identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

B7

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 26 2009

SRC 08 099 50707

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), denied the preference visa petition. The Director, California Service Center (CSC), subsequently treated a late appeal as a motion pursuant to 8 C.F.R. § 103.3(2)(v)(B)*(2)* and reaffirmed the denial, certifying that decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4. The AAO, concluding that no additional brief or evidence had been submitted, affirmed the TSC and CSC decisions. On August 25, 2009, the AAO reopened the matter for the sole purpose of considering a brief and exhibits submitted on certification. The AAO afforded the petitioner 30 days in which to supplement the record pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The AAO will reaffirm its previous decision.

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 TSC determined that the petitioner had failed to demonstrate that she was actively in the process of investing lawfully obtained funds as of the date of filing. The TSC also determined that the petitioner has not demonstrated that she had created or would create the necessary jobs. On the Form I-290B, Notice of Appeal or Motion filed on March 18, 2009, counsel submitted a brief and additional evidence. The CSC concluded that the petitioner had not demonstrated an investment with the business as of the date of filing and questioned the evidence documenting the source of the petitioner's funds. The CSC certified the matter to the AAO on April 30, 2009. Pursuant to 8 C.F.R. § 103.4(a)(2), the CSC advised the petitioner that she could file a brief or written statement within 30 days.

The AAO concluded that the petitioner had not submitted anything in response to the notice of certification and reaffirmed the TSC's ultimate decision on June 26, 2009. In this decision, based on the record before the TSC and the CSC, the AAO accepted that the petitioner had established the source of the funds intended for investment and that issue will not be further discussed in this decision. The AAO, however, upheld the remaining bases of denial set forth in the TSC decision. Moreover, based on the Amendment to the Amended and Restated Rules and Regulations, submitted with the Form I-290B, the AAO concluded that it was unlikely that the petitioner would be able to sustain her intended investment for the full conditional period mandated under section 216A of the Act. Finally, the AAO concluded that the petitioner will not be involved in the management of the new commercial enterprise.

On June 15, 2009, however, counsel did submit a brief and additional evidence, which was not considered in the AAO's June 26, 2009 decision. Thus, on August 25, 2009, the AAO advised the petitioner that we were reopening the matter to consider the June 15, 2009 submission. The petitioner was afforded 30 days to respond pursuant to 8 C.F.R. § 103.5(a)(5)(ii). In response, counsel submitted a brief and evidence to rebut the concerns set forth in the AAO's June 26, 2009 decision. While the purpose of reopening this matter was to consider the June 15, 2009 brief and evidence, given that we raised concerns that had not been previously raised by TSC or CSC, we will consider counsel's new brief and the new evidence. For the reasons discussed below, we reaffirm our prior findings.

As stated in our previous decision, 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).

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 intended investment in a business, [redacted] 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.

INVESTMENT OF CAPITAL

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States *business account(s) for the enterprise*;
> >
> > **(ii)** Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred *to the new commercial enterprise* in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > **(v)** Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

(Emphasis added.) 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. 169, 179 (Comm'r. 1998).

The petitioner filed the petition on February 4, 2008 indicating that she had made an initial investment of $1,000,000 on January 15, 2008 but that her total investment to date was $0.

[redacted] sole member and manager of [redacted], organized the new commercial enterprise on October 3, 2001. On April 19, 2007, [redacted], through VGP, executed an Amended and Restated Operating Agreement. While Briarwood Mobile Homes, Inc. was the majority member at the time, the agreement provides that [redacted] had the option to force a sale of that interest to himself. On January 2, 2008, Briarwood Development Group assigned its rights in GPP II to VGP.

On October 16, 2007, [redacted] advised the petitioner that $1,000,000 would buy an eight percent interest in GPP II, which would have "a minimum hold period of 2 years" and that there would be a buy/sell agreement stating that GPP II must be given the right of refusal should the petitioner wish to sell her interest. On November 19, 2007, the petitioner authored a "Letter of Intent" addressed to expressing her intent to invest $1,000,000 into GPP II.

