**U.S. Department of Homeland Security**
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
MAIL STOP 2090

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**U.S. Citizenship and Immigration Services**

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 12 2008
SRC 06 253 51672

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.

Marla Deadrick
for John F. Grissom, Acting 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 created and would create the necessary jobs.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not demonstrated a qualifying investment in the enterprise identified on the Form I-526 petition.

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, Stone Systems of Raleigh, LLC (SSOR), Federal Employer Identification Number (FEIN) [redacted], 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.

As stated above, the petitioner initially indicated that the new commercial enterprise is SSOR, FEIN [redacted]. The petitioner indicated that the business was established on October 20, 2005.

Notwithstanding this establishment date, the petitioner indicated in part 3 that he had made his initial investment of $86,250 on July 31, 2001. The petitioner listed his total investment as $999,334.

The petitioner submitted Organizational Resolutions of Organizer, Members and Board of Governors of Stone Systems of Raleigh, LLC dated October 20, 2005 resolving that the petitioner would acquire 25 percent of SSOR "in exchange for $450,000 in equipment, cash, materials and services, as determined amongst the members of the Company." The definition of "capital" at 8 C.F.R. § 204.6(e), quoted above, does not include intangible property such as the "sweat equity" a shareholder gains in exchange for labor. Black's Law Dictionary 1461-62 (7th ed.1999). Thus, we cannot consider the full $450,000, but only that portion beyond the sweat equity.

The petitioner also submitted an Amendment to Member Control and Buy-Sell Agreement dated July 31, 2001, whereby the parties agreed to the petitioner's purchase of a 25 percent interest in Stone Systems of North Carolina, LLC (SSONC). Finally, the petitioner submitted a Consent Resolution of the Board of Governors of C&C Terra North Carolina, LLC (C&C) whereby the governors accepted the petitioner's offer to buy a 25 percent interest in C&C for $90,000.

The petitioner did not submit any transactional evidence such as canceled checks, bank statements or wire transfer receipts allowing us to trace funds from the petitioner to any of the above companies.

On September 26, 2006, the director requested evidence documenting the claimed investment of $999,334 and tracing the path of the invested funds from the petitioner to the new commercial enterprise. The director also requested the tax returns for the new commercial enterprise.

In response, the petitioner stated that his investment in SSONC has grown and allowed him to invest in SSOR, C&C and Builders Plus of the Carolinas, LLC (Builders Plus). The petitioner claimed to have made an initial investment of $535,804 and a subsequent investment of $607,280 for a total of $1,143,084. The petitioner submitted a break down of his claimed investment as follows: $521,221 in SSONC, $272,040 in SSOR, $86,059 in C&C and $92,514 in Builders Plus, which totals $971,834.

In support of these claims, the petitioner submitted his own Schedules K-1 for SSONC, a balance sheet as of March 31, 2006 for SSOR, an option agreement for C&C, a Member Control and Buy-Sell Agreement for Builders Plus and a balance sheet as of September 30, 2006 for Builders Plus.

The Schedules K-1 for SSONC reflect that the petitioner contributed $86,250 to the company in 2001. While the petitioner received a share of the company's profits in subsequent years, increasing his capital account, he did not infuse any additional capital after his initial investment. SSOR's balance sheet reflects the petitioner's contribution as -$29,500. This balance sheet cannot establish the amount of funds infused by the petitioner into SSOR.

Section 203(b) of the Act states that the alien must be seeking to engage in "a" new commercial enterprise. The regulation at 8 C.F.R. § 204.6(e) provides:

> Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) A corporation is a separate and distinct legal entity from its owners or stockholders and, thus, certainly is distinct from another corporation with similar ownership. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). On appeal, counsel asserts in footnote three that Cosentino/Stone Systems USA is the parent company for all of the companies in which the petitioner has invested. The Amendment to Member Control and Buy-Sell Agreement for SSONC reflects that Stone Suppliers has a 50 percent interest in that company. The Member Control and Buy-Sell Agreement for SSOR reflects that Stone Suppliers owns 50 percent of that company. The record does not reflect that Stone Suppliers has any interest in C&C or Builders Plus. Rather, C&C Terra Holdings is a 50 percent owner of C&C and Builders Plus USA owns 50 percent of Builders Plus. Thus, there is no single holding company for all of the companies in which the petitioner has invested. Regardless, the petitioner did not invest in a holding company and none of the subsidiaries are wholly-owned subsidiaries as the definition of "commercial enterprise," quoted above, requires.

