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

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FILE:

SRC 06 199 52188

Office: TEXAS SERVICE CENTER

Date: **NOV 24 2008**

IN RE:

Petitioner:



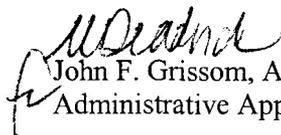
PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

  
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 she had created or will create the necessary 10 new jobs.

On appeal, the petitioner submits a statement, requests oral argument and submits a letter from prior counsel discussing the director's decision. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner asserts that if her former attorney was not able to satisfactorily demonstrate her eligibility, the only means to so is through oral argument due to the complexity of this case. Having reviewed the record, we find that the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

For the reasons discussed below, prior counsel misunderstands some of the director's concerns, which the petitioner has not overcome on appeal. While we will address multiple deficiencies, the most significant are the lack of evidence tracing funds, allegedly invested through a third party as repayment of a loan owed by that third party, back to the petitioner and the lack of evidence that the petitioner has created 10 new jobs through her alleged investment beginning in 2002.

The petitioner asserts generally that the petition should be approved because her companies have generated revenues and her husband was voted "Business Man of the Year" in Florida. At issue is not whether the petitioner operates a successful business. Rather, the petitioner must establish that she meets the investment requirements set forth in the pertinent regulations, that she can trace all of the invested funds back to herself, that she can establish that her funds were acquired lawfully and that she has, as a result of her claimed investment, created 10 new jobs.

The 21<sup>st</sup> 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. As the petitioner's petition was filed after November 2, 2002, she need not demonstrate that she personally established the new commercial enterprise. The issue of whether the petitioner invested in a preexisting business is still relevant, however, as the petitioner must still demonstrate the creation of 10 new jobs. Prior counsel misconstrues the director's concern in this regard as challenging whether the new commercial enterprise is "new." We acknowledge that the new commercial enterprise is "new" as defined at 8 C.F.R. § 204.6(e).

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, I&E Homes, 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. The nature of the business is identified as "residential real estate developer."

### **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 new commercial enterprise identified on the Form I-526 petition is I&E Homes, Inc. The petitioner indicates that this corporation was established on December 1, 1997 but that her initial investment did not occur until April 22, 2002. The petitioner indicates she owns 80 percent of the new commercial enterprise.

On appeal, the petitioner notes that she and her husband operate several companies. The tax records submitted by the petitioner reveal that I&E Homes, Inc. is one member of a controlled group of corporations. According to Black's Law Dictionary 330 (7<sup>th</sup> ed. 1999), a controlled group consists of two or more corporations "whose stock is substantially held by five or fewer persons." The examples provided are parent-subidiaries and brother-sister groups.

The petitioner submitted the new commercial enterprise's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2001 through 2005. Schedule K, line 5 asks whether any individual, partnership, corporation, estate or trust owns, directly or indirectly, 50 percent or more of the corporation's voting stock and, if yes, requests the percentage owned. In 2001, Schedule K reflects that one entity, identified as the petitioner on Statement 4, owns 80 percent of the corporation. In 2002, Schedule K, line 4, reflects that I&E Homes, Inc. was a subsidiary of a parent-subidiary controlled group, I&E Group, Inc. The Schedules K and accompanying statements for

2003 through 2005 no longer identify I&E Homes, Inc. as a subsidiary but reflect that it is owned, directly or indirectly, 100 percent by an “individual, partnership, corporation, estate or trust,” described in statement 5 as follows: 60 percent owned by the petitioner and 40 percent owned in equal amounts by relatives. While the Schedules K only reflect that I&E Homes, Inc. was a subsidiary of a parent-subsidiary controlled group in 2002, the tax returns for every year from 2001 through 2005 contain an Election Schedule for Controlled Group of Corporations Worksheet. Also, in 2002 through 2005, the petitioner is listed on Schedule E as the sole officer but the line for her percentage of stock ownership in the corporation is blank. No schedule E was submitted for 2001.

The petitioner submitted a stock certificate reflecting that she was issued 600 shares, a 60 percent ownership interest, on January 1, 1998. Curiously, the certificate, purportedly issued in 1998, was issued by ██████ & Sons Construction, Inc., “Now Known as I&E Homes, Inc.” even though the corporation did not change its name until May 6, 2002. In light of the above, the record does not support the petitioner’s assertion on the Form I-526 petition, signed April 7, 2006, that she personally owned 80 percent of I&E Homes, Inc. at that time.

