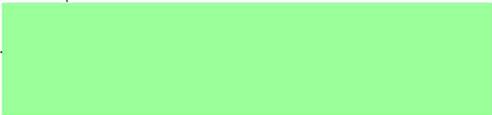




**U.S. Citizenship  
and Immigration  
Services**

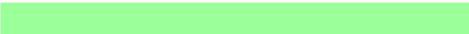
(b)(6)



DATE: **APR 03 2013**

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicated that the petition is based on an investment in an existing business that underwent a restructuring resulting in the creation of a new commercial enterprise (NCE), [REDACTED]. The petitioner amended the business strategy from being a salvage yard to providing wholesale and retail sales of recycled original equipment manufacturer (OEM) automobile parts. The petitioner purchased the building and assets of the former owner and in a separate transaction, and from a separate party, purchased the land upon which the existing business resided. As the petitioner has not provided sufficient evidence to establish that the NCE is within a targeted employment area, the required amount of capital in this case is \$1 million. For the reasons discussed below, including serious discrepancies among the tax documentation for assets and wages, the AAO will dismiss the appeal.

## I. THE LAW

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

## II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the petition on January 20, 2011, supported by evidence relating to the following issues: (1) the establishment of the NCE; (2) the restructuring of the business; (3) a November 12, 2010 letter from [REDACTED] Director of the Labor Market Statistics Center at Florida's Agency for Workforce Innovation (AWI) relating to the NCE's location within a TEA; (4) the amount of capital the petitioner invested; (5) the lawful source of the invested funds; and (6) the creation of jobs as required by the statute and regulation.

On January 6, 2012, the director issued a notice of intent to deny (NOID). Specifically, the director noted the following deficiencies: (1) the petitioner checked the box indicating the NCE was not located in a TEA but counsel asserted that the NCE was situated within a TEA; (2) the petitioner appeared to have purchased the relevant assets with funds earned from the operation of the NCE, which is not a qualifying investment; (3) the record did not establish the requisite job creation; and (4) the petitioner had not established that he had invested \$1 million of his own funds into the NCE. The petitioner

responded on February 8, 2012, with additional documentation, including a January 23, 2012, letter from [REDACTED] Director of the Labor Market Statistics Center, now part of the Florida Department of Economic Opportunity; compiled financial statements; and an organizational chart.

On April 2, 2012, the director denied the petition determining that the petitioner had failed to demonstrate: (1) that the NCE was located within a TEA; (2) a qualifying at-risk investment of \$1 million; (3) that the funds invested in the NCE were obtained through lawful means; and (4) that the NCE would create at least ten full-time positions for qualifying employees.

On April 30, 2012, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts: (1) the petitioner has invested capital in the NCE in excess of \$1 million; (2) the director erred in her determination that the NCE was not located in a TEA; (3) the director misapplied the law by failing to recognize that the petitioner was in the process of investing the required capital; (4) the petitioner demonstrated that his invested funds derived from a lawful source; and (5) that the petitioner had demonstrated the requisite job creation. For the reasons discussed below, including serious discrepancies on the tax documentation relating to assets and wages, the AAO finds that the petitioner has not overcome the director's grounds for denial.

### III. ISSUES PRESENTED ON APPEAL

#### A. Inconsistencies in the Record

The record contains notable and unexplained irregularities. The NCE's 2007 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation reflected \$86,989 total assets in block F. This reflected the NCE's assets at the end of the tax year for 2007. In comparison, the NCE's 2008 IRS Form 1120S, Schedule L indicated the NCE's total assets at the beginning of the tax year was \$804,867. The record lacks evidence or an explanation from the petitioner of this discrepancy in the NCE's total assets at the end of 2007/beginning of 2008 in the amount of \$717,878. In addition, the petitioner listed the NCE's IRS tax number, or Federal Employer Identification Number (FEIN), as [REDACTED]

This number, however, only appears on the NCE's 2005 tax return. The remaining tax returns and Forms 941 show [REDACTED] as the FEIN. Moreover, the salaries and wages reported in the 2008 Forms 941 and the 2010 and 2011 IRS Form W-2s do not match the salaries and wages listed on the NCE's tax returns for those years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not resolve the discrepancy in assets. Finally, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

