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U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFRONIA SERVICE CENTER Date: JAN 18 2005

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the approval of the preference visa petition. The matter 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).

On March 24, 2001, the director approved the petition. Upon review in conjunction with the petitioner's application to adjust status, the director determined that the record was deficient. On July 31, 2003, the director issued a notice of intent to revoke. The director considered the petitioner's subsequent response and, on November 20, 2003, issued a final notice of revocation. In that notice, the director concluded that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds.

On appeal, counsel[1] focuses on the issue of the source of the petitioner's invested funds. As will be discussed below, we find counsel persuasive on this issue. As will also be discussed below, however, we find that the petitioner has not overcome the director's concern regarding the petitioner's alleged investment of at least $500,000. Before we discuss the merits of the director's decision, however, counsel also raises procedural concerns both initially and in a subsequent brief filed more than 30 days after the appeal was filed. In his initial brief, counsel recites the procedural history of this petition, asserting that the director was "heartless" to revoke the approval of the petition given the petitioner's status as a sole proprietor and the hardships his children will suffer. Subsequently, counsel asserts that the decision in *Firstland International, Inc. v. Ashcroft,* 377 F.3d 127 (2d Cir. 2004), renders the revocation without effect.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988). The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

There is no provision that allows a lower burden of proof for sole proprietors seeking benefits as an alien entrepreneur. Similarly, there is no provision that would allow us to consider hardship claims resulting from the procedural history that includes a decision to revoke the approval of the petition. Counsel's hardship claim is essentially an estoppel claim. The federal courts, however, have not applied the principal of estoppel to administrative decisions. As stated in *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985):

> It has not been determined that estoppel will lie against the Government in immigration cases. *See INS v. Miranda*, 459 U.S. 14 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308 (1961); but see *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Even if we assume that estoppel would apply to the Government in some cases, the respondent here has failed to show the elements necessary for equitable estoppel. In order to show estoppel, the respondent would

[1] The petitioner initially filed the petition as self-represented. Counsel represented the petitioner in his response to the director's request for additional documentation. In 2003, the petitioner retained a different attorney to respond to the director's notice of intent to revoke. Although the attorney who filed the appeal is the attorney who responded to the director's first request for additional documentation, we will refer to the attorney who responded to the notice of intent to revoke as "prior counsel" as that attorney no longer appears to represent the petitioner. We note that a new G-28 for present counsel was submitted on appeal.

> have to prove affirmative misconduct on the part of the Government or its agent, that he reasonably relied on the action or representation of the Government, and that he was prejudiced thereby. *Heckler v. Community Health Services of Crawford County, Inc.*, *supra*, at 59.

The Board then provided several examples where affirmative conduct had been ruled out, citing *Matter of Tayabji*, 19 I&N Dec. 264 (BIA 1985) (a district director's approval of an alien's application for a waiver under section 212(e) of the Act, 8 U.S.C. § 1182(e) (1982), in excess of his authority); *Matter of Morales*, 15 I&N Dec. 411 (BIA 1975) (the Service's erroneous approval of a visa petition); *Matter of Polanco*, 14 I&N Dec. 483 (BIA 1973), and *Matter of Khan*, *supra*, (immigration inspectors' admission of inadmissible aliens).

Moreover, the petitioner has previously obtained a nonimmigrant treaty trader or investor visa pursuant to Section 101(a)(15)(E), which has far less stringent requirements than the immigrant benefit currently sought. This type of nonimmigrant visa can be extended indefinitely pursuant to 8 C.F.R. § 214.2(e)(20)(iii). Thus, the denial of the adjustment application relating to the instant petition need not place the petitioner at risk for deportation. We note however, that, if appealed, the director's decision on the instant petition is not final until this office issues the appellate decision.

