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U.S. Citizenship  
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FILE: [Redacted]  
SRC 98 104 52598

Office: TEXAS SERVICE CENTER Date:

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:



INSTRUCTIONS:

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on our motion to reopen. We will reopen the matter for the sole purpose of considering an appellate brief and evidence not part of the record at the time our previous decision was issued.

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 would meet the employment generating requirements.

On appeal, counsel argued that the petitioner invested \$500,000 in a new commercial enterprise that has generated 16 new jobs. The petitioner submitted photographs of remodeling and a one-page business plan. In addition, counsel requested 90 days in which to submit a brief and/or additional evidence. Counsel dated the appeal April 15, 2002. At the time of our previous decision, the record did not contain any additional submissions. Counsel has now demonstrated that he submitted a brief and additional evidence to the Service Center on September 3, 2003.<sup>1</sup> As those materials are now part of the record, we will reopen the matter for the limited purpose of considering those materials.

For the reasons discussed below, we find that while the petitioner has now established that he has invested in a targeted employment area, he has not demonstrated a qualifying investment of \$500,000 or that he will create the requisite employment.

The 21<sup>st</sup> 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 petitioner's appeal was pending on November 2, 2002, he 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 the creation of 10 new jobs or, in the case of a troubled business, the maintenance of 10 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).

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<sup>1</sup> The Form I-290B Notice of Appeal instructs appellants to submit subsequent briefs directly to the AAO.

**MINIMUM INVESTMENT AMOUNT**

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

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

*Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

The petitioner indicated on the petition that he was investing in Snyder, Texas, located in Scurry County. The petitioner indicated that the business was located in a targeted employment area. On June 23, 1998, the director requested evidence that the business was located in a targeted employment area. The director quoted the above regulations. In response, prior counsel asserted that Scurry County had a population of 19,038 and, thus, was a rural location. Prior counsel referenced 1997 census materials at "Tab 10." At the time of our previous decision, the record did not contain the 1997 census materials or "Tab 10." In his decision, the director stated that the record contained no evidence that Scurry County is a targeted

employment area and concluded that the minimum investment amount was \$1,000,000. The record now contains evidence that Scurry County's population is less than 20,000. According to the list of Metropolitan Statistical Areas (MSA) and their included counties, available at [www.census.gov](http://www.census.gov), Scurry County is not within any MSA. Thus, we conclude that the petitioner has invested in a rural area. As such, the minimum investment amount is \$500,000. This conclusion does not invalidate our previous decision, however, as we concluded that the evidence did not demonstrate an investment of \$500,000. As will be discussed below, the evidence submitted with the supplemental brief does not overcome that conclusion.

### INVESTMENT OF CAPITAL

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.

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.

Initially, the petitioner claimed to have invested \$60,000 in November 1995 and a total of \$160,772. In his most recent brief, counsel asserts that the petitioner has now invested \$649,421.03 as follows: a \$60,000 inheritance, \$332,368.55 in fixed assets, \$195,868.48 in total property and equipment, and \$61,184 in total other assets. First, where there is no evidence that the petitioner purchased assets from his personal funds, we will not add capital contributions to capital expenses. Expenses are paid out of contributions and may not be considered twice. A true capital investment of \$500,000 is best demonstrated by evidence tracing \$500,000 from the petitioner to the business, evidence that the funds constituted an equity investment, and evidence of capital expenses, including future expenses to which the petitioner was committed as of the date of filing. Second, assets are not a useful means to determine the amount of the petitioner's personal investment. As will be discussed in more detail below, a corporation, and even a sole proprietorship, can acquire assets without utilizing capital contributions to do so.

