



U.S. Citizenship
and Immigration
Services

BT

[Redacted]

FILE: [Redacted]
SRC 07 057 50558

Office: TEXAS SERVICE CENTER

Date: FEB 05 2009

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:

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.

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

A handwritten signature in cursive script, appearing to read "John F. Grissom".

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 (AAO) 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 or would create the necessary jobs.

On appeal, the petitioner submits a brief and additional evidence. The petitioner also requests oral argument before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) 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). The petitioner requests oral argument because he did not initiate his investment as a means to adjust status pursuant to section 203(b)(5) of the Act. Thus, according to the petitioner, he did not obtain or prepare the necessary documents but is able to “verbally explain” his investment. The written record of proceeding, which includes several written statements by the petitioner in addition to considerable financial documentation, fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

While the director underestimated the amount of funds documented by the checks in the record, the director also incorrectly credited the petitioner with investing funds documented only by invoices for normal operating expenses several months after the purchase date. For the reasons discussed below, we concur with the director’s ultimate conclusion that the petitioner has not documented a sufficient investment and that he has created or will create the necessary jobs.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner was filed after November 2, 2002, the petitioner need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

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, [REDACTED] 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 \$500,000.

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.

In support of the petition, the petitioner indicated that [redacted] purchased an operational truck stop in Pennsylvania and that the petitioner's investment included the following:

Advance paid along with contract	\$50,000
At the time of closing	\$239,297
Funds deposited with Chase Bank for L.C. opening	\$80,000
Our attorney cost enclosed	\$4,291
Inventory Cost and Miscellaneous payment	<u>\$51,000</u>
Total	\$424,588

The petitioner also listed the following additional investment costs:

Subway Franchise cost paid	\$7,500
Immediate repair and improvement cost alone	\$23,650
Running expenses paid for the past three (3) months	<u>\$50,000</u>
Total	\$81,150

These two summaries reflect a claimed investment of \$505,738. The petitioner indicated that \$250,000 of his investment derived from a home equity loan with M&T Bank, \$100,000 derived from a "cash credit facility" with M&T Bank and \$80,000 derived from funds "diverted from [an]other business ([redacted])"

The record contains a May 22, 2005 purchase agreement between [redacted] and [redacted]. The purchase price was set at \$225,000 payable by a \$50,000 deposit, the balance at

closing plus 50 percent of the cost basis of the inventory and \$9,250 for equipment. The August 18, 2006 closing statement, which lists the settlement agent as [REDACTED] reflects that [REDACTED] paid \$239,297 at closing, including the equipment costs. An undated agreement between Town Hill [REDACTED] indicates that, after closing, the inventory would be assessed. The record contains a handwritten inventory summary reflecting total inventory value of \$101,027.48. Fifty percent of the inventory value is calculated to be \$50,513 with an additional \$3,000 for a diesel dispenser added to total \$53,513.74. The summary is signed August 19, 2006. A handwritten note on the summary of the petitioner's investment marked "Enclosure II" indicates that [REDACTED] was the petitioner's attorney for the purchase.

To document his personal investment, the petitioner submitted the following checks:

Date	Remitter	Bank	Payee	Amount
5/5/2006	Petitioner	[REDACTED]	[REDACTED]	\$1,000
5/22/2006	Petitioner	[REDACTED]	[REDACTED]	\$50,000
7/24/2006	[REDACTED]	[REDACTED]	[REDACTED]	\$7,500
8/18/2006	Petitioner	[REDACTED]	[REDACTED]	\$9,250
8/18/2006	Petitioner	[REDACTED]	[REDACTED]	\$175,000
8/18/2006	Petitioner	[REDACTED]	[REDACTED]	\$50,000
8/18/2006	Petitioner	[REDACTED]	[REDACTED]	\$185
8/18/2006	Petitioner	[REDACTED]	[REDACTED]	\$4,862
8/18/2006	[REDACTED]	[REDACTED]	[REDACTED]	\$3,000
8/18/2006	[REDACTED]	[REDACTED]	[REDACTED]	<u>\$291.04</u>
			Total	\$301,088

* A handwritten note indicates this check was issued to obtain a bank check for payment of the franchise fee to Subway although the franchise agreement is dated October 30, 2006.

