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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B7

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 16 2009
SRC 06 126 50480

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.

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).

Mari Johnson

John F. Grissom, Acting 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 he had created or would create the requisite employment.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's concerns. In our analysis below, we raise some concerns not raised explicitly by the director. The AAO, however, maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

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, not 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 $1,000,000.

NEW COMMERCIAL ENTERPRISE

Section 203(b) of the Act states that the alien must be seeking to engage in "a" new commercial enterprise. The regulation at 8 C.F.R. § 204.6(e) provides:

> Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) As stated above, the new commercial enterprise identified on the Form I-526 petition is ., Federal Employer Identification Number (FEIN) The petitioner indicated that this company was established on April 23, 1996 and that his investment, $3,333.33 initially on March 24, 1997 and $1,024,152.93 total, included the purchase of an existing business.

The petitioner did not initially submit any evidence. In response to the director's initial request for additional evidence, the petitioner indicated that he purchased 33.4 percent of a textile distributor, on April 23, 1997. The petitioner stated that he then acquired the remaining interest in on January 1, 2003. The petitioner further stated that America lost business to domestic and foreign competition, at which point the petitioner acquired a second company in May 2004, Inc., as a manufacturing site. The petitioner claimed to own 100 percent of established in 1987 and "re-incorporated" in 1991.

The petitioner describes a "synergy" between and based on expertise in weaving and s market knowledge. He further asserts:

> In 2006, is meant to become a manufacturer of the products it currently sells. For this conversion from a distribution company to a manufacturing company, additional investments in personnel, raw material and fixed assets such as buildings and equipment will be required. The investments will be done either in form of a joint-adventure or fusion of the two companies.

The petitioner submitted Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for both , FEIN reflecting an incorporation date of April 23, 1996 and for , FEIN reflecting an incorporation date of October 10, 1991.

As of the date of filing, and were two separate corporations. The record contains no evidence that either corporation was the wholly owned subsidiary of the other. In fact, the most recent IRS Form 1120 tax returns of record for both companies (2005), indicate on Schedule E that the petitioner owns 100 percent of the stock in both corporations.

As is not a wholly owned subsidiary of , the new commercial enterprise identified on the Form I-526, we cannot consider any investment in that company. Even if were a wholly owned subsidiary of the petitioner would need to demonstrate that is "new," defined at 8 C.F.R. § 204.6(e) as established after November 29, 1990. 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). Thus, the incorporation date for Finatex International is not determinative. Rather, we must look at the operational businesses the corporation purchased.

The regulation at 8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
>
> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

As stated above, 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. This amendment did not, however, eliminate the requirement that the commercial enterprise be "new." Thus, we find that 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

While the petitioner purchased an interest in an existing corporation, th on was incorporated in 1996, after November 29, 1990. The record does not su est that in 1996, took over a preexisting company. Thus, it would appear that as defined at 8 C.F.R. § 204.6(e).

The record does not demonstrate, however, that is "new," as defined at 8 C.F.R. § 204.6(e). The petitioner acknowledges that the original business now operated by Finatex International was established in 1987. The petitioner has not submitted any evidence that Finatex International's net worth or employment has expanded by 40 percent after November 29, 1990. The record also lacks evidence that anyone reorganized after November 29, 1990. "A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership." *Matter of Soffici*, 22 I&N Dec. at 166.

As is not a wholly owned subsidiary of and is not "new" as defined at 8 C.F.R. § 204.6(e), we can only consider the petitioner's investment in and creation of employment at the new commercial enterprise identified on the Form I-526. Regardless, the record does not demonstrate a qualifying investment in or that will create at least 10 *new* jobs.

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 petition, the petitioner claimed to have made an initial investment of $3,333.33 on March 24, 1997 and a total investment of $1,024,152.93. As stated above, the initial petition was not supported by any documentation. In response to the director's initial request for additional evidence, the petitioner did not explain how he had invested the sums listed on the Form I-526.