In response to the director's request for additional evidence, the petitioner submitted evidence that on February 6, 2008, two days after the petition was filed, she transferred $1,000,000 to [redacted] not GPP II.

In support of the Form I-290B, the petitioner submitted a February 6, 2008 amendment to GPP II's Amended and Restated Rules and Regulation from the same date recognizing the addition of the petitioner as a member. The Amendment further states:

> retains the right to buy out [the petitioner] at any time within 36 months from the date hereof ("Option Period") for $1 million (the "Option"). Upon closing upon the Option, [the petitioner] will be removed from membership in the company and [redacted] will own 100% ownership interest and membership interest in the company.

After the expiration of the Option Period, [redacted] retains only a right of first refusal at the price of any bona fide offer received by the petitioner.

The petitioner also submitted GPP II's Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income for 2008. This return reflects no assets or liabilities at the beginning of the year despite having been formed in 2001. According to the Schedules K-1, VGP invested $6,986,022 during 2008 and, despite the company's net loss, withdrew $1,798.476; the petitioner invested $1,000,000 and maintained that investment for the year.

A. *Date of Investment*

In his June 15, 2009 letter, counsel asserts that the petitioner was "in the process of investing" as of October 16, 2007. Counsel concludes that in order to invest such a large sum on February 6, 2008, there must have been "ongoing, active investment activity" prior to that date. Counsel notes that evidence of being in the process of investing might include a secured loan and notes that the petitioner "needed no loan whatsoever." Rather, counsel states, the petitioner's "immediately available personal funds equates to having immediately available a secured loan for the investment."

Counsel concludes that the TSC and CSC concerns are "wholly irrelevant" because the petitioner was actively in the process of making an investment. The petitioner submitted a June 3, 2009 letter from [redacted] of Collier Accounting & Technologies, Inc., asserting that the petitioner was in the process of investing capital as of October 16, 2007 when [redacted] advised the petitioner that $1,000,000 would purchase an eight percent interest in GPP II. The petitioner resubmits that offer and the November 19, 2007 response in which the petitioner expresses her "intent" to invest $1,000,000. Counsel's September 23, 2009 brief does not address this issue.

In the June 26, 2009 decision, the AAO concurred with the determination by the TSC and the CSC that the petitioner had not transferred any funds to the new commercial enterprise, [redacted] or an escrow account as of the date of filing. Even considering counsel's June 15, 2009 response, we reaffirm that conclusion.

The online law dictionary by American Lawyer Media (ALM), available at www.law.com,[1] defines offer as "a specific proposal to enter into an agreement with another. An offer is essential to the formation of an enforceable contract. An offer and acceptance of the offer creates the contract." The October 16, 2007 offer created no obligation to invest. Moreover, the November 19, 2007 letter expresses only the petitioner's "intent" to invest and does not constitute an acceptance of the offer. As noted in the AAO's previous decision, as of the date of filing, the petitioner had not signed a contract obligating her to invest with consequences for failing to invest as intended. Counsel is not persuasive that the petitioner was actively "in the process of investing" as of the filing date, when she had not transferred any money to the new commercial enterprise or escrow. As quoted above, the definition of "invest" means "to contribute capital." It cannot be credibly asserted that the petitioner was in the process of contributing capital when she had not yet begun to transfer any capital. As quoted above, the regulation at 8 C.F.R. § 204.6(j)(2) unambiguously states that a mere intent to invest is insufficient.

We reaffirm that the record contains no evidence of the petitioner's actual commitment of the required amount (or any sum) as of the date of filing. While the petitioner may have had the money immediately available, unlike counsel's example of a secured loan, the new commercial enterprise would have had no recourse if the petitioner had changed her mind. As the petitioner has not shown a commitment of the full amount as of the filing date, such as a binding contractual agreement, a secured loan or an escrow fund, she cannot demonstrate a qualifying investment. *Id.* A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. at 175. More specifically we cannot consider facts that come into being only subsequent to the filing of a petition. *Id.* at 176 (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). *See also* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

[1] Accessed October 8, 2009 and incorporated into the record of proceedings.

