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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2010

WAC 07 046 50611

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.

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).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the evidence submitted to establish the lawful source of the petitioner's investment could not be deemed credible in light of an outstanding warrant for the petitioner in Taiwan alleging breach of trust and diversion of funds.

On appeal, counsel asserts that the charges against the petitioner are politically motivated and baseless, that the charges do not relate to the funds that were actually invested (according to evidence that was not found deficient) and that the final rule implementing the regulations requiring evidence tracing the lawful source of an alien's funds violates the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-554. For the reasons discussed below, counsel's assertions are not persuasive. As will be explained in more detail below, the alleged source of funds is a one-time payment of $1.5 million covering three years of alleged consulting services for a British Virgin Islands (BVI) company whose only contract for services is to a Chinese company that already employed the petitioner. This remuneration, for which the petitioner has never paid any income tax, far exceeds any other income earned by the petitioner throughout his career. This evidence cannot outweigh the petitioner's outstanding warrant alleging crimes for which we have no competence to evaluate as baseless. We stress that this is not a criminal proceeding. Thus, the burden is not on the government to prove the charges beyond a reasonable doubt. Rather, the question is whether the petitioner has established by a preponderance of the evidence that his funds derive from a lawful source. For the reasons elaborated below, we find that he has not.

Beyond the director's decision, the record demonstrates that the petitioner, who owns the new commercial enterprise with his wife, has merely placed the vast majority of the "invested" funds into company certificate of deposit (CD) accounts with business financial projects showing no major start-up costs or other capital expenditures through 2011. Thus, the "invested" funds are not at risk. Finally, the petitioner's business plan calling for the creation of at least 10 jobs is not credible.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Moreover, a Form I-526 petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

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, , 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

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;
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> > (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)).

At the outset, we must address counsel's assertion that the above regulation violates the APA's requirement for notice and comment set forth at 5 U.S.C. § 553(b). Specifically, counsel notes that the proposed regulation at 56 Fed. Reg. 30713 (July 5, 1991) did not include separate evidentiary requirements relating to the source of the invested funds. The proposed rule did, however, define capital as excluding assets acquired by unlawful means. In the commentary to the final rule, 56 Fed. Reg. 60897, 60904 (Nov. 29, 1991), legacy Immigration and Naturalization Service (INS) (now the U.S. Citizenship and Immigration Services (USCIS)), stated that specific evidentiary requirements relating to this issue were being included in the final rule to fulfill "Congress's instruction that 'processing of an individual visa not continue under this section if it becomes known to the Government that the money invested was obtained by the alien through other than legal means (such as money received through the sale of illegal drugs).' S. Reg. 101-55, p.21."

Counsel has not explained why implemented regulations, which have been incorporated into binding precedent decisions pursuant to 8 C.F.R. § 103.3(c) are not binding on the director or this office. We are not persuaded that we have the authority to disregard regulations we conclude were issued improperly. Counsel fails to identify any federal court decision that has thrown out the above-quoted regulation at 8 C.F.R. § 204.6(j)(3). In fact, at least one federal court has upheld the use of this regulation, stating that 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).

Moreover, the regulation was issued as a final rule in 1991. The precedent decisions interpreting this regulation, *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195; *Matter of Soffici,* 22 I&N Dec. at 165, were all issued in 1998. As stated above, Congress amended section 203(b)(5) of the Act in 2002. Congress is presumed to be aware of existing administrative and judicial interpretations of statute when it reenacts a statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress, at that time, could have taken any number of actions to limit, modify, or completely nullify the regulation at 8 C.F.R. § 204.6(j)(3). Instead, Congress merely removed the requirement that the petitioner personally establish the new commercial enterprise, specified that a new commercial enterprise could include a limited partnership and defined full-time employment.

In light of the above, we are bound by the requirements set forth at 8 C.F.R. § 204.6(j)(3), quoted above, as well as the abovementioned precedent decisions designated as such pursuant to 8 C.F.R. § 103.3(c). Thus, we will now address the evidence submitted in this matter in accordance with these legal authorities.

