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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

B7

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 28 2009
SRC 07 213 50930

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, 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 an investment in a *new* commercial enterprise or that the investment would create the necessary *new* jobs.

On appeal, counsel asserts that the petitioner created a new commercial enterprise and did not simply purchase an existing business because the petitioner did not assume any of its predecessor's liabilities. On May 18, 2009, this office advised the petitioner that a cursory review of the copies of the alien registration cards of the petitioner's employees revealed anomalies that prompted this office to attempt to verify the alien registration numbers on those cards. As further provided in that notice, that process revealed that all but one of the petitioner's employees were using bogus alien registration cards. This office noted that this derogatory information suggested that the petitioner may have replaced qualifying employees with those lacking authorization to work in the United States. This office also requested additional evidence of the petitioner's lawful source of funds.

In response, counsel asserts that the petitioner no longer employs those individuals identified in our notice as having submitted bogus alien registration cards. The petitioner submits new Forms I-9 for individuals identified as the new employees, although the petitioner did not submit payroll records or quarterly reports listing the names of its current employees. The petitioner also submits the requested evidence regarding the lawful source of his invested funds, satisfactorily resolving that issue. For the reasons discussed below, while the petitioner has now resolved our concerns regarding the lawful source of the invested funds, we uphold the director's finding that the petitioner's purchase of a company's assets and take over of that company's lease does not constitute the creation of an original business. Even if we accepted the alternative assertion that the petitioner restructured an existing business, he has not demonstrated that this restructuring has created or will create sufficient new jobs.

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 petition was filed after November 2, 2002, the petitioner 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, Kuiper Dairy, LLC, located in a rural 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.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise" (Emphasis added.)

The regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

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).

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.

It is the petitioner's position that he created a new commercial enterprise pursuant to 8 C.F.R. § 204.6(h)(1), through the creation of an original business. Thus, despite requests for information about the dairy from which the petitioner purchased the business assets, the petitioner has declined to submit such evidence, asserting that a preexisting business did not exist.

On appeal, counsel relies on the analysis used by U.S. Citizenship and Immigration Services (USCS) under 8 C.F.R. § 1274a.2(b)(1)(viii)(A)(7) and in evaluating "successor-in-interest" claims pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r. 1986). The regulation at 8 C.F.R. § 1274a.2(b)(1)(viii)(A) addresses when an employer is not deemed to have hired an employee for purposes of being required to complete the Form I-9 paperwork. Subparagraph (7) asserts that the employer is not deemed to have hired an employee that continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I–9 where applicable. While counsel asserts that the commercial enterprise in this matter is not a "successor in interest for I-9 purposes," that is only true because the commercial enterprise did not retain any of the former employees and, thus, would not be required to maintain Form I-9 paperwork for those employees. Ultimately, the provision cited by counsel in no way suggests that the petitioner's failure to keep any of the employees that previously worked in the dairy it acquired demonstrates that the petitioner created an original business pursuant to 8 C.F.R. § 204.6(h)(1). In fact, the regulation at 8 C.F.R. § 1274a.2(b)(1)(viii) is irrelevant to whether the petitioner in this matter created an original business as it focuses on the employee's status, not the employer's relationship with a predecessor company and, thus, provides no guidance as to the issue before us.

The precedent decision on which counsel relies, *Matter of Dial Auto Repair Shop, Inc.,* 19 I&N Dec. at 481, involved an employer's attempt to use an alien employment certification issued by the Department of Labor to the company's alleged predecessor-in-interest. *Matter of Dial Auto* predates the Act and the regulations implementing section 203(b)(5) of the Act. Nothing in the pertinent regulations at 8 C.F.R. § 204.6 relating to the classification sought in this matter suggests that the analysis for determining whether an employer is a successor-in-interest for purposes of assuming the alien employment certification issued to its predecessor is relevant or useful in determining whether an alien entrepreneur has created an original business as required under 8 C.F.R. § 204.6(h)(1).[1]

Significantly, *Matter of Soffici,* 22 I&N Dec. 158 (Comm'r) also postdates *Matter of Dial Auto.* Yet *Matter of Soffici*, 22 I&N Dec. at 166, in addressing whether the purchase of a preexisting hotel constituted the creation of an original business, makes no reference to the analysis in *Matter of Dial*

[1] The only reference to the phrase "successor-in-interest" in 8 C.F.R. § 204.6 is within the definition of troubled business, where the regulation at 8 C.F.R. § 204.6(e) provides that in considering whether an alleged troubled business has been in business for two years, successors-in-interest will be considered to have been in existence for the same period of time as the predecessor business.