B. *Investment in the New Commercial Enterprise*

The AAO further concluded that a new petition would not remedy all of the deficiencies in this matter, as the funds transferred on February 6, 2008 were transferred to [redacted] not GPP II. The definition of "invest" at 8 C.F.R. § 204.6(e) requires a contribution of capital. When the capital being contributed constitutes cash (as opposed to assets for use by the business or indebtedness), the regulation at 8 C.F.R. § 204.6(j)(2), quoted above, requires the submission of evidence that the cash had been transferred to the new commercial enterprise. While involving a different set of facts, *Matter of Izummi*, 22 I&N Dec. at 179, provides that the full amount of the investment must be made available to the employment-generating entity. In the matter before us, the employment generating entity is GPP II, not [redacted] As noted by the TSC, the record lacks transactional evidence establishing that the petitioner contributed any capital to the new commercial enterprise. Rather, she transferred her "investment" directly to [redacted]. The requirement that the petitioner demonstrate the transfer of funds to the new commercial enterprise is not a technicality. The AAO concluded that the petitioner had not explained how purchasing [redacted]s interest from [redacted] provides any financial benefit to GPP II such that the petitioner can be credited with job creation.[2] Rather, the financial benefit appears to accrue to [redacted]

Counsel's June 15, 2009 brief asserted that GPP II's accounting ledger and 2008 tax return confirm the petitioner's investment in GGP II. In addition to those documents, the petitioner submitted a June 11, 2009 letter from [redacted] asserting that the petitioner's $1,000,000 "is being actively used to fund projects" for GPP II. [redacted] asserts that the total project cost is $1,200,000 and that [redacted] 'actively uses [the petitioner's] $1,000,000 investment to fund an account titled PPMT (Paradigm Properties management Team)" which pays for the work and purchase contracts for GPP II.

The petitioner submitted a summary of planned projects, invoices, checks from the PPMT account and Wachovia statements for PPMT, Inc.'s account and an account in [redacted]s name. While the Wachovia account ending in [redacted]s in [redacted] name, a May 19, 2009 credit advice for a debit from this account shows the originator (as well as the beneficiary) of the transfer as Paradigm Group. The documents show several transfers from [redacted] account to the PPMT account. Significantly, however, the statement for the [redacted] account covering February 2008 (the month when the petitioner transferred funds to [redacted]) does not show a deposit of $1,000,000. Instead, the account shows large credit advices from Paradigm Group. As the petitioner has not traced any of her money into [redacted]s Wachovia account ending in [redacted], the use of these funds to pay GPP II's costs is not evidence of her money being used by the company.

In response to the CSC's concern that there was no evidence that the funds were not deposited into an escrow account, direct deposit and or trust reserve account, counsel asserts that the law does not

[2] As will be discussed in more detail below, as of the date of filing, [redacted] retained full managerial control over GPP II; thus, not even the petitioner's management of the company could be credited with any future job creation. Regardless, the regulations do not include so-called "sweat equity" as a legitimate investment.

require an investment into one of the above accounts. In his September 23, 2009 brief, counsel references the materials submitted in June 2009.

The evidence submitted with the June 15, 2009 brief does not resolve this issue. The petitioner did not provide new capital to GPP II. Rather, she paid [redacted] $1,000,000 for his shares. Contrary to the assertions of counsel and [redacted] the record does not show that the petitioner's funds were used for GPP II expenses. Rather, the funds came from a different account in [redacted] name that was funded by the Paradigm Group. As stated in our previous decision and above, when the capital being contributed constitutes cash (as opposed to assets for use by the business or indebtedness), the regulation at 8 C.F.R. § 204.6(j)(2), quoted above with relevant emphasis, requires the submission of evidence that the cash had been transferred to "the new commercial enterprise." The record still contains no evidence tracing the funds from the petitioner to [redacted] to the new commercial enterprise. [redacted] decision to route business funds through an account in his own name does not relieve the petitioner of her burden of tracing her funds from her own account to the new commercial enterprise. We reiterate that the Wachovia account ending in [redacted] in [redacted] name does not show a $1,000,000 deposit on or about February 6, 2008, when the petitioner transferred her funds to [redacted]