The record contains evidence that the petitioner has been affiliated with a company in Taiwan and four companies in China. The petitioner submitted compilations from the four Chinese companies for 2003 through 2005 reflecting total income of 809,100 yuan ($97,636) in 2003, 877,779 yuan ($105,929) in 2004 and 809,264 yuan ($100,174) in 2005.[1] The petitioner also submitted his 2005 Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return reflecting adjusted gross income of $174,808. In response to the director's June 4, 2007 request for additional evidence, the petitioner submitted his 2006 Chinese tax certification reflecting total income of 824,870 yuan ($105,393).[2]

Thus, the income on which the petitioner has paid income tax in a single country has never exceeded $174,808. Nevertheless, the petitioner submits an alleged contract between himself and organized in the British Virgin Islands although it does not appear to do any business there. According to a self-serving PowerPoint presentation in the record, AEC provides technical services to companies interested in manufacturing plant construction. In this agreement, the petitioner agrees to provide the following services:

1. Promoting the business of technology transfer of AEC's proprietary technology of Project Plants in PRC.

2. Market survey and feasibility study for the Project Plants in USA, Europe and PRC.

3. Upon the reasonable request of AEC, [the petitioner] shall assist in establishing and advising on the initial layout of Project Plants, inspect Project Plants and advise on its operational efficiency, examine and test raw materials used and Product produced by Project Plants, and assist Project Plants in the utilization of the Project Plants Technology.

4. Performs all Planning, Check, Review and Evaluation jobs necessary to prepare and maintain an efficient and professional overall coordination procedure.

5. Total coordination in the designing, engineering, equipment manufacturing and procurement, inspection for the Project Plants.

6. Conducting check and review and evaluation in relation to the engineering, equipment manufacturing and procurement, and inspection and execution for the Project Plants.

7. Providing all necessary professional assistance to expedite the engineering, equipment manufacturing and procurement, inspection and execution for the Project Plants.

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[1] The U.S. dollar amounts were calculated at http://www.oanda.com/currency/converter/ as of December 23rd of each year listed.

[2] The U.S. dollar amounts were calculated at http://www.oanda.com/currency/converter/ as of December 23, 2006.

The contract is dated April 1, 2003 and provides that the petitioner will be paid a lump sum of $1.5 million for three years of services on April 15, 2006. The record is absent any explanation as to why the petitioner is suddenly able to command such an increase in remuneration or why he would agree to wait three years for any remuneration.

The record does not include any annual reports for AEC. The only evidence that AEC is actually engaged in any business whatsoever is an April 20, 2004 "Umbrella Agreement" with Under this agreement, AEC agrees to supervise the revamping of a purified terephthalic acid (PTA) manufacturing facility. The petitioner, however, was Vice Chairman of XLP from 2002 through 2004, continued as a senior advisor after that date and has submitted evidence of independent compensation from XLP in 2003, 2004 and 2005. The record is absent any evidence as to why XLP would enter into an agreement with AEC that includes consulting services from the petitioner when he is already a high level employee of XLP.

Moreover, the actual payment of the $1.5 million was transferred from AEC's account at a Singapore bank. AEC's address on the bank's advice of transaction is in Taiwan. It is unclear why AEC, based in the British Virgin Islands, would pay the petitioner from a Singapore bank account that lists a Taiwan address for AEC.

Finally, the record contains the petitioner's 2006 Chinese tax return which does not reflect $1.5 million in taxable income. The petitioner has never submitted his 2006 U.S. tax return. Thus, the petitioner has never established that he paid any tax on his $1.5 million in income in 2006. While we recognize that the British Virgin Islands may offer some beneficial tax consequences for the companies that organize there, the petitioner has not submitted any evidence that he can receive $1.5 million in tax free remuneration simply because the remuneration is paid by a British Virgin Islands-based company.

Given the above, the evidence documenting the source of the $1.5 million the petitioner allegedly invested raises certain questions on its own. Moreover, as noted by the director, the petitioner is the subject of an outstanding warrant issued in Taiwan. As acknowledged by counsel, the warrant alleges that the petitioner and his wife diverted NT$885,675,000 from the capital of a member of the , and, while the funds were eventually returned, deprived the company of NT$8,351,423 ($317,201)[3] in interest.

The director advised the petitioner of this outstanding warrant on October 29, 2008. In response, the petitioner resubmitted a 1997 news story about his success running Tuntex Distinct Corporation with a foreword by then Minister of Economic Affairs of Taiwan. While the translation states that the article was "published by Business Weekly Publishing Co. (Taiwan)," the nature of this publication is undocumented. Regardless, a favorable article in 1997 does not preclude a legitimate finding of criminal activity at a later date. The warrant was not issued until June 3, 2003.

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[3] The U.S. dollar amount was calculated at http://www.oanda.com/currency/converter/ as of November 23, 1994, the date of the crime as identified on the warrant.

