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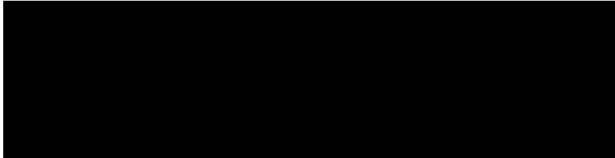
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B-7



FILE: WAC 01 284 54222 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

 John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 he had created or would create the necessary employment.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome all of the director's concerns.

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. Thus, the required amount of capital in this case is \$500,000.¹

¹ According to the California Business Portal, <http://kepler.sos.ca.gov> (accessed March 30, 2009 and incorporated into the record of proceedings), the corporate status of [REDACTED] is still active. The address for the corporation, however, is the petitioner's personal residence. According to the record, the petition is based on an investment in a targeted employment area, Rosemead, California. The specific address in Rosemead is a warehouse at [REDACTED]. We note that the addendum for the lease for this warehouse where the jobs are being created expired July 2002 with an option to extend. According to an Internet search on March 30, 2009 (results incorporated into the record of proceedings), KC Auto Services now operates from [REDACTED] in Rosemead, California. In any future proceedings involving this petition, the petitioner must demonstrate that [REDACTED] continues to operate in a targeted employment 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 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.

The petitioner indicated on the Form I-526 that he had made an initial investment of \$150,000 on June 20, 2001 and that he had invested a total of \$200,000. The petitioner submitted stock certificates issued by [REDACTED] to the petitioner on June 22, 2001 for 150,000 shares and August 8, 2001 for 200,000 shares. The petitioner also submitted an August 8, 2001 Notice of Transaction reporting the sale of securities worth \$250,000 by [REDACTED]. The petitioner submitted United National Bank Statements for [REDACTED], reflecting a deposit of \$2,000 on June 20, 2001 and a \$20,000 transfer credit on June 22, 2001. The source of the \$2,000 is not documented. The \$20,000 was transferred from [REDACTED]'s own savings account. The petitioner also submitted evidence of a June 20, 2001 \$148,000 transfer to [REDACTED] savings account. The petitioner further submitted a July 31, 2001 deposit slip for \$100,000 with no evidence as to the source of this deposit. Finally, the petitioner submitted a rental receipt for [REDACTED] and a check issued on [REDACTED]'s business checking account.

The business plan calls for an additional investment of \$250,000 within 12 and 18 months after operations begin.

The petitioner submitted a contract between [REDACTED] and [REDACTED] agreed to buy silk screen equipment from Tee City for \$10,000 "in installment" and Tee City agreed to teach those at [REDACTED] how to use the equipment.

The director requested evidence of assets purchased for the business, evidence of the transfer of cash in exchange for stock and balance sheets and income statements. In response, the petitioner asserted that he had deposited \$250,000 previously and an additional \$254,974.38 on May 29, 2002. The petitioner explains that the \$150,000 invested in August 2001 resulted from a check issued by [REDACTED] for "an amount [the petitioner] originally deposited" and that the \$100,000 was drawn from his personal account.

The petitioner submitted compiled financial statements. The petitioner asserted in his personal statement that this document reflects that he had "already placed more than \$100,000 of my \$500,000 in an at risk position." The balance sheet as of May 31, 2002 reflects common stock of \$500,000, but \$403,038 of those funds remained as cash. As of May 31, 2002, the company had only acquired \$20,022 in inventory and \$32,559 in equipment.

The petitioner also submitted a June 20, 2001 check issued to [REDACTED] by [REDACTED] for \$148,000 and a July 31, 2001 check issued to [REDACTED] by the petitioner for

\$100,000. The [REDACTED] check was issued on account [REDACTED]. The petitioner submitted a bank statement for another account for [REDACTED] account [REDACTED] showing a deposit of \$70,000 on June 11, 2001. This statement reflects a balance of only \$141,458.04 as of June 20, 2001 and total withdrawals of only \$141,488.04 for the entire month of June. The petitioner also submitted an automatic teller receipt confirming the transfer of \$70,000 to this account from account [REDACTED]. Thus, this receipt cannot document the source of the \$148,000 that remained in account [REDACTED] on June 20, 2001 and were used to pay the check issued by [REDACTED], assuming the check did not bounce.