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, in this case I&E Homes, Inc. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Commr. 1998). Thus, the petitioner must demonstrate the requisite investment in I&E Homes, Inc. Moreover, while this case involved different facts than the matter before us, it stands for the proposition that the petitioner must demonstrate a nexus between her investment and direct job creation. As such, while I&E Homes, Inc. may have been incorporated in 1997, the petitioner’s claimed investment began in 2002. Thus, she must demonstrate that I&E Homes, Inc. has created or will create at least 10 jobs since the petitioner began investing since no claim has been made that I&E Homes, Inc. was a troubled business in 2002. *See* 8 C.F.R. § 204.6(j)(4)(ii). Contrary to prior counsel’s assertion, we see no reason to differentiate between an investment in an existing business founded by the petitioner or founded by a different individual. Nowhere in the statute, regulations or case law is such a distinction suggested. Regardless of who founded the business, it is the qualifying investment that must create the required jobs unless the investment is in a troubled business, defined at 8 C.F.R. § 204.6(e). There is no claim in this matter that I&E Homes was a troubled business.

The petitioner breaks her investment down into eight transactions as follows.

*Transfers in 2002 and 2003 to PCB business account*

The petitioner submitted bank statements and deposit slips reflecting transfers of \$15,000 and \$20,000 in April 2002 from the petitioner’s SunTrust Bank account to ██████ and Sons Construction, Inc.’s PCB account. The tax identification number for ██████ and Sons Construction on the bank statement is the number used by I&E Homes, Inc. and the record contains articles of amendment reflecting that ██████ and Sons Construction changed its name to I&E Homes on May 6, 2002. Subsequent bank statements for the same account reflect the account holder as I&E Homes, Inc. Thus, the petitioner has traced these funds from herself to the new commercial enterprise.

In addition, the petitioner submitted bank statements, deposit slips and a check issued by her to I&E Homes reflecting a transfer of \$17,480 to I&E Homes' PCB account on March 18, 2003. This transaction is also sufficiently documented.

We acknowledge that I&E Homes' 2002 and 2003 tax returns, Schedules L, show additional paid-in-capital increasing from zero to \$400,000 in 2002 and from \$400,000 to \$429,503 in 2003. Statement 6 in 2002, however, also reflects a "Family [REDACTED]" loan increasing from \$0 to \$113,757. While this loan does not appear on I&E Homes' 2003 statements, it may have been re-characterized as part of the company's shareholder loans, which are larger at the beginning of 2003 than the end of 2002. Thus, the \$52,480 transferred to I&E Homes in 2002 and 2003 are consistent with both an increase in capital and a loan to I&E Homes.

*Transfers in 2004 to SunTrust business account*

The petitioner submitted bank statements, checks and deposit slips to document the transfer of \$30,000 on December 10, 2004, \$20,000 on December 22, 2004 and \$30,000 on December 22, 2004. These funds were transferred from the petitioner's SunTrust account to [REDACTED] and Sons Construction's SunTrust account. We acknowledge that the taxpayer identification number for this account is I&E Homes' number. All three checks, however, include the word "loan" in the memo section of the check. Thus, these amounts appear to reflect loans by the petitioner to I&E Homes, Inc. Significantly, I&E Homes' 2004 tax return, Schedule L, reflects no increase in stock or additional paid-in-capital. Statement 8, however, reflects the following entry: "Loan Family [REDACTED]" increasing from zero to \$195,851 during 2004.

As quoted above, the definition of capital at 8 C.F.R. § 204.6(e) excludes loans to the new commercial enterprise. Thus, none of the funds transferred to I&E Homes in 2004 can be considered part of a qualifying investment of capital.

*\$500,000 Wire Transfer on October 29, 2003*

The petitioner submitted I&E Homes' PCB statement for October 2003 reflecting a deposit of \$500,000 on October 29, 2003 and a wire transfer receipt reflecting that these funds were transferred by [REDACTED]. The petitioner also submitted correspondence between the petitioner and Mr. [REDACTED] regarding [REDACTED] ability to pay off a second mortgage on the house he purchased from the petitioner and her desire for him to transfer the funds directly to I&E Homes.

The petitioner further submitted a purchase contract dated December 4, 1993 whereby [REDACTED] agreed to purchase property from the petitioner for 8,500,000 Austrian Schillings, 5,000,000 Austrian Schillings of which would be "secured owner financing." The petitioner, who translated the German documents, indicates that 5,000,000 Austrian Schillings is equal to \$500,000.<sup>1</sup> The contract bears a notary seal but is signed by a different individual than the notary identified on the

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<sup>1</sup> The petitioner did not submit any exchange rates for 1993 or any other time. According to [www.oanda.com](http://www.oanda.com) (accessed on October 17, 2008 and incorporated into the record), 5,000,000 Austrian Schillings amounted to \$412,712 on December 4, 1993.

seal. The contract also contains little of the detailed legal language typically seen in sales contracts involving large amounts of money. The petitioner did not submit the financing agreement specifying the terms of payment by [REDACTED], a document that would be expected for a mortgage of this amount. Thus, the petitioner has not established that the full amount would have remained outstanding nearly 10 years later. In response to the director's request for additional evidence, the petitioner submitted a property record dated June 15, 1992 reflecting that the petitioner and her husband owned property as of 1975 and noting: "record intend to sale 05/11/1993." We note that [REDACTED] appears to have some relationship to I&E Homes as he is listed as an asset on I&E Homes' tax returns, statement 6 in 2003, 2004 and 2005.

