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

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 25 2007
SRC 05 009 51095

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, Chief
Administrative Appeals Office

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

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds.

On appeal, counsel asserts that the director incorrectly discounted the evidence submitted. For the reasons discussed below, we concur with the director that the record lacks evidence that the petitioner has invested the necessary funds or that the funds derive from an ultimately lawful source.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

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

The record indicates that the petition is based on an investment in a business, [redacted] located in a targeted employment area for which the required amount of capital invested has been adjusted downward.[1] Thus, the required amount of capital in this case is $500,000. Section 203(b)(5)(C)(ii) of the Act, 8 U.S.C. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2).

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[1] A targeted employment area is a rural area or an area of high unemployment. Section 203(b)(5)(B)(ii) of the Act, 8 U.S.C. § 1153(b)(5)(B)(ii); 8 C.F.R. § 204.6(e). Initially, counsel asserted that the business was located in a rural area and referred to photographs of the business as evidence of the rural nature of the location. The statute and pertinent regulation, however, specifically define a rural area as an area not within a designated Metropolitan Statistical Area or the boundaries of a city with a population of 20,000 or more. Section 203(b)(5)(B)(iii) of the Act, 8 U.S.C. §1153(b)(5)(B)(iii); 8 C.F.R. § 204.6(e). The regulation at 8 C.F.R. § 204.6(j)(6) requires that the petitioner submit evidence to document that the location of the business meets the definition of rural. Despite the petitioner's failure to submit the required evidence, the director did not contest that the business is located in a rural area. Although it is the petitioner's burden to submit the required evidence that the business is located in a rural area, we take administrative notice of the fact that Bushnell, Florida, is located in Sumter County, which, according to the website www.census.gov, is in the Villages, Florida "Micro Area," and not a Metropolitan Statistical Area. Moreover, according to the same website, Bushnell has a population of 2,281 and the largest city in Sumter County, Wildwood, has a population of only 3,287. Thus, Bushnell, the location of the business, is within a rural area.

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

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

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

> nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
>
> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the petition, the petitioner indicated that he had made an initial investment of $46,632.51 on March 27, 2000 and had made a total investment of $652,787. The petitioner broke down the investment as $264,638 in stock purchases and $388,149 in "other" investments. The petitioner also indicated that he owned 100 percent of the company. In counsel's cover letter, he asserts that the petitioner's initial investment derived from personal savings and "cash out" from a loan on the petitioner's home. Counsel further asserts that the petitioner refinanced his home on two occasions, resulting in an investment of $224,371.38 in November 2002 and an investment of $97,145 in January 2003. In addition, counsel asserts that the petitioner traded a $284,638 promissory note issued by the petitioner's other corporation, [redacted] for 200 shares in [redacted] Finally, counsel asserts: "[redacted]. is owned by [the petitioner] and his wife . . . and by [redacted], which is a corporation 100% owned by [the petitioner] and his wife."

As evidence of the above investments, the petitioner submitted a settlement document dated March 27, 2000 for the petitioner's residence reflecting cash back to the petitioner of $46,632.51. The petitioner also submitted a November 22, 2002 settlement document reflecting $224,371.38 back to the petitioner and his wife and a January 7, 2003 refinancing reflecting $97,145 paid back to the petitioner and his wife. As evidence that these funds were actually transferred from the petitioner to [redacted] however, the petitioner only submitted six record copies of checks issued by the petitioner or his wife to [redacted] between January 10, 2003 and March 14, 2003 totaling $130,000.[2]

Regarding the final alleged investment, the petitioner submitted a letter from attorney [redacted] registered agent according to the articles of incorporation, advising the petitioner's wife that he was enclosing a stock certificate evidencing 200 new shares of stock and the resolution authorizing the issuance of the shares in consideration for the assignment of a promissory note. The letter concludes:

> This will also confirm our discussion regarding the intent of you and [the petitioner] to invest additional capital in [redacted] in the amount of $220,000.00 over the next two (2) years. This additional capital could be in the form of cash, real or personal property, or a combination of both. Please advise me as these investments

[2] In her request for additional evidence, the director concluded that these amounts totaled $170,000. The checks, however, include four checks for $10,000, a check for $40,000 and a check for $50,000, which equal $130,000 altogether. The petitioner submitted two copies of the single check for $40,000.

are made in order that they might be appropriately documented in the corporate records.