The petitioner submitted stock certificates two and three issued by to and on April 23, 1996 for 2,450 shares each. The petitioner also submitted the cancellation form for stock certificate one, previously issued to for 5,100 shares on April 23, 1996 indicating the company transferred 1,700 shares each to the petitioner, and on March 24, 1997. The petitioner also submitted a February 28, 1997 Stock Purchase Agreement whereby he agreed to purchase the shares owned by and for $10,000. The record contains stock certificate four reflecting the petitioner's ownership of 3,334 shares in . Finally, the petitioner submitted an October 16, 2003 corporate resolution whereby and agreed to sell their shares in to the petitioner for an undisclosed amount.

The petitioner also submitted a Bill of Sale whereby and agreed to sell their shares in to the petitioner for $2. The record provides no explanation for this low purchase price.

Throughout the proceedings, the petitioner has submitted several cancelled checks and bank statements reflecting debits from his personal account corresponding to credits for The funds that can be clearly traced from the petitioner to are represented by the following transfers:

Amount:	Date:
$5,000	March 23, 2004
$10,000	April 19, 2004
$20,000	April 21, 2004
$3,875	April 22, 2004
$20,000	April 27, 2004
$30,000	May 25, 2004
$50,000	July 7, 2004
$11,000	December 28, 2004
$165,139	February 9, 2005
$41,233.23	April 10, 2005
$100,000	April 18, 2005
$10,000	May 20, 2005
$15,000	May 26, 2005
$2,000	August 20, 2005
$8,000	August 20, 2005
$8,000	September 24, 2005
$10,000	October 26, 2005
$2,000	March 19, 2006
$7,000	April 27, 2006
$65,000	May 2, 2006
$4,000	May 11, 2006
$3,000	May 31, 2006
$12,000	June 11, 2006

Total $622,247.23

The petitioner must establish his eligibility as of the filing date of the petition. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The petition was filed March 15, 2006. Thus, $93,000 of the above funds were transferred after the date of filing. As such, the record reflects that the petitioner had transferred only $529,247.23 to the new commercial enterprise as of the date of filing. While the petitioner need only establish that he was actively in the process of transferring the required $1,000,000, he must demonstrate that the full

amount was fully committed to the new commercial enterprise. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. 8 C.F.R. § 204.6(j)(2). The petitioner has not documented the transfer of at least $1,000,000 from his personal account to or that the remaining funds are irrevocably commited to the new commercial enterprise.

The petitioner also transferred an additional $5,000 to in 2006, $3,000 before the date of filing and $2,000 after that date. For the reasons discussed above, however, we cannot consider the petitioner's investment in . Regardless, even if we did consider the extra $5,000, the petitioner has not demonstrated the transfer of $1,000,000 to and Finatex International as of the date of filing or even subsequently.

In addition, the tax returns of and do not reflect a qualifying equity investment. The returns contain the following information on Schedule L:

	2001	2002	2003	2004	2005
Shareholder loans	$133,678	$133,678	$544,031	$542,368	$948,845
Mortgages, etc.	$367,932	$992,392	$10,079	$5,959	$1,236
Stock	$5,000	$5,000	$5,000[1]	$5,000	$5,000
Paid-in-capital	$0	$0	$0	$0	$0
Shareholder loans	N/A	N/A	$88,553	($4,751)	$49,317
Mortgages, etc.	N/A	N/A	$0	$146,606	$65,101
Stock	N/A	N/A	$527,414[2]	$527,414	$527,414
Paid-in-capital	N/A	N/A	$0	$0	$0

tax returns show no more than a $5,000 equity investment. For the reasons discussed above, we cannot consider any investment in . Regardless, while the tax returns reflect stock of $527,414, the record only documents the transfer of $5,000 from the petitioner to , all of which was transferred after 2005. In addition, the record includes a "Register" of the petitioner's "Long Term Loan." The register includes all of the transfers documented above as well as other payments not documented for a total of $780,299.96 through December 9, 2005. Even this loan is for less than the required $1,000,000. The record also contains a February 4, 2006 promissory note whereby promised to pay the petitioner $52,356.72.

