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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 10 2005
SRC 04 219 50014

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and 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 would create the requisite employment.

On appeal, counsel submits a brief and additional documentation.

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 petitioner filed the petition after 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.

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).

According to the petition, the record indicates that the petition is based on an investment in a business, Dryjas Holdings, LLC (Dryjas), located in a rural area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $500,000.[1] A review of the record, however, reveals that the petitioner's claimed investment consists of contributions to the above company and two separate limited liability companies: Will's Inn, LLC (Will's Inn) and Top Notch Vacations, LLC (Top Notch). According to the documentation submitted, the petitioner and his wife own all three companies; Dryjas Holdings, despite its name, is not a holding company for the other two. The problem with this arrangement will be discussed below.

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[1] The petitioner established that [redacted] New Hampshire, is not located within a Metropolitan Statistical Area and, while not obligated to do so, we have verified that Bartlett is not within the outer boundary of any city or town having a population of 20,000 or more. *See* 8 C.F.R. § 204.6(e)(definition of rural).

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;
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> (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 petition, Part 3, the petitioner claimed to have invested a total of $656,425. In Part 4, this amount is listed as "total value of all property transferred from abroad to the new enterprise." On June 9, 1999, Dryjas purchased Will's Inn and Top Notch as well as a "single fam. Residence Rt 302." The total paid, according to the settlement documents, was $949,545.04, $650,000 of which was financed. The loan documents for this loan reflect the borrowers as all three limited liability companies. The purpose is stated as "[a]pproximately $625,000 to finance the purchase of Will's Inn, Top Notch Management and a single family residence and approximately $25,000 to fund improvements to the residence." The security is listed as follows:

> First mortgage on Will's Inn located at Route 302, Bartlett, New Hampshire and the residence located across the street from Will's Inn, along with a first security interest in all business assets of Will's Inn and Top Notch management and an assignment of leases and rents.

Under "Guarantors" the loan document provides:

> The Dryjas Revocable Trust of 1999, and [the petitioner and his wife] personally ("Guarantors"), will guarantee all extensions of credit to [the three limited liability companies].

The petitioner demonstrated the following transfers to Badger Realty, the escrow agent for the purchase of Will's Inn and Top Notch: $10,000 from the petitioner's account at Berlin City Bank on March 6, 1999, $40,000 from the petitioner's account at Berlin City Bank on April 20, 1999 (through a cashier's check from that bank listing the petitioner's name in the "memo" section) and $225,000 on May 18, 1999.

In her request for additional evidence, the director noted that loans secured by the company's assets and loans to the company could not be considered qualifying investments. In response, the following is claimed as evidence of the petitioner's investment:

1. Top Notch, LLC, Form 1065, Schedule K-1, Capital Contributed During the Year – 1999 ([the petitioner] $23,103 and [the petitioner's wife] $23,104.)

   $46,207

2. Will's Inn, LLC, Form 1065, Schedule K-1, Capital Contributed During the Year – 1999 ([the petitioner] $118,072 and [the petitioner's wife] $118,072)

   $236,144

3.a Dryjas Holdings, LLC, Form 1065, Schedule K-1 Capital Contributed during the Year – 1999 [the petitioner] $30,654 and [the petitioner's wife] $30,654)

   $61,308

b Dryjas Holdings, LLC, Form 1065, Schedule K-1, Line F, Recourse Debt Personally Guaranteed (At-Risk Investment per Internal Revenue Code) by the [petitioner and his wife] – Original Loan Amount June 9, 1999 $650,000

Total Active, At-Risk Investment by [the petitioner and his wife] in 1999 $993,659

The director acknowledged the transfers of $10,000, $40,000 and $225,000 discussed above and concluded that the remaining funds were "obtained through loans secured by the investment property and the petitioner has not shown that he has the personal resources to invest the rest of the required amount of capital and he has not shown the source of any future investment capital."

On appeal, counsel asserts that the director failed to consider loans "guaranteed" by the petitioner and "collateralized by his personal assets." Counsel further asserts that the director failed to consider cash payments after the date of filing.