As stated above, in a supplementary brief, counsel draws the AAO's attention to a recent opinion, *Firstland Int'l*, 377 F.3d at 127, issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland Int'l*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, Citizenship and Immigration Services (CIS) may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.[2]

According to the record of proceeding, the petitioner lives in California; thus, this case did not arise in the Second Circuit. *Firstland Int'l* was never a binding precedent for this case. Even as a merely persuasive precedent, moreover, *Firstland Int'l* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, __ Stat. __ (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

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[2] Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant E-2 Treaty Investor on April 5, 2000, two months prior to the filing of the Form I-526 immigrant petition and more than three years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited to file the petition after he or she arrived in the United States.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland Int'l* argument no longer has merit.

The petitioner in this case has been afforded all the process that is required in revocation proceedings pursuant to the regulation at 8 C.F.R. § 205.2. Specifically, the director issued a notice of intent to revoke advising the petitioner of the deficiencies in the record and allowed 30 days to respond. In addition, the petitioner had the opportunity to appeal the director's adverse decision to this office, which he has done. The only issue is whether the petition was approved in error; specifically, whether the petitioner has established his eligibility for the classification sought.

Counsel also attempts to distinguish the facts in *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972) and the four investor precedent decisions: *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998), *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998), and *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998). We do not find this discussion persuasive. While *Matter of Treasure Craft* does not involve an investor immigrant petition, this office has a long and consistent history of relying on that case for the proposition that unsupported assertions are not evidence in all matters before us, including in precedent decisions. For example, the case is cited for that proposition in an investor case, *Matter of Soffici*, 22 I&N Dec. at 165. Further, while the four investor precedent decisions deal with different fact patterns, we find the principles and regulatory interpretations set forth in those decisions are binding in the adjudication of investor immigrant petitions and the director did not err in citing them. Nor do we find that the director's characterization of these 1998 decisions as "recent" implies that the issuance of these decisions, admittedly before the petition was even filed, triggered a reconsideration of the approval.

Finally, counsel appears to argue that the regulatory requirements that a petitioner affirmatively demonstrate the lawful source of the invested funds exceed the requirements of the pertinent statute. First, counsel provides no federal precedent striking down the relevant regulation. In fact, a federal court has specifically upheld the source of funds regulation. *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). Thus, the regulation is binding on us.

In addition to the above procedural arguments, the petitioner submits new evidence in an attempt to overcome the director's concerns. We will address that evidence now.

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, Mulligan's Pub and Restaurant, 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.

SOURCE OF FUNDS

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. at 210-211; *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 Treasure Craft of California*, 14 I&N Dec. at 190; *Matter of Soffici*, 22 I&N Dec. at 165. These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1040 (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).

On appeal, counsel asserts that the director should not have inquired into this issue as the petitioner has received nonimmigrant investor visas and, thus, has already demonstrated the lawful source of his funds. Each petition must be adjudicated based on the evidence of record. An approval of a nonimmigrant visa does not mandate approval of an immigrant visa in a similar classification; especially, as in this case, where the regulatory requirements for the two classifications are significantly different. Counsel further asserts that the use of the word "or" in the regulation quoted above means that a petitioner need only submit one type of documentation. We cannot agree. The regulation states that the evidence must be submitted "as applicable." Where the ultimate source of the investment is the petitioner's occupational income, evidence of that income,

such as tax returns, is clearly "applicable." Nevertheless, the petitioner submits new evidence on appeal. We will consider that evidence below.

Initially, the petitioner submitted no evidence of the lawful source of his funds. In response to the director's October 25, 2000 request for additional documentation, the petitioner submitted transactional documentation tracing approximately $431,541[3] from the petitioner's account at Ulster Bank in Ireland to U.S. accounts held by the petitioner and Mulligan's. The petitioner also submitted evidence that he sold a house in September 1995 for $840,000. That evidence included a certificate under the Capital Gains Tax Act which reads: "I hereby certify that the sum representing the amount of capital gains tax specified in Paragraph 11 (2), Schedule 4, Capital Gains Tax Act, 1975, *should not be deducted* from the consideration amount to £525,000 payable under a contract for the disposal and acquisition of Toranfield House." (Emphasis added.)