#### B. Targeted Employment Area

The statute and regulation provide for a reduced investment amount (\$500,000) for investments made within TEAs. Section 203(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2). The director found that the petitioner failed to establish that the NCE was within an area that qualified as a TEA. The director cited to 2010 census data to determine the NCE resided in the census tract of 903.07 instead of the census tract noted

in [REDACTED] letter dated November 12, 2010, which listed the NCE in the census tract of 903.02. [REDACTED] relied upon 2000 census data relating to the location of the NCE. Section 203(b)(5)(B)(ii) of the Act and the regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that a targeted employment area means an area which, "at the time of investment," is a rural area or an area which has experienced unemployment of at least 150 per cent of the national rate. On the Form I-526 the petitioner claimed an initial investment in the NCE on September 16, 2003. Therefore, the relevant unemployment data in this case is not related to the petition filing date, but to the claimed initial investment date of September 16, 2003. The petitioner has not submitted unemployment data relating to on or around the date of his initial investment.

In reference to the initial evidence required to accompany the petition, the regulation at 8 C.F.R. § 204.6(j)(6)(ii) requires that the petition be accompanied by evidence that the county in which the NCE "is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate," or a letter from the respective state government that the area "in which the enterprise is principally doing business has been designated a high unemployment area." This letter from the state authority must meet the requirements of 8 C.F.R. § 204.6(i), which authorizes state governments to designate a geographic or political subdivision as a TEA, supported by the government's methodology.

On appeal, counsel asserts that the director incorrectly relied upon 2010 census data, when she should have used the 2000 census data. Counsel further asserts that state designations should be binding or at least entitled to substantial deference. In support of this position, the petitioner provided an email from [REDACTED] with a [REDACTED] address. [REDACTED] does not list her position with the Florida Department of Economic Opportunity. She asserts that USCIS has accepted the combination of census tracts previously and that the use of 2000 census data was used pursuant to U.S. Bureau of Labor Statistics mandates. Her assertions, however, are not relevant to the issue of whether the petitioner provided the appropriate statistics for 2003 when he made his investment.

The regulation at 8 C.F.R. § 204.6(i) authorizes each state to designate the boundaries of an area as one with high unemployment, provided the area meets other requirements within the regulation. The state appears to have complied with the requirements of the regulation at 8 C.F.R. § 204.6(i); however, the information is more closely related to the petition filing date instead of the statutory and regulatory required initial investment date.

The petitioner failed to submit evidence that, as of the date of the initial investment, the State of Florida had designated the area in which the NCE would operate as a TEA. As a result, the amount of capital the petitioner is required to invest regarding this petition is \$1 million.

### C. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines capital and investment. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she 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. The regulation then lists the types of evidence the petitioner may submit to meet this requirement.

Within his statement accompanying the petition, the petitioner claimed the following investments of capital in the NCE as of December 31, 2009:

- \$165,000 on September 16, 2003, for the purchase of the assets of [REDACTED]; and
- \$75,000 on September 16, 2003, for the purchase of the real estate upon which the NCE was located.

The petitioner also listed the following assets to be included as resulting from his investment:

- \$24,710.35 in the NCE's [REDACTED]
- \$42,163.62 in the NCE's [REDACTED]
- \$2,128.24 in the NCE's [REDACTED] and
- \$1,090,035.43 in additional assets and inventory.

Regarding the NCE's bank account statements submitted with the petition, the only statement that contains one of the above claimed figures is the [REDACTED] which shows an opening balance of \$2,128.24. The statement however, does not reflect the origin of these funds. The remaining banking statements do not establish any infusions of capital that can be attributed to the petitioner. A business that has been in operation since 2003 can acquire cash in many ways other than a shareholder investment. The petitioner has not established that all cash and other assets in a business that has been operational over several years represent the petitioner's personal equity investment. If the petitioner asserts that the "Statement Beginning Balance" of \$2,128.24 in account [REDACTED] constitutes an infusion of capital on his part, he has failed to provide corollary evidence relating to the beginning balance of the other two bank accounts.

Regarding the September 16, 2003, purchase of assets and real estate, the petitioner failed to document either of these transactions with any evidence other than the agreements themselves. The agreements are not sufficient evidence to establish that a particular exchange of money, assets, and real estate took place or the source of the cash payment. A petitioner must provide sufficient forms of financial documentation to substantiate his claims that such purchases took place and the source of the cash used to purchase the assets and land. Otherwise, he is not able to demonstrate that he personally has invested the claimed amount of capital in the NCE as required by the regulation at 8 C.F.R. §§ 204.6(f) and (j)(2).

