U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 0 8 2004

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and 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 equity investment.

On appeal, counsel argues that the new commercial enterprise was not obligated to repay the "advances" from the petitioner. Counsel also challenges the director's failure to consider funds invested by the petitioner's other corporation. While counsel asserts that she will submit a brief and/or evidence within 30 days, nothing further has been received. The appeal will be adjudicated on the evidence of record considering counsel's appellate arguments as stated on the Form I-290B.

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, the Hildenborough Hotels, Ltd., Inc. (hereinafter HHL), 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 petitioner further indicated that HHL does business as "Island" in Key West, Florida. The articles of incorporation reflect that HHL is a corporation and that is the registered agent of the corporation. The record contains a "Register of Members of Island House" without explanation. We note that the term "members" generally applies to the equity owners of a limited liability company. The record contains no evidence of a limited liability company owned by or affiliated with HHL.[1]

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

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[1] Florida's Department of State's website, www.sunbiz.org, reveals no limited liability company with the name "Island House" that is clearly related to this case has a mailing address in Miami and the manager is not the petitioner Island House Key West, Inc., a corporation, lists its principal address as According to www.bedandbreakfast.com, that address belongs to a hotel called The Villa.

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.

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the petition, the petitioner identified the new commercial enterprise as HHL and indicated that he owned 50 percent of that business. He further indicated that he had invested $50,000 on December 14, 1998 and a

total of $1,094,476.25. In addition, the petitioner indicated that his investment was composed of $98,339.05 in a U.S. bank account, $5,466,141.37 in assets purchased for the business, $3,816,130.51 in debt financing, and $0 in stock purchases. In support of this claim, the petitioner submitted his own letter explaining his investment.

At the outset, we note that in contrast to the claim on the petition that the petitioner owns 50 percent of HHL,[2] in his letter he asserts that he actually owns 50 percent of Asian ShoeSourcing Ltd. (ASSL), which in turn is the 100 percent owner of HHL. While an analysis of this issue requires us to evaluate evidence submitted later in the proceedings first, it is necessary to resolve the ownership of HHL before we can properly analyze the investment in it. The petitioner has submitted 1998, 1999, 2001 and 2002 Forms 1120-F U.S. Income Tax Returns of a Foreign Corporation for ASSL. Line Q on page 2 of this form asks whether the corporation owns, directly or indirectly, 50 percent or more of the voting stock of a U.S. corporation. On every Form 1120-F in the record, the question is answered in the negative.

Moreover HHL is organized as a subchapter S corporation. The Internal Revenue Service (IRS) regulation at 26 C.F.R. § 1.1361-1 (b) and (f) precludes S-corporations from having corporate shareholders with limited exceptions not shown in this case. Thus, despite the petitioner's initial claim and counsel's similar claim on appeal, we cannot conclude that HHL is a subsidiary of ASSL, much less a wholly owned subsidiary as is required by the regulation at 8 C.F.R. § 204.6(e)(definition of commercial enterprise).

In light of the above, we will consider only HHL as the commercial enterprise, and any investment by the petitioner into ASSL, a Hong Kong corporation, is irrelevant.[3] Counsel's additional arguments regarding transfers from ASSL will be considered below.

In his letter, the petitioner claimed to have invested through four means. First, the petitioner claimed to have invested in HHL through an $872,000 loan obtained by ASSL for which the petitioner signed as a guarantor. The petitioner asserted that the loan was secured by property at [redacted] allegedly owned by the petitioner and his partner, [redacted] Second, the petitioner claimed credit for $668,514.57 in "advances" made by ASSL to HHL. As the petitioner is a 50 percent owner of ASSL, he claimed only half of the two investments listed above, or $770,257.30.

Third, the petitioner claimed to have transferred $250,000 directly from his personal account at Coutts & Co. "to reclassify an advance to HHL that was originally made by Asian Shoesourcing." Finally, the petitioner claimed to have made various payments directly to HHL totaling $73,807.76.