The director appears to have accepted that the \$500,000 represents an infusion of cash by the petitioner, but noted that the tax returns reflect "just over \$400,000" in paid-in-capital. On appeal, the petitioner acknowledges that the paid-in-capital is approximately \$400,000, but asserts that the 2005 tax return also reflected:

Capital TL Office building	\$500,000
Capital TL Entertainment	\$1,144,958

The petitioner submitted an unnumbered statement listing the individual mortgages, notes and bonds payable in less than one year from line 17 on Schedule L. This statement includes the liabilities listed by the petitioner in her statement. The record, however, contains no evidence as to what these liabilities represent. Regardless, they are listed as current liabilities due within one year. They are not part of I&E Homes' equity. As stated above, loans to the new commercial enterprise, even assuming they originate from the petitioner, cannot be considered part of a qualifying investment of capital as defined at 8 C.F.R. § 204.6(e).

It remains, [REDACTED] transferred \$500,000 to I&E Homes in 2003 purportedly as repayment of a ten year old debt. The company's tax return for that year, Schedule L, shows an increase of only \$29,503 in additional paid-in-capital during that year. Thus, the petitioner has not demonstrated that these funds represent a qualifying investment by the petitioner.

*\$387,000 transferred on May 14, 2004*

On appeal, the petitioner asserts that she and her husband gave a loan to [REDACTED] Development, Inc. because the foreign owner could not find financing. 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)). As will be explained below, the record does not support this assertion or the implication that [REDACTED] Development, Inc. is an unrelated company.

The petitioner submitted I&E Homes' PCB statement for May 2004 reflecting a deposit of \$387,000 on May 14, 2007. The petitioner also submitted a check for that amount issued by [REDACTED] Development, Inc. Finally, the petitioner submitted a "Loan Agreement" dated August 8, 2002,

whereby the petitioner and her husband expressed a willingness to loan \$500,000 to [REDACTED] Development for completion of the TownLakes development, the same development I&E Homes is purportedly developing. The agreement further states that the money will be provided as needed and that repayment will take place from selling lots or financing. The agreement does not discuss any interest rate, schedule of repayment or security, terms that would normally be expected of a loan this size. The petitioner failed to submit any evidence tracing the path of funds *from* her personal account *to* [REDACTED] between August 8, 2002 (the date of the loan agreement) and May 14, 2004 (the date [REDACTED] transferred the funds to I&E Homes). Significantly, **nothing** in the “Loan Agreement” specifies how much of the \$500,000 offered was actually loaned to [REDACTED]

The director noted the lack of a promissory note from Gassner and the lack of evidence tracing the funds from the petitioner to [REDACTED] in the first place and concluded that a loan to a third party to be invested cannot be considered an at risk investment. On appeal, prior counsel only addresses one of the director’s concerns, the concern that a loan is not at risk. Specifically, prior counsel states that the only loans that are excluded are loans whereby the investor borrows funds secured by the assets of the company. Counsel does not acknowledge that the definition of “capital” also precludes funds loaned to the new commercial enterprise, although we acknowledge that the petitioner’s assertion is that she invested funds that were being repaid to her from a previous loan to a third party.

We concur with the director that the record lacks evidence that the \$387,000 originated from the petitioner personally. Not only does the record lack evidence that the petitioner, prior to May 14, 2004 or at any other time, transferred any money to [REDACTED], but I&E Homes’ tax returns strongly suggest that the loan was made by I&E Homes itself and that the \$387,000 was, at least in part, **repayment to I&E Homes of a loan that I&E Homes made to [REDACTED]. In 2003, according to I&E Homes’ tax return, statement 6, I&E Home loaned \$200,000 to [REDACTED]. In 2004, the year [REDACTED] paid \$387,000 to I&E Homes, I&E Homes’ tax return, statement six, shows the repayment of the \$200,000 loan in full. We note that, beginning in 2003, [REDACTED] is listed on I&E Homes’ Election Schedule for Controlled Group of Corporations Worksheet as another member of I&E Homes’ controlled group. The petitioner’s decision to move corporate funds between her various corporations as loans cannot be considered a qualifying investment of the petitioner’s personal funds. Moreover, if the \$200,000 loaned to [REDACTED] and repaid originated from the \$500,000 transferred by [REDACTED] a few months earlier, we cannot double count those funds.**

In light of the above, the petitioner has not demonstrated that the \$387,000 transferred from [REDACTED] to I&E Homes constituted an investment of the petitioner’s personal funds.

