U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 28 2009

SRC 07 010 50604

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

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

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds in a new commercial enterprise and that he had created or would create the necessary 10 jobs.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's concerns.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petition was filed after November 2, 2002, the petitioner need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate that the new commercial enterprise is "new" as defined at 8 C.F.R. § 204.6(e) and the creation of 10 *new* jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted], Federal Employer Identification Number (FEIN) [redacted] The petitioner indicated that [redacted] is 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.

At the outset, it is useful to review the structure of [redacted] and its affiliated companies. While the petitioner indicated on the Form I-526 that he and his wife own 100 percent of [redacted], the record does not support that assertion. In fact, [redacted] is 100 percent owned by a foreign corporation, [redacted]. The stock ledger for this company reflects that the petitioner and his

wife each invested $25,000 into this foreign corporation. Both [redacted] and [redacted] were incorporated in 1993. In 1998, the petitioner incorporated [redacted] and purchased 1,000 shares for $1,000 cash. In the same year, the petitioner also organized [redacted] which is jointly owned by the petitioner, his wife and [redacted]

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise" (Emphasis added.)

The regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

The regulation at 8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

As stated above, the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. This amendment did not, however, eliminate the requirement that the commercial enterprise be "new." Thus, we find that 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

The regulation at 8 C.F.R. § 204.6(j)(1) provides:

> To show that a new commercial enterprise has been established by the petitioner in the United States, the petition must be accompanied by:
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> (i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;
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> (ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the state or municipality does not issue such a certificate, a statement to that effect; or
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> (iii) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth, number of employees.

On February 25, 1993, [redacted] purchased an operational hotel from [redacted] According to a "Business History" submitted with the petition [redacted] had acquired the hotel after foreclosing on a mortgage held by the company. The record contains no evidence as to when the hotel was built, but the list of employees indicates that the hotel's "inspectress" was hired on April 10, 1981.

On December 21, 2006, the director requested evidence that the petitioner had invested in a new commercial enterprise as defined at 8 C.F.R. § 204.6(e), quoted above. In response, counsel asserted that [redacted] was operating the hotel after foreclosing on a mortgage and that most of the employees at the time worked part-time. Counsel further asserted that no records were available that predate the sale in 1993.

The director noted that the petitioner had indicated on the Form I-526 that the hotel employed 20 workers before his investment and concluded that the unavailability of evidence does not create a presumption of eligibility. The director further concluded that the record contained no evidence of reorganization or an expansion of employment or net worth after November 29, 1990. Thus, the director concluded that the petitioner had not established an investment in a new commercial enterprise.

On appeal, counsel asserts that the petitioner submitted the evidence required at 8 C.F.R. § 204.6(j)(1). Counsel notes that [redacted]s was incorporated in 1993 and asserts that because the corporation purchased a hotel out of foreclosure, there must have been a restructuring and reorganization as a new entity and "a substantial change in net worth."

It is the job creating business that must be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici,* 22 I&N Dec. 158, 166 (Commr. 1998). Thus, the fact that [redacted] was incorporated after November 29, 1990 is not determinative. Rather, we must look at the hotel purchased by [redacted]. We acknowledge counsel's assertions that the petitioner restructured, reorganized and increased the net worth of the hotel. The unsupported assertions of counsel, however, 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).

While we recognize the amount of time that has passed since the petitioner claims to have made his investment, there is nothing in the statute or regulations suggesting that a 14-year old investment is exempt from the evidentiary requirements set forth in the regulations. While the regulation at 8 C.F.R. § 204.6(e) defines "new" as after November 29, 1990, thereby allowing older investments as that date regresses into the past, the regulations also require evidence of a reorganization, restructuring or expansion as of that date. The petitioner's reliance on a 14-year old investment claim to support his Form I-526 does not relieve him of his burden to provide the necessary documentation. Rather, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner does not contest that [redacted] purchased a hotel that was operated as a hotel. The record establishes that the hotel was previously a [redacted] and is now operated as a [redacted] Nevertheless, the hotel remains a hotel and the record lacks evidence that the hotel now offers such an array of new services as to be considered sufficiently restructured or reorganized such that a new commercial enterprise results. "A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership." *Matter of Soffici,* 22 I&N Dec. at 166.