The new commercial enterprise identified on the Form I-526 petition is [REDACTED] a retail grocery located at [REDACTED] in Snyder, Texas. With the supplemental evidence submitted on appeal, the petitioner included a new business plan. On page 3, this plan indicates that the petitioner and his wife founded [REDACTED] located at [REDACTED] in October 1995. In 1996, the petitioner added a deli. In January 2000, more than two years after filing the instant petition, the petitioner opened the White Buffalo, a restaurant located on College Avenue. 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 *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 CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). The petitioner has not established that, at the time of filing, he was fully committed to investing in the White Buffalo restaurant. As such, we cannot consider any investment into that separate business. We will only consider the petitioner's alleged investment into Snyder One-Stop, the new commercial enterprise identified on the Form I-526 petition.

Initially, the petitioner submitted the articles of incorporation, filed June 27, 1996, which authorize 1,000 shares with a par value of \$1. The petitioner also submitted his 1996 personal tax return, including schedule C, reflecting that [REDACTED] was operated as a sole proprietorship prior to June 1996. In 1996, prior to incorporation, Snyder One-Stop incurred \$931 in costs of goods sold and \$64,486 in other expenses, many of which, like utilities, were normal operating expenses. Form 4562 reflects \$5,500 as a basis for seven-year property and \$24,390 as a basis for nonresidential real property. The balance sheets also reflect that the worth of the store property is \$24,390. The record includes a settlement statement documenting the petitioner's cash purchase of Lot 1, Block 45 in Snyder, Texas for \$24,390. While the

record does not establish that this lot is [REDACTED] we will credit the petitioner with the purchase of the store and the \$1,500 purchase of underground tanks.

Form 4562 also reflects an additional \$43,500 spent on three cars used personally and for business. In addition, the petitioner submitted balance sheets reflecting \$129,852 in capital as of June 30, 1997 and August 31, 1997. A balance sheet dated November 30, 1997 lists the entire net worth of the corporation as \$41,800. Net worth is the same as owner's equity. *Barron's Dictionary of Accounting Terms* 295 (3<sup>rd</sup> ed. 2000). Finally, the petitioner submitted numerous receipts for inventory in 1997. The purchase of inventory two years after opening the store must be considered normal operating expenses paid from proceeds.

On September 23, 1998, the director requested additional evidence of the petitioner's investment, including bank statements reflecting the transfer of funds from the petitioner to the new commercial enterprise, evidence of assets purchased for the business, evidence of money transferred or committed to be transferred to the business and evidence of any financing. In response, the petitioner submitted the company's bank statements, which fail to trace any funds back to the petitioner, and the settlement documents referenced above.

The petitioner also submitted loan documents reflecting that the petitioner and his wife borrowed \$5,000 on October 23, 1995 from First State Bank for the purchase of furniture secured by the petitioner's personal certificate of deposit; \$24,000 on December 5, 1996<sup>2</sup> from Snyder National Bank for "consumer: renewal note [REDACTED] Operating expense" secured by certificates of deposit;<sup>3</sup> \$8,000 on February 15, 1997 from Snyder National Bank for "consumer:personal" secured by the petitioner's property; \$165,000 on December 11, 1997 from Brenco Marketing Corp. for the installation of new tanks and monitoring systems, to purchase food service equipment, and to refinance loans with Snyder Bank, secured by a lien on the business property, inventory and equipment; and \$14,114 on March 15, 2000 from Snyder National Bank secured by a 1996 Jayco.

In addition, the petitioner submitted tax documentation for 1997 that is inconsistent. As stated above, the petitioner incorporated [REDACTED] in June 1996. Yet, in 1997, while Snyder One-Stop filed its own corporate tax return, the petitioner also claimed a loss from the business on his personal tax return, schedule C. The corporate tax return does not include schedule L, which would list the corporate equity. The petitioner did submit a new balance sheet as of December 31, 1998. This financial document provides the following information regarding equity:

Common Stock	\$1,000
Capital Due to FMV Increase	\$60,000
Retained Earnings	\$3,819
Capital Contributed - Brenco	\$50,000
Net Income (Loss)	\$40,971

The director concluded that while the \$5,000, \$8,000, and \$24,000 loans were secured by the petitioner's own assets, that amount was far below the requisite \$1,000,000 or even the claimed minimum investment amount of \$500,000.

