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

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[redacted]

FILE: WAC 08 101 51080 Office: CALIFORNIA SERVICE CENTER Date: MAR 15 2010

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, 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 petitioner had failed to demonstrate a qualifying investment or that he had created or would create the requisite jobs.

On appeal, counsel asserts that the petitioner need only be actively in the process of investing and need not have created the necessary employment at the Form I-526 stage. The petitioner submits new evidence. While counsel is correct that the law and regulations only require that the petitioner be actively in the process of investing, the petitioner has not supported the initial assertion that he had already completed the investment and the record does not reflect that the petitioner is actively in the process of investing as contemplated by the regulation at 8 C.F.R. § 204.6(j)(2). Moreover, while counsel is also correct that the ten jobs need not exist at this stage, the record lacks a credible business plan projecting the need for at least ten new jobs resulting from the petitioner's investment.

Beyond the decision of the director, the appraisal of the employment generating entity, the hotel, indicates that it was built in the 1950s. The record does not establish whether or not it was an operational hotel at the time of purchase by the commercial enterprise at issue in this matter. Without further documentation, we cannot conclude that the petitioner has invested in a "new" commercial enterprise as defined at 8 C.F.R. § 204.6(e). Finally, the record lacks evidence demonstrating how the petitioner has lawfully accumulated the necessary funds.

In evaluating these issues, we must note at the outset that the record contains several discrepancies, including the number of original investors, how they invested (loan or equity) and when and how the petitioner has invested. 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.*

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).

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 employment generating entity, however, must still meet the definition of "new" at 8 C.F.R. § 204.6(e). *See Matter of Soffici,* 22 I&N Dec. 158, 166 (Comm'r. 1998). Moreover, the issue of whether the petitioner purchased a preexisting business is also relevant to whether the petitioner has demonstrated 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
>
> (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] 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.

Before we can consider the petitioner's investment claims, we must clarify what constitutes the commercial enterprise. 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 initial evidence all related to HLI's ownership of a hotel at [redacted] in Anchorage, currently operated as a Travelodge Inn. In response to the director's December 11, 2008 request for additional evidence, counsel asserted for the first time that the beneficiary owns a second hotel, [redacted] Counsel further asserted that the petitioner was submitting a letter from Certified Public Accountant (CPA) [redacted] explaining that it is part of the business plan for HLI to have both hotels owned by HLI. What [redacted] actually states, however, is that the beneficiary did not use HLI as a holding company for [redacted] because he is maintaining this second hotel under a different franchise and is not qualified, as a nonresident alien, to have a Subchapter S corporation through which he can offset his losses

against income. [redacted] does not imply any future plan to transfer ownership of the second hotel to HLI. On appeal, counsel reiterates that it is the petitioner's intent to place both hotels under HLI, but asserts that "based on the advice of [the petitioner's] accountant, said intent will occur once he is a lawful permanent resident."

Nothing in the statute or the regulations suggests that the commercial enterprise need not be established by the petitioner or someone else as of the date of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, 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 U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. In order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). At the time of filing, [redacted] was not part of the commercial enterprise. The initial business plan does contain scattered references to a second hotel, but focuses on the Travelodge Inn. The only employment projections are for the Travelodge Inn.

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). Counsel's speculation that the petitioner will, at some point in the future, transfer his interest in [redacted] cannot establish that the funds invested into [redacted] are irrevocably committed to HLI. The record does not even establish that the petitioner would be able to maintain the two hotels with different franchises under the same holding company. In fact, the license agreement between HLI and Travelodge states that HLI shall not affiliate with another franchise system, reservation system, brand, cooperative or registered mark during the term of the agreement.

In light of the above, we will only consider the petitioner's investment into HLI and, thus, will not consider his investment into the entirely separate entity managing [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.

HLI was incorporated on June 5, 1995. In 2006, HLI apparently purchased what is now the Travelodge Inn. The petitioner did not submit the closing document for this purchase. Rather, the

petitioner submitted the Deed of Trust whereby HLI secured a mortgage for $1,400,000, a summary of the funds deposited into escrow for the purchase and evidence that the petitioner issued checks to the escrow agent for $125,000. The escrow agent disbursed $538,000 to the title company, $20,000 to itself in satisfaction of its fees and $218,823.18 to HLI. On February 10, 2007, HLI issued share certificates to [redacted] In October 2007, HLI issued new certificates to [redacted], the petitioner and the petitioner's wife.