In the notice of intent to revoke, the director concluded that the record did not establish how much the petitioner actually received from the sale of his house after taxes. In response, prior counsel argued that the evidence submitted was sufficient. The petitioner submitted his personal tax returns for 1994 through 2002. While prior counsel asserted that this submission was more than the five years of tax returns required, we note that tax returns reflecting the petitioner's income after the date of investment cannot demonstrate the lawful source of those invested funds. The petitioner also submitted evidence that his first wife had no legal claim to the proceeds of the sale of his home in 1995.

The director concluded that the petitioner had still not demonstrated how much income the sale generated after taxes or that he had legitimate business interests in Ireland. On appeal, although arguing that additional documentation was not required, the petitioner submits new documentation addressing the director's concerns. Specifically, the petitioner submits a letter from Managing Director of Taxation Consultants Ltd. in Ireland, referencing the certificate discussed above and asserting that the firm represented the petitioner with the sale of his property in 1995 and that no taxes were owed. In a separate letter, Mr. asserts that he prepared the petitioner's tax returns from the mid 1980's through 1994 and that Irish law does not require the government to keep records more than six years. Mr attaches a copy of the relevant law. The petitioner also submitted several newspaper articles attesting to the success of the petitioner's horseracing investment.

We find that the record adequately establishes that the petitioner received the full amount from the sale of his house in 1995, without any payment of taxes. Moreover, the newspaper articles regarding the petitioner's investment in racehorses cover several years, going back to 1989. Given the record as a whole, we find that the petitioner has adequately overcome the director's concerns regarding source of funds.

INVESTMENT OF CAPITAL

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

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[3] The petitioner submitted debit advices from Ulster Bank reflecting debits withdrawn for the benefit of the petitioner of $15,643.65 on October 17, 1994, $12,144 on November 10, 1994, and $151,925.96 on November 14, 1994. The petitioner also submitted a check issued on an Ulster Bank account to the petitioner for $237,450 dated September 5, 1995. Finally, the petitioner submitted a wire transfer receipt reflecting the transfer of $14,377.39 from Ulster Bank to the U.S. The petitioner also submitted a June 23, 1995 Foreign Draft document, but the portion with the amount transferred is cut off.

> *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.
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> * * *
>
> *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.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. at 179.

On the petition, the petitioner indicated, somewhat inconsistently, that he had invested $700,000 on November 1, 1995, with a current total investment of $624,000. On Part 4 of the petition, which is supposed to relate to the commercial enterprise, the petitioner indicated that it had $46,100 in cash, $451,567 in assets purchased by the petitioner, $700,000 in property that the petitioner had transferred from abroad, $499,560 in debt financing, $330,275 in capital from stock purchases (despite being a sole proprietorship) and $450,000 in other assets. In support of the petition, the petitioner submitted a compiled financial statement relating to his own financial condition. This statement reveals that the above amounts listed on Part 4 of the petition relate to the assets of the petitioner, not the business. Specifically, the statement of the petitioner's financial condition provides:

Assets:

	Cost	Estimated Fair Market Value
Cash – Bank of America	$ 46,110	$ 46,110
Investments/Stock –	330,375	330,375
Personal Residence	385,000	750,000
Rental Property . . .	209,000	225,000
Business – Mulligan's Bar and Restaurant	**242,567**	**685,000**
Personal Assets	65,000	65,000
Total Assets	$1,277,952	$2,202,385

Liabilities and Net Worth

[Bank loan] secured by personal residence	$ 499,560	$ 499,560
Total Liabilities	499,560	499,560
Net Worth	778,392	1,601,825
Total Liabilities and Net Worth	$1,277,952	$2,202,385

(Emphasis added.) The financial statement is the result of a compilation, not an audit, and, as such, has limited evidentiary value. We note, however, that it suggests that while Mulligan's may have accrued in value on its own, the petitioner's personal investment in Mulligan's was only $242,567. As will be detailed below, this number is consistent with the remainder of the record.