As stated above, the petitioner may be the guarantor of the $650,000 loan (the loan document is ambiguous as it suggests that the petitioner is only a guarantor for future extensions of credit) but counsel mischaracterizes the loan as collateralized by the assets of the petitioner. As quoted above, the security for the $650,000 is clearly and unambiguously the assets utilized by Will's Inn and Top Notch, most of which were purchased by Dryjas. As also quoted above, the definition of capital at 8 C.F.R. § 204.5(e) precludes any indebtedness where the assets of the new commercial enterprise upon which the petition is based are used to secure *any* of that indebtedness. Moreover, the petitioner's personal guaranty does not transform indebtedness secured by the business assets to indebtedness primarily secured by the petitioner. *Matter of Soffici*, 22 I&N Dec. 158, 162-163 (Comm. 1998). Counsel has not distinguished the instant matter from that case and we see no reason why the analysis in that precedent decision would not apply here. Thus, the director correctly rejected the $650,000 loan as part of the petitioner's qualifying investment.[2]

The record does demonstrate that Dryjas purchased property after 1999 but before the date of filing. In December 2000, Dryjas appears to have purchased property in Bartlett for $51,266.83 and $102,166.45 in addition to loans. In April 2003, Dryjas purchased property in Bartlett for $26,338 in addition to loans. In November 2003, Dryjas purchased property in Bartlett for $39,196.24 and $49,542.83. In July 2004, Top Notch borrowed $112,500. No seller is listed and Top Notch contributed nothing to the transaction except settlement costs of $1,392. For the reasons discussed above, the loans used to finance the property purchases cannot be considered. The cash was transferred directly from Dryjas, not the petitioner. A company has many ways of acquiring cash other than a qualifying equity investment. Thus, merely demonstrating that Dryjas spent money to purchase property is not evidence of the petitioner's personal investment into Dryjas.

Specifically, merely reinvesting Dryjas' proceeds into new property purchases is not a qualifying investment by the petitioner. 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. 169, 195 (Comm. 1998) for the propositions that the

[2] The record contains no evidence that the petitioner had personally, from his own assets, repaid any of the mortgage as of the date of filing.

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. A federal court has upheld our application of this principle to sole proprietorships as well. *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

Significantly, any funds the petitioner may have contributed to Dryjas for the 2000 and 2003 purchases are not reflected by Dryjas as an equity investment. As noted by counsel, the Schedules K-1 for the petitioner and his wife reflect an investment of only $61,308 in Dryjas in 1999. An analysis of subsequent Schedules K-1 is included below.

Prior to looking at all the Schedules K-1, we acknowledge that the petitioner paid taxes on the increase in his capital account. Thus, it might be argued that the amount of those increases that he and his wife failed to remove from their capital accounts should be considered part of their investment. If we take into consideration those funds, however, we must also deduct all withdrawals. The following chart of information contained on all Dryjas Schedules K-1 is instructive:

	Contributions	Profits	Losses	Withdrawals
1999	$61,308	$13,910	$0	$0
2000	$0	$47,447	$0	$9,992
2001	$60,000	$15,629	$0	$3,613
2002	$0	$0	$21,594	$32,486
2003	$0	$53,507	$0	$14,272
Totals	$121,308	$130,493	$21,594	$46,091

These numbers reveal that the petitioner and his wife contributed $121,308. If we add the undistributed taxed profits to those contributions and subtract the withdrawals ($121,308 + $130,493 - $46,091), the petitioner's investment amounts to $205,710. We will not deduct the business' losses; there is no requirement that the petitioner make money yearly. Thus, considering the evidence in the most favorable light to the petitioner, the petitioner's investment in Dryjas as of December 2003 was $205,710, far below the necessary $500,000.

Finally, with respect to Dryjas, we note that the balance sheets provided for Dryjas are not entirely consistent with the tax returns. We note that they list a loan payable to the petitioner. As stated by the director and set forth in the definition of invest above, a loan from the petitioner to the new commercial enterprise cannot be considered a qualifying investment.