Regarding his more recent investment, the petitioner submitted evidence that he withdrew \$109,974.38 from his Washington Mutual account and \$145,000 from his credit line on May 28, 2002 and a receipt for official checks totaling \$254,974.38 payable to [REDACTED]. The petitioner also submitted a May 29, 2002 deposit slip from Far East National Bank for that amount. Prior to the appeal, the petitioner had not documented that [REDACTED] maintained any accounts at Far East National Bank. As of June 2002, [REDACTED] was still issuing checks on its United National Bank account.

The director concluded that the petitioner had not provided bank statements for [REDACTED] reflecting all of the deposits claimed, that the petitioner himself only claimed that the compiled balance sheet reflected \$100,000 in funds placed at risk and that the compiled statements were not sufficiently reliable as they were not audited or even reviewed.

On appeal, counsel asserts that the petitioner was actively in the process of investing the required amount of capital as of the date of filing and had made a total of investment \$502,074.28 as of May 29, 2002.

The petitioner submits audited balance sheets as of March 31, 2002 and May 31, 2002 reflecting \$250,000 stock as of March 31, 2002 and \$500,000 stock as of May 31, 2002. The May 31, 2002 statement continues to show \$403,038 in cash as of that date, with only \$23,986 in inventory and \$32,559 in equipment. The company's total expenses were \$60,176 for the 12 months ending March 31, 2002 and \$18,839 for the two months ending May 31, 2002.

The petitioner also submitted United National Bank statements for [REDACTED] reflecting the following deposits: \$100,000 on July 31, 2001 and \$148,000 on June 20, 2001. For the first time, the petitioner also submitted a statement for [REDACTED] savings account with Far East National Bank. These statements reflect a deposit of \$254,974.38 on May 29, 2002. After the date of the audited balance sheet, however, on June 27, 2002, \$145,501.62 of those funds were withdrawn. An additional \$121,128.77 were withdrawn on September 12, 2002. Thus, we must examine whether the \$254,974.38 "investment" was sustained after it was deposited.

The record contains the United National Bank business checking account statement for that period, which does not reflect a deposit of \$145,501.62. The record does not contain the June 2002 bank statement for [REDACTED] savings account at United National Bank. Neither the statement through September 15, 2002 for [REDACTED] savings account at United National Bank nor

the statement through September 30, 2002 for [REDACTED] checking account at the same bank reflects a deposit of \$121,128.77. The record establishes that [REDACTED] also has a checking account with Far East National Bank. The statements for this account, however, do not cover June 27, 2002 and the September 2002 statement does not reflect a deposit of \$121,128.77. The record also lacks evidence that these funds were withdrawn to pay a business expense. Thus, the record does not establish that the full \$254,974.38 represents a sustained investment after the audit.

The petitioner also submitted several invoices and checks issued by [REDACTED]. These represent the purchase of assets and payment of business expenses reflected on the audited balance sheets. The petitioner also submitted several Far East National Bank statements reflecting checks issued for additional business expenses of \$4,687 in July 2002, \$75 in August 2002, \$3,597.98 in September 2002 and \$47,897.16 in October 2002, for a total of \$56,257.14 in business expenses that postdate the May 31, 2002 financial statements.

The petitioner also submitted loan documents for his \$148,000 line of credit, demonstrating that the loan was secured by the petitioner's personal residence and evidence that on May 11, 2001, he purchased \$20,000 in stock as the sole shareholder of [REDACTED]

The record still does not represent an at-risk personal investment of \$500,000. The record adequately traces the July 31, 2001 \$100,000 deposit with [REDACTED] back to the petitioner. The \$148,000 traces back to [REDACTED], but the record does not trace those funds back to the petitioner. The fact that the petitioner purchased \$20,000 stock in [REDACTED] just over a month before that new company transferred \$148,000 to [REDACTED] does not trace the \$148,000 back to the petitioner himself. While the petitioner asserts that he deposited the \$148,000 with [REDACTED], the record does not support that assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Thus, as of the date of filing, the petitioner had established a personal infusion of only \$100,000 in capital.

While the petitioner need only be in the process of investing the full investment amount, the required amount of capital must have been placed at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). 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. *Id.* The alien must show actual commitment of the required amount of capital. *Id.* While the business plan called for an additional infusion of capital, the record contains no evidence that the petitioner or [REDACTED] had entered into a contract requiring the infusion of additional funds.

