior to the sale. Thus, we concur with the director that the petitioner has not established how he accumulated the requisite \$1,000,000 for investment.

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.

⁷ Counsel did not identify the page numbers he was citing, but pages 194 through 195 are the only pages addressing the lawful source of funds issue.

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.

Finally, the regulation at 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.” To be considered comprehensive, a business plan must be sufficiently detailed to permit Citizenship and Immigration Services (CIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the

distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner indicated on the Form I-526 that HIG would engage in the "real estate" business, that it had no employees but that the petitioner would create 10 jobs. Prior counsel's initial cover letter included a half-page section entitled "Business Plan." In that section, prior counsel asserted that HIG would construct a retail center with 30 to 40 stores, three to six of which would be operated by the petitioner. The project would eventually require a full-time accountant, one or more security agents, cleaning crew and "sales persons, store managers etc." for the stores operated by the petitioner.

In response to the director's request for additional evidence, the petitioner submitted a more detailed business plan for the construction of the retail center, projected to be complete by June 2008. The plan indicates that the retail center would include just 17 "spaces," only two of which would be operated by the petitioner. Specifically, the petitioner plans to operate a Subway restaurant and a Western Union check cashing business. The petitioner also submitted an organizational chart reflecting a managing director at the top, under who would serve security personnel, an accountant, a restaurant manager and a check cashing manager. Under the restaurant manager would serve four "staff employees" and under the check cashing manager would serve two additional "staff employees."

The director concluded that the petitioner had not submitted a comprehensive business plan. On appeal, counsel asserts that "no astute investor would place half a million dollars into a business that he had not thoroughly researched" and that a comprehensive business plan is a "normal practice." Every alien seeking classification pursuant to section 203(b)(5) of the Act claims to have invested at least \$500,000. If counsel is implying that the existence of a comprehensive plan should be presumed for investments of this size, counsel is not persuasive. The regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) specifically requires the submission of a business plan where the employment has yet to be generated and *Matter of Ho*, 22 I&N Dec. at 213 expressly states that all business plans must be analyzed. Counsel acknowledges that requesting a business plan is not an "onerous" requirement and then analyzes the business plan submitted by the petitioner as follows.

First, counsel asserts that the plan provides a description of the business, a retail center with a restaurant and check cashing business to be run by the petitioner. The primary employment generating entity will be the restaurant and the check cashing business. While the petitioner asserts that the restaurant will be a Subway, the plan does not identify the size of the restaurant. Similarly, the plan provides no additional details regarding the check cashing business. Significantly, this description was only provided in response to the director's request for additional evidence.

Originally, prior counsel advised that the petitioner would operate three to six undefined businesses. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175.

Second, counsel asserts that while no marketing analysis was provided, the lending institution “must have conducted its own due diligence analysis in order to justify the Federal auditors of a loan this size.” The loan, however, is for the construction of the retail center, not the operation of a Subway restaurant or check cashing business. There is no evidence the lending institution was advised of any plans for the individual retail stores that would operate in the retail center. Thus, the petitioner has not established that a market analysis had been conducted regarding the viability of a Subway restaurant or check cashing business in this location.

Third, counsel asserts that the petitioner was in negotiations for the necessary permits to begin construction, which have now been obtained. Fourth, counsel asserts that the petitioner provided a construction cost estimate. Fifth, in response to the need for a marketing strategy, counsel asserts that the petitioner provided a time schedule for the construction. These assertions do not relate to the employment generating entity, the operation of two businesses. Specifically, the petitioner has not addressed whether he has the necessary licenses to operate a Subway restaurant or a check cashing business.⁸ Similarly, he has not provided evidence of any necessary franchise agreement allowing him to operate a Subway restaurant or a Western Union check cashing business. Finally, the plan does not discuss marketing plans for the Subway restaurant or Western Union business. As emphasized above, these are the primary employment generating entities.

Sixth, counsel notes the submission of an organizational chart. We acknowledge that an organizational chart was submitted. Seventh, counsel asserts that prior counsel explained the timetable for hiring employees, stating in response to the director’s request for additional evidence:

Security staff (one) will likely be hired prior to the opening of the center. Parking attendants, mall customer service employees, cleaning staff as well as one accountant will be hired in mid 2008. Two of the spaces will be occupied by a restaurant and a money and check cashing service which require managers and employees.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The organizational chart in the business plan makes no mention of mall service employees or cleaning staff. We note that the regulation at 8 C.F.R. § 204.6(e) (definition of employee) precludes indirect employees and independent contractors. The petitioner has not demonstrated that the security and cleaning staff would be HIG’s direct employees. The plan does not include any time tables for hiring staff for the restaurant and check cashing businesses.

⁸ Every check cashing business must be registered with the state of Florida. Fla. Stat. § 560.307.

Eighth, counsel asserts that the plan contains sales, cost and income projections. The record does not include any income projections for the Subway restaurant and check cashing businesses.

In light of the above, the petitioner's business plan is insufficient. Moreover, the petitioner has not demonstrated that the Subway restaurant and check cashing businesses would be operated by HIG or a wholly owned subsidiary of HIG. If the petitioner separately incorporates or organizes business entities to manage these operations, the proposed employment generation at these businesses cannot be considered direct employment created by the petitioner's investment in HIG, the new commercial enterprise identified on the Form I-526 petition.

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.