The petitioner submitted notes from a May 17, 1999 meeting of the shareholders whereby [redacted] agreed to sell their shares to the petitioner, his wife and [redacted] for $572,500. The minutes of a May 24, 1999 meeting report that the petitioner and his wife had paid the other shareholders $572,500. The shareholders then agreed to cancel the previous share certificates issued to the petitioner and his wife and issue new certificates.

The petitioner submitted checks dated May 31, 1999 issued by HLI to [redacted] for $130,100; to [redacted] for $130,100; to [redacted] for $130,100 and [redacted] for $130,200 for a total of $520,500. The checks are notated as being issued for a stock purchase. The record contains three undated stock certificates issued to the petitioner, his wife and [redacted]

The petitioner also submitted evidence that HLI borrowed $200,000 from the petitioner's brother, [redacted] on September 17, 2006 and that the petitioner sold his house for $325,000 on December 2006. Of the $325,000 sales price, $140,758.37 was disbursed to the petitioner after paying the mortgage and commissions. The petitioner did not trace any of this money to HLI.

Finally, the petitioner submitted HLI's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Tax Returns for 1995 through 2006. In 1995, the corporation's schedule L reflects $6,000 in stock and no additional paid-in-capital. In 1996 and 1997, the schedules L reflect $100,000 in stock and $573,592 in additional paid-in-capital. In 1998, the schedule L reflects that the corporation started and ended the year with $6,000 in stock and no additional paid-in-capital even though the corporation ended the year in 1997 with $100,000 in stock and $573,592 in additional paid-in-capital. The schedules L for 1999 through 2006 continued to reflect $6,000 in stock and no additional paid-in-capital.

The schedules L also reflect the following loans from shareholders at the end of the year:

1995	$0
1996	$0
1997	$0[1]
1998	$455,404
1999	$161,954

[1] The corporation's 1998 schedule L reflects that the corporation began 1998 with a shareholder loan of $617,404 even though the 1997 schedule L reflects that the corporation ended 1997 with no shareholder loans.

2000	$210,711
2001	$210,711
2002	$141,122
2003	$217,763
2004	$0
2005	$0
2006	$93,150

The balance sheets for HLI provide the same information about stock and loans from shareholders as that listed above. The balance sheets list the loans from shareholders under liabilities as either "advance from shareholders" or "loan from shareholder."

On December 11, 2008, the director issued a request for evidence (RFE). In this notice, the director accepted the petitioner's initial investment of $125,000 which was used towards the purchase of the hotel. The director then noted that the checks issued to the former shareholders were drawn on HLI's account and, thus, could not be traced back to the petitioner. The director also expressed concern that HLI's tax returns do not reflect $1,000,000 in equity. In addition, the director noted that the record lacked transactional evidence reflecting that the $200,000 from the petitioner's brother and the proceeds of the sale of the petitioner's house were transferred to HLI.

In response, counsel asserts that the petitioner is unable to provide evidence tracing the $572,500 back to his personal account, that the corporation is in the process of resolving the discrepancy between the amount of investment claimed and the total stock and capital listed on HLI's tax returns and that the petitioner needed more time to trace the $200,000 loan proceeds and the $140,758 house proceeds to HLI.

The petitioner submitted a personal statement explaining that, rather than investing equity, the previous shareholders had actually executed promissory notes in behalf of HLI and that, because of this arrangement, the petitioner had transferred the $572,500 to HLI to satisfy those loans rather than buying out the shareholders directly. The petitioner further asserts that neither HLI's bank nor his own bank in Canada maintain records for more than seven years and, thus, he is unable to document the 1999 transfer. The petitioner supports this final assertion with a letter from First National Bank affirming that they only keep records for seven years and information from the Royal Bank of Canada's website confirming that they store copies of checks electronically "for up to seven years." There is nothing from the Royal Bank of Canada affirming that they are unable to produce any records from 1999 regarding one of their customers, including statements that might show the debited amount.

The petitioner submitted July 1996 promissory notes executed by HLI to pay $120,000 to each of the following shareholders: [redacted] and the petitioner. Thus, $120,000 of the petitioner's initial $125,000 "investment" was actually a loan. The petitioner also submitted a letter from [redacted] asserting that the "legal value" of the stock was $6,000, that the "Canadian CPA" recorded the remaining $744,000 as a loan to avoid taxation in Canada and that the petitioner and his wife purchased the remaining shares for

$650,000 in May 1999. [redacted] does not indicate that he has personal knowledge that the funds derived from the petitioner's personal account in Canada as claimed.