On appeal, counsel asserts the director "erred in refusing to accept normal business records as evidence of investment of inventory, assets, machinery and equipment." Regarding the self-generated list of "Machinery and Equipment/Warehouse Equipment," the petitioner attempted to support the claims made within this list with receipts and invoices for the listed items. The majority of the items do not have a receipt or invoice in which the item, date, and purchase amount corresponded with the self-generated list. As this list does not consistently match the invoices and receipts, it essentially amounts to assertions on the petitioner's part. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of*

*Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Regardless, not every expenditure by an operational business constitutes a capital expense. The petitioner did not document that he personally purchased these items as part of his capital investment or that the business purchased them with capital he personally contributed to the business.

In addition, the tax returns are not credible, probative evidence of the petitioner's investment based on the inconsistencies noted above. Specifically, the NCE's 2007 IRS Form 1120S reflected \$86,989 in total year-end assets in block F. This amount is inconsistent with the NCE's 2008 IRS Form 1120S, Schedule L, indicating that the NCE's total assets at the beginning of the tax year was \$804,867. In addition, the FEIN on the Form I-526, [REDACTED] only appears on the NCE's 2005 tax return. The remaining tax returns and Forms 941 show [REDACTED] as the FEIN. Moreover, as will be discussed in more detail below, the salaries and wages reported in the 2008 Forms 941 and the 2010 and 2011 IRS Forms W-2 do not match the salaries and wages listed on the NCE's tax returns for those years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not resolve the discrepancy in assets.

The petitioner also provided a self-generated list of "Buildings and Improvements" at exhibit 18 within the initial filing that suffers the same evidentiary shortcoming as the self-generated list of "Machinery and Equipment/Warehouse Equipment" addressed above. The "Buildings and Improvements" list also consists of the petitioner's assertions of capital investment in the NCE that are not corroborated with any financial documentation establishing that the funds used in exchange for the goods or services were the petitioner's own funds. 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. Additionally, as the petitioner failed to document the infusion of any of his own capital into the NCE, any checks drawn on the NCE's bank account cannot be considered to have originated from the petitioner as these funds could be the result of the NCE's profits. The only payments on record that support the invoices are four checks, all drawn on the NCE's bank account rather than on the petitioner's account. This is not in compliance with the regulation at 8 C.F.R. § 204.6(e), which requires that the petitioner invest his own funds as capital. *See Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998); *see also Kenkhuis v. INS*, No. 3:01-CV-2224-N, 2003 WL 22124059, \*3 (N.D. Tex. Mar. 7, 2003); *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) (holding that the reinvestment of proceeds is not an investment by the petitioner).

In reference to the receipts and invoices, several purchases are evidenced through seven different credit cards. The receipts contain a partial credit card number; however, the petitioner has not provided documentation to establish to which person or entity any of the credit card accounts are assigned. Therefore, the petitioner has not established that the petitioner invested his own capital through the purchase, or if the NCE was the purchasing entity. The invoices for purchases on behalf of the NCE name either the petitioner or the NCE or both. While these invoices reflect that a particular piece of equipment was purchased, the petitioner has not provided evidence showing that any of these purchases were drawn on his personal account.

The compiled financial statements for 2011 are also not credible, probative evidence. The accountant's letter reflects that the statements are based on the representation of management and are not the result

of an audit or review. The representations of management are suspect in this matter due to the unexplained significant jump in assets between the end of 2007 and the beginning of 2008 as reflected on the NCE's tax returns for those years, discussed above. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

On appeal, counsel concedes that the petitioner may not rely on retained earnings and asserts that the director erred in concluding that the petitioner had not demonstrated his personal investment. The use of any proceeds, however, cannot be included as the petitioner's investment even if they did not remain at year's end as retained earnings. Rather, the petitioner must demonstrate his own contribution of capital. 8 C.F.R. § 204.6(e) (definition of invest.) *See generally Kenkhuis*, 2003 WL 22124059 at \*3. The director indicated that the petitioner had not documented whether the NCE paid for the purchases from the petitioner's capital or the NCE's earnings. Given the petitioner's failure to provide the account holder for the credit card transactions or the checks purportedly showing that the petitioner remitted funds on behalf of the NCE, the director concluded that the petitioner had not established that any of the claimed investment derived from the petitioner's personal accounts.