As mentioned above, the petitioner also submits evidence of his investment in two other companies, Will's Inn and Top Notch, although the new commercial enterprise identified on the petition is Dryjas. Section 203(b)(5) of the Act provides benefits for aliens seeking to engage in "a" new 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 Schedules K-1 for Will's Inn and Top Notch reveal that both are owned by the petitioner and his wife. Neither company is a wholly-owned (or even partially-owned) subsidiary of Dryjas. As such, we cannot consider the petitioner's investment in these two companies. Our adherence to this principle is not simply technical. The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998). Although involving different facts, we have consistently relied on this case for the proposition that there must be some nexus between the investment and the employment creation. The petitioner's investment plan demonstrates why consideration of more than one commercial enterprise raises problems. Specifically, Dryjas is not creating any employment. Rather, even if we accepted the petitioner's claim that the employees of ADP TotalSource should be considered employees of Will's Inn and Top Notch, the employment is being created by those companies. Thus, there appears to be little nexus between the funds invested into Dryjas and the employment generating activities of Will's Inn and Top Notch, both of which must pay rent due to their lack of property ownership.[3]

Regardless, the petitioner's equity investments in Top Notch and Will's Inn are not persuasive. Those numbers are as follows:

	Contributions	Profits	Loss	Withdrawals
Will's Inn				
1999	$236,144	$23,821	$0	$0
2000	$0	$0	$35,120	$38,729
2001	$0	$32,928	$0	$60,226
2002	$0	$47,853	$0	$59,540
2003	$0	$0	$13,473	$35,628
Totals	$236,144	$104,602	$48,593	$194,123
Top Notch				
1999	$46,207	$19,395	$0	$0
2000	$42,000	$0	$17,912	$13,262
2001	$0	$29	$0	$52,984
2002	$0	$0	$233	$37,835
2003	$0	$8,995	$0	$38,888
Totals	$88,207	$28,419	$18,145	$142,969

As with the numbers for Dryjas, we will not deduct the companies' losses from the petitioner's investment, but will deduct the withdrawals. The above numbers reveal, at best, an investment of $146,623 ($236,144 + $104,602 - $194,123) in Will's Inn and no maintained investment in Top Notch (the infused capital and retained earnings are less than the amounts withdrawn). Moreover, the petitioner has not submitted sufficient transactional evidence documenting the transfer of these funds from the petitioner and his wife to these two companies.

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[3] Will's Inn pays rent to Dryjas and Top Notch pays rent to Will's Inn, according to the financial statements submitted.

In light of the above analysis, even if we consider the profits reinvested in all three companies, at of the end of 2003 the petitioner's sustained investment was, at best, $352,333 ($205,710 in Dryjas and $146,623 in Will's Inn). The petitioner has not demonstrated that he has irrevocably committed the remaining investment funds. Thus, we concur with the director that the petitioner has not demonstrated a qualifying investment.

We further note that the petitioner's purchase of Will's Inn and Top Notch includes a family residence. Even if we were permitted to consider the $650,000 loan, and we reiterate that we are not, it includes funds for improvements to the residence. Any funds used to purchase and improve the petitioner's own residence cannot be considered the petitioner's investment in the new commercial enterprise.

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 serves or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. . . . This definition shall not include independent contractors.

(Definition for Regional Center cases omitted, as the instant petition is not based on an investment in a Regional Center.)

The regulation at 8 C.F.R. § 204.6(e) continues:

> *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.

Forms I-9, verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as pay stubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full-time employment within the United States. *Id.* at 212.

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 Citizenship and Immigration Services (CIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

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

Id.