We will consider the evidence and assertions regarding each source below.

<u>Half of $872,000 ($436,000) Loan from ASSL</u>

The petitioner submitted a summary of this investment as initial exhibit C-1. While the description for each transaction is "advance" or "advance activity," it is clear that these transactions constitute withdrawals on

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[2] The record does not consistently support this claim either. The petitioner's partner, Jon Allen lists himself as the 100 percent owner of HHL on his 1999 Schedule K-1 for HHL. In subsequent years, while the petitioner filed a schedule K-1, his percentage interest is listed as 39.481 percent.

[3] Even if we did consider ASSL to be the holding company, its tax returns only reflect stock and additional paid in capital of less than $600,000. The petitioner is a 50 percent owner of ASSL. Thus, the record does not reflect a $1,000,000 investment into ASSL by the petitioner. Moreover, the record contains no transactional evidence that the petitioner has transferred funds to ASSL for the benefit of HHL.

ASSL's credit line with TIB Bank, which were in turn loaned to HHL. Specifically, the petitioner submitted Adjusted Trial Balances for HHL as of December 31 of 1999, 2000, 2001 and 2002. On these trial balances, account 2253 is characterized as a "Note Payable – TIB Credit Line." The activity in this account reveals a balance of $296,913.71 in 1999, $160,926.73 in 2000, $540,958.19 in 2001, and $872,822.41 in 2002. The petitioner also submitted credit line statements for account 060802044264 with TIB Bank of the Keys. The account holder is ASSL. The balances for these accounts conform with the numbers listed above.

The petitioner also submitted a 1999 Form 140G entitled "Hildenborough Hotels Ltd., Inc. Note Payable – TIB." The form states:

> A related corp. obtained an equity loan on real estate that it owns. All of the loan proceeds went directly to Hildenborough and Hildenborough has made all debt payments.

The petitioner also submitted a loan document whereby ASSL borrowed $878,000 from TIB Bank of the Keys on September 17, 2001. The petitioner and HHL are all guarantors of the loan. The loan is also secured in Key West, Florida.

On December 8, 2003, the director requested additional evidence of the petitioner's claimed investment, stating that loans from a corporation owned by the petitioner could not be considered a qualifying investment. The director cited *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) and *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958), for the proposition that a corporation is a separate and distinct legal entity from its owners or stockholders. The director requested all security agreements.

In response, counsel implies that the petitioner is the ultimate source of the funds transferred by ASSL to HHL, that such a transfer is similar to the transfer of fixtures, and that, alternatively, the funds were invested by ASSL on behalf of the petitioner and can be considered a gift from ASSL to the petitioner. Counsel does not address the director's concerns that the funds from ASSL to HHL were loaned, stating only that HHL does not owe *the petitioner* any funds. Counsel relies on a nonprecedent decision, which he does not provide, allegedly issued by this office in 1997 prior to the four precedent decisions issued by this office dealing with investor petitions. The petitioner submitted an appraisal of 708 Eaton Street reflecting that the property is owned by ASSL, not the petitioner.

The director noted that the appraisal lists ASSL, not the petitioner, as the owner of and concluded that the petitioner had not placed his personal assets at risk. The director further concluded that even if funds from ASSL were considered, they were loaned to, not invested in, HHL. On appeal, counsel asserts that the regulations do not bar an investment by another entity owned by the petitioner and, in contrast to his assertion that ASSL is the holding company of HHL, implies that ASSL gifted the funds to the petitioner.

At the outset, the record does not support counsel's implication that the funds transferred to HHL by ASSL derived from the petitioner. Rather, the funds derived from ASSL's credit line with TIB Bank of the Keys. A more complete analysis follows.