The petitioner also submitted a copy of the stock certificate issued to him and his wife on June 30, 2004 for 200 shares and the resolution authorizing the shares "in consideration for the assignment of that certain *Promissory Note* from [redacted]., in favor of [the petitioner and his wife] dated June 30, 2004, in the original principal amount of $284,638.00." The record contains the June 30, 2004 promissory note itself whereby [redacted] promised to pay the petitioner $284,638 on demand with no specified interest accruing unless [redacted] defaults on its promise to pay on demand. Significantly, the note bears no reference to collateral. The petitioner signed the note on behalf of [redacted]

The petitioner submitted evidence that in 1998 [redacted] received a warranty deed for property in Sumter County where [redacted] is located, but no evidence that this property was ever transferred to [redacted] The record also lacks evidence relating to the amount of the purchase price or demonstrating that the property was bought with capital contributed by the petitioner.

On Schedule E of the [redacted] 2003 Florida Tangible Personal Property Tax Return for a Corporation, the petitioner indicated that the total value of the company's outstanding shares was $644,822. It would appear, however, that this value represents the company's increase in value rather than a contribution by the petitioner. Specifically, on [redacted] Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, Schedule L, the common stock value is reflected as $100, the additional paid-in-capital is reflected as $14,252 and the unappropriated retained earnings are reflected as $630,470. Thus, this return does not reflect that the petitioner ever contributed more than $14,352 to [redacted] We will not pursue this issue further, however, as [redacted] is not the new commercial enterprise on which the petition is based.

More relevant to the matter before us, we acknowledge that, according to the Schedule [redacted] ended 2003 owing $284,638 in shareholder loans, which matches the amount listed in the 2004 promissory note. According to [redacted]'s 2003 IRS Form 1120, it had no income, only $2,132 in current assets (including cash). According to statement 5, one of its main long term assets is a loan from [redacted] for $710,568. The only other asset from which [redacted] could pay the promissory note is its land valued at $162,500, which appears to be already subject to a mortgage of $115,000 according to statement 7. Thus, it would appear that [redacted] ability to pay the $284,638 promissory note assigned to [redacted] is contingent on funds due to be repaid to [redacted] itself.

Finally, the petitioner submitted [redacted] IRS Form 1120 for 2003 reflecting, on Schedule L, that the company repaid a loan of $227,252 to its shareholder (shareholder loans decreased during the year from $227,252 to $0), had common stock of $1,000 and had received no additional paid-in-capital. This tax return reflects no infusion of capital from the petitioner above $1,000. Even if we considered the $227,252 shareholder loan, and we do not as the definition of "invest" at 8 C.F.R. § 204.6(e) precludes debt financing, the company repaid the full loan by the end of 2003. Thus,

even if the petitioner was the source of that loan, the petitioner had already withdrawn those funds as of the date the petition was filed, October 13, 2004.

As stated above, counsel asserts that the petitioner, his wife and [redacted] jointly own [redacted] There was, however, no joint ownership in 2003. Specifically, Schedule K, Line 5 of [redacted]'s 2003 tax return reflects that one entity owns 100 percent of Tree Capital. In response to the director's request for additional evidence, the petitioner submitted statement 6 for [redacted]'s 2003 tax return reflecting that [redacted] is the sole (100%) owner of [redacted] We note that page 3 of [redacted]'s articles of incorporation reveal that [redacted] was issued 1,000 shares initially. This amount corresponds with the sole $1,000 in capital listed on the 2003 tax return, schedule L. The record contains no evidence that [redacted] sold or otherwise transferred his interest in [redacted] to the petitioner, the petitioner's wife or Ambelex Trading Group. The petitioner has not documented his own equity interest in [redacted] prior to June 20, 2004 as evidenced by the stock certificate issued to him and his wife on that date. This information is inconsistent with the petitioner's claims to have invested capital into [redacted] in 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On November 8, 2004, the director issued a request for additional evidence. In that notice, the director noted that the record lacked evidence of any transfers from the petitioner to [redacted] other than the $170,000 (actually $130,000) represented by the record copies of checks. The director also questioned whether those funds were at risk. Regarding the promissory note, the director noted that the record contained no evidence of collateral. Finally, the director noted the large liabilities reflected on [redacted]'s 2003 IRS Form 1120, Schedule L.