On the petition, the petitioner indicated that he had purchased an existing business. He further indicated that the business had 10 employees at the time of his investment and 20 at the time of filing. In counsel's cover letter, he asserted that there were four full-time and ten part-time employees at the time of purchase and 16 full-time and 30 part-time employees currently. In response to the director's request for additional evidence, counsel indicated on the exhibit list that the three companies employed no workers as of May 14, 1999, 11 as of December 31, 1999 and 22 as of December 31, 2003. Counsel listed an additional 25 subcontractors. On appeal, counsel asserts that the petitioner purchased Top Notch and Will's Inn, dissolved and liquidated them, terminated all employees and contributed the assets to three limited liability companies. Counsel further asserts that at "the time of creation, the companies had no employees." Counsel concludes that the petitioner "then proceeded to hire for these three LLCs, as new hires, certain employees previously employed by the dissolved corporations along with other new employees." The petitioner's accountant reiterates this claim.

The petitioner submits Employer Status Reports for [redacted] Both forms indicate that no employment had been furnished in New Hampshire in previous years. On the back, however, the petitioner indicated that this was because the entity was a new company. Thus, the response appears to relate to the purchaser, not the seller. Thus, these forms do not demonstrate that Top Notch and Will's Inn had no employees at the time of purchase.

It is instructive that Congress defined this classification as "employment creation." Thus, the creation of new jobs is a major goal of the statute at issue. The assertion that an alien can satisfy the congressionally mandated employment creation requirement by first terminating existing employees and then rehiring them is fallacious. Specifically, it runs counter to the clear congressional intent behind the "employment creation" visa classification: to create a net increase in jobs. Thus, we find that it is the petitioner's burden to demonstrate how many employees were employed at Top Notch and Will's Inn prior to the purchase date in 1999.

On appeal, counsel states that Will's Inn employed seven part-time workers and one full-time worker. Counsel further states that Top Notch employed four full-time and three part-time employees. The petitioner submitted no evidence regarding the number of employees at Will's Inn and Top Notch prior to his purchase of those businesses. 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). Even if we were to accept these numbers, the two businesses together employed five full-time employees. Thus, the petitioner must demonstrate that he will employ 15 full-time employees.

The petitioner submitted payroll statements listing the company name as ADP Total Source, EIN 65-0172853, not the EIN for any of the three companies discussed above. The records are for Company/Corporation Codes MJD and MJE. Handwritten notations and some cover pages indicate that "MJD" records are prepared for Top Notch and "MJE" records are prepared for Will's Inn.

The director concluded that since ADP Total Source issued the Forms W-2, the employees were only contracted by the petitioner's companies. As quoted above, the definition of employee excludes independent contractors and those who do not receive their salaries directly from the new commercial enterprise. On appeal, counsel asserts that ADP is a personnel leasing company, used to ensure compliance with legal and human resource requirements as well as providing for healthcare benefits.

Top Notch's income statements reflect "cleaning labor," "billable cleaning labor" and "billed out subcontractors" in addition to ADP payroll expenses. The tax returns for Top Notch reflect no wages or cost of labor, but deductions for contract labor in 2002 and 2003. In 2001 Top Notch paid $124,630 in wages, no cost of labor and $39,804 in contract labor. In 2000 Top Notch paid $117,385 in wages, no cost of labor and $57,028 in contract labor. In 1999, Top Notch paid $49,204 in wages, no cost of labor and $11,242 in contract labor.

Will's Inn's income statements reflect salaries and ADP payroll expenses. According to the tax returns submitted, [redacted] paid wages in 1999 through 2001 (between $7,048 and $24,799), but after that time paid no wages or cost of labor expenses. Will's Inn began incurring contract labor expenses in 2002.

The characterization of the wages paid through ADP Total Source as contract labor on the tax returns of Top Notch and Will's Inn does not support a conclusion that ADP Total Source merely prepared the petitioner's payroll documentation. Rather, Top Notch and Will's Inn appear to be contracting employees through ADP Total Source. As such, we uphold the director's analysis of this issue. Regardless, even if we considered the

employees employed through ADP Total Source, the record does not demonstrate the creation of 10 new full-time jobs. Our analysis follows.