We will not presume that every foreclosure purchase results in a 40 percent increase in net worth or employment. Rather, the petitioner must document the net worth both before and after his investment. In this case, the petitioner claims to have made a $730,000 investment in 1993 and a $1,100,000 investment in 1998. We further note that "net worth" is a defined accounting term that equals total assets less total liabilities. Barron's Dictionary of Accounting Terms 295 (3rd ed. 2000). For the reasons discussed below, the petitioner has not demonstrated that either "investment" increased the new commercial enterprise's net worth or employment.

According to [redacted] 1993 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return, Schedule L, its end of year net worth was -$41,106. As the record does not demonstrate the hotel's net worth prior to the date of purchase, the petitioner has not demonstrated that the hotel experienced a 40 percent increase in net worth in 1993. In 1998, when the petitioner

allegedly invested an additional $1,100,000 into [redacted] the corporation's net worth actually decreased from -$291,472 to -$362,754. [redacted] ended 2005 with a net worth of -$2,358,428. Thus, the record reflects that the net worth of the new commercial enterprise identified on the Form I-526 has dramatically decreased since the petitioner's claimed investment. Similarly, the amount of wages paid by [redacted] as reflected on its IRS Form 1120 tax returns has decreased significantly since 1996. While the petitioner claims that another corporation is responsible for compensating [redacted] employees, the tax returns for that company show no wages paid or cost of labor expenses.

In summary, the record lacks evidence that the [redacted] purchased by the petitioner began operations as a hotel on or after November 29, 1990. The petitioner has not established that he or anyone else restructured or reorganized the business, which continues as a hotel, to an extent that a new commercial enterprise resulted. The record also reveals that, rather than increase the hotel's net worth or employment by 40 percent, the petitioner has presided over a dramatic decrease in both the net worth of and employment by the new commercial enterprise.

In light of the above, the petitioner has not demonstrated an investment in a "new" commercial enterprise.

Finally, as stated above, section 203(b)(5) requires an investment in "a" new commercial enterprise. Significantly, the regulation at 8 C.F.R. § 204.6(e) provides:

> Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) The new commercial enterprise identified on the Form I-526 petition is [redacted]. Thus, the petitioner must demonstrate a qualifying investment into [redacted] and its wholly owned subsidiaries. Significantly, an investment into [redacted] or [redacted] cannot be considered as none of these entities are wholly owned subsidiaries of [redacted]

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.

On the Form I-526, the petitioner claimed to have made an initial investment of $200,000 on March 3, 1993 and a total investment of $3,361,029. The "Business History" submitted with the petition notes the purchase of a hotel and states:

> The property was extremely run down and we invested $500,000 in remodeling, redecorating and painting the hotel. In total, at this time we personally invested $800,000 to cover the earnest money and repairs.

The "Business History" acknowledges that the seller provided a mortgage of $1,800,000 to finance the purchase of the hotel. The history continues, however, that the petitioner transferred $1,100,000 to [redacted]. for the purpose of repaying the loan on March 2, 1998. The history then concludes that the petitioner has invested $3,361,029 "through [redacted] to make improvements to the hotel."

The purchase agreement for the hotel lists a purchase price of $2,300,000 including an initial $100,000 deposit and a subsequent $100,000 deposit. The closing statement reflects an actual purchase amount of $2,556,316.07, a $1,800,000 mortgage with the seller and a total due to seller of $406,875.98. The closing statement does not credit the petitioner with $200,000 in deposits. In fact, line 201, "Deposit or earnest money," is blank. That said, line 608 reflects $200,000 in repair expenses "in connection with loan." It is not clear whether this amount was paid prior to closing. The petitioner did not submit any transactional evidence reflecting the transfer of funds in 1993 from the petitioner to the new commercial enterprise or the seller. The petitioner did, however, submit a [redacted] corporate resolution authorizing the company to seek a $750,000 loan from [redacted] and a February 24, 1993 promissory note whereby [redacted] agreed to pay [redacted] $750,000 on demand. Thus, it appears that the entire hotel purchase was financed through a mortgage with [redacted] and a loan from [redacted]. The record also contains March 18, 1994 corporate resolutions and promissory notes confirming a loan of an additional $61,000 from [redacted]s to [redacted]

The petitioner also submitted a February 20, 1998 credit advice reflecting a transfer of $1,100,000 from [redacted] to [redacted] and a March 2, 1998 withdrawal notice for $1,194,598.35 notated "loan payoff to [redacted] for [redacted]' We acknowledge that [redacted] is the representative for [redacted] The petitioner, however, did not trace these funds back to his own personal account and the 1998 tax return for [redacted] Schedule L, does not reflect an increase in stock ($1,000) or additional paid-in-capital ($0). Moreover, the 1998 tax return does not reflect a decrease in the company's mortgages, notes and bonds payable in one year or more. Rather, the amount on that line on Schedule L increased from $2,271,944 to $2,957,249.

