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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:

WAC 02 283 50721

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 27 2009

IN RE:

Petitioner:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds. On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's valid concerns. In addition, the petitioner has not demonstrated an investment in a troubled business such that he can rely on job maintenance rather than job creation pursuant to 8 C.F.R. § 204.6(j)(4)(2). Moreover, for the reasons explained in *Matter of Soffici*, 22 I&N Dec. 158, 165-67 (Comm'r 1998), the petitioner has not demonstrated that his investment was in a "new" commercial enterprise as defined at 8 C.F.R. § 204.6(3) or that he has met or will meet the job creation requirement.

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 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 pending on 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, 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.

INVESTMENT OF CAPITAL

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

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

* * *

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

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

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

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

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

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

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

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm'r. 1998).

On the Form I-526 Petition, Part 3, the petitioner indicated that he had made an investment of \$2,392,386 on February 23, 2001. Counsel explained that the investment constituted the purchase of a hotel for \$2,300,000 through the assumption of a \$1,381,763.69 mortgage, the conveyance of property in New Jersey worth \$458,000 and a loan of \$150,000 from [REDACTED], the seller of the hotel.

The petitioner submitted the operating agreement for [REDACTED], reflecting on exhibits A and B that the petitioner's initial contribution would be \$100,250. The February 26, 2001 settlement document for [REDACTED] purchase of the hotel from [REDACTED] reflects a \$150 deposit, a \$458,000 "Deed of Trust on New Jersey Property," a \$1,381,736.64 mortgage, \$51,000 earnest money paid by the buyer, \$120.88 interest paid by the buyer and \$481,500 in closing costs paid by the buyer. The petitioner did not submit any transactional evidence, such as cancelled checks or wire transfers, reflecting his personal payment of these costs. The original December 29, 1998 mortgage, assumed by the [REDACTED] when it purchased the hotel in 2001, has a maturity date of January 1, 2019.

The petitioner also submitted a February 23, 2001 mortgage note whereby the petitioner and his wife promised to pay [REDACTED] \$458,000, secured by [REDACTED] in Livingston, New Jersey, listed as the petitioner's residence. The [REDACTED] loan requires monthly payments of \$4,921.69 and is due on demand after five years. In addition, the petitioner submitted an August 27, 2001 promissory note whereby he promised to pay [REDACTED] \$150,000, the final balloon payment of \$122,565.46 plus interest due July 28, 2006. The petitioner did not initially submit evidence of his ownership of the New Jersey property. In response to the director's request for additional evidence, the petitioner submitted a closing statement reflecting that he sold this property on August 29, 2001 and that the proceeds were used to repay \$305,852 of the mortgage to

The petitioner also included a cashier's check for that amount payable to

On February 23, 2001, the petitioner entered a franchise agreement with Inc., which required an affiliation fee payment of \$25,000 upon signing. In response to the director's request for additional evidence, the petitioner submitted his personal check for this amount. The record also includes the "Tri-party Agreement" whereby and the petitioner, jointly and severally granted A a security interest in the franchise agreement with as partial collateral for the \$1,381,736.69 mortgage.

In addition to the above documents, the petitioner submitted the 2001 Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income filed for . The tax return, Schedule L, reflects a mortgage of \$1,500,086 and capital accounts of \$748,776. The tax return includes two Schedules K-1, one for the petitioner and one for his wife. These schedules reflect that the petitioner and his wife each contributed \$506,923 and withdrew \$32,145 in 2001, for a sustained contribution of \$949,556.

The petitioner also submitted compiled financial statements for . These statements were not audited or even reviewed and, thus, are based solely on the representations of management. The February 28, 2001 balance sheet reflects a current liability listed as " of \$458,000, a mortgage of \$1,381,736.64 and member capital of \$576,407.02. If the \$458,000 was borrowed by the petitioner solely in his individual capacity, however, it is not clear why this amount would be reflected as liability.