In response to the director's request for additional documentation, the petitioner submitted Mulligan's 1999 depreciation schedule. The schedule reflects purchases between November 1, 1995 and June 1, 1999 and covers everything from improvements to equipment to fixtures to the liquor license. The total amount of these costs (bases) is $242,567. The petitioner also submitted his 1999 personal tax return, listing the business address as his "home address." The return includes Schedule C, where the income and expenses of Mulligan's are represented. On the petitioner's Schedule B, he indicated that he received $11,047 in interest from a "Mulligan's Note." Schedule C reflects that Mulligan's paid $4,694 in "other interest." In addition, Schedule E reflects that the petitioner also owns an interest in Mulligan's Irish Pub, LLC, with a different Employer Identification Number. The petitioner also submitted Form 571-L, Business Property Statement for

1999. On this form, the petitioner indicated that Mulligan's had $62,359 in equipment and $120,786 in Buildings, Building Improvements, and/or Leasehold Improvements, Land Improvements, Land.

In addition, the petitioner submitted evidence tracing funds from the petitioner's account in Ireland to U.S. accounts held by the petitioner and Mulligan's. Specifically, the petitioner submitted evidence of the following debits (-) and deposits (+):

Ulster Bank Limited (Ire) Account 9452800100	Bank of the West (U.S.) Account 186-0118-47	Bank of the West Account 186-0784-32	Bank of the West Account 186-0842-73	Bank of the West Account 186-8609-12
Oct. 10, 1994 -$15,643.65 (wire trans. to 186-0784-32)	Nov. 21, 1994 +$155,000	May 10, 1995 +$70,090	Oct. 11, 1995 +$200,000	Sept. 8, 1995 +$220,000
		Oct. 11, 1995 +$20,867.95		Oct. 11, 1995 -$220,867.95 (trans. to 186-0784-
Nov. 10, 1994 32 -$12,144 (wire trans. to 186-0784-32)		Sept. 8, 19995 +$17,450		and 186-0842-73)
		Nov. 14, 1995 +$50,000		
Nov. 14, 1994 -$151,925.96 (wire trans. to 186-0784-32)		Dec. 1, 1995 +$50,000		
June 23, 1995 -$14,377.39 (wire trans. to 186-0784-32)		Dec. 21, 1995 +$25,000		
Sept. 5, 1995 -$237,450 (check[4])				

The petitioner ordered two of the debits from the Ulster Bank, while [redacted] ordered the third. Thus, the petitioner appears to be at least one of the account holders of that account. The account holder for account 186-0118-47 is Mulligan's. The account is characterized on the bank statement as a "business checking account." The account holder for 186-0784-32 is the petitioner. The account is characterized on the bank statement as a "personal check plan account." The account holder for 186-8609-12 is the petitioner.

In the notice of intent to revoke, the director noted that the record only reflected that $155,000 of the transferred funds were demonstrated as being deposited in an account held by Mulligan's. In response, prior counsel asserted that the petitioner had invested a total of $629,591.07 in the following amounts in 1994 and 1995:

10/17/94	$15,582.83	11/10/94	$12,090	11/21/94	$155,000	05/10/95	$70,090
06/23/95	$14.377.39	09/8/95	$17,450	09/8/95	$220,000	11/14/95	$50,000

[4] We note that the check issued by Ulster Bank does not reflect the account number or account holder of the account from which the funds were debited.

12/1/95 $50,000 12/21/95 $25,000

Prior counsel further asserted that the petitioner had spent $60,000 "acquiring the liquor license and initial inventory from the owner of the previous business" and $100,000 "toward construction services prior to its opening in December 1994." Prior counsel does not explain how the petitioner expended capital for Mulligan's after December 1994.