The petitioner did not submit any contracts for repairs or evidence that the funds for those repairs derived from the petitioner's personal account.

In response to the director's request for additional evidence, the petitioner submitted evidence that the petitioner transferred $530,000 from his foreign account to his domestic account on February 24, 1993. The petitioner also submitted the February 1998 bank statement for [redacted] reflecting the $1,100,000 deposit from [redacted] on February 20, 1998. Counsel asserts that the $530,000 plus the $200,000 deposits required by the purchase agreement reflect a $730,000 investment in 1993 in addition to the subsequent $1,100,000 investment in 1998.

The director concluded that the petitioner had not demonstrated that the $530,000 constituted a personal investment and that the petitioner had not traced the $1,100,000 from 1998 back to the petitioner's personal account. The director noted that the 1998 transfer of funds was from [redacted] which is a separate legal entity from its shareholders. In support of the latter conclusion, the director cited *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Commr. 1980) and *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Commr. 1980). Finally, the director noted that the [redacted] contributions to [redacted] were loans, which cannot constitute a qualifying investment. The director noted that [redacted] Schedule L attachments to its tax returns failed to reflect the necessary stock or additional paid-in-capital.

On appeal, counsel notes that the cases cited by the director do not relate to petitions filed under section 203(b)(5) of the Act. Counsel further notes that the petitioner and his wife own 100 percent of [redacted] and, thus, are "at risk for their investment" regardless of whether the funds went through [redacted] Counsel does not address the director's concerns regarding the fact that [redacted] only loaned funds to [redacted] and that [redacted] tax returns do not reflect sufficient stock and additional paid-in-capital. (As of 2005, the company's tax return, Schedule L, still reflects only $1,000 in stock and no additional paid-in-capital.)

We acknowledge that the cases cited by the director relate to a different type of petition. Nevertheless, they stand for the legal proposition that a corporation is a separate legal entity from its shareholders. This proposition permeates other areas of immigration law. For example, when considering an employer's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). More significantly, USCIS has applied this legal principle to section 203(b)(5) of the Act. *Matter of Izummi*, 22 I&N Dec. 169, 195 (Commr. 1998) states that evidence of the income of the alien's corporation "says nothing about the *petitioner's* level of income that year." If the corporate earnings cannot be considered sufficient evidence of the petitioner's lawful accumulation of the necessary funds to invest, then the corporate funds themselves cannot constitute the petitioner's personal investment. Thus, we concur with the director that an investment by [redacted] (which, while owning 100 percent of [redacted], is not identified as the new

commercial enterprise), assuming it had actually made an investment, could not be credited to the petitioner.

Further, we concur with the director that even if we considered [redacted] to be acting as some type of proxy or pass-through entity for the petitioner's "investment," the funds transferred to [redacted] were not contributed as capital. Rather, they were loaned by [redacted] as evidenced by the promissory notes and the failure in 1998 for [redacted] liabilities to decrease. In addition, the most recent IRS Form 5472, Part IV, for [redacted] in the record, covering 2004, reflects that [redacted] has lent [redacted] $2,643,519. As quoted above, the definition of invest excludes funds transferred in exchange for a note or other debt arrangement.

Finally, 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 (Commr. 1998). As will be discussed in more detail below, some evidence suggests the employment was all generated by [redacted] The petitioner has not demonstrated either that he has invested $1,000,000 into this company or that it is a wholly owned subsidiary of [redacted], the entity identified as the new commercial enterprise on the Form I-526. As discussed above, the definition of new commercial enterprise includes the company and its wholly owned subsidiaries only.

In light of the above, the petitioner has not demonstrated a personal equity investment of $1,000,000 into an employment-generating entity.

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:
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> (i) Foreign business registration records;
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> (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 (Commr. 1998); *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 Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted no evidence of his own income prior to his 1993 investment. In response to the director's request for additional evidence, the **petitioner** submitted a letter from [redacted] asserting that the petitioner worked with that firm from March 1, 1981 to December 31, 1998. [redacted] provides the "TL Gross Revenue" for each position held by the petitioner over a specified period. does not indicate if these amounts represent the **petitioner's** annual income.