On appeal, counsel asserts that the director misapplied the law and required that all the petitioner's "capital must be finally invested in order to qualify." Counsel asserts that the petitioner is only required to demonstrate that he is in the process of investing the required amount of capital. Counsel's reading of the regulation does not account for the requirement that the petitioner's capital be committed to the NCE. The regulation at 8 C.F.R. § 204.6(j)(2) states: "[T]he 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." Therefore, at the time of filing, the petitioner must provide evidence that the full amount of required capital is committed to the NCE.

The amount of capital required to be invested in the NCE is \$1,000,000. The petitioner must demonstrate that as of the petition filing date, he has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). Prospective investment arrangements with no present commitment at the time of the petition filing "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." *See id.* As such, he had not complied with the regulation at 8 C.F.R. § 204.6(j)(2). Moreover, as the petitioner has not traced any of his claimed investment back to his own personal accounts, he has not established that he is in the process of investing any amount.

#### D. Source of Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital. 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 (Assoc. 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.* (citing *Matter of Soffici*, 22 I&N Dec. at 158). 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. 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).

Evidence accompanying the petition at the time of filing consisted of several banking wire transfers that are in a foreign language that are not accompanied by certified translations for these documents, as required under the regulation at 8 C.F.R. § 103.2(b)(3). This regulation provides “[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.” The petitioner has failed to provide information relating to the identity or competency of the translator(s), or information on whether the English translations are complete and accurate. Without certified translations, the foreign language documents have no evidentiary or probative value.

Within the appellate brief, counsel notes that the regulations require that the petition be accompanied by tax returns within five years to demonstrate the lawful source of the petitioner’s invested funds. Counsel claimed the petitioner complied with the regulation by providing the NCE’s tax returns for the five years preceding the petition’s filing date. The regulation at 8 C.F.R. § 204.6(j)(3)(ii), which counsel is referencing states:

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.

The inclusion of business tax returns as relevant evidence to establish the lawful source of funds does not suggest that the tax returns of the NCE are relevant for this purpose; rather the regulation contemplates the need to document funds derived from the petitioner’s interest in foreign or other U.S. companies that are not the NCE. The lawful operations of the NCE do not establish that the funds the petitioner invested in the NCE were themselves obtained through lawful means. The petitioner must demonstrate that the funds used to purchase the assets of [REDACTED] the real estate, as well as the remaining claimed contributions of capital as defined at 8 C.F.R.

§ 204.6(e) were all derived from the petitioner's own lawfully acquired funds. If it is counsel's contention that the tax returns reflect the lawful source of the funds the NCE reinvested in itself, those funds are the company's own proceeds and cannot be included among the petitioner's personal investment for the reasons discussed above.

Regarding the sale of property owned by the petitioner in Venezuela, the petitioner submitted translated statements outlining the price of the transactions as well as the exchange rate of 1,315 Venezuelan bolivars to one U.S. dollar on April 20, 2001. The petitioner failed to provide evidence of the source of this exchange rate. The exchange rate on this date was actually 709.5 Venezuelan bolivars to one U.S. dollar.<sup>1</sup> The petitioner allowed [REDACTED] the buyer of his foreign property, to make payments on several dates, but utilized the 1,315 bolivar exchange rate throughout the payment process. The petitioner has not provided the exchange rate for each of the dates in which [REDACTED] executed a payment.

The petitioner failed to provide evidence demonstrating that his foreign business was a lawfully operating water treatment plant as claimed in his July 2, 2012, letter submitted on appeal. As the sale of this business is purportedly the basis for the petitioner's investment, the regulation mandates that he provide foreign business registration records or tax returns for this foreign business. See 8 C.F.R. § 204.6(j)(3). The failure to establish that the water treatment plan was operating lawfully precludes the petitioner from establishing eligibility under this regulation.

Contrary to counsel's assertion on appeal that the petitioner need not provide all the "previous links in the chain," the petitioner must document the full path of his invested funds in order to meet his burden of demonstrating that the funds are his own. *Matter of Izummi*, 22 I&N Dec. at 195; see also *Matter of Soffici*, 22 I&N Dec. at 165 n.3. The petitioner failed to document any financial transaction between himself and [REDACTED]. This constitutes a break in the path of the funds, and the petitioner cannot demonstrate that the funds he purportedly contributed to the NCE originated from a lawful source. The petitioner also failed to document the claimed infusion of capital into the NCE on September 16, 2003, or on numerous other dates.