In addition, the petitioner submitted a "Legal Opinion Letter" from , a practicing attorney in Taiwan. asserts that loans among related companies were only permitted in Taiwan after November 12, 2001 and that the petitioner's actions were a method for issuing short term loans to other companies in the Tuntex Group. As intercompany loans are now permitted, asserts that the alleged misconduct is no longer illegal and that the prosecutor was thus only able to pursue the "rarely used" provisions of Taiwanese law relating to Breach of Trust. asserts that after November 12, 2001, there have been no prosecutions under the Company Law and that the petitioner is the only individual to be charged with breach of trust, raising questions about the "logic of the Prosecutors." then discusses the criminal elements of the crime of breach of trust and concludes that the petitioner's conduct does not amount to a breach of trust.

goes on to assert that the petitioner is unlikely to receive a fair pre-trial hearing or a speedy trial. states that the court was able to issue an order despite the petitioner's failure to appear in court and speculates that the court "decided not to proceed over the past few years because the case is based on a weak legal basis." concludes that the attention given to the investigation of the petitioner and his listing as a fugitive despite his "standing" demonstrates that "this case involved suspicion due to the motive and special handling involved."

The petitioner also submitted a letter from for from 1992 through 1995. reiterates that the transactions in question were devised to serve as intercompany loans and that they were all repaid. further states no shareholder at demanded compensation for lost interest.

The petitioner also submitted his own personal declaration in which he details the political basis for the charges against him, culminating in his refusal to testify against who ran for President of Taiwan as an independent candidate challenging the KMT party.

In addition, the petitioner submitted a letter from of the Center for East Asian Studies (1996-2002) at the University of California, Los Angeles. concludes that the reversal of the initial decision not to pursue charges against the petitioner demonstrates that the charges have no articulated legal basis and, thus, the eventual decision to pursue the charges was not made by an impartial agency on the basis of the facts. then reviews Taiwan's party politics and asserts that the Taiwanese judiciary lacks impartiality and is subordinate to the executive branch. Based on these discussions, concludes that the charges brought against the petitioner were politically motivated and are unfounded.

Finally, the petitioner submitted a 2005 article in the *Central Daily News* discussing the judiciary's handling of election lawsuits as an example of how the judiciary has lost its independence. The article also notes the failure of prosecutors to investigate political malfeasance. The article concludes that the petitioner was forced to leave the country or face political persecution.

The director concluded that the petitioner had not resolved the issue of the outstanding warrant and the charges therein. On appeal, counsel reiterates previous assertions.

The arguments raised by regarding the legitimacy of the charges under Taiwan law are not determinative. This body is not a criminal court in Taiwan and is not competent to determine guilt or innocence. The petitioner's decision not to appear in court and ultimately flee Taiwan without resolving the charges does not obligate us to accept the assurances of a Taiwanese lawyer that the charges are unfounded. We are also not persuaded that the record necessarily demonstrates that politics can be the only motive for the charges against the petitioner.

As stated by the director, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In addition, if USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The fact that the petitioner is a wanted fugitive with an outstanding warrant based on financial improprieties is certainly cause to reevaluate the evidence submitted to establish the allegedly lawful source of his "invested" funds. For the reasons discussed above, a review of the evidence submitted by the petitioner raises its own questions as it constitutes a huge increase in remuneration and comes from a company with little documented history other than a contract to perform services the petitioner was already performing for compensation as an employee of XLP.

In light of the above, we are not persuaded that the petitioner has demonstrated by a preponderance of the evidence that the funds transferred to PRT were lawfully obtained.

CAPITAL AT RISK

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.
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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.

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:
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> > (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 regulations provide that a 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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Matter of Ho*, 22 I&N Dec. 206, 209 (Comm'r. 1998). Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001) (citing *Matter of Ho*).

Matter of Ho, 22 I&N Dec. at 210 continues:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough.

On May 31, 2006 the petitioner transferred $1,200,000 to PRT. The evidence for this transaction includes: (a) a check issued by petitioner on East West Bank account, (b) a deposit slip for PRT's United Commercial Bank account and (c) a statement for account that includes the check to PRT and the May 30, 2006 wire transfer deposit of $1,499,983 from AEC.