<sup>2</sup> The loan documents submitted on appeal reveal that this loan was a renewal of a November 27, 1995 loan for the same amount.

<sup>3</sup> The loan documents submitted on appeal reveal that this loan was renewed on May 27, 1997, December 18, 1997, June 10, 1998, November 25, 1998, and May 25, 1999.

On appeal, counsel stated, "there is over \$500,000 invested as that term is used in the law." The petitioner submitted photographs of the business before and after it was remodeled. In support of the supplemental brief, the petitioner submits additional financial statements, tax returns, bank statements, loan documents and invoices.

Counsel asserts that the income statements for 1996 through 2000 reflect the petitioner's "continued reinvestment" in the commercial enterprise. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. See generally *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi*, 22 I&N Dec. at 195, for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

It is acknowledged that the commercial enterprise at issue in this petition was a sole proprietorship for part of 1996 and that the commercial enterprise in [REDACTED] was a corporation. Regardless, a reinvestment of proceeds is simply not an infusion of new capital into a business. Certainly the personal assets of a sole proprietor are at risk and can be seized by a creditor. In addition, unlike a corporation, the owner of a sole proprietorship who reinvests the profits of the business is being taxed on those profits. As indicated above, however, while the company was still a sole proprietorship, the petitioner deducted normal operating business expenses on Schedule C, and, thus, was not taxed on any proceeds not included in the company's profits. While the petitioner paid taxes on profits in 1996, that money constituted the bulk of his personal income. As such, at least some of that money was spent on personal living expenses, and was not reinvested into the business.

We note that a federal court, in an unpublished decision, has upheld our interpretation of "invest" as applied to a sole proprietorship. In *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003), the court stated:

The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing Mirriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101<sup>st</sup> Cong. 1<sup>st</sup> Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

*Id.* at 4-6. Thus, we will not consider the enterprise's income statements as evidence of an investment by the petitioner. Moreover, the petitioner's 1998, 1999, and 2000 Schedules K-1 reflect that he withdrew all the profits of the company, leaving no retained earnings. The record contains no evidence that he reinvested this money after paying taxes on it.

As stated in our previous decision, the 1998 balance sheet does not reflect \$500,000 in capital contributions under equity. Similarly, the 1996 and 1997 tax returns and receipts do not reflect \$500,000 in capital expenditures. Rather, they suggest minimal start-up costs and some renovation capital expenses, all well below \$500,000. The remaining expenses are normal operating costs.

The record now contains Snyder One-Stop's balance sheets as of December 31, 1999 and 2000.<sup>4</sup> Counsel notes that as of December 31, 2000, Snyder One-Stop had fixed assets of \$309,351.76 and total liabilities and equity of \$415,294.68. Counsel does not explain how these numbers relate to the petitioner's personal equity investment in Snyder One-Stop. Our review of the balance sheets reveals that they contain the following information:

	1999	2000
Common Stock	\$1,000	\$1,000
Capital Due to FMV Increase	\$60,000	
Retained earnings	\$3,819	\$25,288.67
Capital Contributed – Brenco	\$50,000	
Net Income (loss) <sup>5</sup>	\$40,971.73	\$34,419.92
Profit Draws by [the petitioner]		<u>-\$60,000</u>
 Total Equity	 \$155,790	 \$708

These balance sheets reflect a contribution of only \$1,000 by the petitioner, and, as they are not audited, have little evidentiary value.

The petitioner also submits Snyder One-Stop's 1999 and 2000 federal tax returns, including Schedule L. The schedules L reflect shareholder loans to the business decreasing from \$81,586 to \$70,476, mortgages increasing from \$157,707 to \$293,173, other liabilities of \$50,000, stock of \$1,000, and no additional paid-in-capital. The definition of invest, quoted above, explicitly excludes loans from the petitioner to the new commercial enterprise. Thus, the shareholder loans are not evidence of a qualifying investment. The large mortgages suggest that Snyder One-Stop acquired many of its assets by borrowing funds, and not as a result of capital investment. Most significantly, the extremely low stock amounts and lack of any additional paid-in-capital cannot establish an investment of \$500,000.

