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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B7

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 16 2008

SRC 07 057 50507

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:

SELF-REPRESENTED

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.

Laura Dendrick

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 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 and that the necessary employment had been or would be created.

On appeal, the petitioner submits new evidence. While this new evidence addresses some of the director's concerns, the petitioner has still not established a qualifying investment into the employment-generating entity. The record also still lacks evidence that the petitioner has created or will create at least 10 new full-time jobs for qualifying employees.

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's petition was filed 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.[1]

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

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

The record indicates that the petition is based on an investment in a business, Vida, LLC, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. The type of business specified on the Form I-526 petition, Part 3, is "motel." As the

---

[1] Regardless of when the "new commercial enterprise" was formed, for example through organization or incorporation, it is the job-creating business that must be examined in determining whether a "new" commercial enterprise has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Commr. 1998). The new commercial enterprise in this matter does qualify as "new" as defined at 8 C.F.R. § 204.6(e) because it was formed to operate a hotel built in 1994.

petitioner does not claim to have invested in a targeted employment area, the required amount of capital in this case is $1,000,000. While the new commercial enterprise is identified as Vida, LLC on the Form I-526 petition, handwritten next to that appears "& Inc." It is not clear who added this information. The statute requires an investment in "a" new commercial enterprise. The definition of a new commercial enterprise at 8 C.F.R. § 204.6(e) includes a holding company and its wholly owned subsidiaries. The record contains no evidence that either Vida, LLC or Vida, Inc. is the wholly owned subsidiary of the other. We note that the evidence of funds transferred to the new commercial enterprise all show funds transferred to Vida, Inc., not Vida, LLC. The record also contains numerous checks issued by Vida, Inc. but none issued by Vida, LLC. Similarly, the business licenses are issued to Vida, Inc.

INVESTMENT OF CAPITAL

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

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

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

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts

containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the Form I-526, Part 3, the petitioner indicated that the new commercial enterprise's business would involve a motel. On appeal, the petitioner references passive real estate investments and submits settlement contracts for property the petitioner has purchased other than the motel. First, these passive real estate investments are the petitioner's personal investments; there is no evidence that these properties were purchased by Vida LLC with the petitioner's invested funds or transferred to that company. Moreover, 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). In this case, the employment-generating business is a motel located at 9551 Highway 17 North in Myrtle Beach, South Carolina. Thus, we will only consider the petitioner's investment relating to the motel.

The petitioner initially submitted his 2004 and 2005 Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Returns reflecting no business income or loss but rather a loss from rental real estate listed on Schedule E. The property listed on Schedule E is "Holiday Inn Express." It is not clear that Schedule E is the appropriate tax form for a business such as a motel. Specifically, the instructions for Schedule E, Line 3, provide that if the tax payer "provide[s] significant services to the renter, such as maid service, report the rental activity on Schedule C or C-EZ." Schedule E appears to apply to renting out specific dwelling units rather than the operation of a motel, which typically includes services well beyond room "rental." For example, the Property Information document submitted reveals that the motel has a meeting room and a breakfast room. Moreover, Schedule E does not allow for normal business expense deductions, such as wages. The petitioner has never submitted the tax returns filed by Vida, LLC or Vida, Inc. in any year. Such tax returns, Schedule L, would demonstrate the amount of capital invested in Vida, LLC or Vida, Inc. in addition to any shareholder loans. Capital reflected on Schedule L, however, would also have to be

documented as having been infused into the new commercial enterprise. For the reasons discussed below, the evidence submitted does not reflect the infusion of $1,000,000 from the petitioner into the Vida, LLC or Vida, Inc. or as payment for the motel's expenses.

The director requested additional evidence documenting the path of funds from their source to the petitioner and then to the new commercial enterprise. In response, the petitioner submitted a list of expenses; a letter from attorney [redacted] verifying that he assisted the petitioner with forming Vida, LLC and purchasing property on June 11, 2004; a letter from [redacted], Financial Specialist at Wachovia Bank, confirming the receipt of three wires into account [redacted]; a response from Holiday Inn Brands agreeing to the petitioner's request for an extension of the motel's Property Improvement Plan; a list of expenses from March 31, 2004 through November 3, 2005; a repair order; a repair proposal and several invoices that do not establish the origin of the funds. While [redacted] asserts that the documentation for the purchase of the motel is attached to his letter, the record does not contain the sales contract, settlement document or deed for the motel. Without the settlement document, the petitioner cannot establish the purchase price of the motel or the amount of cash paid above a mortgage.

