# identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



## **PUBLIC COPY**



SRC 05 009 51095

Office: TEXAS SERVICE CENTER Date:

SEP 2 5 2007

IN RE:

Petitioner:

**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, 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 21<sup>st</sup> 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, located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$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).

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

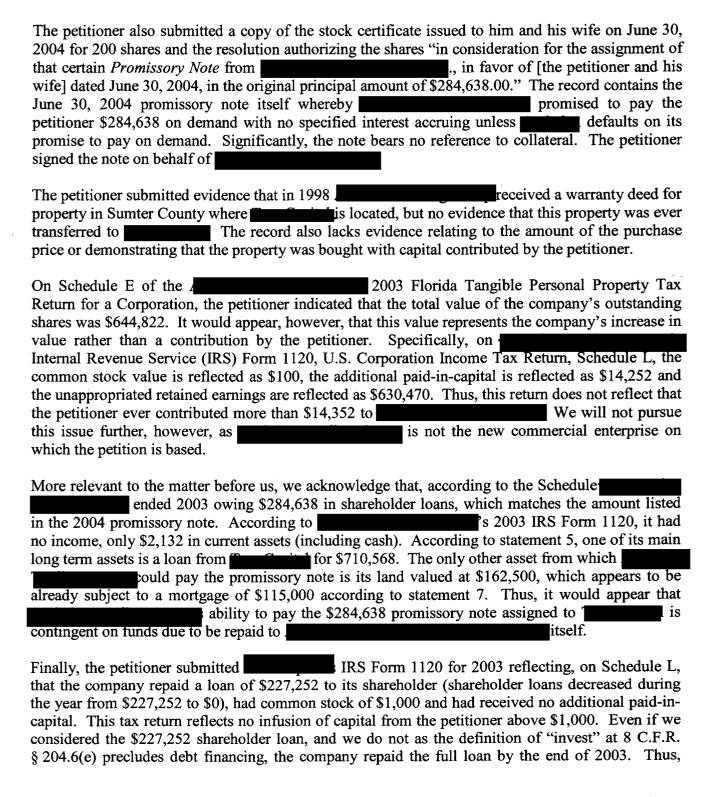
nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(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.

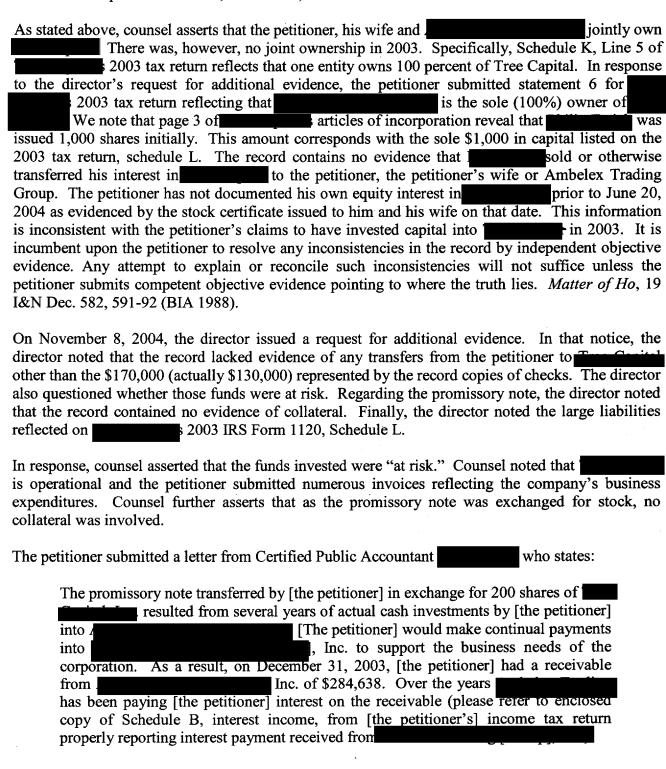
On the petition, the petitioner indicated that he had made an initial investment of \$46,632.51 on March 27, 2000 and had made a total investment of \$652,787. The petitioner broke down the investment as \$264,638 in stock purchases and \$388,149 in "other" investments. The petitioner also indicated 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, for 200 shares in . is owned by [the petitioner] and his wife . . . and by Finally, counsel asserts: , 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 however, the petitioner only submitted six record copies of checks issued by the between January 10, 2003 and March 14, 2003 totaling petitioner or his wife to \$130,000.<sup>2</sup> Regarding the final alleged investment, the petitioner submitted a letter from attorney 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] in the amount of \$220,000.00 over the to invest additional capital in 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

<sup>&</sup>lt;sup>2</sup> 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.