[1] 2003 is the year that the petitioner bought out the other two shareholders of

[2] The petitioner did not have any interest in in 2003.

The director concluded that the petitioner had loaned the "invested" funds to and, thus, had not made a qualifying investment. We note that the director advised the petitioner that loans to the new commercial enterprise were not qualifying investments beginning with the first request for evidence.

On appeal, the petitioner asserts that he is "willing to convert the loans provided to the companies in question into company held capital stocks" once he obtains lawful permanent resident status. The petitioner also asserts for the first time that he has personally guarantied the loans of . The petitioner concludes that the purchase "of two companies with no operational profits, additionally personally guaranteeing a total amount of $270,000" is a sufficiently at-risk investment.

On appeal, the petitioner submits for the first time documentation of loans that he and his wife have guarantied. First, is not the new commercial enterprise identified on the Form I-526 or its wholly owned subsidiary. Thus, we cannot consider any investment in that company. Second, several of the loans postdate the filing of the petition and cannot establish eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Third, the loans are also secured by assets. The definition of capital provides that the assets of the new commercial enterprise[3] cannot secure any indebtedness considered capital. A personal guaranty does not change the character of a loan secured by the assets of the new commercial enterprise. *Matter of Soffici*, 22 I&N Dec. at 163.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). At the time of filing, the petitioner had only loaned funds to . His expressed intent to convert these loans into a qualifying investment is insufficient. The record contains no evidence of a binding agreement that predates the filing of the petition to convert the loans to equity at a later date. Moreover, as the petitioner is the sole shareholder of , it is not even clear how binding such an agreement would be.

Finally, 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. at 179. As will be discussed below, the majority of the employment has been documented at . While is the new commercial enterprise identified on the Form I-526 petition, the petitioner has not established that all of the funds invested in are being made available to the employment generating entity, although we acknowledge that loaned $226,210.71. Nevertheless, the

[3] While we have stated that is not part of the new commercial enterprise, it is identified as such in this instance solely for the purpose of demonstrating that even if it was the new commercial enterprise the guaranty of its loans would not be a qualifying investment.

petitioner has not invested in an approved Regional Center, defined at 8 C.F.R. § 204.6(e), and, therefore, must demonstrate direct job creation by the new commercial enterprise itself.

In light of the above, the petitioner has not demonstrated a qualifying equity investment of at least $1,000,000 in the new commercial enterprise identified on the Form I-526 even if we include funds transferred to

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 (Commr. 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 (Regl. Commr. 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) *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).

Moreover, the regulation at 8 C.F.R. § 103.2(b)(3) provides:

> *Translations.* Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The director's first request for evidence, issued because the petitioner provided no evidence in support of the petition, stated: "Submit English translations of all foreign documents and U.S. equivalencies for all foreign currency."

In response, the petitioner submitted an April 20, 2006 letter from advising that the petitioner sold his shares in for Euro 992,500 to be paid over three years ending April 1, 2006. The record contains transactional evidence reflecting the transfer of $526,127.22 from to the petitioner between September 17, 2003 and May 2, 2006. The record also contains evidence of transfers of $356,372 between February 8, 2005 and April 18, 2005 from an unidentified source to the petitioner and $18,898 from to the petitioner on May 12, 2004.

On May 16, 2006, the director requested documentary evidence that the petitioner owned the shares and that they were worth the amount paid by In response, the petitioner submitted the foreign-language sales contract for the purchase of shares and foreign tax returns. As noted by the director in the final denial, the petitioner did not submit translations of any of this evidence.

On appeal, the petitioner submitted the translations of these foreign documents. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Specifically, the first request for evidence advised that translations were required for all foreign language documentation. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accepting the letter from as evidence of the sale of shares, 992,500 Euros is approximately $1,273,457.[4] The record, however, only traces $526,127.22 from to the petitioner. Moreover, while indicates on April 20, 2006 that the final payment was due April 1, 2006, the record shows a transfer of $93,788.08 from to the petitioner on May 2, 2006.

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[4] According to www.oanda.com (accessed December 9, 2008 and incorporated into the record of proceedings).