As the petitioner has failed to document the complete path of the funds from the sale of his property and subsequently into the NCE, he cannot demonstrate that the funds are his own and he cannot demonstrate the lawful source of the invested funds. As a result, the petitioner is unable to demonstrate that he has invested, or is actively in the process of investing capital obtained through lawful means in accordance with 8 C.F.R. § 204.6(j)(3).

#### E. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) lists the types of evidence that must accompany a petition for the petitioner to demonstrate that the ten qualifying employees have already been hired following the establishment of the NCE, or if the employment creation requirement has not been satisfied prior to

<sup>1</sup> Dollar amount calculated as of April 20, 2001, at <http://www.oanda.com/currency/converter>, accessed January 8, 2013, and incorporated into the record of proceeding. The Internal Revenue Service (IRS) lists the website as a reliable external source. See <http://www.irs.gov/businesses/small/article/0>, [REDACTED] accessed on January 23, 2013, and incorporated into the record of proceeding.

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." As the petitioner has purchased the assets of an existing business, and claims to have restructured it pursuant to 8 C.F.R. § 204.6(h)(2), the petitioner must demonstrate that the business underwent a "simultaneous or subsequent restructuring or organization" to the extent "that a new commercial enterprise results." The petitioner must first document the number of full-time employees within the restructured or reorganized business prior to his investment. Subsequently, the petitioner must demonstrate that at least ten new jobs were created as a result of his investment.

The regulation at 8 C.F.R. § 204.6(e) defines the terms employee and qualifying employee eligible to be counted toward employment creation under the present classification sought by the petitioner. Section 203(b)(5)(D) of the Act defines full-time employment as a position that requires at least 35 hours of service per work week. 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).

On the Form I-526 petition, the petitioner asserted that there were 1.5 full-time employees at the time of the initial investment in September 2003 and 12 employees as of the date he filed the petition. The petitioner indicated that two additional jobs would be created by his additional investment in the NCE. The director listed several shortcomings relating to the number of individuals employed by the NCE. For the reasons outlined below, the petitioner has not already created the necessary jobs and, thus, must submit a comprehensive business plan to establish his eligibility under 8 C.F.R. § 204.6(j)(4). Evidence in the form of a Form 941, TeleFile Tax Record dated October 15, 2003, relating to the business in which the petitioner invested his capital, indicated the business named [REDACTED] had two employees who earned \$4,400 during the same quarter that the petitioner's claimed investment occurred. However, the petitioner failed to provide evidence to establish that such employees were employed full-time. Assuming both employees were full-time, the petitioner would need to demonstrate that the NCE employs or will employ a total of 12 employees.

Although the petitioner filed the petition in January 2011, he primarily submitted employee information relating to 2008 and 2009 with the petition. The petitioner submitted documentation with the petition titled, "Federal Tax Liability Report," which does not list the name of any company or corporation to which the report is related. The report indicated that it related to client [REDACTED]. The petitioner also submitted documentation titled, "SUTA Tax Liability Report" also listing the client as [REDACTED] but it further identified the client as [REDACTED]. This report further indicated that the NCE was "dba" (doing business as) [REDACTED]. This report also contains a Federal Employer Identification Number (FEIN), [REDACTED]. It is unclear how this FEIN relates to the NCE. Rather, it appears to be affiliated with [REDACTED] the employee leasing company that completed the 2010 and 2011 IRS Forms W-2 submitted on appeal.

The petitioner also provided an additional report titled, "Employee Pay History" that also lists the client number as [REDACTED]. This report is the only evidence the petitioner

submitted that relates to 2010 and 2011. A list of employees covering one year, however, does not document how many of these employees worked concurrently at any one time.

At the time the petitioner filed the petition, the most recent documentation that he had provided to the U.S. government was the NCE's 2009 Form 1120S, U.S. Income Tax Return for an S Corporation. The self-prepared IRS Form 1120, U.S. Corporation Income Tax Return, reflects that the company paid salaries and wages of \$138,987 in 2009. The petitioner also provided Form UCT-6, "Florida Department of Revenue Employer's Quarterly Report." The most recent quarterly information covered the second quarter ending on June 30, 2009. It is not apparent why the most recent Form UCT-6 is from 18 months prior to the petition's filing date. This evidence is insufficient to meet the requirements of the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A). This regulation requires evidence "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."