According to the compiled balance sheet as of December 31, 2001, the carryback loan had diminished to \$148,905.19, the mortgage had decreased to \$1,351,181.09 and the total capital contributed had increased to \$1,006,257.26, although \$64,291.44 member capital had been withdrawn during the year, which, if supported by the record, would leave a \$941,965.80 sustained investment.

In response to the director's request for additional evidence, the petitioner submitted evidence that had overdraft protection whereby a savings account held jointly by the petitioner and would be debited if checking account had insufficient funds. Bank accounts for both accounts reflect several protection transfers of between a few dollars and \$13,746 to maintain sufficient funds in the checking account. A January 2001 statement for the joint savings account shows a deposit of \$100,000. While counsel asserts that these funds were deposited by the petitioner, 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 director concluded that the petitioner could not rely on loans secured by the assets of the business, that the mixing of funds in a joint account made it difficult to determine what amounts were invested and that the petitioner had not demonstrated the source of the \$100,000 deposit.

On appeal, counsel submits a letter from an accountant detailing the petitioner's alleged investments and listing the evidence supporting each claim. The petitioner also submits evidence that the \$150,000 loan has been paid in full. We note that [REDACTED] was a borrower for that loan. The record does not contain evidence that the petitioner, and not [REDACTED], paid off the loan. Therefore, we cannot consider this evidence as documenting a personal investment by the petitioner. The petitioner also submitted a 2002 IRS Form 1065, Schedule K-1, for [REDACTED] reflecting that the petitioner invested another \$139,509 but withdrew \$34,548. The petitioner must still provide transactional evidence supporting the information on the Schedules K-1.

We will now address the accountant's assertions. First, the accountant cites the settlement statement as evidence that the petitioner paid \$532,620.88 cash for the hotel including deposits and cash paid at closing. The accountant also notes the \$27,634.74 referenced in the "miscellaneous notes" on the settlement document. The record, however, contains no transactional evidence such as cancelled checks or wire transfers documenting the path of these funds from the petitioner to the seller.

Second, the accountant asserts that the carryback loan and the subsequent satisfaction of that loan through the sale of the New Jersey property by the petitioner documents an investment of \$305,852. The record documents that the petitioner personally promised to pay [REDACTED] \$458,000 secured by the property and that the petitioner subsequently sold this property and transferred \$305,852 of the proceeds to [REDACTED]. Two anomalies, however, exist. First, while the petitioner purportedly personally executed this loan, it is listed on [REDACTED] balance sheet as a current liability. Second, the documents in the record reveal that the petitioner sold the [REDACTED] on August 29, 2001 and issued a check to [REDACTED] on that date. On appeal, however, the petitioner submitted a September 6, 2001 Novation Agreement, which typically substitutes a new obligation for an old one,¹ between [REDACTED] and the petitioner listing both [REDACTED] and the petitioner as the borrower. In this document, the parties acknowledge that the petitioner "shall" sell the property on or about August 29, 2001, a date that had passed, and agree that the loan shall not become due upon the sale. The document further cancels the mortgage if the payment of \$305,852.35 is received by [REDACTED] at the time of sale. The record does not explain why the novation agreement postdates the August 29, 2001 sale and payment of \$305,852.35 referenced in the agreement as upcoming.

Third, the accountant notes the payment by the petitioner of the \$25,000 franchise fee. The record contains the franchise agreement listing a \$25,000 fee, the check issued by the petitioner for this amount and the petitioner's bank statement showing this check was cashed. We are satisfied that the franchise fee paid for the hotel is a legitimate business expense paid by the petitioner and can be considered part of his qualifying investment.

Fourth, the accountant considers all of the overdraft protection transfers in July through December 2001 to be qualifying investments by the petitioner. The transfers, however, were from a business savings account to a business checking account. While the petitioner may be a named joint account holder for the savings account, the record contains no evidence that this account exclusively held his

¹ Black's Law Dictionary 1091 (7th ed. 1999).

own personal savings and none of the company's savings. Thus, the transfers from this account cannot be considered the petitioner's personal investment.