The director's statement that only the German language documents were submitted as evidence of the lawful source of the petitioner's funds is not accurate. As stated above, the petitioner submitted the letter from and transactional evidence tracing $526,127.22 back to Nevertheless, the record does not trace the full investment back to Moreover, the director correctly noted that the petitioner had failed to submit English translations of the foreign language documents. Thus, the record before the director was deficient regarding the lawful source of the petitioner's 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
>
> (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. . . . 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.

The petitioner indicated on the Form I-526 that is a distributor of textile products, that it employed one individual when the petitioner began investing in March 1997, that he had created one job and that he would create an additional eight to ten jobs. In response to the director's first request for additional evidence, the petitioner indicated that he had acquired to create a manufacturing site for The petitioner attests to 's "expertise in weaving." The petitioner concludes:

> Between the two companies and (both held by [the petitioner] with 100% shares) three people have been employed, excluding [the petitioner] and spouse. Due to a significant back log for the upcoming quarter of the year 2006, plans for additional employment are made and implemented.

In response to the second request for evidence, the petitioner asserted that the loan to will be used to purchase machinery that will create the necessary jobs.

The tax returns for reflect wages decreasing from a high of $216,235 in 2002 to $124,671 in 2005. A December 2003 profit/loss statement fo shows salaries paid to three employees including the petitioner. The petitioner submitted the following number of IRS Forms W-2 issued by including those issued to the petitioner, four in 2001, five in 2002, four in 2003, three in 2004 and four in 2005. The quarterly employer returns for 2003 reflect no more than three employees working at any one time. s payroll document from November 2005 lists only three employees. The record reflects that as of February 28, 2004, terminated its lease. According to the petitioner, then began using s warehouse and using the petitioner's residence for its "business main office."

The 2003 tax return for shows no wages but indicates cost of labor of $281,289. This return predates the petitioner's ownership of the company. In 2004, shows no wages but cost of labor of $215,290, less than in 2003. In 2005, paid wages of $98,999 and indicated no cost of labor expenses. The petitioner also submitted evidence that in 2005 Finatex issued two IRS Forms W-2c Corrected Wage and Tax Statements but no evidence as to whether it also issued IRS Forms W-2 to other employees in 2005. The two Forms W-2c reflect total corrected wages of only $54,555.34.

The record contains a business plan projecting hiring a tape loom weaver, texturizing equipment operator, weaver, warehouse manager and sales associate in year one. The plan for year two is contingent on relocating to a larger location in 2007 to increase manufacturing. The record contains no evidence either or relocated in 2007.

The director considered only the employment at , concluded that it only employed two individuals other than the petitioner and noted that the petitioner had not demonstrated how many employees existed before the petitioner began investing.

On appeal, the petitioner asserts that the business plan explained the need for five new employees in year one and five additional employees in year two. The petitioner concludes a more detailed plan "would imply a lot of speculation." The petitioner submitted a payroll summary for Finatex International covering May 2004 as evidence of employment at that company prior to his "investment."

As stated above, the petitioner purchased l on May 20, 2004. While the petitioner asserted that he purchased to expand into manufacturing and implied had at least some expertise in weaving, the tax returns and promotional materials for the company submitted by the petitioner reflect that has, up to present, operated as a machine rebuilder and supplier of pre-owned equipment. The May 2004 payroll summary submitted on appeal reflects ten employees. Thus, whether or not

has since lost employees, which appears to be the case, the final number of employees at would need to be 20. As appears to have lost employees since the petitioner took over, it would appear that the creation of ten jobs at this point in time would be insufficient. Regardless, is not the new commercial enterprise. The employees of are not being paid directly by as required by the definition of "employee" at 8 C.F.R. § 204.6(e), quoted above. Thus, job creation projected for this company cannot be considered.

The petitioner has not created any employment at , which does not lease or own a manufacturing location or even a warehouse at this time. The business plan appears to project employment creation at , which is not a wholly owned subsidiary of the new commercial enterprise. Thus, the petitioner has not established that he has created or will create at least 10 new jobs at

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.