

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship  
and Immigration  
Services

B7



FILE: SRC 07 200 54423

Office: TEXAS SERVICE CENTER Date: MAR 27 2009

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).

*Mai Pluon*

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 personal funds or that he had created or would create the requisite 10 jobs.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's bases of denial. We note that the facts in this matter are nearly identical to those in *Matter of Soffici*, 22 I&N Dec. 158 (Comm'r 1998) and this binding precedent decision explains in detail why the facts in this matter are problematic.

The AAO 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 21<sup>st</sup> 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 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 employment generating entity is "new" as defined in the pertinent regulations and 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).

On the Form I-526, Part 3, the petitioner indicated that the name of the new commercial enterprise is [REDACTED]. In the cover letter, however, counsel indicated that the petitioner and his partners actually organized two limited liability companies, [REDACTED] (which was also formed to hold and lease commercial real estate) and [REDACTED], one to own the hotel and one to manage it. The record does not indicate that there is one holding company that serves as the new commercial enterprise. The record indicates that the location of the hotel is 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.

### **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.) Significantly, the singular is used.

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 21<sup>st</sup> 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.

The director noted that one of the petitioner's limited liability companies, [REDACTED], purchased an operational hotel. The director requested evidence as to when the hotel was established. In response, the petitioner distinguished the facts from those in *Matter of Izummi*, 22 I&N Dec. 169 (Comm'r. 1998) and asserted that he had formed new companies that had reorganized the hotel. The director concluded that the hotel was a hotel prior to purchase and is still a hotel. As the record lacked evidence as to when the hotel was established, the director concluded that the petitioner had not established an investment in a "new" commercial enterprise.

On appeal, the petitioner asserts that the petitioner and his partners obtained a new Federal Employer Identification Number (FEIN) and entered a new franchise agreement with [REDACTED]. Once again, the petitioner distinguished *Matter of Izummi*, 22 I&N Dec. at 169.

The controlling precedent decision in this matter is *Matter of Soffici*, 22 I&N Dec. at 165. That case involved a new corporation, [REDACTED], which purchased a [REDACTED]. The decision acknowledges that [REDACTED] was incorporated in 1997, but concludes that "it is the job creating business that must be examined in determining whether a new commercial enterprise has been created." *Id.* at 166. The decision concludes that the motor lodge had been in business for 24 years when purchased by [REDACTED], which had merely "replaced the former owner." *Id.* The decision then concludes:

The petitioner has not shown the degree of restructuring and reorganization required by 8 C.F.R. § 204.5(h)(2); the hotel has always been a [REDACTED] and is still a [REDACTED] today. A few cosmetic changes to the décor 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. Therefore it cannot be concluded that the petitioner has created a new commercial enterprise.

*Id.* The facts in the case before us are nearly identical to those in *Matter of Soffici*. The petitioner in this case formed a new company that purchased an existing hotel. While the petitioner obtained a new FEIN, the Internal Revenue Service (IRS) Form SS-4, Application for Identification Number, indicates that [REDACTED] "purchased [a] going business." As stated in *Matter of Soffici*, 22 I&N Dec. at 166, a mere change in ownership is insufficient to establish a new commercial enterprise through the creation of a new commercial enterprise or reorganization.

The next question is whether the petitioner had sufficiently reorganized the hotel simultaneously with the purchase or subsequently. While the regulation permits an alien to reorganize the business after purchase, the commercial enterprise must still be "new" as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). An alien may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. The petition was filed on June 20, 2007.

The petitioner asserts that he has added a miniature golf course, fitness center, a business center, a free breakfast and other renovations. [REDACTED] purchased the hotel on March 1, 2006. At that time the company took out a loan of \$188,000 for renovations required to maintain the hotel as a [REDACTED] franchise. These general renovations did not significantly alter the business from a hotel.

In response to the director's request for additional evidence, the petitioner submitted evidence that in July 2007, after the date of filing, [REDACTED] borrowed an additional \$324,000 for more extensive renovations. While these renovations may have expanded the services the hotel offered its guests, it is not clear that these renovations reorganized the business such that a new commercial enterprise resulted; the hotel remained a hotel. Regardless, these renovations all postdated the filing of the petition and cannot be considered.