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 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 shareholder loan (due to [the petitioner]) is listed on shareholder sheet as of December 31, 2003.

The petitioner submitted Schedules B from his personal tax returns reflecting interest payments from 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. In a sentence is incorrect; balance sheet for 2003, as reflected on its schedule L for that year, does reflect a shareholder loan of \$284,638. In a 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 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 The fact that the than \$130,000 (the director incorrectly stated \$170,000) directly to petitioner may have borrowed additional funds against his home cannot establish that those borrowed funds were subsequently invested into 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 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 and, thus, are the (BIA 1980). If some of these funds were actually lent to source of the funds owed to the petitioner and now assigned to it would be double counting those funds to consider them both as a cash investment into and again as the basis of the promissory note subsequently assigned to

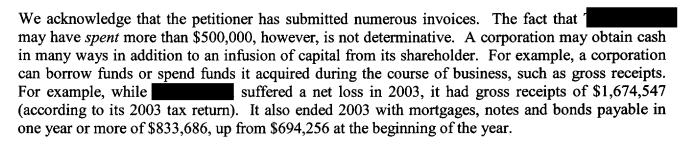
Finally, even the \$130,000 investment is poorly documented. We note that record copies, created when the payor writes the check, are not evidence that the checks were actually cashed. The petitioner did not submit cancelled checks or bank statements reflecting that the checks represented by the record copies were actually deposited with for the petitioner in 2003. Specifically, 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 These interest payments strongly suggest that, prior to this period, at least some of the petitioner's contributions to 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.

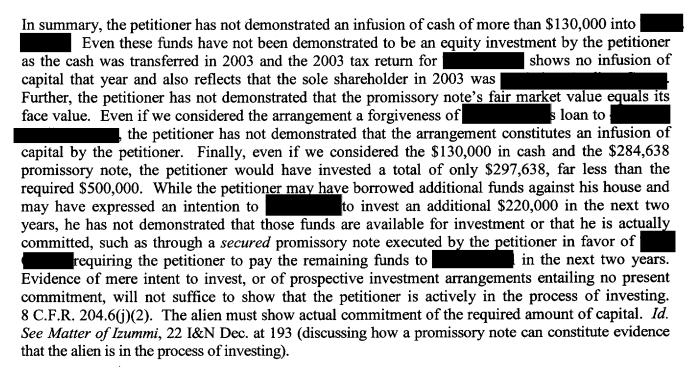
The promissory note is equally unpersuasive evidence of a qualifying investment. *Matter of Izummi*, 22 I&N Dec. at 193, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. In this matter, as the petitioner is assigning the 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, promise to pay the petitioner, assigned to unsecured. Moreover, as discussed above, 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 Thus, the petitioner has not established how can secure payment without first repaying the funds to 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 forgiving the loan from 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 also acknowledge the submission of evidence that the petitioner has insured 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 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(i) 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 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.

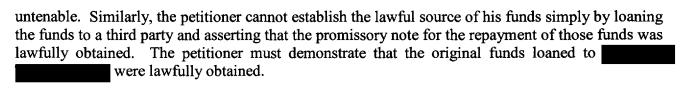
In response, counsel asserts that \$367,000 of the invested funds derive from loans guaranteed by the appreciation of the petitioner's house. Counsel further asserts that the remaining funds derive from employment by the petitioner and his wife. The petitioner submitted an appraisal conducted on April 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 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 promissory note assigned to

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

We acknowledge that the Schedules B were not submitted as evidence to establish the lawful source of the invested funds, but to demonstrate that was paying interest to the petitioner, thus validating the existence of the loan underlying the note assigned to 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 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. Such a result is

<sup>&</sup>lt;sup>3</sup> 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.



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 the petitioner's finding that the petitioner has not established that any of the funds allegedly invested into the 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 Table 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 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.