Top Notch

The MJD payroll records for the first quarter of 2002 reflect nine employees other than the petitioner, seven of whom could have worked full time based on their quarterly wages. The records for the second quarter of 2002 reflect ten employees other than the petitioner, three of whom earned no wages that quarter. The numbers fluctuate for the remainder of the year, never demonstrating employment of more than seven full-time employees. By the fourth quarter of 2002, the records reflect 14 employees other than the petitioner, five of whom earned no wages that quarter. Of the remaining nine employees, five earned wages consistent with full-time employment. The MJD records for 2003 never reflect more than seven employees whose wages are consistent with full-time employment and only four employees could have worked full-time at minimum wage in the final quarter of that year. In the first quarter of 2004, MJD employed 12 workers, six of whom could have worked full-time at minimum wage that quarter.

The Forms W-2 for 2002 and 2003, issued by Total Source, code MJD, reflect between 14 and 15 employees in addition to the petitioner respectively, seven of whom could have worked year round full-time at minimum wage. In 1999 through 2001, Top Notch issued its own Forms W-2, nine in 1999, 14 in 2000 and nine in 2001. As the petitioner purchased Top Notch in 1999, it is difficult to discern how many of the employees receiving Forms W-2 in 1999 could have worked full-time. The Employer Quarterly Tax and Wage Report filed by Top Notch for the third quarter of 1999, however, reveals no employees in July, six employees in August, and four employees in September. As none of those employees worked the full quarter, their quarterly wages are not helpful in calculating whether they could have worked full-time.

Finally, Top Notch also issued Forms 1099 MISC during 1999 through 2003. Such forms are issued to independent contractors, who are expressly excluded from the definition of employees in the regulations quoted above. Thus, we will not consider these forms.

At best, the records discussed above demonstrate that Top Notch employed six full-time employees as of the first quarter of 2004.

Will's Inn

The MJE payroll records for 2002 and 2003 fluctuate between one and three employees whose wages are consistent with full-time employment at minimum wage. In the first quarter of 2004, MJE payroll records reflect two employees, both of whom could have worked full time, although its Employer Quarterly Tax and Wage Report lists three employees, two of whom could have worked full-time. In 1999, Will's Inn filed its own Employer Tax and Wage Report, reflecting one employee in July, one in August and two in September.

ADP Total Source, code MJE, issued six Forms W-2 in 2003, two for employees whose wages can account for full-time year round employment at minimum wage. ADP Total Source, code MJE, issued seven Forms W-2 in 2002, two for employees whose wages can account for full-time year round employment at minimum wage. Prior to 2002, Will's Inn issued its own Forms W-2, two in 1999, seven in 2000, and three in 2001.

Finally, Will's Inn also issued Forms 1099 MISC during 1999 through 2003. As stated above, such forms are issued to independent contractors, who are expressly excluded from the definition of employees in the regulations quoted above. Thus, we will not consider these forms.

At best, the records discussed above demonstrate that Will's Inn employed two full-time employees as of the first quarter of 2004.

Dryjas

Dryjas never paid wages or cost of labor expenses and never listed expenses for contract labor. Dryjas did issue a small number of Forms 1099-MISC, but such forms are issued to independent contractors and cannot be considered as discussed above. We reemphasize here that Dryjas is the new commercial enterprise identified on the petition and into which the bulk of money was transferred.

In light of the above, the petitioner has not demonstrated the employment of more than eight full-time employees, six at Top Notch and two at Will's Inn. It is acknowledged that employment fluctuates based on season. Full-time employment, however, means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion). Section 203(b)(5)(D) of the Act, enacted in 2002, does not contradict this interpretation. Thus, while the *replacement* of new employees is not problematic, the new positions themselves must be filled year round to be qualifying. The record does not demonstrate the creation of ten new, year round, full-time positions.

The petitioner has not submitted business plans for Top Notch and Will's Inn that meet the requirements set forth in *Matter of Ho*, 22 I&N Dec. at 210, quoted above. Thus, we concur with the director that the petitioner has not met the employment creation requirements.

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.