In response, counsel asserted that the funds invested were "at risk." Counsel noted that [redacted] is operational and the petitioner submitted numerous invoices reflecting the company's business expenditures. Counsel further asserts that as the promissory note was exchanged for stock, no collateral was involved.

The petitioner submitted a letter from Certified Public Accountant [redacted] who states:

> The promissory note transferred by [the petitioner] in exchange for 200 shares of [redacted] resulted from several years of actual cash investments by [the petitioner] into [redacted] [The petitioner] would make continual payments into [redacted], Inc. to support the business needs of the corporation. As a result, on December 31, 2003, [the petitioner] had a receivable from [redacted] Inc. of $284,638. Over the years [redacted] has been paying [the petitioner] interest on the receivable (please refer to enclosed copy of Schedule B, interest income, from [the petitioner's] income tax return properly reporting interest payment received from [redacted]

> As a result of the above clarification and enclosed documentation, we confirm that the note receivable represents true and accurate economic value.
>
> As of December 31, 2003 a shareholder loan (due to Ambelex) of $710,568 is listed on [redacted] balance sheet. No shareholder loan (due to [the petitioner]) is listed on [redacted] [sic] balance sheet as of December 31, 2003.

The petitioner submitted Schedules B from his personal tax returns reflecting interest payments from [redacted] in the amount of $31,254 in 1998, $15,000 in 1999, $11,500 in 2000, $7,000 in 2001 and $5,200 in 2002. [redacted] final sentence is incorrect; [redacted] balance sheet for 2003, as reflected on its schedule L for that year, *does* reflect a shareholder loan of $284,638. [redacted] however, acknowledges this amount was due to the petitioner on that date in an earlier paragraph and we acknowledge that the loan wasn't assigned to [redacted] until June 30, 2004.

We will first address the petitioner's alleged cash contributions and then address the promissory note.

As stated by the director, the record does not contain evidence that the petitioner transferred more than $130,000 (the director incorrectly stated $170,000) directly to [redacted] The fact that the petitioner may have borrowed additional funds against his home cannot establish that those borrowed funds were subsequently invested into [redacted]. It is the petitioner's burden to trace the path of any investment from his personal funds to the new commercial enterprise. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Commr. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Commr. 1998). The petitioner's mere assurance that the funds were subsequently contributed to [redacted] and counsel's affirmation of the same iformation is insufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Ho,* 22 I&N Dec. at 211 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Regl. Commr. 1972)). Moreover, 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). If some of these funds were actually lent to [redacted] and, thus, are the source of the funds owed to the petitioner and now assigned to [redacted] it would be double counting those funds to consider them both as a cash investment into [redacted] and again as the basis of the promissory note subsequently assigned to [redacted]

Finally, even the $130,000 investment is poorly documented. We note that record copies, created when the payor writes the check, are not evidence that the checks were actually cashed. The petitioner did not submit cancelled checks or bank statements reflecting that the checks represented by the record copies were actually deposited with [redacted] Moreover, [redacted] 2003 tax return, schedule L, does not confirm any investment by the petitioner in 2003. Specifically, [redacted] began and ended the year with only $1,000 in capital. The schedule L also reflects an elimination of the shareholder loan, reflecting a removal of cash by a shareholder, not an infusion. We also note that, according to the Schedules B for the petitioner's personal tax returns for 1999

through 2002, the petitioner received interest payments of $15,000 in 1999, $22,357 in 2000, $27,143 in 2001 and $14,696 in 2002 from [redacted] These interest payments strongly suggest that, prior to this period, at least some of the petitioner's contributions to [redacted] were loans. As quoted above, the definition of "invest" at 8 C.F.R. § 204.6(e) excludes debt arrangements whereby the alien loans funds to the new commercial enterprise. Finally, as stated above, Tree Capital's *sole* shareholder in 2003 is listed on statement 6 of the 2003 tax return as Ambelex Trading Group.