First, we concur that any investment by ASSL cannot be considered the petitioner's investment. While the regulations and precedent decisions do not specifically address this exact fact pattern, they support our conclusion. As quoted above, the definition of capital requires that the petitioner be personally and primarily liable for the investment. Moreover, the principle that a corporation is a separate entity from its shareholders

has been extended to investor petitions in *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Specifically, in evaluating evidence submitted to demonstrate source of funds, *Matter of Izummi* held that demonstrating the income of the alien's corporation was insufficient evidence of the alien's personal income. *Id.* In this case, the petitioner has not demonstrated that his personal assets are at risk. As stated by the director, [redacted] is owned by ASSL and while the petitioner asserts that a creditor could seize his interest in ASSL, a Hong Kong corporation, the petitioner has not demonstrated the value of this interest after the costs of seizing it or even that this interest is subject to seizure by a U.S. creditor. *See generally Matter of Hsiung* 22 I&N Dec. 201, 203-204 (Comm. 1998). Finally, this office has a consistent history of rejecting investments made by a corporation instead of the alien petitioner.

Second, while we would consider evidence that ASSL transferred the funds on behalf of the petitioner, the record contains no evidence that the funds transferred from ASSL to HHL constituted a gift, wages, officer compensation or a dividend. The record contains no evidence that the petitioner reported a gift to tax authorities in either the United States or the United Kingdom in 1999 or 2000. Moreover, the petitioner has not established that it is an accepted business practice to borrow funds on credit to gift to a shareholder. ASSL's 1999 and 2000 tax returns reflect no deductions for wages, officer compensation, or distributions of cash. Again, the petitioner has not established that it is an acceptable business practice to borrow funds on credit to issue a dividend to a shareholder. Thus, the petitioner has not submitted evidence to support the assertions of counsel, which, by themselves, do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Third and finally, at no point has the petitioner or counsel addressed the director's concern, stated specifically in both the request for additional evidence and in the denial, that ASSL lent the funds to HHL. The record reflects that HHL has been repaying these loans. The regulatory definition of invest quoted above clearly states that loans to the new commercial enterprise cannot be considered a qualifying investment. Thus, we concur with the director's concerns on this issue.

<u>Half of $668,514.57 ($334,257.29) in "Advances"</u>

In support of this claim, the petitioner submitted a summary of transfers from ASSL to HHL in 1999 and 2000. The summary then subtracts loans from ASSL reclassified as loans from the petitioner ($254,911.83) and [redacted] ($15,068.25), leaving a total of $668,514.57. The adjusted trial balances for 1999 and 2000 reflect that account 2254, "Note Payable – Asian Shoesourcing," had a balance of $940,325.63 as of December 31, 1999 and $931,733.12 in 2000. The petitioner also submitted bank letters and bank statements for ASSL's account with London's Coutts & Co. for the following transactions:

December 15, 1998, $100,000 to The Real Estate Company of Key West
January 1999, $4,640 to [redacted]s account at TIB Bank of the Keys
March 25, 1999, $5,300 to [redacted]
March 25, 1999, $8,000 [redacted]
May 18, 1999, $100,000 to The Real Estate Company of Key West
May 21, 1999, $25,000 to [redacted]or the petitioner
June 2, 1999, $425,000 to HHL

The petitioner also submitted evidence of a $440 payment to [redacted] by ASSL on February 3, 1999. A partially obscured "Statement for Professional Services" from [redacted] reflects that he performed services in January 1999 relating to the possible purchase of an unidentified parcel as well as financing and architectural services. The only names mentioned in the legible portion of the statement are [redacted] and Joe Schroeder. An adding machine tape copied over part of the statement reveals a total of $26,189.48.

A handwritten notation references ASSL records, but the legible portion of the typed statement does not. Two other letters in the file are addressed to the seller of Island House and signs the letters as the attorney for the petitioner and

The petitioner also submitted credit card statements for ASSL reflecting numerous highlighted expenses. The expenses reflect restaurant tabs and purchases at such businesses as Waldenbooks, K-Mart and Clone Zone. A compilation of the expenses follows with the title "Island House – Loan." Some expenses are deducted as "personal." The record does not include an explanation for how the remaining expenses relate to HHL other than to assert that they do. A December 31, 1999 Form 144G, entitled "Loan Payable – ASSL" lists a loan balance of $940,325.63 after deductions for misposted personal expenses and shareholder loans. The December 31, 2000 Form 144G provides a loan total of $931,733.12. A Form 140G for 2001 reflects an additional loan from ASSL of $6,000. The evidence also reflects continuous loan repayments by HHL throughout this period and in 2002.