In light of the above, we reaffirm our concern that the petitioner has not demonstrated how her investment has provided new capital to the new commercial enterprise such that she can be credited with the company's employment creation. Rather, we reaffirm our previous conclusion that the sole financial benefit appears to accrue to [redacted]

C. *Buy Back Agreement*

As noted in the AAO's previous decision, [redacted] retains the right to repurchase the petitioner's interest in GPP II for $1,000,000 at any time during the three-year period beginning February 6, 2008. We acknowledge that the petitioner is not guaranteed a buyback price in a scheme similar to the one found objectionable in *Matter of Izummi*, 22 I&N Dec. at 187. Specifically, the petitioner risks loss in the matter before us because [redacted] is not obligated to exercise his buyback right. *Matter of Izummi*, 22 I&N Dec. at 187, however, provides that in a true investment, the alien risks both loss and gain. In this matter, the petitioner is unlikely to realize any gain. Should her investment do well and gain value, [redacted] has a strong incentive to buy back his interest at the original price, especially as he loses that right after three years. We note that [redacted] has previously exercised his buyback rights with Briarwood Development Group within a year of the agreement providing him that right.

The AAO concluded that the buyback right has serious consequences beyond rendering it unlikely for the petitioner to realize any gain from her investment that are relevant to the classification sought. Section 216A(d)(1)(A)(ii) of the Act requires that the petitioner sustain her investment throughout a two-year conditional period. Even if the petitioner intends to do so, however, Mr. [redacted] can exercise his buyback right at any time during that period, forcing the petitioner to sell her interest. Given the facts in this matter, it appears very unlikely that the petitioner would be able to sustain her investment for the conditional period. Should the business fail, the petitioner will be

unable to demonstrate the necessary job creation. Should the business succeed and her interest gain value, [redacted] has a strong incentive to buyback his former interest at the original purchase price. Thus, the buyback right retained by [redacted] precludes approval of the petition.

In his September 23, 2009 brief, counsel asserts that the "mere possibility of not being able to sustain the investment for the conditional period should not preclude approval of the Petitioner's petition at this stage." Specifically, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) may deny the petitioner's Form I-829 Petition to Remove Conditions should she fail to maintain her investment for the full two years.

Counsel is not persuasive. Clearly, there can be no guarantee that an investor will be able to or will even desire to maintain her investment for the full conditional period. The investor could choose to withdraw the investment for her own reasons or the business could fail for reasons out of the control of the investor. The buy back agreement, however, adds an entirely new element beyond the petitioner's control. The agreement creates not merely a "possibility" that the petitioner will be unable to maintain her investment but a situation where she is highly unlikely to be able to do so. As stated in our previous decision and above, there are two possibilities: either the business succeeds or fails. Should it succeed and the petitioner's interest gain value, it seems unlikely that [redacted] would not exercise his right to repurchase his interest for the original price. Should the business fail, the petitioner would not be able to demonstrate the necessary job creation at the end of the conditional period. USCIS is not required to approve a petition based on the possibility that Mr. [redacted] will not act in his own interest and repurchase his interest at the original price.

In light of the above, we reaffirm that the petitioner has not established that she was actively in the process of making a qualifying investment as of the date of filing in this matter. Moreover, we reaffirm that her intended investment would not have rendered the petition approvable.

MANAGEMENT

The regulation at 8 C.F.R. § 204.6(j)(5) states:

> To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:
>
> (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
>
> (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
>
> (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For

> purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

Counsel has repeatedly asserted:

> Petitioner's role is significantly more than a mere passive role. Petitioner is functioning as a managing member of the LLC with administrative and voting rights concerning the operation of the business.