The promissory note is equally unpersuasive evidence of a qualifying investment. *Matter of Izummi*, 22 I&N Dec. at 193, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. In this matter, as the petitioner is assigning the promissory note in exchange for stock, it is the promissory note itself that constitutes the capital. All capital must be valued at fair market value. 8 C.F.R. § 204.6(e)(definition of capital); *Matter of Izummi*, 22 I&N Dec. at 191. The fair market value of the promissory note depends on its security and the terms of the note itself. *Matter of Izummi*, 22 I&N Dec. at 191-92. "In the real business world, promissory notes, such as mortgages, are regularly sold and are regularly discounted." *Id.* at 193. Whether a promissory note is capital or evidence that the alien is in the process of investing, the assets securing the note must be specifically identified, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. *Matter of Hsiung*, 22 I&N Dec. 201, 203-04 (Commr. 1998).

In this matter, [redacted] promise to pay the petitioner, assigned to [redacted] is unsecured. Moreover, as discussed above, [redacted] has almost no current assets from which to pay the loan. Without further evidence, we cannot conclude that the fair market value of the promissory note is equal to the face amount of the note. *Id.* at 204. Moreover, the only long-term assets sufficient to cover the note are owed funds from [redacted] Thus, the petitioner has not established how [redacted] can secure payment without first repaying the funds to [redacted] itself. Further, while the promissory note is due "on demand," it has no final maturity date. Finally, interest does not start to accrue until the demand for payment is made. Thus, it could remain outstanding without any interest due after the two-year conditional period. Nearly all of the money due under a promissory note must be payable within two years. *Matter of Izummi,* 22 I&N Dec. at 194. Finally, we note that these transactions are not arms-length transactions, but were made among interested parties.

At best, this arrangement is effectively the same as [redacted] forgiving the loan from [redacted]. A corporation, however, is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631, 633 (Act. Assoc. Commr. 1981); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530, 531 (Commr. 1980) and *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958). Thus, the forgiveness of a loan owed to a corporation is not a forgiveness by the shareholder of that corporation. As such, the forgiveness in exchange for stock cannot be considered an investment by the petitioner.

We acknowledge that the petitioner has submitted numerous invoices. The fact that [redacted] may have *spent* more than $500,000, however, is not determinative. A corporation may obtain cash in many ways in addition to an infusion of capital from its shareholder. For example, a corporation can borrow funds or spend funds it acquired during the course of business, such as gross receipts. For example, while [redacted] suffered a net loss in 2003, it had gross receipts of $1,674,547 (according to its 2003 tax return). It also ended 2003 with mortgages, notes and bonds payable in one year or more of $833,686, up from $694,256 at the beginning of the year.

We also acknowledge the submission of evidence that the petitioner has insured [redacted] for over $1,000,000. Once again, the accrued value of the business is not determinative. A company can acquire value without infusions of capital, such as by retention of retained earnings or an increase in assets such as land value. The regulations specifically state, however, that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. 8 C.F.R. § 204.6(e). The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds or the accrual of value to assets such as land. Moreover, 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 or land appraisals. The reinvestment of proceeds cannot be considered capital. *De Jong v. INS*, No. 1997 WL 33765206 at *3 (E.D. Tex. Jan. 17, 1997). *See also Matter of Izummi*, 22 I&N Dec. at 195 (corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation).

In summary, the petitioner has not demonstrated an infusion of cash of more than $130,000 into [redacted] Even these funds have not been demonstrated to be an equity investment by the petitioner as the cash was transferred in 2003 and the 2003 tax return for [redacted] shows no infusion of capital that year and also reflects that the sole shareholder in 2003 was [redacted]. Further, the petitioner has not demonstrated that the promissory note's fair market value equals its face value. Even if we considered the arrangement a forgiveness of [redacted]'s loan to [redacted], the petitioner has not demonstrated that the arrangement constitutes an infusion of capital by the petitioner. Finally, even if we considered the $130,000 in cash and the $284,638 promissory note, the petitioner would have invested a total of only $297,638, far less than the required $500,000. While the petitioner may have borrowed additional funds against his house and may have expressed an intention to [redacted] to invest an additional $220,000 in the next two years, he has not demonstrated that those funds are available for investment or that he is actually committed, such as through a *secured* promissory note executed by the petitioner in favor of [redacted] requiring the petitioner to pay the remaining funds to [redacted] in the next two years. 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. 8 C.F.R. 204.6(j)(2). The alien must show actual commitment of the required amount of capital. *Id. See Matter of Izummi*, 22 I&N Dec. at 193 (discussing how a promissory note can constitute evidence that the alien is in the process of investing).