### *Summary*

The \$52,480 transferred to I&E Homes in 2002 and 2003 is consistent with a qualifying equity investment, although the petitioner’s family also loaned funds to I&E Homes in that year. The \$80,000 transferred to I&E Homes in 2004 is traceable to the petitioner; however, these funds, according to the memos on the checks and the 2004 tax return, constitute a loan to I&E Homes. According to the definition of capital at 8 C.F.R. § 204.6(e), the \$80,000 in loans to I&E Homes in 2004, notated as loans on the checks themselves, cannot be considered part of a qualifying

investment. The path of the \$500,000 transferred to I&E Homes in October 2003 has only a tenuous origin with the petitioner as it purports to be repayment of a ten year old loan documented by a property sales contract devoid of the legal terms typically seen in contracts of this type and signed by a different individual than the notary identified on the notary stamp. Moreover, the record does not show an increase of \$500,000 in paid-in-capital in 2003. Finally, the record does not trace the \$387,000 back to the petitioner as the origin of these funds and the tax returns reflect no increase in paid-in-capital during 2004.

Even if we were to ignore the paid-in-capital numbers on the tax returns and consider the remaining evidence in the most favorable light to the petitioner, the record does not established an equity investment of more than \$552,480, far less than the required \$1,000,000. The petitioner has not established that the remaining funds are available and were fully committed to the business as of the priority date.

### **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 (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. 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) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted the evidence discussed above regarding her claimed investment. While the petitioner has established that she owned a home that she sold in 1993, the record does not trace all the funds purportedly invested back to this asset. The petitioner has never explained how she accumulated the \$380,000 allegedly loaned to [REDACTED] and, as stated above, has not submitted evidence that traces the funds loaned to [REDACTED] back to her own personal account. Thus, the petitioner has not documented the source of all the funds purportedly invested.

### **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 does not claim to have invested in a troubled business. Thus, she must demonstrate that her investment, which began in 2002, created 10 new jobs. Prior counsel asserts that the investment must only create 10 new jobs when an alien is investing in a business she did not previously own but provides no legal authority for making this distinction. As stated above, we see no basis for such a distinction. The statute requires an investment that creates jobs. An investment that creates no new jobs, regardless of whether the business was already owned by the alien, is simply non-qualifying.

The petitioner indicated on the Form I-526 that there were no employees at the time of her investment and that the company now employed 16 employees. The record contains two lists of

full-time employees, one listing 12 employees and their titles and the other listing eight employees. The petitioner submitted Forms I-9. One of the 2005 employees' Form I-9 is not marked as to whether the employee is a citizen, lawful permanent resident or alien authorized to work. The petitioner has not, therefore, established that this employee is qualifying as defined at 8 C.F.R. § 204.6(e).

The petitioner submitted 17 Forms W-2 issued in 2005, two of which were issued by an unrelated company, [REDACTED]. The petitioner has not explained why these IRS Forms W-2 were submitted and we will not consider them evidence of employment generated by I&E Homes. Of the 15 Forms W-2 issued by I&E Homes, three of them were issued to individuals with the same last name as the petitioner. The petitioner has not established that these individuals are qualifying employees as defined at 8 C.F.R. § 204.6(e). An employee would have to have earned \$10,598<sup>2</sup> during 2005 to reflect full-time wages (35 hours per week according to 203(b)(5)(D) of the Act). Two of the remaining 12 Forms W-2 reflect annual wages of less than \$10,598. While ten of the 2005 Forms W-2 can account for full-time employment, we note that I&E Homes' 2001 tax return reflects wages paid of \$124,297. Thus, I&E Homes did not, as claimed on the Form I-526 petition, have no employees when the petitioner began investing in 2002.

In light of the above, we concur with the director that the petitioner has not established the creation of 10 *new* jobs because the record lacks evidence, such as quarterly wage and withholding reports, reflecting an increase of ten jobs at I&E Homes after April 2002, the date the petitioner claims to have begun her qualifying investment.

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.

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<sup>2</sup> As of May 2, 2005, Florida's minimum wage was \$6.15 per hour. See <http://library.findlaw.com/2005/May/19/174538.html> (accessed November 19, 2008 and incorporated into the record of proceedings). The federal minimum wage at that time was \$5.15 per hour. See <http://www.dol.gov/elaws/faq/esa/flsa/001.htm> (accessed November 19, 2008 and incorporated into the record of proceedings.) Thus, minimum wage during 2005 would reflect 17 weeks at \$5.15 per hour and 35 weeks at \$6.15 per hour. According to section 203(b)(5)(D) of the Act, full-time means 35 hours per week. Thus, we calculate the minimum amount of wages required to show payment of full-time wages in Florida in 2005 as follows: (17 weeks times 35 hours times \$5.15 per hour) plus (35 weeks times 35 hours times \$6.16 per hour).