The director subsequently reissued the RFE with a later response date. In response, the petitioner submitted an unaudited balance sheet as of December 31, 2008 reflecting $448,643 as an "advance from shareholders" and $450,000 in common stock. In addition, the petitioner submitted minutes from a December 31, 2008 shareholders' meeting changing the par value of the stock from $1 to "no par." The minutes continue:

> In 1999 when the present shareholders purchased 74% of the outstanding stock of the corporation each share purchased had a purchase value of $257.88. In 1999 when the shareholders purchased the Shares for $572,500, the shareholders also advanced an additional $326,143. The money used to purchase the shares and subsequently to invest in the Corporation were not loans to the Corporation but cash investment in the Corporation. To the extend [*sic*] the amounts so advanced were reflected earlier on the books as Shareholder's advances, such amount should properly be reflected as Stockholder's equity and the Corporation's C.P.A. is directed to make such changes to the Corporation's financial statements.

In addition, counsel acknowledges that the $200,000 borrowed from the petitioner's brother was used to purchase [redacted], which is not part of the new commercial enterprise. Finally, the petitioner submits evidence that he wired $122,888 to HLI on December 13, 2006.

The director concluded that the petitioner had not documented that the $572,500 derived from his personal account, that the $200,000 went to purchase a hotel that is not part of the new commercial enterprise and that the tax returns do not reflect more than $6,000 in capital.

On appeal, counsel correctly notes that the regulations only require that the petitioner be actively in the process of investing the requisite $1,000,000. Counsel further notes that the commercial enterprise has been undertaking business activity for years and, thus, any investment must be "at risk." Counsel notes the $125,000 transferred in 1996, the alleged $572,500 invested in 1999 and asserts for the first time that the petitioner also "was responsible for $500,000 in renovations of the hotel." Finally, counsel notes that the hotel has been appraised at $4,500,000, well above the $2,080,000 purchase price which counsel attributes to the petitioner's undertaking of actual business activity.

Counsel is not persuasive. While the petitioner need only be actively in the process of investing the requisite $1,000,000, the claim that he is only in the process of investing is a material change from the initial petition and cover letter, which maintained that the petitioner had already made the necessary investment. The initial business plan did not explain how additional capital would be invested or when. 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. Even if counsel's current position that the petitioner is only in the process of investing did not represent a material change from the initial petition, the regulation

at 8 C.F.R. § 204.6(j)(2) provides that 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 same regulation further states that the alien must show actual commitment of the required amount of capital. The record lacks evidence that the petitioner even possesses any additional liquid assets available for investment into HLI let alone that he is committed to further capital infusions.

Thus, at issue is whether the petitioner had already invested $1,000,000 as initially claimed. The petitioner had traced $125,000 from his personal account to HLI. HLI, however, issued a promissory note to the petitioner for $120,000 in exchange for that infusion. Thus, only $5,000 of that amount appears to be equity. Even if we accepted the full $125,000 as an equity investment, an investment of such a small proportion of the requisite amount does not create a presumption that the full amount will be invested without an irrevocable commitment and evidence that the petitioner has the remaining funds available to invest.

The petitioner has not overcome the director's concern that the record does not trace the $572,500 back to the petitioner. The petitioner's assertion that his bank is unable to produce any records from more than seven years ago is not persuasive. The materials provided only indicate that his bank in Canada does not keep electronic records of cancelled checks for more than seven years. The self-serving assurances from the petitioner that he transferred those funds to HLI are insufficient. Specifically, going on record without supporting documentary evidence is not sufficient for purposes 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 (Reg'l. Comm'r. 1972)). Moreover, [redacted] does not purport to have any personal knowledge of the petitioner's transfer of funds from his personal account to HLI for purposes of repaying the loans to the previous shareholders.

We concur with the director that the $200,000 used to purchase a second hotel cannot be considered an investment into HLI for the reasons discussed above. Thus, we will not consider those funds. Moreover, those funds were borrowed by HLI, not the petitioner. A loan secured by the assets of the commercial enterprise cannot be considered a capital investment by the petitioner. 8 C.F.R. § 204.6(e)(definition of capital); *Matter of Soffici*, 22 I&N Dec. at 162-63.