The director concluded that the new evidence did not demonstrate an investment of at least $1,000,000. On appeal, the petitioner asserts that since he has been in the United States, he has "invested in a variety of successfully [sic] projects and [his] portfolio includes a lot of land, two condominiums, a house and a hotel." As stated above, however, the new commercial enterprise involves the operation of a motel, the employment-generating entity. Other passive real estate investments cannot be included in the petitioner's qualifying investment in an employment-generating entity.

The petitioner submits a letter from Jordan Properties dated May 25, 2007, advising that a promissory note dated June 10, 2004 for $75,000 has been repaid; copies of checks documenting the transfer of $299,500 from the petitioner to Vida, Inc. between June 11, 2004 and January 11, 2007; invoices; settlement contracts for the purchase of the petitioner's residence and two other locations in South Carolina that are not the motel; a "Customer Detail Inquiry" reflecting no specific settlement costs but with an attached adding machine tape showing $172,359.52 in settlement costs; a list of renovations and attached checks issued by Vida, Inc. totaling $201,229.17;[2] a list of expenses with attached checks issued by Vida, Inc. totaling $134,093.43;[3] a list of "monies spent after closing" followed by copies of checks issued by Vida, Inc. for $36,073.10.[4] The petitioner also submits personal bank statements with the following attached checks issued by the petitioner:

Attached to the list is adding machine tape totaling $226,755.50. The first check number [redacted], the second check number [redacted] and check [redacted] are not in the record and the amounts for checks [redacted] and [redacted] are all incorrectly listed on the list of renovations and the adding machine tapes.

[3] The attached adding machine tape totaling $123,361 omits check number [redacted] and incorrectly lists the amounts for check numbers [redacted], and [redacted]

[4] The attached adding machine tape shows a total of $59,026.51, but includes the first check number [redacted] and check number [redacted] which are not in the record, omits check number [redacted] which is in the record and lists incorrect amounts for checks [redacted] and [redacted].

Check Number	Date	Payee	Amount
[redacted]	March 10, 2004	Wachovia	$19,150
	April 4, 2004	Holiday Hospitality Franchising	$2,500
	May 18, 2004	William DesChamps	$1,304
	May 24, 2004	Richard Heath	$1,500
	June 10, 2004	Summers Thompson Lowry, Inc.	$20,264.40
	June 10, 2004	SCE&C	$3,035
	June 10, 2004	Santee Cooper Power	$8,500
	June 10, 2004	Jordan Properties	$16,106
Total			$72,359.40

It is the petitioner's burden to demonstrate that any funds paid from the petitioner's personal account were actually used to pay the expenses of the new commercial enterprise's business, operating a motel. Assuming the above $72,359.40 represents payment of the motel's expenses, the petitioner has demonstrated that he has paid out $371,859.40 ($299,500 through checks payable to Vida, Inc. and $72,359.40 in payment of the motel's expenses), far less than the required $1,000,000. We will not add the $371,395.60 paid by Vida, Inc. to this amount because to do so would double count much if not all of the $299,500 the petitioner transferred to Vida, Inc. Regarding the $71,895.60 Vida, Inc. paid out above the amount the petitioner transferred to Vida, Inc., the petitioner has not demonstrated that these funds represent additional capital contributed by the petitioner. A corporation can acquire funds in ways other than capital contributions, such as loans, credit lines and its own revenues. Significantly, on the Form I-526, the petitioner listed $3,200,000 in debt financing. Schedule E for 2004 and 2005 reflects mortgage payments of $81,933, reflecting that the purchase of the motel was at least partially financed. Funds acquired in this manner cannot be considered part of the petitioner's personal investment. Specifically, loans secured by the assets of the new commercial enterprise cannot be considered part of a qualifying investment. 8 C.F.R. § 204.6(e) (definition of capital). Moreover, the reinvestment of the corporation's revenues cannot be considered part of a qualifying investment. *See generally De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

Finally, we acknowledge that on appeal, the petitioner demonstrated the satisfaction of a $75,000 note. The record, however, does not establish whether the petitioner paid off this loan or whether Vida, Inc. paid off the loan from other borrowed funds or its own proceeds.