** Official Check

† No remitter identified, but the account is listed as [REDACTED] which belongs to [REDACTED] according to the July 24, 2006 check and bank statements that the petitioner submitted.

The petitioner also submitted a Chase transaction summary receipt reflecting the withdrawal of \$78,000 from the petitioner's account [REDACTED] and deposit into a business certificate of deposit account for [REDACTED], account number [REDACTED]. Finally, while the petitioner includes the full \$101,027.48 for inventory as part of his investment on the summary for "Enclosure II," the record contains the agreement discussed above that indicates the petitioner was only required to pay 50 percent of the inventory, or \$50,513 plus an additional \$3,000 for a diesel dispenser. Moreover, the August 18, 2006 check issued to [REDACTED] for \$50,000 corresponds to the \$50,000 inventory escrow on the closing statement while the \$3,000 check to [REDACTED] may correspond with the \$3,000 owed for the diesel dispenser. Thus, the petitioner has not established that he made any payments for inventory above the \$301,088 documented by the checks listed above.

Finally, the petitioner did not document the transfer of any funds other than the \$78,000 from his personal account to [REDACTED]'s account. The record contains an August 17, 2006 \$100,000 Business Access Line of Credit Note for [REDACTED] with M&T Bank and a JP Morgan Chase Bank security agreement listing [REDACTED] as the borrower. Thus, [REDACTED] had access to funds other than those contributed by the petitioner. As such, any expenses paid by [REDACTED] cannot be considered part of the petitioner's personal investment without further evidence tracing those funds back to the petitioner.

The director concluded that the petitioner had submitted checks for approximately \$100,000 and invoices for approximately \$103,000, which did not document an investment of \$500,000. On appeal, the petitioner resubmits the checks listed above. The petitioner also claims to have invested \$23,650 in repairs and \$50,000 in working capital but evidence of these contributions is not in the record.

We concur with the petitioner that the record contains checks totaling more than the \$100,000 allowed by the director. In fact, the record contains checks from the petitioner in satisfaction of company expenses totaling \$290,296.60. (For the reasons stated above, the petitioner has not established that the checks issued by [REDACTED] represent his personal investment.) The petitioner also documented the transfer of \$78,000 from his personal account to [REDACTED]. Thus, the petitioner has traced a total of \$368,296.60 from his personal account to [REDACTED] or in satisfaction of the company's expenses, less than the requisite \$500,000. The petitioner has not demonstrated that the remaining funds were irrevocably committed to [REDACTED] as of the date of filing.

While the director appears to have accepted that the invoices documented a personal investment by the petitioner, we cannot agree. The invoices are dated in 2007 and the petitioner has not established that he personally contributed the funds used to pay these invoices. The payment of operating expenses from proceeds cannot be considered part of a qualifying equity investment by the petitioner. *See generally De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003). Moreover, as stated above, [REDACTED] obtained its own \$100,000 line of credit with M&T Bank and had some type of loan with JP Morgan Chase Bank represented in the record by a security agreement with that bank. Any funds from this line of credit used to satisfy the invoices cannot be considered an investment by the petitioner.

A second issue arises as to whether the \$368,296.60 truly derived from the petitioner's personal funds. On August 17, 2006, the petitioner took out a \$100,000 Commercial Mortgage for Residential Property with M&T Bank and on August 22, 2006, the petitioner took out a \$250,000 mortgage on his personal residence, also with M&T Bank. The record also contains an August 17, 2006 Business Access Line of Credit Note with M&T Bank for [REDACTED]. According to page 7 of the note, the petitioner individually and [REDACTED] are jointly and severally liable on this note. According to page 5 of the note, each borrower, endorser and guarantor grants M&T Bank a continuing lien on any and all deposits with that bank. According to the petitioner's statements, the Commercial Mortgage for Residential Property is the security for [REDACTED].

line of credit, for which [REDACTED] is a borrower whose deposits with M&T Bank also secure the line of credit. Thus, the \$100,000 note is secured both by assets of the petitioner and assets of [REDACTED].