PRT's statement for account (a Business Money Market account) shows $1,200,000 deposited on May 31, 2006. The August statement for the same account, however, also demonstrates the following transactions: (a) an August 2, 2006 Debit Memo for $100,000, (b) an August 3, 2006 check drawn for $500,000 and (c) an August 25, 2006 Debit Memo for $300,000. The ending balance for the account in August 2006 is $77,241.81.

The petitioner also submitted a statement for account , PRT's Business Checking account. This statement reflects (a) a deposit of $30,000 on July 7, 2006, (b) a credit memo for $100,000 on August 2, 2006, (c) a credit memo for $500,000 on August 3, 2006 and (d) a check issued for $500,000 on August 3, 2006. PRT also opened the following CD accounts:

1. A $500,000 CD opened July 7, 2006 for a 90 day period,

2. A $500,000 CD opened August 3, 2006, and

3. A $300,000 CD opened August 25, 2006, which expired November 25, 2006. A letter in the record requests that it be deposited back to the money market account.

Thus, the petitioner, who owns PRT jointly with his wife, was clearly depositing the vast majority of the "investment" in money market and CD accounts. As stated above, a mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Id.* at 209.

The petitioner did submit a lease for PRT's office space. Once again, however, the de minimus action of signing a lease agreement, without more, is not enough. The petitioner did submit a contract between PRT and ., whereby PRT would act as Dragon's agent in the United States and an agreement between Dragon and Kodak that does not mention PRT. We note that the petitioner is a senior advisor to Dragon and, thus, already represents that company in the United States.

The petitioner also submitted a business plan. Significantly, the expenses and revenues for 2007 through 2011 are projected on pages 18 through 21. The expenses for 2007 are projected to be $699,000. The revenue projected for 2007, however, is at least $39,600,000. Charts 17A through 17 project cash flow carryover from 2007 as at least $1,474,860. The business plan includes no major start up costs or other capital expenditure requirements within the next two years. Thus, it is clear that the petitioner's funds are not at risk.

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:
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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
>
> (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:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
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> * * *
>
> *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 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (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.

According to the petitioner's business plan, PRT will negotiate the import of Polyethylene terephthalate (PET) chips for use by U.S. manufacturers. The petitioner submitted a lease for office space, but no evidence that PRT will operate a warehouse for inventory. Rather, it appears that PRT will operate as a go-between for manufacturers of PET chips in China and users in the United States. The petitioner submitted a quarterly wage report for the third quarter of 2006 reflecting four employees during the final month of this quarter and five Forms I-9, one of which reflects that the

employee is a nonimmigrant. The business plan calls for the hiring of ten employees in addition to the company president by the end of its first year. The plan includes an organizational chart and job descriptions for most of the positions on the chart. The plan does not include a description for the inventory supervisor. As stated above, PRT is only renting office space, not a warehouse. It is not clear what duties an inventory supervisor would have.

A review of the lease, however, raises serious concerns regarding PRT's ability to create at least 10 jobs within its first year or even within two years. The lease indicates that PRT has leased 863 square feet, which entitles PRT to no more than three parking spaces for employees and invitees. Exhibit F-1 shows only two potential offices, one of which would presumably be for the company president. The petitioner also submitted a plan prepared by Commercial Services Group. The plan shows one office, a conference room and eight cubicles. Assuming the office is for the company president, that leaves only seven spaces for employees. Moreover, the record lacks evidence that the landlord has approved these improvements or approved PRT for more than three parking spaces. The record lacks evidence that 863 square feet is sufficient space for ten employees.[4] Thus, we are not persuaded that the petitioner has demonstrated that PRT can reasonably be expected to create 10 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.

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[4] Notably, an Office Space Use Review, Current Practices and Emerging Trends prepared by the Office of Governmentwide Policy, U.S. General Services Administration, provides:

> **The appropriate U.S. Government average for space use is 200 usable square feet per person, as compared to the U.S. private sector average of 250 usable square feet per person.** Based on the historical trend in the BOMA experience data, our analyses of the PBS inventory and lease prospectuses, and the benchmark data, we believe that this average is appropriate and typical for Federal space use in office type buildings. The 200 usable square feet per person average refers to total space (office plus associated storage and special space).

Available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/97spaceuse_R2P52_0Z5RDZ-i34K-pR.pdf, accessed December 24, 2009 and incorporated into the record of proceeding. While this report reflects standards for government space and is not binding, it would seem that 200 square feet per employee is at least a reasonable benchmark by which we could compare the petitioner's projections. Given that 863 square feet total only allows for 86.3 square feet per person, the petitioner's projections are somewhat suspect.