Auto. Rather, *Matter of Soffici* states that "it is the job creating business that must be examined in determining whether a new commercial enterprise has been created." In reaching its conclusion, the AAO noted only that the hotel, the job creating business in that matter, had been in operation for 24 years and was an ongoing business at the time of purchase. The AAO then concluded that the alien's new corporation, Ames Management, had merely replaced the former owner. The AAO did not indicate that it had looked at whether Ames Management had assumed all of the rights, duties, and obligations of the former owner, the successor-in-interest test used in *Matter of Dial Auto*. The AAO also did not indicate that it had considered whether or not Ames Management had replaced the hotel employees or negotiated new contracts. Thus, these factors would not appear to be relevant considerations in evaluating whether the petitioner created an original business.

On July 24, 2006, entered into an asset purchase agreement with Cross Timbers Dairy, LLC. The agreement included the purchase of cattle; rolling stock and equipment and inventories of feed, forage, minerals, grains, supplies, fuel and other similar items. The agreement also called for the transfer of operating data. As noted by counsel, Section 1.6 of the agreement provides that except as otherwise provided, Kuiper Dairy "shall not assume, and Cross Timbers shall remain liable for, any and all liabilities, obligations, contracts, claims or commitments." Money earned for milk produced prior to closing would be paid to Cross Timbers, revealing that Cross Timbers was an ongoing business at the time of purchase. Cross Timbers Manager [redacted] agreed to remain "available to consult with Kuiper concerning all aspects of the dairy operation which is the subject of this Agreement" for thirty days following closing.

We note that the use of the phrase "asset purchase agreement" does not create a presumption that Kuiper Dairy purchased something less than a business. Specifically, the phrase "asset acquisition," also termed "asset purchase," refers to the purchase of a corporation from the corporation rather than the purchase of shares from shareholders. Black's Law Dictionary 114 (7th ed. 1999).

Also on July 24, 2006, [redacted] entered into a lease agreement with Penn-Cal, LLC. The lease indicates that the leased property will sometimes be referenced as the "dairy" within the lease and subsequently defines "dairy" as the land and improvements and appurtenances thereto. The improvements include buildings, structures, equipment machinery, fixtures and appurtenances. The lease explicitly states that Cross Timbers currently leases the dairy and acknowledges that Kuiper Dairy "desires to take over that Lease, purchase the cattle, feed, equipment, and inventory from Cross Timbers" and "lease the Real Estate from Penn-Cal for its own farming, dairy and cattle raising operations." The lease further provides that all milk produced "on the dairy" up to 5:00 a.m. on October 16, 2006 belongs to Cross Timbers and that milk produced after that time and date belong to Kuiper Dairy.

In response to the director's request for additional evidence, counsel asserts that the petitioner purchased assets from Cross Timbers and "moved these assets to his land and commenced dairy farming operations." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The record, in fact, reveals that the petitioner purchased the assets of Cross Timbers *and* took over its lease of property

repeatedly referenced as an operational dairy fitted with the necessary buildings, structures and equipment to operate as a dairy. This information directly contradicts counsel's assertion.

Counsel further asserts that the petitioner "took no employees and no customers from Cross Timber Dairy." Counsel notes that the asset purchase agreement provides that Kuiper Dairy will not assume any liabilities, obligations, contracts, claims or commitments other than those provided herein, but acknowledges that the petitioner did need to pay off some debts on the assets he purchased. Finally, counsel notes that the petitioner purchased additional assets (cattle and equipment) for the dairy. This evidence, however, relates to whether the petitioner expanded the business pursuant to 8 C.F.R. § 204.6(h)(3) rather than whether he created an original business pursuant to 8 C.F.R. § 204.6(h)(1).

The petitioner submitted a statement from [redacted] asserting that he sold "certain assets" of his dairy to the Kuiper Dairy, and not "the dairy." [redacted] affirmed that Cross Timbers did not provide Kuiper Dairy with any employees and that Kuiper Dairy did not assume any customers or any liabilities of Cross Timbers. Finally, [redacted] affirms that Cross Timbers did not sell any land to Kuiper Dairy.