Fifth, the accountant refers to a \$7,590 accounting adjustment for the petitioner's personal payment of automobile expenses incurred on behalf of the company, \$1,085 in unsubstantiated items on the general ledger and \$4,147.64 in adjustments for withdrawals "incorrectly removed from capital." These claimed investments are not documented in the record.

Sixth, the accountant references a \$165 credit card ATM payment. While this amount appears on general ledger, the record does not credit this payment to the petitioner.

Seventh, the accountant references \$46,660 in cash deposited by the petitioner. In support of this claimed investment, the accountant notes the submission of the general ledger and company bank statements. The ledger, however, is self-serving and the bank statements do not document the source of the deposits.

Finally, the accountant references \$92,684.46 in credit card expenses paid by the petitioner. The accountant relies on the company's general ledger and credit cards statements for a business account, the petitioner's account and an account for the petitioner's wife. The record contains no evidence that the petitioner personally paid the balance on the company's credit card and the statements for his account and the one belonging to his wife show no expenses that are clearly business related. In fact, their personal statements include purchases at Costco, Exxon and Wal-mart.

In light of the above, even if we were to accept the transfer of proceeds from the sale of the New Jersey property, the petitioner has only documented an investment of that amount and the \$25,000 franchise fee, or \$330,852.35. The petitioner has not documented that the remaining funds are fully committed to the new commercial enterprise in two years. Thus, we concur with the director that the petitioner has not demonstrated a qualifying investment.

SOURCE OF FUNDS

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

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

- (i) Foreign business registration records;
- (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind

filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'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).

Initially, counsel asserted that the petitioner earned \$250,000 in the aggregate between 1997 and 2001 and \$671,838.69 in the aggregate in Saudi Arabia from 1983 to 1996. The petitioner submitted his IRS Form 1040 U.S. Individual Income Tax Returns for 1997 through 2001 reflecting adjusted gross incomes of \$81,459, \$61,806, \$64,454, \$38,272 and -\$186,764 respectively. The petitioner also submitted his Schedules K-1 for [REDACTED], but this income is already reflected on his personal income tax returns. Regarding the petitioner's employment in Saudi Arabia, the petitioner submitted a letter from [REDACTED] affirming the petitioner's employment for the company at a salary of SR15,000 in addition to free medical coverage, a furnished house and a car beginning in December 1982. The petitioner also submitted an April 6, 1995 letter from Citibank in Saudi Arabia confirming that the petitioner had a balance of \$431,157 as of that date. In response to the director's request for additional evidence, the petitioner established that there is no income tax in Saudi Arabia; thus, the petitioner did not file income tax returns during his employment there.

Finally, the petitioner submitted wire transfer receipts documenting the following transfers:

<u>Date</u>	<u>Amount</u>	<u>Remitter</u>	<u>Beneficiary</u>
August 8, 1995	\$25,000	The petitioner, [REDACTED]	[REDACTED] Trust Account
July 13, 1996	\$225,000.27	The petitioner, [REDACTED]	[REDACTED] Trust Account
August 26, 1996	\$1,000	"Deposit," source unknown	The petitioner, [REDACTED]