In the June 26, 2009 decision, the AAO noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

The amended Operating Agreement, Article VI, provides that GPP II is to be managed by a manager, not the members in the aggregate. Specifically, section 6.1 provides that the manager "shall have full, complete and exclusive authority to manage and control the business of the Company for the purposes herein stated." Significantly, Article XI provides that each member "irrevocably appoints and empowers the Manager and each of its duly authorized officers, agents, successors, and assignees, with full power of substitution, as its true attorney-in-fact, in its name, place and stead, to make, execute, sign, acknowledge and swear to, deliver and record all instruments and file all documents requisite to carrying out the intention and purpose of this Agreement." Section 7.3 of the agreement provides that the assignment of a membership interest does not itself entitle the assignee to participate in the management and affairs of the Company. Rather the assignee is only entitled to receive the membership interest "to the extent assigned."

The February 6, 2008 amendment to GPP II's Amended and Restated Rules and Regulations states that the petitioner is being added as a member but contains no indication that she will be a managing member. In his May 28, 2008 letter, [redacted] identifies himself as the managing member of GPP II, LLC. The record contained no evidence that he assigned this duty to the petitioner as of the date of filing or subsequently.

Given the absence of any affirmative language in the Operating Agreement setting forth the rights, powers or duties of members and the sweeping nature of the power of attorney provision in Article XI of the Operating Agreement, the AAO concluded that the petitioner had not established what member rights, powers and duties she has not waived, if any.

In support of counsel's September 23, 2009 brief, the petitioner submitted a September 15, 2009 letter from [redacted] addressed to the petitioner which states:

> In recognition of your involvement and ongoing activity on behalf of The Enclave Apartments, here is a filed document naming you a managing member of Gainesville Place Phase II, LLC, reflecting and formalizing your role in ownership and management of The Enclave since its inception.

The petitioner also submitted a September 11, 2009 amendment to GPP II's Articles of Organizations, filed with the Secretary of State, listing the petitioner as one of the company's managing members.

While [redacted] implies that the petitioner has been involved in the management of GPP II since "its" inception, this implication is contradicted by the remainder of the record. GPP was established in 2001 while the petitioner did not even invest in this company until 2008. Moreover, we cannot ignore the power of attorney language whereby the petitioner waived her rights in favor of the listed managing member. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* [redacted] bare assertion that the petitioner has participated in the management of the company since its inception does not resolve the inconsistencies on this issue in the record.

While the petitioner may now be listed as a managing member, this amendment took place after the date of filing and, thus, cannot be considered. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. Moreover, we cannot consider facts that come into being only subsequent to the filing of a petition. *Id.* at 176 (citing *Matter of Bardouille,* 18 I&N Dec. at 114. *See also* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. The amendment adding the petitioner as a managing member constitutes a material change and is a fact that did not exist as of the date of filing. As such, we will not consider this amendment.

In light of the above, we reaffirm the conclusion that the company structure as of the date of filing did not provide the petitioner with a role in the management of the company.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

> *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.
>
> * * *
>
> *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 USCIS to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N

Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

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

Id.

On the petition, the petitioner indicated that GPP II had no employees at the time but would create 10 positions. Initially, the petitioner submitted what counsel called a business plan. As noted in the AAO's initial decision, however, the document is an appraisal of the property, including the proposed construction project. The appraisal does include payroll projections for May 2009 through May 2019, but does not provide any explanation of the company's staffing requirements, job descriptions or a hiring timetable. In response to the director's request for additional evidence, counsel asserted that a business plan had been submitted. The director concluded that the petitioner had not demonstrated that her investment would create the necessary jobs.