On appeal, as stated above, counsel asserted that *Matter of Dial Auto,* 19 I&N Dec. at 482, should be considered the controlling authority. For the reasons discussed above, we find that *Matter of Soffici*, 22 I&N Dec. at 166 is the controlling authority. Thus, the inquiry is not whether Kuiper Dairy assumed all of the rights, duties, and obligations of Cross Timbers, but whether, pursuant to *Matter of Soffici,* 22 I&N Dec. at 166, the "job creating business," in this case the dairy, was an ongoing business at the time of purchase.

It cannot credibly be asserted that Kuiper Dairy did not take over a job creating business, the dairy operation, formerly run by Cross Timbers. The fact that Kuiper Dairy did not purchase land from Cross Timbers is irrelevant as it took over that company's lease. Kuiper Dairy did not "move" Cross Timbers' assets to its own dairy as stated by counsel in response to the director's request for additional evidence. Rather, those assets were already in use on that property that was, at the time of the asset purchase agreement, being leased by Cross Timbers. The fact that Kuiper Dairy had to enter into two separate agreements, the asset purchase agreement with Cross Timbers and the lease with Penn-Cal, is irrelevant. By entering these two agreements, Kuiper Dairy effectively replaced Cross Timbers as the entity that previously owned those assets and leased that property. That Kuiper Dairy may have then entered into new supply agreements and purchased additional assets has no bearing on whether Kuiper Dairy created an original business. Under any credible analysis of the facts it did not.

As the evidence does not reflect that the petitioner created an original business, the next question is whether the petitioner restructured, reorganized or expanded an existing business pursuant to 8 C.F.R. § 204.6(h)(2) or (3). In a supplement to the appeal, counsel asserts if the AAO concludes that the petitioner did not create an original business, the AAO should find that the petitioner restructured the previous business. In addressing why the petitioner has failed to provide net worth or employment information from Cross Timbers, counsel questions why Cross Timbers would provide such confidential information to a company that "only purchased its assets." The

regulations, however, clearly contemplate situations where an alien may need to provide documentation relating to its predecessor. For example, if a petitioner intends to demonstrate an expansion pursuant to 8 C.F.R. § 204.6(h)(3), it is his burden to secure and submit the requisite net worth or employment information for both prior to and after the expansion for comparison purposes. Even if a petitioner is relying on restructuring pursuant to 8 C.F.R. § 204.6(h)(2), a petitioner wishing to do so must still secure some type of evidence of employment at the former company in order to demonstrate that ten new positions have been created, potentially through negotiations at the purchase agreement stage.

First, we will consider whether the petitioner expanded the business pursuant to 8 C.F.R. § 204.6(h)(3), although we acknowledge the petitioner does not claim to have done so. The earliest employment data for the dairy in the record is on the quarterly return filed by Kuiper Dairy for the fourth quarter of 2006. This return reflects that the dairy employed 14 employees. If we assume that Cross Timbers employed a similar number, and the petitioner has not documented that that is the case, 140 percent of 14 (19.6) rounds up to 20. While the petitioner need not have created the requisite 10 jobs as of the filing date, the establishment of the new commercial enterprise, whether through the creation of an original business or the restructuring or expansion of an existing business, should have already occurred as of the date of filing. The record lacks evidence that Kuiper Dairy employed 19 or 20 employees as of the date of filing or even that he employs this number of employees currently. The record contains only one net worth evaluation predating the filing of the petition, for March 31, 2007.[2] Thus, the petitioner has not established that, as of the date of filing, he had created a new commercial enterprise through the expansion of a preexisting business.

The final means of creating a new commercial enterprise that must be addressed is restructuring or reorganizing pursuant to 8 C.F.R. § 204.6(h)(2). The regulation provides little guidance on what might constitute a sufficient restructuring or reorganization. In the supplement to the appeal, counsel relies on "informal notes to the field and discussion" of a hotel converted from a Days Inn to a Marriott. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

While not mentioned by counsel, *Matter of Soffici,* 22 I&N Dec. at 166, briefly addresses restructuring and reorganization. The AAO concluded in that matter that the petitioner had not

[2] A balance sheet submitted in response to our May 18, 2009 notice reflects a 140 percent increase in net worth between the March 31, 2007 net worth, $955,093, and December 31, 2007, $1,357,781. The petition, however, was filed July 6, 2007. Thus, the subsequent net worth does not establish that a new commercial enterprise had been established as of the filing date, the date as of which the petitioner must establish his eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Rather, this evidence would only be relevant in support of a new petition meeting all of the requirements for this classification.

demonstrated the necessary restructuring or reorganization. The AAO noted that the hotel had always been a Howard Johnsons and remained one. More specifically, the AAO stated: "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."