We acknowledge the submission of depreciation schedules, invoices, and balance sheets reflecting that the business has acquired assets. We will not, however, consider assets and other expenses without evidence that a capital investment by the petitioner was the ultimate source of those assets. A corporation can obtain funds from many sources, including loans and proceeds, neither of which can be credited as an investment by the petitioner. Thus, as will be discussed in more detail below, the mere acquisition of assets is insufficient evidence of a capital investment.

<sup>4</sup> The petitioner also submits a "Year 2000" balance sheet that differs somewhat from the balance sheet as of December 31, 2000. Balance sheets should reflect a snapshot picture of the entity's finances as of a specific date. Thus, we will consider the December 31, 2000. Regardless, the "Year 2000" balance sheet reflects only \$1,000 in common stock and \$50,000 in capital contributed from Brenco.

<sup>5</sup> The record contains no explanation for the inclusion of retained earnings and net income under equity. The definition of a retained earnings statement indicates that net income is one of the elements used to calculate retained earnings. *Barron's Dictionary of Accounting Terms* 378 (3<sup>rd</sup> ed. 2000).

In fact, much of the corporate expenses were financed. As stated above, the petitioner borrowed \$5,000 in 1995 and \$24,000 in 1996. The 1996 loan was renewed through May 2000. On appeal, the petitioner submits evidence of several more lines of credit. Specifically, one loan index lists the following debts:

Loan 24582	7/16/97	\$20,000	
Loan 24652	8/1/97	\$5,000	
Loan 20937	11/27/95	\$24,000	renewed through 5/25/99
Loan 29780	10/20/99	\$23,824	renewed through 5/29/01
Loan 30245	2/7/00	\$16,000	
Loan 30312	3/21/00	\$15,000	renewed through 8/10/00
Loan 30242	2/7/00	\$16,000	renewed through 6/13/01

The petitioner submitted the documentation for several of these loans and their renewals. The petitioner and his wife are listed as the borrowers and the loans are secured by personal certificates of deposit. These loans / credit lines on the index total \$119,824, \$49,000 of which was borrowed prior to the date of filing.

Another loan index lists several more loans / lines of credit all dated after the date of filing and relating to "3703 College." Several of the loans are secured by that property. As such, even if we were to consider the petitioner's "investment" into the White Buffalo, it appears that the restaurant was funded by loans secured by the assets of the business. As quoted above, the definition of capital precludes loans secured by the assets of the business.

As indicated above and stated in our previous decision, much, if not all, of the Snyder National Bank loans prior to December 1997 were refinanced with a loan secured by the assets of the business. Thus, the petitioner did not sustain any investment he might have made by obtaining the loans secured with his personal assets. As stated in our previous decision, the loans after the refinancing occurred after the date of filing and cannot be considered evidence of the petitioner's investment at that time. The submission of more post filing loans in the supplemental evidence does not change our analysis of the petitioner's investment as of the date of filing. As stated in our previous decision, while a petitioner need only demonstrate that he is actively in the process of investing, the record contains no evidence that any funds were irrevocably committed to the business at the time of filing.

In our previous decision, we discussed prior counsel's assertion that the assets of the business, as reflected on the balance sheets, should be considered the petitioner's personal investment. As stated above, counsel reiterates this assertion in his supplemental brief. As stated in our previous decision, a balance sheet represents a shareholder's investment as equity, which is equal to assets less liabilities. *Barron's Dictionary of Accounting Terms* 41, 163 (3<sup>rd</sup> ed. 2000). Thus, considering only the assets without considering the liabilities mischaracterizes the petitioner's investment. As noted above, the tax returns, schedules L, reflect significant mortgages and other long-term loans that can account for the purchase of some of those assets. Second, even all of the equity on the balance sheets is not representative of the petitioner's personal investment. The December 31, 1998 and December 31, 1999 balance sheets, for example, reflect capital contributed by another entity, Brenco, as well as retained earnings.