The record includes two settlement documents. The first settlement document is for in Key West, Florida, purchased by HHL on June 4, 1999 for $3,776,650.88, $2,600,000 of which was borrowed. The settlement agent is This loan was secured by property located in Monroe County, Florida. The second settlement document is for the purchase of , Florida, purchased on June 15, 2001 for $509,322.81, $500,000 of which came from HHL's assumption of the seller's mortgage. The settlement agent is The contract for this purchase authorizes The Real Estate Company as the escrow agent. The Real Estate Company is also listed as the Cooperating Broker and HHL's agent.

In his request for additional documentation, the director expressed the same concerns regarding this claim as stated above. Counsel's response is provided above. In addition, both counsel and the petitioner acknowledge that the $2,600,000 loan is not part of the petitioner's investment. Although the petitioner makes no such claim regarding the first investment method, he states that HHL never signed a promissory note to repay the $668,514 loaned by ASSL. The summary of the investment submitted as exhibit C11 reveals that HHL repaid ASSL $9,977.60 in 2000, $24,958.68 in 2001, and $24,529.02 in 2002. Yet, HHL declared a loss on its taxes for each of those years. Thus, whether or not the funds were loaned or "advanced," the "investment" was not sustained. Moreover, the record does not allow us to trace all the funds discussed above from the petitioner through ASSL to HHL. Finally, the record contains minimal evidence that the funds were used for business expenses relating to HHL.

<u>$250,000 Reclassification of Advances</u>

In support of this claim the petitioner submitted a statement from reflecting a June 2, 1999 transfer from the petitioner to a trust account held by and another statement reflecting that ASSL transferred £160,000 to the petitioner's account on May 21, 1999.

The December 31, 2002 balance sheet reflects $147,615.53 in "owner's capital" and $1,000 in stock. Handwritten[4] next to "owner's capital," however, is "s/h loans." Moreover, the adjusted trial balances

[4] While the phrase is handwritten, it is part of the photocopy. Thus, it appears to be part of the document submitted, and not added by anyone at U.S. Citizenship and Immigration Services.

referenced above reflect adjusted balances for loans from stockholders as follows: $107,336.49[5] in 1999, $171,630.09[6] in 2000, and $156,910.07 in 2001.

The petitioner submitted HHL's tax returns, including Schedule L, reflecting the following shareholder loans: $107,336 in 1999, $171,630 in 2000, $697,868 in 2001 and $1,020,438 in 2002. The adjusted trial balances and HHL's tax returns, Schedule L, reflect $1,000 stock and no additional paid-in-capital in all years submitted.

In the request for additional evidence, the director questioned the use of loans as an investment. In response, counsel asserted that while U.S. Citizenship and Immigration Services (USCIS) "classified these payments as loans, they are actually advances." Counsel quotes the definition of an advance as funds furnished before they are due. According to Barron's Dictionary of Accounting Terms 18-19 (3rd Ed. 2000), however, advances are recorded as liabilities, not as equity, when preparing financial statements. Counsel further states that HHL has no obligation to repay the "advances" from the petitioner.

The petitioner provides a personal statement making similar remarks. Both counsel and the petitioner assert that the petitioner classified his alleged investment as an "advance" instead of equity so "if the enterprise turns a profit I can receive a return on my investment." (Emphasis in original.)