September 9, 1996	\$7,613	[REDACTED]	The petitioner,
September 12, 1996	\$14,935	[REDACTED]	The petitioner,
September 12, 1996	\$99,069.85	[REDACTED]	The petitioner,
November 27, 1996	\$198,450.63	The petitioner,	The petitioner,
January 17, 1997	\$9,000	The petitioner,	The petitioner,
April 7, 1997	\$49,926.34	The petitioner, bank unknown	The petitioner,
May 7, 1997	\$15,590.45	The petitioner, bank unknown	The petitioner,
July 7, 1997	\$25,785.80	The petitioner,	The petitioner,
July 9, 1997	\$14,040.71	The petitioner,	The petitioner,
July 10, 1997	\$35,993.51	The petitioner,	The petitioner,
July 21, 1997	\$7,066	The petitioner, bank unknown	The petitioner,
October 6, 1997	\$12,985	[REDACTED]	The petitioner,
May 20, 1998	\$41,481	Unknown	The petitioner,
May 21, 1998	\$12,548	[REDACTED] source unknown	The petitioner,
July 24, 1998	\$16,842	"Deposit," source unknown	The petitioner,
August 17, 1998	\$16,883	"Deposit," source unknown	The petitioner,
September 2, 1998	\$16,885	"Deposit," source unknown	The petitioner,
September 18, 1998	\$2,848.64	"Deposit," source unknown	The petitioner,
October 21, 1998	\$13,567.68	Unknown	The petitioner,
February 8, 1999	\$10,005	"Deposit," source unknown	The petitioner,
August 18, 1999	\$75,385.77	[REDACTED]	The petitioner,
December 20, 1999	\$25,205.49	[REDACTED]	The petitioner,
February 10, 2000	\$44,359.86	The petitioner, [REDACTED] s."	The petitioner,
May 15, 2000	\$4,985	[REDACTED]	The petitioner,
September 5, 2000	\$10,000	[REDACTED]	The petitioner,
October 2, 2000	\$27,975	The petitioner, bank unknown	The petitioner,
November 2, 2000	\$1,956.41	The petitioner, bank unknown	The petitioner,
November 24, 2000	\$99,975	[REDACTED]	The petitioner,
April 12, 2001	\$10,000	The petitioner, bank unknown	The petitioner,

As is clear from the above information, the record does not document the source of several of the "deposits," "credit memos" and even some of the wire transfers.

The petitioner also submitted ten State Bank of India bonds worth \$10,000 each issued on October 1, 1998. They were all payable on October 1, 2003, after the date of the petitioner's investment and the date of filing.

The director concluded that the petitioner's investment was primarily loans and that the petitioner's income could not account for his ability to repay those loans from his own funds. The director further concluded that the record did not trace the funds from the petitioner to the new commercial enterprise. On appeal, counsel asserts that the petitioner has documented the path of the invested funds.

Even if we concluded that the petitioner had documented the transfer of over \$1,000,000 from Saudi Arabia and India between 1995 and 2001, the petitioner has invested in other companies. Thus, the full amount transferred was not available for investment in [REDACTED]. Moreover, while the sale of the petitioner's New Jersey property was the source of the \$305,852.35 used to pay off the carryback loan, we concur with the director that the record lacks evidence that the petitioner

earns sufficient income to repay the other loans and evidence tracing the path of the funds used to pay the deposit and amount due at closing for the hotel property.

In light of the above, the petitioner has not established the lawful source of his investment.

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).

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.

Initially, counsel noted that the petitioner had formed [REDACTED] and entered into the franchise agreement with [REDACTED]. Thus, counsel concludes that, according to the discussions in *Matter of Izummi*, 22 I&N Dec. at 197 and *Matter of Hsiung*, 22 I&N Dec. 201, 204-

05 (Comm'r. 1998), the petitioner has established a new commercial enterprise. We acknowledge that, unlike *Matter of Izummi*, 22 I&N Dec. at 197, the petitioner was involved with the formation of [REDACTED]. At issue, however, is not whether the petitioner established the commercial enterprise, something the petitioner need no longer demonstrate, but whether the commercial enterprise can be considered “new.” *Matter of Hsiung*, 22 I&N Dec. at 204-05, does not specifically address whether or not the existing clinics that petitioner purchased were sufficiently “new,” but noted that the petitioner could not cause a net loss of employment. While not addressed by counsel, however, *Matter of Soffici*, 22 I&N Dec. at 165-66, specifically addresses whether an original business entity that purchases a preexisting business can be considered “new.” That case explicitly states that “it is the job creating business that must be examined in determining whether a new commercial enterprise has been created.” *Id.* at 166. Thus, in order to establish that [REDACTED] is “new,” as defined at 8 C.F.R. § 204.6(e), the petitioner must demonstrate that the hotel purchased by [REDACTED] qualifies as “new.” The record contains no evidence that the hotel was built after November 29, 1990. Thus, it is not “new” as defined at 8 C.F.R. § 204.6(e).