In light of the above, the record does not document the transfer of more than $299,500 from the petitioner to the new commercial enterprise or more than $72,359.40 in motel expenses paid by the petitioner. These two amounts total less than half of the required investment of $1,000,000. Moreover, without an audited balance sheet or tax returns (including Schedules L) for Vida, Inc. we cannot determine whether the amounts transferred by the petitioner to the corporation were invested as capital or merely loaned to Vida, Inc. The record contains no evidence of additional funds fully committed to the corporation. Thus, we uphold the director's finding that the petitioner has not established a qualifying investment.

SOURCE OF FUNDS

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

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted his own IRS Form 1040 tax returns for 2004 and 2005. These tax returns do not demonstrate the source of the funds purportedly invested beginning in 2004. In response to the director's request for additional evidence, the petitioner submitted the letter from Mr. [redacted] at Wachovia Bank affirming the following international wire transfers from Lloyds Bank in London to the petitioner's account at Wachovia: $35,852 on January 12, 2004, $986,832 on March

10, 2004 and $278,250 on February 9, 2005. The director concluded that the record lacked the wire transfers themselves or evidence of how the money was earned.

On appeal, the petitioner submits evidence that the petitioner and his wife sold Sandena Nursing Home in the United Kingdom in March 2003, with £627,309 remaining as proceeds after satisfaction of the mortgage and other fees. A handwritten note indicates that the proceeds were equivalent to $1,159,267.40.[5] The petitioner also submits the wire transfer receipts for the wire transfers listed in [redacted] letter. The petitioner also submitted a Completion Statement for the sale of additional property in the United Kingdom on January 27, 2005 with sales proceeds of £173,296.77. Once again, the handwritten notation indicates that this amount is equivalent to $320,252.43.[6]

The petitioner has now resolved the director's main concerns regarding the source of the funds wired to the petitioner's account at Wachovia bank. The record, however, would be bolstered by some evidence that the properties sold in 2003 and 2005 were long term investments that accrued value rather than short term investments with money from an as of yet unidentified source.

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:

> *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.

---

[5] According to www.oanda.com, accessed October 7, 2008 and incorporated into the record, based on the exchange rate on March 28, 2003, the proceeds equaled $982,115.

[6] According to www.oanda.com, accessed October 7, 2008 and incorporated into the record, based on the exchange rate on January 27, 2005, the proceeds equaled $326,231.

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.

Finally, the regulation at 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

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).

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 Form I-526, the petitioner indicated that the motel employed 20 workers when he began investing and that it now employs 33 workers. Initially, the petitioner failed to submit any evidence regarding the number of previous and current employees. Significantly, Schedule E for the petitioner's individual income tax return, which appears to be where the motel is being taxed, lists no wages, salaries or costs of labor. In response to the director's request for additional evidence, the petitioner submitted a letter from [redacted], Controller at Jordan Properties (the previous owner of the motel), indicating that the motel employed 19 employees in 2002 and 20 in 2003 and 2004. [redacted] does not indicate how many of these employees worked 35 hours or more. The petitioner submitted the payroll journal for Vida, Inc. for August 13, 2004. The payroll journal lists 28 employees. Significantly, however, the majority of these employees did not work at least 35 hours per week during this period. Including salaried employees and hourly employees working 35 hours or more, the total number of full-time employees is six.

The director concluded that the record lacked evidence that the petitioner had created jobs for at least 10 qualifying employees. On appeal, the petitioner asserts that he employs "about thirty members of staff" and "additional staff on a more seasonal basis." The petitioner, however, does not submit IRS Forms W-2, quarterly employer returns, a recent payroll journal documenting the hours of each employee or Forms I-9. Thus, the petitioner has not established that he has created any new full-time jobs or that the employees working for the new commercial enterprise are qualifying as defined at 8 C.F.R. § 204.6(e). Finally, the petitioner has never submitted a business plan. Thus, the petitioner has not established that he has created or will create at least 10 full-time, new jobs for qualifying employees.

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.