In light of the above, we uphold the director's finding that the petitioner has not demonstrated a qualifying investment of $500,000.

SOURCE OF FUNDS

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

> (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 210-11; *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. *Izummi*, 22 I&N Dec. at 195. Simply going on record regarding the source of funds without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 164-65 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001)(affirming the AAO's 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 initial funds invested derived from the petitioner's personal savings and "cash out" deriving from loans on the petitioner's house. Counsel further asserted that the remaining investment resulted from refinancing the petitioner's house. 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 petitioner submitted evidence that he received the following amounts of cash when financing his home: $46,632.51 on March 27, 2000, $224,371.38 on November 22, 2002 and $97,145 on January 7, 2003. The petitioner also submitted copies of personal check records documenting the transfer of $130,000 from the petitioner to [redacted] between January 10, 2003 and March 14, 2003.

The director requested evidence tracing the path of the invested funds from the petitioner to Tree Capital and evidence that the petitioner had accumulated the necessary savings through lawful employment.

In response, counsel asserts that $367,000 of the invested funds derive from loans guaranteed by the appreciation of the petitioner's house. Counsel further asserts that the remaining funds derive from employment by the petitioner and his wife. The petitioner submitted an appraisal conducted on April 15, 1997 listing the initial sales price as $375,000 and appraising the petitioner's house at $400,000. The value had increased to $438,000 as of October 20, 1999; $490,000 as of March 9, 2000 and $840,000 as of October 16, 2002. Thus, the petitioner's house had increased in value by $465,000 as of October 2002.

The petitioner also submitted Schedules B from his personal tax returns evidencing interest payments from [redacted] and other sources as well as ordinary dividends. These documents cover 1998 through 2002. They show income of $32,142 in 1998; $30,225 in 1999; $35,179 in 2000; $34,948 in 2001 and $20,994 in 2002. The director noted that the petitioner had not provided the complete personal tax returns, questioning whether they had even been filed, or the source of the $284,638 the petitioner loaned to [redacted], the ultimate source of the promissory note assigned to [redacted]

On appeal, counsel asserts that the director had no reason to question whether the petitioner had filed his personal tax returns, including the Schedules B submitted, and that the director did not request the complete tax returns. Counsel does not address the director's conclusion that the petitioner had not demonstrated the source of the funds loaned to [redacted]

We acknowledge that the Schedules B were not submitted as evidence to establish the lawful source of the invested funds, but to demonstrate that [redacted] was paying interest to the petitioner, thus validating the existence of the loan underlying the note assigned to [redacted] in exchange for stock. Clearly, the Schedules B were sufficient for that purpose. Nevertheless, it remains that the petitioner has never submitted complete tax returns or other evidence documenting the ultimate source of his personal savings, used to purchase his house and loaned to [redacted] While we acknowledge that the house accrued in value and that the accrued funds are asserted to be the source of the invested funds, accepting the accrued funds as lawfully acquired, without inquiring as to the source of the funds used to purchase the house, would allow an alien to convert unlawfully obtained funds into lawfully obtained funds simply by investing those funds.[3] Such a result is

[3] This example is provided as an explanation for why any petitioner relying on accrued value to his home must submit evidence that he acquired the home with lawfully obtained funds not as an allegation as to what actually occurred in this matter.

untenable. Similarly, the petitioner cannot establish the lawful source of his funds simply by loaning the funds to a third party and asserting that the promissory note for the repayment of those funds was lawfully obtained. The petitioner must demonstrate that the original funds loaned to [redacted] were lawfully obtained.

The record lacks personal tax returns or other evidence establishing the petitioner's income and savings prior to purchasing his house and loaning funds to [redacted] Thus, we uphold the director's finding that the petitioner has not established that any of the funds allegedly invested into [redacted] were lawfully obtained.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4) states, in pertinent part:

> *Job Creation* – (i) *General.* 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:

> *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, provides:

> Full-time employment defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

While the director did not question the petitioner's employment creation in the final decision, we note that the record lacks evidence that the petitioner has created jobs for qualifying employees. A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See id.* at 1043. *See also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

While the petitioner has established that T[redacted] employs over 10 full-time employees, he has not documented that they are qualifying. Specifically, the record lacks the Forms I-9 that would document that [redacted] employees are qualifying as defined at 8 C.F.R. § 204.6(e), quoted above.

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.