While the above discussion may seem technical, it can be difficult to demonstrate a nexus between investment and employment creation if an investment in more than one corporation is permitted. 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). While that case involved different facts, it stands for the proposition that there must be some nexus between the petitioner's investment and the employment being created.

The new commercial enterprise identified on the Form I-526 petition is SSOR, FEIN The Schedules K-1 submitted for SSONC show that company has a different FEIN, As stated above, C&C and Builders Plus both have different ownership than SSOR. 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. **Thus, at issue is only the petitioner's investment in SSOR.** Nevertheless, even if we consider the petitioner's investment in the other companies, his investment falls far short of the necessary $1,000,000.

**Stone Systems of Raleigh, LLC**

The record contains no transactional evidence such as canceled checks, bank statements or wire transfer receipts documenting the transfer of cash from the petitioner to SSOR. The petitioner also failed to submit his Schedules K-1 for SSOR. As stated above, the agreement whereby the petitioner would contribute $450,000 includes service, which cannot be considered part of a qualifying investment. The agreement does not reflect how much of the petitioner's investment would include cash, equipment or other tangible property. The balance sheet is not audited and reflects a negative capital account.

The chart submitted on appeal purporting to document an investment of $272,040 is insufficient. First, we acknowledge that counsel asserts that the chart was prepared by the parent company. The unsupported assertions of counsel, however, 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). The record does not reflect that all four companies have the same parent company; thus, it is not clear how one company can confirm the petitioner's investment in all four companies. Moreover, the chart is not signed or otherwise affirmed by any official at any company and does not appear on company letterhead. 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)).
In light of the above, the petitioner has not demonstrated any investment in SSOR, the company identified on the petition.

**Stone Systems of North Carolina, LLC**

The record contains no transactional evidence such as canceled checks, bank statements or wire transfer receipts tracing any funds from the petitioner to SSONC. The petitioner did submit his 2001 through 2005 Schedules K-1 for SSONC. These Schedules K-1 reflect that the petitioner contributed $86,250 in 2001. In the same year, the petitioner's capital account was credited with $30,069 as his share of the profits. In subsequent years, the petitioner's capital account was credited with his share of the profits: $110,462 in 2002, $155,681 in 2003, $262,971 in 2004 and $312,958 in 2005. The petitioner withdrew $14,500 in 2002, $95,600 in 2003, $159,071 in 2004 and $175,902 in 2005, leaving a total of $513,318 at the end of 2005.

The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS,* No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi,* 22 I&N Dec. at 195 for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate

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

We note that a federal court, in an unpublished decision, has upheld our interpretation of "invest" even as applied to a sole proprietorship. In *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003), the court stated:

> The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing Mirriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

*Id.* at 4-6.

The only new capital infused into SSONC is the initial $86,250 in 2001. Thus, the petitioner has not established a qualifying investment of more than $86,250 into SSONC.

**C&C Terra North Carolina, LLC**

The petitioner did not submit any transactional evidence such as canceled checks, bank statements or wire transfer receipts documenting the transfer of funds from the petitioner to C&C. The petitioner also failed to submit his Schedules K-1 for C&C. The option agreement for the petitioner's investment into C&C indicates that he would purchase a 25 percent share for approximately $80,000. The chart submitted on appeal indicates that the petitioner invested $135,000 on January 1, 2006. This chart is not persuasive, however, for the reasons discussed above. Thus, the petitioner has not established the exact amount of his investment in C&C.