Even if we considered the \$254,974.38 transferred to [REDACTED] s Far East National Bank account after the date of filing, as stated above, \$266,630.39 was withdrawn from that account in the following few months (after the May 31, 2002 audited balance sheets showing \$500,000 in capital)

and transferred to an unknown account. Thus, the record does not establish that any of the \$254,974.38 “investment” was sustained.

Even if the \$266,630.39 was transferred to another [REDACTED] account, it is not clear that these funds were at risk. *Matter of Ho*, 22 I&N Dec. 206, 210 (Comm’r. 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner’s de minimus action of signing a lease agreement, without more, is not enough.

We acknowledge the evidence that [REDACTED] was an operational company in 2002. Regardless, *Matter of Ho* stands for the proposition that all the funds must be at risk. *Matter of Ho* states:

Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

Id. at 210.

As of May 31, 2002, the company had \$403,038 in cash and comparatively little inventory and fixed assets. The business plan calls for the use of the \$300,000 post-startup investment for \$25,000 in additional equipment, \$10,000 in additional operating space, \$150,000 in inventory financing, \$75,000 debt financing for increased sales and \$40,000 working capital. The income and expenses projection, however, calls for gross profit from sales of \$432,000 in the first year, \$750,000 in the second year and \$1,350,000 in the final year. The normal operating expense of \$150,000 in inventory financing would not seem to require an infusion of capital. The more typical capital expenditures, equipment, additional space and working capital, would appear to be far less than the \$300,000 post-startup capital listed as necessary in the business plan. We cannot conclude that a grossly overcapitalized company demonstrates a fully at-risk investment.

In light of the above, the petitioner has not demonstrated a qualifying at-risk investment of at least \$500,000.

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. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998). 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. at 190). 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) *aff’d* 345 F.3d 683 (9th Cir. 2003) (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).

An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho*, 22 I&N Dec. at 211.

In his initial cover letter, prior counsel asserted that the petitioner had HK\$1,500,000, approximately \$200,000, on deposit from 1993 through 2000, which has “apparently” been transferred to the United States. In addition, prior counsel notes that the petitioner has a \$145,000 line of credit with Washington Mutual Bank. Finally, prior counsel asserted that the petitioner had an additional \$275,272.07 accumulated in Hong Kong and Chinese currencies for a total of \$620,000 accumulated throughout several years. Prior counsel concluded that the petitioner deposited \$150,000 into the corporate accounts on June 20, 2001, an additional \$100,000 on July 31, 2001 and has an additional \$275,272.07 which he intended to invest in addition to the \$145,000 also available to invest.

The petitioner submitted the first pages of his Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Returns for 1997 through 2000 reflecting an adjusted gross income of \$9,000, \$40,339, \$39,634 and \$11,574 respectively.

The petitioner also submitted bank statements for accounts with Shanghai Commercial Bank reflecting what appear to be certificates of deposit as follows:

| <u>Amount²</u> | <u>Deposited</u> | <u>Withdrawn</u> |
|------------------------------|-------------------|------------------|
| HK\$22,983.60 (\$2,966.58) | December 31, 1997 | January 17, 1998 |
| HK\$294,963.46 (\$38,072.10) | December 31, 1997 | January 13, 1998 |
| HK\$300,074.81 (\$38,746.80) | January 13, 1998* | April 14, 1998 |
| HK\$307,509.37 (\$39,683.70) | April 14, 1998 * | July 14, 1998 |
| HK\$312,636.46 (\$40,348.00) | July 14, 1998* | October 14, 1998 |
| HK\$661,521.45 (\$85,266.70) | June 30, 1999 | July 7, 1999. |

* Renewal of previous certificate of deposit.

The petitioner also submitted a statement for a deposit account with Overseas Trust Bank dated March 3, 1998 reflecting a balance of HK\$557,693.17 (\$72,027.30)³. The petitioner also opened a fixed deposit account of HK\$635,104.42 (\$81,633.00)⁴ on February 10, 2000 and renewed that deposit account on April 10, 2000. Given the dates on these statements, the petitioner has not established that these funds are in addition to the HK\$661,521.45 deposit with Shanghai Commercial Bank on June 30, 1999.