The petitioner submitted deposit slips documenting the deposits previously documented. The wire receipts issued by Bank of the West for the amounts wired from Ulster Bank in 1994 reveal that of the amounts debited from Ulster Bank, only $15,582.83, $12,090.85, $151,842.16, and $14,377.39 were actually deposited with Bank of the West after transfer fees. The petitioner also submitted for the first time a "Purchaser's Record" issued by Bank of the West for a cashier's check in the amount of $34,000 dated July 19, 1995. The check is payable to the Fidelity Title Company and contains no information regarding the number of the account from which the funds were debited. The petitioner submitted no evidence that this was a business expense.

The petitioner also submitted a letter from Vice President and Branch Manager for Bank of the West. Mr. asserts that the petitioner maintained business "accounts" for Mulligan's in which the petitioner deposited more than $500,000 in 1994 and 1995. Mr. asserted that the bank no longer has records from 1994 and 1995 and that he based his statements on the bank transactional documentation provided by the petitioner.

Finally, the petitioner submitted his personal tax returns from 1994 to 2002. The petitioner's 1994 Schedule C for Mulligan's reflects $20,692 for inventory and $6,308 ($2,980 in Part III and $3,328 in Part II) for supplies. The record contains no Schedule C for 1996 and in 1997 Mulligan's began paying interest reflected in some years as a mortgage and in other years as "other" interest.

The director concluded that the petitioner had still not established that more than $155,000 was deposited with asserting a lack of documentation relating to the holder for account The director questioned whether Mr. was including the deposit of normal business receipts in his determination.

On appeal, counsel does not address the issue of the petitioner's investment in her 21-page brief, instead focusing on the source of funds issue discussed above. In her cover letter, counsel asserts that account belongs to the petitioner and that the funds were subsequently dispersed to "two known accounts and The petitioner submits a new letter from Mr , asserting that the petitioner purchased a certificate of deposit on September 9, 1995, account and that the funds were transferred to and on October 11, 1995. Mr. concludes: "Accordingly[,] funds were used for the operation of Mulligan's Restaurant." Mr. encloses the documents confirming these transactions. While these documents confirm that the petitioner was the account holder of these documents do not indicate the account holder for the accounts to which the funds were dispersed. Other documentation in the record establishes that the petitioner is the account holder for Contrary to counsel's assertion, the record contains no evidence regarding the account holder for

The petitioner's apparent choice to place business funds in a personal account, possibly mixing them with personal funds, does not relieve him of his burden to establish a qualifying investment. Mr. assertions, apparently based on the same transactional documentation present in the record, are not supported by those documents. The record contains no evidence that the petitioner paid business expenses out of the

accounts held in his own name. As the record still reflects no more than $155,000 transferred from the petitioner to [redacted] business account, we concur with the director's concerns.

Moreover, the record contains no evidence of capital expenses amounting to $500,000. Prior counsel lists only $160,000 for 1994 and 1995 (with none suggested for later years) and the depreciation schedule reflects only $242,567 for 1994 through 1999. Even if we add the costs for inventory and supplies from the 1994 Schedule C as start up expenses, the total is only $269,567. The petitioner has not explained what additional capital expenses he paid for the business in addition to this amount. The record contains no explanation for the payment of $34,000 on July 19, 1995 to Fidelity Title. We note that the petitioner indicated on his Form G-325A submitted with his application to adjust status that he began residing at his residence in 1995. It is not clear whether the payment to Fidelity Title represents the petitioner's payment towards his residence, a personal, non-business related expense.

In summary, the record lacks evidence that the Bank of the West accounts in the petitioner's name were used for business expenses and that [redacted] incurred $500,000 in capital expenses. As the petitioner has not demonstrated that he has invested or is actively in the process of investing the full $500,000,[5] 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.

[5] While the petitioner need not have invested the full amount at the time of filing, the remaining funds must be fully at risk at that time, evidence of a mere intent to invest the remainder at a future date is insufficient. 8 C.F.R. § 204.6(j)(2); *Matter of Ho*, 22 I&N Dec. at 210.