Counsel has asserted that the petitioner "is operating his farm in a way far different than Cross Timbers." Specifically, according to counsel, Kuiper Dairy grows its own feed, which Cross Timbers did not. Counsel further asserted that the petitioner replaced 34 percent of the Cross Timbers herd, switching from Jersey Holstein cows to higher producing Holstein Frisian cows. Finally, counsel asserts that while Cross Timbers used Lonestar Coop as its sole producer of milk, the petitioner distributes to Select Milk Producers. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. Moreover, given counsel's incorrect assertion that the petitioner purchased assets and "moved" them to his own dairy, counsel's credibility is reduced.

The record contains Kuiper Dairy invoices for planting, swathing, plowing, harvesting and hauling grain and financial statements documenting the replacement of cows. The financial statements also document significant "farming expenses" although more was spent on purchasing hay and silage. The letter from [redacted] referenced by counsel, however, is not in the record.

While the record establishes that Kuiper Dairy is harvesting its own feed, the record does not establish that this is a new use of the dairy property. [redacted], in his letter, does not suggest that Cross Timbers did not grow any of its own feed. We note that the lease references irrigation equipment already on the premises, suggesting the growing of some crops prior to the asset purchase agreement.

The record simply does not document a significant restructuring or reorganization in the dairy. The business was primarily a dairy when Cross Timbers owned the assets and leased the property and Kuiper Dairy continues this business. Counsel does not explain how switching to a higher producing cow or switching distributors somehow constitutes a restructuring or reorganization such that a new business results. The evidence that Kuiper Dairy is engaging in significantly more grain farming than Cross Timbers is minimal.

Even if we were satisfied that the petitioner had converted the dairy into a business that also included significant grain farming and that this conversion was a sufficient restructuring or reorganization to demonstrate that the petitioner had established a new commercial enterprise, such a finding would only resolve the issue of whether the petitioner established a "new" commercial enterprise. As discussed below, the petitioner must still demonstrate that he has created or will create ten *new* jobs, regardless of who fills them.

EMPLOYMENT CREATION

Nothing in the regulations suggests that the creation of a new commercial enterprise through the restructuring, reorganization or expansion of an existing business allows the petitioner to count the preexisting jobs as "new" even if the employees themselves are replaced. The petitioner may only rely on employment maintenance if reconstructing, reorganizing or expanding a troubled business. 8 C.F.R. § 204.6(j)(4)(ii). The clear intent in the regulations is confirmed in AAO precedent. Specifically, in *Matter of Hsiung,* 22 I&N Dec. 201, 204-05 (Comm'r. 1998), the AAO noted that the petitioner was proposing[3] to purchase *and restructure* preexisting, ongoing clinics. Noting that even a restructured business could not cause a net loss of employment, the AAO concluded that the petitioner had not explained whether the projected 194 employees represented "the maintenance of the former levels of employment at the unidentified clinics (in the case of troubled businesses), the addition of 10 new positions per investor, or an actual loss of employment." *See also Matter of Soffici,* 22 I&N at 167. The petitioner has never claimed that Cross Timbers was a troubled business. Thus, the petitioner must establish that he has created or will create at least 10 new positions for qualifying employees.

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. 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.
>
> * * *

[3] Another issue in this case was that the petitioner had not placed the requisite investment at risk as of the date of filing. *Matter of Hsiung,* 22 I&N at 204.

> *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 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (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 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 there were no employees when he made his investment and that he had created 14 jobs. He further indicates that he will create an additional 10 jobs. In his personal letter accompanying the petition, the petitioner asserted that the dairy employed 14 employees and that the dairy "did not exist with employees" prior to operating under Kuiper Dairy. 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. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The petitioner submitted quarterly returns for the fourth quarter of 2006 and the first quarter of 2007. The 2007 quarterly return reflects 15 employees, fourteen of whom earned wages that could account for full-time employment at minimum wage or more. The petitioner also submitted Forms I-9 and copies of supporting documentation for 14 employees. The petitioner did not submit a business plan explaining how the ten new jobs projected on the Form I-526 would be created within two years.