The petitioner also submitted evidence of the following bank balances in the United States:

| <u>Amount</u> | <u>Date</u> | <u>Institution</u> |
|---------------|--------------------|---------------------------------------|
| \$109,494.37 | December 31, 1999 | Eastern International Bank |
| \$119,960.32 | March 31, 2000 | same account |
| \$78,028.78 | June 30, 2000 | same account |
| \$75,496.31 | September 30, 2000 | same account |
| \$0 | December 31, 2000 | same account |
| \$91,255.22 | January 4, 2001 | Washington Mutual Bank |
| \$22,890.05 | May 31, 2001 | Waterhouse |
| \$25,803 | June 5, 2001 | Washington Mutual Bank (same account) |

² All U.S. dollar amounts were calculated as of the relevant dates at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

³ According to the conversion performed for March 3, 1998 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

⁴ According to the conversion performed for February 10, 2000 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

As the above bank accounts do not overlap in date, the petitioner has not demonstrated that all of these accounts had significant balances on any one date. The petitioner also submitted evidence of his \$145,000 credit line.

Finally, the petitioner submitted foreign language deposit statements for three Chinese banks. While the petitioner submitted a summary of the balances for these statements, the petitioner failed to provide certified translations, or even any translations, as required under 8 C.F.R. § 103.2(b)(3). Thus, these deposit statements have no evidentiary value.

The director requested evidence tracing the deposits with [REDACTED], back to the petitioner and evidence of personal income from all jurisdictions. In response, the petitioner asserts that he received from [REDACTED] \$270,008.28 and HK\$1,200,000 (\$423,854.43 according to the petitioner) legally due to him. The petitioner further asserts that the \$254,974.38 deposited with [REDACTED], after the date of filing derived from the petitioner's line of credit and additional funds from his Washington Mutual Bank account

The petitioner also submitted transfer receipts reflecting the following deposits into the petitioner's Washington Mutual account from [REDACTED]

| | |
|--|--|
| HK\$1,199,840 (\$153,841) ⁵ | July 9, 2001 (deposited in account [REDACTED]) |
| \$48,674.26 | November 2, 2001 (deposited in account [REDACTED]) |
| \$51,022.47 | November 1, 2000 (deposited in account [REDACTED]) |

[REDACTED], on behalf of the [REDACTED] and [REDACTED] transferred \$60,000 to [REDACTED] Bank of China account.

The petitioner submitted an affidavit from [REDACTED] explaining that she agreed to assist the petitioner transfer funds through Hong Kong to the United States. Specifically, she asserts that she received \$109,995 on February 23, 2000 and transferred this amount to [REDACTED], an agent of the petitioner's, and the petitioner in 2000. She further asserts that in June 2001, the petitioner gave her HK\$70,000 (\$8,974.70)⁶ in cash, which she deposited in her Hong Kong account. She also claims to have received from the petitioner an additional HK\$1,410,000 (\$180,774)⁷ between June 12, 2001 and September 11, 2001, which she then transferred to the petitioner on July 9, 2001 and November 2, 2001.

While [REDACTED] submits her own bank statements, they do not trace the deposits in her account back to the petitioner. The record also fails to document the transfer of funds from [REDACTED] to the petitioner.

⁵ According to the conversion performed for July 9, 2001 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

⁶ According to the conversion performed for June 30, 2001 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

⁷ According to the conversion performed for September 11, 2001 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

The director concluded that the petitioner had failed to document his foreign income. On appeal, the petitioner submits evidence of his interest in [REDACTED] in China and the U.S. company [REDACTED]. He also submits a letter from [REDACTED] in China asserting that the company paid the beneficiary HK\$2,500,000 (\$320,644)⁸ in consulting fees from 1993 through 2001. Finally, the petitioner submitted General Forms of Tax Payment reflecting the following taxable income:

| <u>Period</u> | <u>Taxable Income⁹</u> |
|--------------------------|-----------------------------------|
| December 1996 | RMB 532,200 (\$64,134.40) |
| December 1997 | RMB 514,200 (\$62,104.40) |
| 1998 | RMB 418,180 (\$50,511.50) |
| 1998 (bank income) | RMB 57,174.11 (\$6,906) |
| 1999 (bank income) | RMB 181,370 (\$21,905.90) |
| 1999 (different account) | RMB 247,000.06 (\$29,832.70) |
| March 2000 | RMB 60,000 (\$7,246.81) |

The above amounts do not appear to demonstrate how the petitioner accumulated the necessary \$500,000 in addition to his living expenses. Even if the petitioner could have accumulated sufficient funds, the record does not trace all of the funds deposited with [REDACTED] back to the petitioner. As stated above, the petitioner has not traced the deposits with [REDACTED] back to his own accounts. The record also fails to document that the funds transferred to [REDACTED] were subsequently transferred to the petitioner. Finally, as stated above, the record does not reveal where [REDACTED] obtained the \$148,000 it transferred to [REDACTED].