The petitioner does not claim, and the record does not suggest, that the petitioner expanded either the hotel's net worth or employment by 40 percent.

In light of the above, the petitioner has not established that he or any owner before him, created or reorganized the [REDACTED] as a "new" commercial enterprise as defined at 8 C.F.R. § 204.6(e).

Moreover, the petitioner has not established that he has invested in "a" commercial enterprise. Rather, the petitioner and his partners organized two limited liability companies, one to own the hotel and one to operate it. While we look at the employment-generating entity, in this case the hotel, to determine whether or not the commercial enterprise is "new," *Matter of Soffici*, 22 I&N Dec. at 166, does not suggest that the hotel itself is the commercial enterprise. The regulation at 8 C.F.R. § 204.6(e) defines "commercial enterprise" as follows:

*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.

(Bold emphasis added.)

The record contains no evidence that the petitioner and his partners have formed a holding company for [REDACTED] and [REDACTED]. Thus, we cannot consider both of these companies. The requirement that the alien invest in "a" commercial enterprise is not merely technical. As will be seen below, the use of more than one commercial enterprise can make it difficult to confirm that the full investment amount is being made available for job creation.

In light of the above, the petitioner has not established an investment in a single commercial enterprise that conforms to the regulatory definition of “new.”

### **INVESTMENT OF CAPITAL**

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

*Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

\* \* \*

*Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing

ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

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

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

On the Form I-526, Part 3, the petitioner claimed to have made an initial investment of \$3,160,000 on March 1, 2006 and a total investment of \$3,184,000. He indicated that he had a 20 percent interest in the new commercial enterprise. In providing the composition of his investment, the petitioner indicated there was \$160,000 in a U.S. bank account, \$24,000 in assets purchased for the business, \$3,000,000 in debt financing and \$50,400 in "other." In the cover letter, counsel asserted that the petitioner and his partners "each invested \$160,000.00 USD from personal funds, and mortgaged the property for the remainder of the purchase price." Counsel then asserts that the petitioner signed the promissory note, thus becoming "jointly and severally liable for the full amount" of the \$3,000,000 loan.

The petitioner submitted the operating agreements for both [REDACTED], indicating that each member would receive 20 of the 100 units to be issued by each company. Exhibit D of the agreement for [REDACTED] provides that the price for each unit would be \$5,000 per unit. Exhibit D for the agreement for [REDACTED] provides that the price for each unit would be \$100. The petitioner also submitted a deed receipt reflecting a transfer of property from [REDACTED] to [REDACTED] worth \$3,515,000. In addition, the petitioner submitted cancelled checks reflecting his payments of \$7,500 on November 6, 2005 and \$50,000 on January 16, 2006 to 2836

On February 27, 2006, the petitioner wired \$50,000 to [REDACTED] and on February 28, 2006 the petitioner wired \$8,000 to [REDACTED]. The amounts the petitioner transferred to [REDACTED] total \$115,500.

The petitioner did not submit any tax returns for [REDACTED]. Thus, the petitioner's capital contribution as reflected on his Schedule K-1 is not documented. The petitioner did submit the 2006 IRS Form 1065 U.S. Return of Partnership Income for [REDACTED]. This document, Schedule K-1, reflects a contribution of \$66,500 during the year. On appeal, the petitioner submits the 2007 Form 1065 for [REDACTED]. The Schedule K-1 for this year reflects that the petitioner did not contribute any additional funds in 2007. Thus, the petitioner has not submitted tax returns demonstrating an investment of more than \$66,500. If we add the amounts transferred to [REDACTED] (\$115,500) to his contribution to his capital account for [REDACTED], the petitioner

has demonstrated an infusion of cash of no more than \$182,000, less than half of the \$500,000 minimum investment required.