**Builders Plus of the Carolinas, LLC**

The Member Control and Buy-Sell Agreement for Builders Plus makes no mention of the purchase price for the petitioner's 25 percent interest. The balance sheet is not audited and has limited evidentiary value. Moreover, the balance sheet purports to document a capital account for Stone Suppliers whereas the Member Control and Buy-Sell Agreement does not reflect that Stone Suppliers has any interest in Builders Plus. Regardless, the balance sheet, while dated September 30, 2006, does not reference a capital account for the petitioner. The chart submitted on appeal indicates that the petitioner invested $92,514 into Builders Plus on March 31, 2006. As stated

above, however, this chart is not persuasive evidence. In light of the above, the petitioner has not submitted credible evidence of his alleged investment into Builders Plus.

For the reasons stated above, even if we considered the petitioner's amended claims to have invested in four companies, the record does not contain evidence supporting those claims. The only investment supported by Schedules K-1 is the $86,250 into SSONC in 2001. The rest of the petitioner's alleged investment in SSONC constitutes the reinvestment of proceeds, which, as explained above, is not a qualifying investment. The record contains no transactional evidence of any additional investments.

**SOURCE OF FUNDS**

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> > (i) Foreign business registration records;
> >
> > (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 (Commr. 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. 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 initial submission included no evidence relating to the source of the petitioner's alleged investment. The director specifically requested evidence tracing the path of funds from the petitioner to the new commercial enterprise, evidence of the petitioner's income and evidence of accumulated savings. As noted by the director, the petitioner's response did not include any of the requested evidence. That said, the petitioner did submit Schedules K-1 reflecting that his initial investment in SSONC grew and that he withdrew some of his profits.

On appeal, counsel asserts that he demonstrated the source of his $86,250 when he entered the United States on a nonimmigrant investor visa. Counsel further asserts that the petitioner's profits from this investment are the source of his subsequent investments. The petitioner withdrew $30,069 in 2001, $110,462 in 2002, $155,691 in 2003, $262,971 in 2004 and $312,958 in 2005 amounting to a total of $872,151. The petitioner submits his Internal Revenue Service (IRS) Forms 1099 and W-2 for 2005 and 2006 reflecting income of $109,983 in 2005 and $28,000 in 2006.

While the petitioner's income is not inconsistent with accumulating the required investment funds, the record does not trace any funds from the petitioner to any of the above businesses.

**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 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 that the new commercial enterprise employed eight workers at the time of his investment, which had increased to 70. The petitioner projected creating another 30 jobs. The initial submission included no evidence of employment at any of the businesses in which the petitioner now claims to have invested.

The director requested that the petitioner submit Forms W-2 and other evidence that the petitioner has created 62 jobs. In response, the petitioner submitted SSONC's third quarter employer returns reflecting that SSONC employed between 13 and 15 employees during the quarter. The petitioner also submitted nine Forms I-9 completed for SSONC. The petitioner also submitted payroll documentation for SSOR reflecting that SSOR employed between nine and twelve employees during the second quarter of 2006. The petitioner also submitted ten Forms I-9 completed for SSOR. The petitioner also submitted payroll documentation for Builders Plus reflecting the company increased its number of employees from zero to four in the second quarter of 2006. The petitioner also submitted five Forms I-9 completed for Builders Plus.

The director acknowledged the submission of the above evidence but concluded without explanation that the petitioner had not demonstrated that he had created or would create at least 10 jobs. On appeal, counsel asserts that the various companies now employ 46 workers and submits recent payroll documentation. The payroll documentation for SSOR, the new commercial enterprise listed on the petition, reflects that SSOR employed 23 employees during a two week period in February 2007. Ten of these employees, including the petitioner, are on salary and several others worked more than 210 hours year to date (35 hours per week multiplied by 6 weeks). Assuming the beneficiary is the only shareholder seeking benefits pursuant to section 203(b)(5) of the Act, it would appear that SSOR has generated sufficient employment.

While SSOR appears to be generating sufficient employment, for the reasons discussed above, the petitioner has not demonstrated a qualifying investment in SSOR.

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.