The director noted that [REDACTED] was a listed borrower of the \$100,000 line of credit and concluded that both the line of credit and the \$250,000 mortgage postdated the purchase of the business.

On appeal, the petitioner correctly notes that the \$100,000 line of credit predates the purchase of the business by one day. Thus, we withdraw the director's finding that this line of credit could not have served as the source of the funds used to purchase the business. The closing costs, however, totaled \$239,29 [REDACTED]. [REDACTED] asserts on appeal that he obtained bridge financing from [REDACTED] and [REDACTED]. The petitioner submits a statement from [REDACTED] affirming a loan of \$200,000 in July 2006 and a June 8, 2006 \$100,000 promissory note in favor of [REDACTED] signed by the petitioner. As noted by the petitioner on appeal, the record contains a statement for his Chase account, [REDACTED], which shows a balance of \$200,555.26 as of July 19, 2006. This statement, however, does not establish the source of these funds. Moreover, the record lacks evidence that the petitioner used the funds from the August 22, 2006 mortgage to repay the bridge loans.

While the \$100,000 line of credit predates the purchase of the business, the documentation reflects that the assets of [REDACTED] at least partially secure the loan. The definition of capital at 8 C.F.R. § 204.6(e), quoted above, expressly excludes indebtedness where the assets of the new commercial enterprise secure any part of the indebtedness. Thus, while we acknowledge that the petitioner mortgaged his property to secure the \$100,000 line of credit, those funds cannot be considered part of a qualifying investment because the assets of the new commercial enterprise also secure the indebtedness.

While the \$250,000 mortgage is secured by the petitioner's personal residence, it postdates the purchase of the business. While the petitioner submits evidence on appeal suggesting that he obtained bridge financing from individuals, the petitioner did not submit cancelled checks or other transactional evidence tracing the invested funds back to those individuals. Moreover, the petitioner did not submit evidence that he used the \$250,000 from his mortgage to repay those individual loans.

Finally, the petitioner has not submitted stock certificates or any other evidence verifying an equity rather than debt (shareholder loan) contribution. While the petitioner submitted profit and loss statements for [REDACTED], he did not submit audited balance sheets or federal tax returns for [REDACTED], including Schedules L. While we acknowledge that the director never requested such evidence, it remains that without such evidence, the petitioner has not established that the transferred funds were contributed as equity rather than as shareholder loans.

In summary, the petitioner has not established the transfer of more than \$368,296.60 from his personal funds to the new commercial enterprise. Moreover, if any of these funds derive from the \$100,000 line of credit listing the petitioner and [REDACTED] as borrower, those funds cannot be

considered part of the petitioner's qualifying investment. Finally, the record lacks evidence that any of the funds transferred to the business were transferred as an equity investment rather than a shareholder loan. Thus, the petitioner has not established a qualifying investment of \$500,000.

SOURCE OF FUNDS

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

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

- (i) Foreign business registration records;
- (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
- (iii) Evidence identifying any other source(s) of capital; or
- (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'r. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted his personal tax returns reflecting adjusted gross income of \$14,979 in 2001; \$18,909 in 2002; \$6,713 in 2003; \$14,400 in 2004 and \$95,210 (including \$74,708 in "other

income”) in 2005. The petitioner also submitted his credit report listing a mortgage with [REDACTED] and a balance of \$249,209 on the M&T home equity mortgage. Finally, the petitioner submitted a property value notice indicating that the market value of his personal residence was assessed at \$779,000 on January 15, 2007.

The director concluded that the petitioner had not demonstrated how he was able to purchase his house or that he was legally authorized to work in the United States. On appeal, the petitioner submitted a photocopy of his employment authorization card issued in 2007. The petitioner asserts that he has been working legally since 1991 and that the source of his invested funds is the appreciation from the value of his house, allowing him to borrow against the new equity.