In support of the Form I-290B, the petitioner submitted the 2008 IRS Form 1065 tax return filed by GPP II. On the attached Form 8825, Rental Real Estate Income and Expenses of a Partnership or an S Corporation, GPP II listed $145,446 in wages and salaries. In addition, the petitioner submitted quarterly wage and withholding reports listing between six and nine employees during the months in the third quarter of 2008. The petitioner also submitted an employee list reflecting five full-time employees. The job titles are groundskeeper, service technician, property manager, service manager and leasing manager. The list also includes four currently employed part-time "leasing" employees. Counsel asserts that these part-time employees will be converted into full-time positions. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

The AAO acknowledged counsel's repeated assertion that the jobs need not already exist when the Form I-526 Petition is filed and that a comprehensive business plan may be submitted to explain the need for the necessary employees in the next two years. Counsel has further repeatedly stated that the temporary vacancy of a position during the two-year conditional period does not preclude

eligibility to remove conditions if there was a good faith attempt to re-staff the position. The AAO did not contest these assertions, but noted that if 10 full-time jobs for qualifying employees have not been created as of the date of filing, the petitioner must provide a comprehensive business plan detailing the need for at least 10 employees in the two-year period following adjudication of the petition.[3] 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213.

In reviewing the evidence, the AAO noted first that the petitioner did not submit any Forms I-9 as evidence that the full-time employees already hired are qualifying. The AAO further noted that the petitioner did not submit payroll records confirming the full-time employment of those employees. Finally, the AAO reiterated that the "business plan" submitted is actually an appraisal and does not include any explanation of staffing requirements, job descriptions or a timetable for hiring. In analyzing the evidence in more detail, the AAO stated:

> Counsel's assertion that the part-time jobs will be converted to full-time is insufficient. The cover letter for the appraisal predicts that construction of the project will be complete around June 2008. Once the initial leases are executed, it is not clear why GPP II would require more leasing employees rather than fewer for the periodic renewals or new leases. Even though the leases submitted are for one year only, the materials submitted indicate that the apartments cater to university students. Thus, the petitioner must explain why the leasing positions are not inherently intermittent (as opposed to occasionally vacant), with most leasing activity taking place shortly before the start of the academic year. While the appraisal mentions office management and leasing employees (as well as maintenance employees), it also discusses a separate management company, whose employees would not be direct employees of GPP II.

In his September 23, 2009 brief, counsel reiterates once again that the jobs need not exist at the Form I-526 stage and that the temporary vacancy of a position during the two year conditional period does preclude the removal of conditions, propositions that USCIS has never contested. Counsel then states that the petitioner "may" submit a comprehensive business plan, implying that the submission of a comprehensive business plan is optional. Counsel then asserts that "the business plan need only indicate the approximate dates (e.g. through pro-forma income statements) during the following two years when the employees will be hired." As GPP II is a "full-functioning business," counsel states that it need not "absolutely" submit a comprehensive business plan. Rather, counsel concludes that a comprehensive business plans is more appropriate for businesses not yet in operation. Counsel states that GPP II "does not exist merely in vapor" and, thus, a comprehensive business plan is not required. The petitioner submits an employee list showing six active full-time employees and seven active part-time employees, ten Forms I-9 and payroll records.

The petitioner has now demonstrated that the new commercial enterprise employs six full-time qualifying employees. The regulation at 8 C.F.R. § 204.6(j)(4)(i), however, explicitly states that a petitioner "must" submit evidence of *ten* employees "or" a comprehensive business plan. As the

[3] We find that an interpretation that the two year period commences six months after the adjudication of the petition is reasonable.

petitioner has not documented ten employees, she must provide a comprehensive business plan. We are not persuaded that the comprehensive business plan requirement may be waived for operational companies. While GPP II does not exist in a "vapor" we will not presume that every operational company currently operating with fewer than ten employees will create at least 10 full-time jobs within two years. It is the petitioner's burden to demonstrate the likelihood of this job creation through the submission of a comprehensive business plan. Moreover, pro-forma income statements cannot take the place of a comprehensive business plan. Such statements, while they may show an increase in projected wages, do not provide the information specified in *Matter of Ho,* 22 I&N Dec. at 213. Specifically, income statements do not explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions.

In light of the above, the petitioner has not established that her investment will generate the necessary full-time employment.

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 AAO's June 26, 2009 decision is affirmed. The petition is denied.