While the record contains evidence that the Travelodge Inn sustained damage in 2005, the record contains no evidence that the petitioner personally provided the funds to renovate the hotel. Significantly, HLI's tax returns for 2005 reflect no additional infusions of capital or even shareholder loans. In 2006, the shareholder loans increased from zero to only $93,150, still not reflecting an infusion of $500,000 for renovations. The petitioner only documents the transfer of $122,888 in 2006, derived from the proceeds of the sale of his house.

The appraisal of the hotel does not take into account liabilities and cannot be considered evidence of a capital contribution by the petitioner.

Finally, the petitioner has not resolved the failure of the tax returns and balance sheets to reflect $1,000,000 in capital. Even if we were to accept the assertion that HLI misrepresented capital as

loans to the IRS in order to avoid Canadian taxes, which seriously reduces the petitioner's credibility if true, the tax returns do not reflect $1,000,000 in shareholder loan. Even the 2008 balance sheet, purportedly prepared to correct previous errors, does not reflect $1,000,000 in capital and only reflects $898,000 in capital and advances from shareholders combined.

In light of the above, the petitioner has not established that he has invested or even that he is actively in the process of investing the requisite $1,000,000 pursuant to the requirements set forth at 8 C.F.R. § 204.6(j)(2).

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.
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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).

On the petition, the petitioner indicated that he had purchased an existing business that employed five employees as of the date of investment and 11 at the time of filing. He further indicated that the business would create an additional two jobs. As will be discussed below, the petitioner has not established that the employment-generating entity, the hotel, is new. Thus, at issue is whether the petitioner has created 10 jobs in addition to those that existed when the hotel was purchased.

Initially, the petitioner submitted a business plan calling for the following positions to be required in the next two years:

Front desk	6
Housekeeping	4
Maintenance	1
Managers	2
General Manager	1

The petitioner submitted a list of 10 names, including an individual with the same last name as the petitioner, and Forms I-9 for these individuals.

In response to the director's requests for additional documentation of employment, including Forms W-2 and quarterly employer tax returns, the petitioner submitted eight 2008 Forms W-2 as well as Forms I-9. The director noted that the tax forms reflected wages that could not account for full-time employment at minimum wage.

On appeal, counsel notes that the petitioner need not have created the necessary employment at the Form I-526 stage and asserts that the wages do not reflect full-time employment at minimum wage for a full year because the employees were hired during 2008. The petitioner, however, does not submit payroll records, quarterly employer tax returns or other evidence that might establish that these employees are, in fact, working full time. 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. Similarly, going on record without supporting documentary evidence is not sufficient for purposes 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. at 190).

As noted by counsel, the petitioner need not have already created the necessary employment. 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. 206, 213 (Comm'r. 1998). 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 business plan submitted does not explain the business' staffing requirement, include job descriptions for all positions or include a timetable for hiring other than asserting the employees will be needed in the next two years. Moreover, as stated above, the petitioner indicates that the hotel employed five employees at the time of the petitioner's investment. Thus, the petitioner must demonstrate that the hotel will need at least 15 employees within two years.

In light of the above, the petitioner has not established that he has created or will create the necessary ten new jobs.

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;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
>
> (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).

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.

While HLI was incorporated in 1995, it is the employment-generating entity that must be considered in determining whether a new commercial enterprise has been established. *Matter of Soffici,* 22 I&N Dec. at 166. The petitioner indicated on the petition that he had purchased an existing business. The appraisal for the hotel reflects that it was built in the 1950s. The record does not contain the purchase agreement indicating whether or not the hotel was an operational business when purchased. Neither counsel nor the petitioner has explained how a hotel built in the 1950s is "new" as defined at 8 C.F.R. § 204.6(e).

Without a documented explanation as to how the petitioner or someone else has made the hotel "new" after November 19, 1990, the petitioner has not resolved the issue of whether he has invested in a new commercial enterprise.

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;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190). 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 at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, counsel asserted that the petitioner is a distinguished business man who began investing in the textile industry in Korea and owned a clothing factory in Argentina which he sold in 1993 when

he moved to Canada and purchased a coffee shop. 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 only evidence the petitioner submitted to establish the lawful source of his investment is the loan agreement whereby HLI borrowed $200,000 from the petitioner's brother and evidence that the petitioner sold his house in Canada in 2006 for a profit of $140,758.37. This evidence does not establish how the petitioner has accumulated the $1,000,000 he claims to have invested. For example, the petitioner did not submit any personal tax returns or other evidence of personal income.

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.