The director concluded that HHL's tax returns did not reflect a capital contribution of $250,000 at any time. On appeal, counsel challenges the director's failure to cite any legal provisions for the proposition that the tax treatment of contributed funds is decisive. The petitioner submitted tax returns that, one their face, show no more than a $1,000 capital investment and considerable shareholder loans. Given the information on the tax returns submitted to the director as evidence and which were presumably filed with the Internal Revenue Service (IRS), we find that we do not have to support our reliance on this documentation. Rather, we find that it is the petitioner's burden to establish that tax law permits a tax filer to misrepresent an equity investment as a shareholder loan.

Moreover, while counsel notes that the December 31, 2002 balance sheet reflects $939,935.31 in paid in capital, the adjusted trial balances are more consistent with the tax returns, showing little capital and significant shareholder loans. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's bare assertion that we should accept an unaudited balance sheet despite the inconsistent information on the adjusted trial balances and the tax returns is not persuasive.

Finally, in addressing previous arguments by counsel, neither counsel nor the petitioner has explained how an advance entitles the petitioner to more profits than a loan or an equity investment. A loan would place the petitioner in the position of creditor and legally guarantee the petitioner a return on his "investment." A true equity investment entitles the owner to a distribution of profits. Barron's Dictionary of Accounting Terms, *supra*, provides for two types of advances, either a prepayment for services to be rendered or money given to an employee before it is earned. Neither definition appears to entitle the payor of an advance to business

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[5] The unadjusted balance is $1,333,013.89 with various debit and credit adjustments resulting in the adjusted balance listed.

[6] The unadjusted balance is $1,252,437.74 with various debit and credit adjustments resulting in the adjusted balance listed.

profits. The petitioner has provided no accounting provision or principle that allows an individual to make profit on an advance.[7]

$73,807.76 in Direct Payments from Petitioner

In support of this claim the petitioner submitted the December 31, 2002 adjusted trial balance reflecting $147,615.53 in shareholder loans and a summary asserting that 50 percent of that loan is allocated to each of the two shareholders. In addition to the problems discussed above, we note the lack of evidence tracing the path of these funds from the petitioner to HHL.

Summary

The record contains inconsistent information regarding whether the funds paid directly by the petitioner to HHL were loans or capital. The petitioner has not satisfactorily resolved those inconsistencies. Moreover, even if we accepted these funds as an investment, they fall far short of the required investment of at least $1,000,000. The petitioner has not demonstrated that the funds transferred from ASSL constitute the petitioner's personal investment. Regardless, the petitioner has not even attempted to challenge the director's conclusion, supported overwhelmingly by the record, that ASSL loaned those funds to HHL.

EMPLOYMENT CREATION

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:
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> (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
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> (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.

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.

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[7] We acknowledge that cash advances from credit card companies allow the credit card companies to make money, but only by requiring that the payee pay interest on the advance and ultimately repay it, making the transaction more like a loan than an equity transaction.

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 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs. On the petition, Part 4, the petitioner indicated that he had created a new commercial enterprise resulting from the creation of a new business. On Part 5, the petitioner indicated that the business employed no workers at the time of his investment and currently employed 17, with no additional jobs projected.

While 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), removed the requirement that the petitioner personally establish the new commercial enterprise, whether the petitioner did so is still relevant in determining whether the petitioner created 10 *new* jobs. The rider attached to the sale contract for 1129 Fleming Street states that the contract "consists of all the assets, business and property, including all the personal property, equipment, fixtures, machinery and inventory used in the operation and maintenance of all the real estate and business known as Island House." In Part 7.G, the seller agreed to continue operating the business until closing. In Part 9.E, the seller assigned all advance reservations and deposits of guests. Thus, it is clear that the petitioner actually purchased an existing business and his claim that there were no employees at the time of his investment is questionable. The petitioner's apparent misrepresentation of that fact and his actual ownership percentage in HHL (discussed *supra* n.2) reduces his overall credibility.

While the petitioner has submitted evidence documenting employment at HHL in 2003, the record contains no evidence of how many workers were employed at Island House prior to HHL's purchase of the hotel. Thus, we cannot determine whether the petitioner has created any new jobs.

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.