Significantly, the petitioner also provided Forms 941 for all four quarters of 2008, including two Forms 941 for the second quarter of 2008 with conflicting information. The total wages on the 2008 Forms 941 are \$81,971.50 if only the second quarter form showing wages of \$6,400 is used; \$90,521.50 if only the second quarter form showing wages of \$14,950 is used; and \$96,921.50 using both second quarter forms. The petitioner also submitted 10 IRS Forms W-2 that the NCE issued in 2008, totaling \$64,771.50 in addition to a summary IRS Form W-2 indicating the company actually issued 12 IRS Forms W-2 to employees for a total of \$76,521.50 in wages. Neither of these amounts corresponds with the 2008 Forms 941. Moreover, the NCE's IRS Form 1120S for 2008 shows \$87,742 in salaries and wages, an additional \$11,550 in officer compensation, and no cost of labor on schedule A for a total of \$99,292. These numbers do not conform with the Forms 941 in any combination, the ten IRS Form W-2s or the summary IRS Form W-2. The petitioner also submitted 13 IRS Forms W-2 for 2009 with wages totaling \$72,222.98. While this number matches the summary IRS Form W-2 for 2009, the NCE's 2009 IRS Form 1120S shows \$138,987 in salaries and wages, an additional \$51,001 in officer compensation and no cost of labor on schedule A.

Similarly, the IRS Forms W-2 for 2010 total \$212,688.92 and those from 2011 total \$272,077.59. The salaries and wages on the NCE's IRS Form 1120S were \$177,944 in 2010 and \$369,015 in 2011. The officer compensation was \$49,600 in 2010 and \$48,000 in 2011. The 2010 return includes no cost of labor on schedule A and the 2011 return is missing schedule A. Thus, the total compensation in these years as reflected on the tax returns was \$227,544 in 2010 and \$417,015 in 2011, inconsistent with the IRS Forms W-2 in those years. Moreover, the record lacks an explanation as to why the NCE included any amount as salaries and wages and no amount as cost of labor when it was leasing employees rather than employing them directly.

As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not resolve the serious inconsistencies in wages among the various documents.

Regardless, IRS Forms W-2 covering an entire year are insufficient to establish that the NCE already hired the requisite number of qualifying employees. The record also contains Forms W-4, Employee's Withholding Allowance Certificate and Forms I-9, Employment Eligibility Verification relating to several employees. These forms, even when considered in combination with the remaining evidence on record, fails to demonstrate the NCE employed the requisite number of employees at the time the petitioner filed the petition or subsequently.

In response to the director's NOID the petitioner provided an organizational chart that depicted 25 employees, one of which is the petitioner. One additional employee, [REDACTED] bears the petitioner's same surname, but the record does not resolve whether this employee is related to the petitioner in a manner prohibited by section 203(b)(5)(A)(ii) of the Act and 8 C.F.R. § 204.6(e). The NCE's organizational chart submitted on appeal contains this individual's name in the position of general manager, but the "Employee Pay History" report submitted on appeal does not contain an entry for [REDACTED]

On appeal, the petitioner submitted the above mentioned NCE's tax returns for 2010 and 2011, IRS Forms W-2 for 2010 and 2011, his personal tax returns from 2006 – 2011, an affidavit from the NCE's bookkeeper, an organizational chart, and additional employee pay history reports. In addition to the discrepancies discussed above, only six of the NCE's employees earned a salary or wage in excess of the federal or state minimum wage for 2010.<sup>2</sup> This does not take into account that some of the NCE's employees may not have been employed for the entire 2010 calendar year, however the petitioner failed to provide documentation to sufficiently demonstrate the NCE employed the required number of full-time qualifying employees at the time he filed the petition. The IRS Forms W-2 for 2011 suffer the same shortcoming as those from 2010. As the petitioner has not demonstrated that his evidence sufficiently meets the requirements of the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A), the petitioner must submit a "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 affidavit from [REDACTED], who identified herself as the NCE's bookkeeper, claimed that as of January 12, 2011, the NCE employed 11 individuals and as of February 7, 2012, the NCE employed 23 individuals full-time. As of the date of her affidavit, July 12, 2012, [REDACTED] claimed the NCE employed 18 individuals full-time. The record does not contain evidence to corroborate [REDACTED] claims relating to full-time employees. On appeal, the petitioner provided 2010 and 2011 employee pay history printouts relating to [REDACTED] and 2010 and 2011 IRS Forms W-2 and Earnings Summary printouts that cover the entire year. As the petitioner failed to provide evidence demonstrating the period of time each individual was employed by the NCE during the 2011 tax calendar year, he has not documented that the individuals concurrently worked full-time for the NCE.