Finally, we acknowledge the 2002 bank statements submitted with the supplemental evidence. These statements have no relevance to the petitioner's investment as of the date of filing. Moreover, the statements reflect that [redacted] receives its income from credit card settlements (proceeds that may not be credited to the petitioner) and pays off its own loans.

In summary, at best the evidence demonstrates only that the petitioner purchased the store property for \$24,390, the equipment for \$1,500, and borrowed money secured by his own assets for capital expenses, much of which was later refinanced with a loan secured by the assets of the business. In addition, even the above amounts were not all invested and sustained in the company as the balance sheets and tax returns, schedule L, reflect far less than \$500,000 in equity contributed by the petitioner. Thus, we concur with the director and our previous decision that the petitioner has not demonstrated a qualifying investment of \$500,000.

### EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

(i) 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.

(ii) *Troubled Business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

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

*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.

8 C.F.R. § 204.6(e) states that:

*Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039.

In response to the director's request for additional documentation, prior counsel asserted that the petitioner had invested in a troubled business. Prior counsel stated:

The troubled business, C&W Enterprises, Inc. had been losing money for a while prior to its being sold in November 1995, and with a profit of \$2,163 for the month of October, its doors were closing.

The G/L income statement, ending October 24, 1995, which reveals a net income of \$9,511 during the ten-month period of 1995. The year to date column shows the current and the prior year's figures. Each revenue item in the current year (1995) is show[ing] increasing losses with declines of 11-22%. No other records for the business were available [sic]. Compare these with the same statements for Snyder One-Stone, Inc. See Tab 2.

The petitioner also submitted a business plan.

The director concluded that the petitioner had failed to establish that the number of existing employees was and would be maintained at no less than the pre-investment level. With the initial appeal, counsel asserted that the business has created at least 16 new jobs. The petitioner resubmitted a page of the previously submitted business plan. In his supplemental brief, counsel asserts that the petitioner has established an investment in a troubled business because the petitioner increased the “net worth” of the previous business by more than 40 percent.

First, counsel reaches this conclusion by comparing the net *income* of Snyder One-Stop in 1998 with the net *income* of the prior business in 1995. Net income and net worth are two completely different accounting concepts. *Barron's Dictionary of Accounting Terms* 293, 295 (3<sup>rd</sup> ed. 2000). Counsel provides no basis for the implication that an increase in net income necessitates a comparable increase in net worth. Regardless, counsel is confusing the troubled business provision that allows a petitioner to rely on employment maintenance, 8 C.F.R. § 204.6(e)(definition of “troubled business”), with provision relating to the former requirement that the petitioner establish a new commercial enterprise, 8 C.F.R.

§ 204.6(h)(3). If the petitioner wishes to rely on employment maintenance, he must demonstrate that the business in which he invested was a troubled business by comparing its net worth at the time of sale with its net worth either 12 or 24 months prior to that date. See 8 C.F.R. § 204.6(e)(definition of troubled business) quoted above.

As stated in our previous decision, the record does not contain an exhibit labeled two or the G/L income statement referenced by counsel. Regardless, the petitioner must demonstrate that the prior company suffered a net loss over a 12- or 24-month period and that the loss was equal to at least 20 percent of the net worth of the business prior to that loss. Evidence of only 10 months of loss without evidence of the net worth prior to that loss is insufficient.

In addition, the record contains no documentation regarding the number of employees working for the business prior to the date of purchase. Thus, we cannot determine what number the petitioner must maintain. Moreover, the business plan indicates that the petitioner purchased a closed business. The Bill of Sale does not include the cost of good will or other references suggesting an operational business, such as assignment of accounts receivable and payable. Thus, the petitioner must establish the creation of 10 jobs.