In light of the above, the petitioner has not traced back all of the “invested” funds back to his own lawfully acquired funds.

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

⁸ According to the conversion performed for December 31, 2001 at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

⁹ All U.S. dollar amounts were calculated as of the relevant dates at www.oanda.com on April 2, 2009 and incorporated into the record of proceeding.

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, “employee” also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

* * *

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur’s spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

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 U.S. Citizenship and Immigration Services (USCIS) 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 petition, the petitioner indicated that he had created two jobs and would create an additional 13. The petitioner submitted two Forms I-9 but no evidence that these individuals were actually employed or whether they worked full-time.

The petitioner also submitted a business plan indicating that the business will require five operators, one warehouse/delivery employee, one supervisor and one secretary/bookkeeper in its first year and an additional two operators and warehouse employee and a graphic designer in its second year. Finally, the plan projects adding a bookkeeper/order employee, a sales employee and a purchasing employee in the third year, for a total of fifteen employees by that year.

The director requested tax records and quarterly employer returns. The director also advised that the chart projecting employment for the first three years was insufficient. In response, prior counsel asserted that [REDACTED] employed six full-time employees and two part-time employees.

The petitioner submitted quarterly wage and withholding reports for the third quarter of 2001 through the first quarter of 2002. The reports for the last two quarters of 2001 reflect monthly employee numbers as follows: July – none, August – six, September – four, October – four, November – five, and December – three. The report for the first quarter of 2002 does not include a monthly breakdown. The report lists 10 employees total, only two of whom earned wages that could account for full time work at minimum wage (\$5.15 per hour x 35 hours per week x 13 weeks per quarter, or \$2,343.25). The petitioner also submitted IRS Forms W-2 issued by [REDACTED] in 2001 and a list of six alleged full-time employees and two alleged part-time employees as well as a list of 25 “resigned” employees. Further, the petitioner submitted eight Forms I-9, none of which are marked to indicate what type of work eligibility documentation was reviewed.

The petitioner submitted a staffing plan providing the job descriptions of the eight employees already working for [REDACTED] and affirming the need for a graphic designer, driver and additional production workers to be hired before December 31, 2002. The plan also calls for a sales assistant, purchasing employee and office assistant to be hired "as required." The petitioner also submitted compiled financial statements. The statement of revenue, expenses and deficit for the twelve months ending May 31, 2002 shows wages paid of \$29,326.

The director concluded that [REDACTED] performance for its first year did not match projections and that the business plan was not realistic because it did not take into account the cost of materials.

On appeal, the petitioner submits quarterly returns for the second and third quarters of 2002 reflecting seven employees in April 2002, 11 employees in May 2002, 13 employees in June 2002, nine employees in July 2002, nine employees in August 2002 and eight employees in September 2002. Of the employees listed on each quarterly return, only four could have worked full-time at minimum wage in the second quarter of 2002 and only six could have worked full-time at minimum wage in the third quarter of 2002. The petitioner also submitted Forms I-9. Again, none of these forms are marked to indicate what documentation was reviewed to determine that the employees were eligible to work in the United States.

The petitioner also submits a new business plan. The plan lists wages of \$100,000 in 2001, \$150,000 in 2002, \$200,000 in 2003, \$250,000 in 2004 and \$300,000 in 2005. [REDACTED] however, only spent \$19,749 in wages during the twelve month period ending March 31, 2002 according to the audited statement of operations submitted on appeal. The record contains the quarterly returns for the first three quarters of 2002, reflecting total wages of \$49,733.58. The petitioner has not demonstrated why it is credible that [REDACTED] would pay an additional \$100,000 in the final quarter of 2002 after paying less than half of that over three quarters. Thus, the business plan does not appear credible.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.