In the alternative, counsel asserts that the petitioner purchased the hotel and restructured it pursuant to 8 C.F.R. § 204.6(h)(2). As an explanation, counsel asserts that by acquiring the hotel, the petitioner “assumed simultaneous control over the hotel such as a simultaneous restructuring occurred.” Counsel, however, is not persuasive. Once again, *Matter of Soffici*, 22 I&N Dec. at 166 is instructive. The decision states that 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.*” *Id.* (emphasis added).

As in *Matter of Soffici*, 22 I&N Dec. at 165-66, the petitioner purchased a preexisting hotel and continued to operate it as a hotel. As the record contains no evidence that the hotel itself was established after November 29, 1990 and a mere change in ownership is not the type of restructuring contemplated by the regulations, the petitioner has not demonstrated an investment in a “new” commercial enterprise as defined at 8 C.F.R. § 204.6(e).

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.

* * *

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

While not contested by the director, the petitioner has also failed to demonstrate that his investment will create the required number of new jobs or that he can rely on job maintenance in a troubled business.

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."

Pursuant to 8 C.F.R. § 204.6(j)(4)(ii), if the employment-creation requirement will be met through preservation of employment in a troubled business, the petitioner must submit a "comprehensive business plan." 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.

Initially, counsel asserted that the petitioner meets the job creation requirement in one of two ways. First, counsel asserted that the petitioner actually created a new business by buying a preexisting hotel through a contract that did not obligate him to keep any of the preexisting employees. Thus, concluded counsel, the petitioner "constructively created new jobs" during the probationary period enacted for current employees of the hotel. In the alternative, counsel asserts that the petitioner invested in a troubled business such that he need only demonstrate job maintenance.

Counsel is not persuasive that the petitioner's failure to close the hotel after purchasing it constitutes the creation of new jobs. The statute and pertinent regulations do not permit the "constructive" creation of jobs. The petitioner must either create 10 new positions that did not previously exist or must demonstrate job maintenance from an investment in a troubled business pursuant to 8 C.F.R. § 204.6(j)(4)(ii). Significantly, the regulation at 8 C.F.R. § 204.6(j)(4)(ii) permits evidence of job maintenance where the new commercial enterprise "has been established through a capital investment in a troubled business." Thus, according to the plain language of this regulation, the business must have been a troubled business at the time of the petitioner's investment. Such a requirement is reasonable; we cannot presume that the regulations would favor an entrepreneur who purchased a business that was not troubled and then operated it at a loss for 12 or 24 months.

The 2001 tax return for [REDACTED] reflects a net loss of \$200,521 and a net worth of \$748,776. The petitioner also submitted profit and loss statements for Quality Inn and Suites reflecting a net loss of \$61,780 in 1998, \$136,841 in 1999 and \$112,684 in 2000. The statements do not list a preparer and are not accompanied by an accountant's cover page indicating whether they are audited, reviewed or compiled. As these statements do not include balance sheets, the hotel's net worth prior to the losses is unknown.

Without evidence of the hotel's net worth prior to the losses, we cannot determine whether the petitioner invested in a troubled business. Thus, the petitioner must establish the creation of 10 new jobs. As noted in the case cited by counsel, the petitioner may not cause a net loss of jobs. *Matter of Hsiung*, 22 I&N Dec. at 205.

The record does not contain evidence of the number of hotel employees on the date the petitioner purchased the hotel. The earliest evidence of employment at the hotel is payroll documents for March 5, 2001, reflecting 15 employees. The record does not reflect that all 15 worked full-time. As of June 19, 2002, the hotel continued to employ 15 workers. In response to the director's request for additional evidence, the petitioner submitted evidence of eligibility to work for 11 employees. This evidence cannot demonstrate that the petitioner has created at least 10 positions. In fact, it appears that the petitioner may have decreased the number of jobs at the hotel. The petitioner has not submitted a business plan, which is required even when relying on job maintenance at a troubled business. 8 C.F.R. § 204.6(j)(4)(ii).

In light of the above, the petitioner has not demonstrated that he has created or will create the necessary jobs or that he has maintained the number of employees in a business that was troubled at the time of his investment.

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.