In his supplemental brief, counsel asserts that the petitioner has created 17 jobs, eight of which are full-time. Counsel includes jobs created at the White Buffalo. For the reasons stated above, we cannot consider any investment in or jobs created at the White Buffalo, as the petitioner was not fully committed to investing in this restaurant at the time of filing. See 8 C.F.R. § 103.2(b)(12); 8 C.F.R. § 204.6(j)(2)(requiring an "actual commitment" of the invested funds); *Matter of Katigbak*, 14 I&N Dec. at 49.

The record contains a letter from [REDACTED] of Abilene Bookkeeping. She asserts that the petitioner hired a manager in 1996 and only one part-time employee, other than his wife and three daughters, in 1997. In July 1998, the petitioner hired two additional employees. Finally, according to Ms. [REDACTED] the petitioner planned to hire additional employees in October 1998 for the addition of a pizza delivery service.

The petitioner submitted a single Form W-2 for 1997, Forms 941 reflecting no wages in the first and second quarters of 1998 and a wage and withholding report for the first quarter of 1997 reflecting one employee in January, one in February, and none in March. In addition, the petitioner submitted two Forms I-9 that are unsigned by an official of Snyder One-Stop.

In the supplemental evidence submitted on appeal, the petitioner includes Forms 941, quarterly wage and withholding reports, Forms W-2, and Forms I-9 for 1998 through 2001. Of the 12 Forms I-9 submitted, 10 are for employees at the White Buffalo. The withholding reports for 1998 reflect no more than three employees during any one month. In 1999, Snyder One-Stop issued eight Forms W-2 reflecting annual wages of no more than \$2,390. The withholding reports for 1999 reflect between one and three employees during any given month. With the opening of the White Buffalo in 2000, [REDACTED] issued 59 Forms W-2 that year. Most of these forms reflect annual wages of a few hundred or a few thousand dollars. Only a handful of Forms W-2 reflect wages that could account for full-time employment at minimum wage. The 2000 withholding reports reflect no more than three employees per quarter earning sufficient wages to account for full-time employment at minimum wage. In 2001, Snyder One-Stop issued 41 Forms W-2, only one of which reflects sufficient wages for full-time employment at minimum wage. The withholding reports for that year reflect no more than three employees per quarter earning sufficient wages to account for full-time employment at minimum wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The evidence does not support counsel's assertion that Snyder One-Stop now employs eight full-time employees, even if we count the White Buffalo employees.

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 the Service 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.* at 213.

The objectives on the first page of the petitioner's original business plan project the creation of three full-time jobs and two to four part-time jobs. Section 2.2 of the plan provides: "In addition to the five [members of the petitioner's family] that work full-time in the business, recent expansion has led to the hiring of two full-time employees (July 1998) and one part-time employees [sic] (August 1998)." Finally, section 6.2 reiterates that the petitioner employs his wife and three daughters and has added two full-time employees. Without explanation, the plan states: "Our plans calls [sic] for having ten jobs in our store before the end of this year." In our previous decision, we concluded that the plan fails to provide the positions these additional eight employees will fill or provide projected hiring dates. We further noted that if the petitioner, his wife, and three daughters will hold five of those jobs, he cannot claim to have created 10 jobs for qualifying employees.

The supplemental evidence includes a new business plan dated June 4, 2002. The objectives in Section 1.1 include providing ten full-time and four to six part-time jobs. Section 6.2 indicates that the petitioner, one of his daughters, and five employees operate Snyder One-Stop and the petitioner's wife and eleven other employees run the White Buffalo. The business plan includes no explanation as to how and when

the part-time employees will become full-time or the business will hire new full-time employees. The Appendix Table entitled "Personnel (Planned)" lists 15 employees for every month of the unspecified year with wages increasing only from \$10,000 to \$11,000.

As stated above, the petitioner's employment records do not reflect more than two or three full-time employees at any one time. The business plan does not sufficiently explain how the petitioner will increase full-time employment to 10. Ultimately, the record confirms the director's initial determination that the petitioner's original business plan to employ 10 full-time workers at Snyder One-Stop within two years was not credible.

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.