While the director’s concern that the petitioner’s income cannot account for the accumulation of the necessary funds is understandable, the petitioner has established that his property has appreciated in value and that he obtained a mortgage of \$250,000 and partially secured the company’s credit line with another mortgage for \$100,000 based on the appreciated value. These funds, however, only account for \$350,000, not the full \$500,000. In his initial filing, the petitioner indicated that an additional \$250,000 in funds derived from “total cash at Chase Bank in various account[s],” and that a final \$80,000 derived from funds “diverted from other businesses.”

The petitioner submitted July 19, 2006 bank statements for two personal accounts and one account for [REDACTED]. The petitioner’s statements reflect balances of \$23,866 and \$200,555.26 while the statement for [REDACTED] reflects a balance of \$125,080.99. The record also contains tax returns for [REDACTED].

On appeal, the petitioner implies that the \$200,555.26 in his personal account derived from a bridge loan. If this loan was subsequently repaid with the funds obtained by the August 22, 2006 mortgage, those funds cannot be considered in addition to the mortgaged funds. Moreover, the record contains no information about the legitimate accumulation of wealth of the two individuals who provided the funds or transactional evidence such as wire transfer receipts or cancelled checks tracing the funds back to those individuals. As noted above, the petitioner must document the path of the invested funds. *Matter of Izummi*, 22 I&N Dec. at 195.

[REDACTED] is a separate legal entity from the petitioner, even assuming the petitioner is the corporation’s sole shareholder. Thus, any funds contributed by this company cannot be credited as an investment by the petitioner. *Id.*; see also *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm’r. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm’r. 1980).

In light of the above, the petitioner has only established the source of \$350,000. While the petitioner has not demonstrated an investment of much more than that, the minimum investment amount in this matter is \$500,000. Even if we accepted that the petitioner is actively in the process of investing \$500,000, and the record lacks evidence that the remaining funds were irrevocably committed to the new commercial enterprise as of the date of filing, he has not demonstrated that he has lawfully acquired the remaining \$150,000.

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 U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

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

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

On the petition, the petitioner indicated that there were five employees when he made his investment, that he had created an additional five jobs and that he would create an additional eight jobs. In response to the director's request for additional evidence, including a business plan, the petitioner projected 11 employees as of January 2007, 20 as of June 2007 and 21 as of June 2008. The petitioner proposed to increase the number of cashiers, food service employees, maintenance workers and to add diesel fill service employees, a clerk and an accountant. The petitioner also proposed to create new jobs through the addition of a Subway franchise and a weigh station.

The petitioner submitted monthly unaudited and unreviewed profit and loss statements for August through December 2006. These statements reflect payroll expenses of \$2,162 (the petitioner did not purchase the business until August 18, 2006 and, thus, would not have paid a full month of wages in that month), \$9,226.95, \$13,465.81, \$8,541.03 and \$13,425.84. The petitioner also submitted payroll statements, Forms I-9 and Forms W-4 for ten employees. In addition, the record contains a Form 940 Employer's Annual Federal Unemployment (FUTA) Tax Return filed by [REDACTED] for 2006 reflecting total wages of \$40,766.

Finally, the petitioner submitted an October 30, 2006 Subway franchise agreement and evidence of preliminary negotiations with [REDACTED] for a weigh station but no evidence that the landlord had approved the construction of such a scale.

The director concluded that without evidence of the number of employees prior to the purchase, the petitioner could not establish the number of new jobs that have been and will be created. On appeal, the petitioner asserts that he is unable to request the employment records of the previous owner. He

further asserts that the previous owner did not operate a Subway in the location and that the Subway would create new jobs.

Even assuming that the previous owner only employed five workers and that the petitioner has now created five new full-time employees, the petitioner has not explained how a "non-traditional" (reduced size) Subway restaurant will require five new full-time employees as claimed. The CAT Scale project appears too speculative to consider.

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.