In response to the director's request for employment documentation for the dairy prior to the sale and evidence of how the petitioner would create 10 new jobs at the dairy, counsel reiterates the assertion that the petitioner created an original business and that there was no prior dairy. For the reasons discussed above, that assertion is contradicted by the record. The letter from Mr. [redacted] submitted at that time affirms that Cross Timbers did not provide Kuiper Dairy with any employees but does not assert that Cross Timbers operated what is referenced in the lease as "the dairy" without employees. The petitioner did not submit a business plan explaining how he would create the 10 new jobs.

The director concluded that the petitioner had not demonstrated that his investment had created or would create the necessary jobs. On appeal, counsel continued to maintain that the petitioner created an original business. Thus, all jobs at Kuiper Dairy would have to be considered "new." For the reasons discussed above, the evidence clearly and unambiguously contradicts that position. In a supplement, counsel asserts in the alternative that the petitioner restructured an existing business. Even if we agreed with that position, however, the petitioner would still need to demonstrate that the restructuring had created or would create 10 new positions. While the petitioner makes this claim on the petition, the petitioner has never submitted evidence of 10 new positions or a business plan explaining how this will be accomplished.

Counsel also questioned why an existing company would provide documentation of its employment prior to a sale. We are bound by the regulations, finalized after notice and comment, which unambiguously contemplate that an investor who invests in a preexisting business will sometimes need to produce employment or financial documentation from the preexisting business that predates the petitioner's investment. Specifically, where a petitioner relies on an investment in a troubled business, he will need to provide evidence of that business' net worth prior to the investment in order to prove that the business was a troubled business. 8 C.F.R. § 204.6(e)(definition of "troubled business). Where a petitioner seeks to demonstrate that he has expanded a preexisting company, he will need to provide evidence of the preexisting company's net worth or employment. 8 C.F.R.

§ 204.6(h)(3); (j)(1)(iii). Significantly, in *Matter of Soffici,* 22 I&N Dec. at 167, the AAO noted the lack of payroll documentation for the hotel at the time of sale but acknowledged a worksheet relating to this issue. Thus, we are not persuaded that the director erred in requesting evidence of employment at the dairy at the time of its sale/lease to Kuiper Dairy.

The record is absent evidence regarding employment at the dairy prior to the purchase/lease of the dairy by Kuiper Dairy. Even if we were willing to accept a statement of that information, Mr. [redacted] does not provide that information in his letter. Even if we were to assume that the number of employees right after the sale, 14, represented the number prior to the sale, and there is no evidence to support such a presumption, the petitioner has not documented that he has created or will create 10 full-time positions beyond the 14 employed in the fourth quarter of 2006. The most recent information provided documents only 17 employees and the petitioner has never submitted a business plan.

In light of the above, the petitioner has not established that he has created or will create the necessary ten jobs.

Finally, we must address the issue of whether or not the petitioner has created any employment for "qualifying" employees as defined in 8 C.F.R. § 204.6(3), quoted above. As stated in our previous notice, the AAO noticed anomalies on the alien registration cards and attempted to verify the information on the Forms I-9 submitted. The AAO discovered that of the 14 Forms I-9 submitted, 13 were determined to be relying on bogus alien registration cards.

In response, the petitioner provides a list of six employees who have left Kuiper Dairy prior to our notice. The petitioner also provides requests for additional evidence of eligibility to work issued to seven other employees who were subsequently terminated according to the petitioner. The petitioner submits 11 new Forms I-9 as well as quarterly reports and payroll records documenting between 14 and 17 employees. The quarterly reports and payroll records do not include the names of the petitioner's current employees. Forms I-9, while important for establishing that the employees are qualifying, do not establish that the employees are working for the commercial enterprise. *Matter of Ho,* 22 I&N Dec. at 212. Thus, the petitioner has not established that the Forms I-9 provided in response to our notice are for its employees. Regardless, even if the petitioner had overcome our concerns and now employs only qualifying employees, for the reasons discussed above, the petitioner has not demonstrated that he has created or will create at least 10 *new* jobs.

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.