<sup>2</sup> See <http://www.dol.gov/whd/state/stateMinWageHis.htm>, accessed on January 23, 2013, a copy of which is incorporated into the record of proceeding. Minimum wage calculated at \$7.25 per hour, multiplied by 35 hours per week, multiplied by 52 weeks for an approximate total of \$13,195 annually.

Moreover, the employer listed on the IRS Forms W-2 is [REDACTED]. While the record does not contain any agreement between the NCE and [REDACTED] the record does contain a June 3, 2009, Service Agreement between the NCE and [REDACTED] whereby [REDACTED] "agrees to co-employ certain employees." Under this agreement, [REDACTED] is the employer and leases those employees to the NCE. According to section C of the agreement, while the NCE retains control over the day-to-day job duties and job site, [REDACTED] reserves a right of control over leased employees assigned to the NCE and authority to hire, terminate, discipline and reassign leased employees. The [REDACTED] assumes the responsibility for the payment of wages to the leased employees without regard to payments by the NCE.

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

*Employee* means an individual who provides services or labor for the new commercial enterprise **and who receives wages or other remuneration directly from the new commercial enterprise.** . . . This definition shall not include independent contractors.

(Bold emphasis added.) Neither the NCE nor any wholly-owned subsidiary of the NCE directly pays the wages or other remuneration for the leased employees. Thus, the individuals receiving Forms W-2 from an entity other than the NCE do not meet the definition of "employee" at 8 C.F.R. § 204.6(e), quoted above.

In light of the above, consistent with counsel's observation that the NCE need not already employ the requisite number of employees, the petitioner must submit a qualifying business plan. The petitioner provided the NCE's business plan at the time he filed the petition. Pursuant to *Matter of Ho*, 22 I&N Dec. at 212-213, to be "comprehensive" a business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about the job-creation potential. *Matter of Ho* also provides a list of the elements that, at a minimum, should be included in a comprehensive business plan as contemplated by the regulations. Among those elements are:

1. The business's staffing requirements and a timetable for hiring, as well as job descriptions for all positions;
2. A comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise;
3. The business's organizational structure and its personnel's experience;

Finally, the business plan must be credible. While the business plan provided by the petitioner does contain some of the elements set forth in *Matter of Ho*, it does not contain the required elements specified above. "To be 'comprehensive,' a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Matter of Ho*, 22 I&N Dec. at 212-213. Business plans that are insufficiently detailed will not satisfy the petitioner's requirements as contemplated by the regulations.

Regarding item one, the business plan lacked the NCE's staffing requirements and most importantly, the plan contained no timetable for hiring. Under section 6.2 of the business plan titled

“Personal [sic] Plan,” the petitioner only listed the job descriptions of the office manager, foreman, and assistant manager. Each organizational chart on record also identified several other positions within the NCE that the business plan does not account for within section 6.2. Based on the incomplete evidence provided within the initial proceeding, the petitioner has not established how many personnel were required in order for the business to properly operate. Additionally, since the record also lacked the type of staffing requirements the NCE would require or when each position would need to be filled, the business plan cannot be considered to be comprehensive or to be sufficient to establish that the business will result in the required job creation. Regarding item two, the business plan provided the names of two similar businesses in the NCE’s local area that are also self-service auto salvage yards, but did not discuss the pricing structure of these facilities to demonstrate that the NCE’s plan was financially competitive and was a viable alternative to those businesses. Regarding item three, while the petitioner did provide the NCE’s organizational structure at various points throughout the proceedings, the business plan did not include the experience of the NCE’s personnel to demonstrate that those already employed by the enterprise were properly equipped to perform the job to which each employee was assigned. The business plan as presented is not “sufficiently detailed” to establish the job-creation potential in accordance with *Matter of Ho*, 22 I&N Dec. at 213.

The petitioner has not established that the NCE’s business plan meets all the requirements of *Matter of Ho*. Moreover, the petitioner has not established that the NCE would directly compensate the employees projected under the business plan. Therefore, he has not demonstrated that his planned investment will create the required number of direct full-time positions and has not complied with the regulation at 8 C.F.R. § 204.6(j)(4).

#### IV. Summary

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; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.