We acknowledge that the record contains numerous invoices for the normal operations of the hotel. The petitioner, however, has not traced any of these expense payments back to his own personal accounts. The reinvestment of proceeds is not a qualifying investment by the petitioner. *See generally Kenkhuis v. INS*, 2003 WL 22124059 (N.D. Tex. Mar. 7, 2003); *De Jong v. INS*, 1997 WL 33765206 (E.D. Tex. Jan. 17, 1997); and *Matter of Izummi*, 22 I&N Dec. at 195, for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation.

The petitioner, however, asserts that the loans obtained by [REDACTED] should be credited as part of his investment because he personally guarantied these loans. On March 1, 2006, 2836 [REDACTED] purchased the [REDACTED] hotel for \$3,515,200. The main settlement document reflects a loan from Farmers & Merchants Bank for \$2,812,000. A second settlement statement reflects a second loan of \$188,000 for renovations. On the same date, the petitioner signed two personal guaranties, one for each loan. The record also contains two credit line deeds of trust, one for each amount. Both deeds reflect that the loans are secured by the hotel property.

In July 2007, after the date of filing, [REDACTED] borrowed an additional \$324,000 for renovations. While the loan document is signed on behalf of the company, no individual personally guarantied this loan. Specifically, the line for the guarantor's signature is blank. On appeal, the petitioner submits the Uniform Commercial Code (UCC) Financing Statement for Farmers & Merchants Bank showing its interest in [REDACTED]'s inventory, equipment accounts and other personal property.

Once again, the controlling precedent on this issue is *Matter of Soffici*, 22 I&N Dec. at 162-63. In that case, the alien's corporation, [REDACTED] purchased a [REDACTED] motor lodge with cash and a \$1.7 million mortgage. As in the matter before us, the alien in that case signed a personal guaranty of the loan. In concluding that the alien could not be credited with the \$1.7 million loan, *Matter of Soffici*, 22 I&N Dec. at 162, first notes that a loan obtained by a corporation is not the same as a loan obtained by an individual. We note that a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Regarding the alien's personal guaranty of the loan, *Matter of Soffici*, 22 I&N Dec. at 163, concluded:

As the guarantee does not **obligate** 1<sup>st</sup> United to proceed against the petitioner, it does not prohibit 1<sup>st</sup> United from first seeking payment from the business. [Footnote questioning why 1<sup>st</sup> United would prefer to research and pursue the petitioner's assets omitted.] The petitioner's personal guarantee of payment does not change the character of the mortgage; the assets of [REDACTED] are still primarily securing the mortgage. As such, the \$1.7 million that the mortgage represents cannot properly be considered an investment of the petitioner's capital.

(Emphasis in original.)

As stated above, both the \$2,812,000 and the \$188,000 loans are secured by the hotel itself, an asset of [REDACTED]. The petitioner has not established that he executed a personal guaranty for the \$324,000 loan subsequently obtained by the company, although that loan postdates the filing of the petition.

Regardless, the UCC statement reveals that this loan is secured by the hotel's personal property. Specifically, the petitioner's assertion that the UCC statement reflects that his personal property secures the \$324,000 loan is not persuasive. The UCC statement does provide that the loan is secured by the inventory, equipment, accounts, goods, fixtures and "all other personal property and fixtures of the debtor." The debtor, however, is [REDACTED]. The phrase "personal property" does not suggest that non-hotel assets secure the loan. Rather, according to Black's Law Dictionary 1233 (7<sup>th</sup> ed. 1999) the phrase "personal property" refers to any "movable or intangible thing that is subject to ownership that is not real property." It does not refer to property owned by an individual rather than a company. Even if the petitioner's personal property was included as the security for this loan, the loan is also secured by the assets of the hotel and, therefore, cannot be considered the petitioner's personal property according to *Matter of Soffici*, 22 I&N Dec. at 163.

As the assets of the hotel secure all of the above loans, the petitioner cannot rely on these loans as part of his personal investment. In addition to being a binding precedent, the conclusion in *Matter of Soffici*, 22 I&N Dec. at 163, that a personal guaranty cannot convert a mortgage into a personal investment is supported by the plain language of the regulation 8 C.F.R. § 204.6(e) (definition of capital), which excludes as capital any indebtedness secured in any way by the assets of the new commercial enterprise. Thus, the petitioner has not established a capital contribution of more than \$182,000.