The director concluded that the petitioner had not submitted the requisite tax returns documenting his earnings. On appeal, counsel asserts that recent tax returns would not establish the petitioner's earnings prior to his investment and that tax returns predating his investment are not available. Where primary evidence, in this case tax returns, and secondary evidence, such as pay statements, is not available, the petitioner may submit affidavits. 8 C.F.R. § 103.2(b)(2). The petitioner did not comply with 8 C.F.R. § 103.2(b)(2) by providing evidence from the relevant taxing entities confirming that records prior to 1993 are no longer available. Moreover, the letter from [redacted] is not notarized and, therefore, is not an affidavit. Further, as stated above, [redacted] **does not** explain the nature of "TL Gross Revenue."

Regardless, the petitioner has not traced the funds from his personal account to as required. *Matter of Izummi*, 22 I&N Dec. at 195. Specifically, the petitioner has not traced the $530,000 from his domestic account to or in satisfaction of its expenses. Finally, the petitioner has not traced the $1,100,000 deposited with back to his personal account.

In light of the above, the petitioner has not demonstrated that the transferred funds are his own lawfully acquired funds.

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

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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> * * *
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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 at 1039 *aff'd* 345 F.3d at 683 (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.

The petitioner indicated the new commercial enterprise had 20 employees at the time of his investment and 28 currently. He indicated no additional jobs would be created. The tax returns for [redacted] reflect a steady decline in wages paid after 1996. None of the tax returns submitted for [redacted] reflect any wages or cost of labor. The petitioner submitted an Employee List Report for [redacted] and ADP-prepared Statements of Deposits and Filings for [redacted] covering various periods from September 2005 through April 2006.

In her request for evidence, the director noted that [redacted] was not a wholly owned subsidiary of [redacted], the new commercial enterprise identified on the Form I-526, and noted that the petitioner must establish the creation of ten new jobs since purchasing the hotel in 1993 or demonstrate that [redacted] was a troubled business.

In response, counsel asserts that no employment records remain from the business prior to its purchase by the petitioner. Counsel further asserts that the petitioner is submitting a business plan

for a second hotel. The business plan, however, relates to property purchased by [redacted] in 2001, which is not the new commercial enterprise identified on the Form I-526 petition.

The director concluded that the petitioner had not established the number of employees prior to the purchase of the [redacted] or submitted evidence that any current employees are qualifying. The director further noted that the business plan did not relate to [redacted], the new commercial enterprise identified on the Form I-526 petition. Finally, the director concluded that, regardless, the business plan was not sufficiently detailed.

On appeal, counsel reasserts that the evidence of employment prior to the 1993 purchase is not available. Counsel further asserts that [redacted] now employs between 34 and 36 employees. Finally, counsel notes that the petitioner and his wife own 100 percent of [redacted] Corporation and that it is common for the hard assets of a business to be in a separate entity from employees. Counsel does not address the director's concern regarding the failure to submit Forms I-9 establishing that the employees are qualifying.

The petitioner has never claimed that [redacted] is a troubled business. The record does not contain consistent evidence establishing the creation of at least 10 new jobs for qualifying employees. Once again, while we recognize that the petitioner is attempting to rely on a 14-year old investment, his investment choice does not relieve him of the regulatory documentary requirements. Without evidence of the number of employees at the hotel prior to the purchase in 1993, we cannot determine whether the petitioner has created at least 10 new jobs.

While the petitioner submitted 2005 and 2006 employment documentation for [redacted] and none for the tax returns for these two companies reflect that Peet [redacted] pays wages and as recently as 2005, does not. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistency regarding which company pays the hotel's employees. Significantly, [redacted]' tax returns show a steady decline in wages paid from 1996, $420,524 through 2005, $162,999.

As stated above, the definition of new commercial enterprise includes the new commercial enterprise itself and it wholly owned subsidiaries. The new commercial enterprise identified on the Form I-526 is [redacted]. [redacted] is not a wholly owned subsidiary of [redacted] Moreover, as quoted above, the definition of "employee" includes only those who receive their wages directly from the new commercial enterprise. Thus, we cannot consider any employees paid by [redacted]

In light of the above, the petitioner has not demonstrated that has created or will create at least 10 new jobs.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.