In addition, the petitioner has not demonstrated that his entire investment of \$182,000 is qualifying. 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 stated above, [REDACTED] owns the hotel property. The entity managing the hotel and paying the salaries, however, is [REDACTED] as evidenced by the quarterly employer returns filed by that company.

Once again, our concern is not merely technical. The petitioner indicates that [REDACTED] was formed not only to purchase the hotel but other property as well. Any funds invested in 2836 [REDACTED] used to purchase property unrelated to the hotel would not be available to the employment generating entity, the hotel. While *Matter of Izummi*, 22 I&N Dec. at 179, dealt with different facts, it stands for the general proposition that there must be some nexus between the investment and the jobs created.

While the funds invested by the petitioner in [REDACTED] have been made available to the job creating entity, the petitioner has not established that all of his funds invested in [REDACTED] were also made available to the job creating entity.

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

### **SOURCE OF FUNDS**

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'r. 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 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).

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.

The petitioner asserts that his investment derives from distributions from his Indian partnership, [REDACTED]. The petitioner has submitted evidence of the partnership's ongoing business, his salary with this partnership and a debit from his capital account in 2005. As noted by the director, however, the funds transferred to the petitioner's U.S. bank account are from [REDACTED] and [REDACTED]. The petitioner has not traced any funds from [REDACTED] or his Indian account to either of these entities. Thus, the petitioner has not documented the complete path of funds for his investment.

### **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. 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.

*Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. In the case of the Immigrant Investor Pilot Program, "full-time employment" also means employment of a qualifying employee in a position that has been created indirectly through revenues generated from increased exports resulting from the Pilot Program that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

*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 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, Part 5, the petitioner indicated that there were no employees at the time of his investment and that he had created 22 jobs and would create an additional five to seven jobs. The petitioner initially submitted 2006 IRS Form 941 Quarterly Employer Returns for [REDACTED] reflecting 15 employees in the first quarter, 17 in the second quarter, 15 in the third quarter and 13 in the fourth quarter. In response to the director’s request for additional evidence, the petitioner submitted [REDACTED] quarterly return for the second quarter of 2007 reflecting 18 employees. The petitioner’s response did not include the requested evidence of the number of employees at the [REDACTED] hotel prior to the purchase by [REDACTED]

The director concluded that the petitioner had not established the creation of 10 new jobs. On appeal, the petitioner asserts that the hotel employees were interviewed from February 1, 2006 and hired from March 1, 2006. The petitioner further asserts that the hotel now employees 22 full-time employees and two part-time employees whose hours in the aggregate amount to at least 35 hours per week. As stated above, the definition of “full-time” at 8 C.F.R. § 204.6(e) provides that the definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week. While job sharing arrangement are permitted, the record contains no evidence of a job sharing arrangement for the two part-time employees or even

evidence that they perform the same services. Moreover, the dates of hire are not determinative. The firing of current employees and hiring new ones does not create new jobs.

Once again, *Matter of Soffici*, 22 I&N Dec. at 167 is instructive. In that case, the alien claimed that [REDACTED] employed 23 employees. *Id.* The decision concludes that the petitioner had not “established that this figure constitutes either the maintenance of the previous level of full-time employment, permitted only if the hotel was a troubled business as defined at 8 C.F.R. § 204.6(e), or the addition of 10 new “full-time positions.” *Id.* The use of the word “positions” emphasizes that the alien must create 10 new positions regardless of who fills those positions. Replacing a former employee does not create a new position.

Even if we assumed that the hotel employed 15 employees at the time of purchase, the amount reflected on the first employer quarterly return filed by [REDACTED], the most recent employer quarterly return reflects only 18 employees, a gain of three positions. The petitioner has never submitted a comprehensive business plan meeting the requirements set forth at *Matter of Ho*, 22 I&N at 213, including a time table for hiring at least 10 new employees into new positions.

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