PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

B9

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

AUG 19 2003

File: [redacted] Office: California Service Center Date:

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The approved preference visa petition was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal.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).

On August 5, 1999, the director approved the petition. Based on this approval, the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The Service (now the Bureau) interviewed the petitioner at the Los Angeles District Office on April 30, 2001. On April 19, 2002, after no action upon the adjustment application, the petitioner filed a writ of mandamus to compel the Service to act upon the application. On May 16, 2002, the Los Angeles District Office forwarded the matter back to the director for reconsideration of the prior approval. Upon review, the director determined that the approval was issued in error. In a notice dated June 4, 2002, the director advised the petitioner of his intent to revoke the approval. The petitioner responded. Upon consideration of the petitioner's response, the director concluded that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds in a targeted employment area. The director also concluded that the petitioner could not establish that he would meet the employment generating requirements without a comprehensive business plan.

On appeal, counsel argues that the director's concerns were unfounded. Counsel concludes by suggesting that the director was "intent on denying this case, possibly because a writ of mandamus was filed by the alien due to the unreasonable delay of INS in adjudicating this case," and that "there may be racial and economic prejudice involved."

Section 205 of the Act states:

> The Attorney General may, at any time, *for what he deems to be good and sufficient cause*, revoke the approval of any petition approved by him under section 204.

(Emphasis added.) An approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The realization by the director that he made an error in judgment in initially approving a visa petition may, in and of itself, be good and sufficient cause for revoking the approval, provided the director's revised opinion is supported by the record. *Id.* For the reasons discussed below, we find that the director's concerns were valid. The record contains no suggestion that the revocation was motivated by some hypothetical revenge or prejudice.

Counsel's allegation of economic prejudice is especially perplexing. The petitioner is applying for a visa petition that requires an investment of at least $500,000. A petitioner who is unable to demonstrate lawfully obtained wealth is ineligible under the regulations. Thus, an evaluation of the petitioner's financial situation is appropriate. If counsel is suggesting that the Bureau is

prejudiced against the petitioner due to a low economic status, counsel is conceding that the petitioner did not obtain, lawfully or otherwise, sufficient wealth to account for the claimed investment. If counsel is suggesting that the Bureau is prejudiced against the petitioner due to his high economic status, counsel has not explained why the Bureau would discriminate against the very class of people for whom the program was designed. Counsel's remaining arguments will be discussed below.

Section 203(b)(5)(A) of the Act, as amended by the 21st 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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

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

> *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 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management

and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

The definition of "targeted employment area" at 8 C.F.R. § 204.6(e), quoted above, requires that the location of the business be a targeted employment area "at the time of investment." In addition, the petitioner must demonstrate that the location of the business was still a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

On the petition, the petitioner indicated that the new commercial enterprise, W&F Apparel, Inc. (W&F), was located at 6156 South Eastern Avenue in Commerce, California. The petitioner submitted materials published by the Employment Development Department (EDD), designating certain metropolitan statistical areas, counties, and cities as qualifying for designation as high unemployment areas with an unemployment rate of 7.4 percent or greater. The materials rely on data from 1997. The Metropolitan Statistical Area of Los Angeles-Long Beach, which includes Commerce, is not designated as qualifying, but several cities within that area are so designated. Commerce, however, is not designated as a qualifying city. The petitioner also submitted unemployment data indicating that Commerce had an 8.3 percent unemployment rate in May 1999.

In his notice of intent to revoke, the director advised the petitioner that according to the 2000 U.S. Census tract information from the California Technology, Trade and Commerce Agency, the tract containing 6156 South Eastern Avenue was not qualifying. In response, counsel asserted that the unemployment rate in Commerce, California was 8.3 percent, whereas the qualifying rate was only 7.4 percent. The petitioner resubmitted the same documents discussed above.

In his final decision, the director noted that counsel is comparing the 1997 annual national unemployment rate with the May 1999 unemployment rate for Commerce, California. The director noted that the EDD publication does not list Commerce as a qualifying city within the Los Angeles-Long Beach Metropolitan Statistical area using 1997 data.

On appeal, counsel states, "the manner in which the INS examiner reaches the conclusion that . . . the area is not a targeted area, is not understandable by the alien or its counsel."

On this issue, we find that the director's findings are reasonable and clearly explained. In order to qualify for a minimum investment of $500,000, a petitioner must demonstrate that from the time of investment through the time of filing the area in which the employment will be created is either a high unemployment area or a rural area. According to 8 C.F.R. § 204.6(j)(6), quoted above, a petitioner has two ways in which to demonstrate that a location is a high unemployment area. First, according to 8 C.F.R. § 204.6(j)(6)(A), a petitioner can submit evidence that the *metropolitan statistical area, the specific county within a metropolitan statistical area, or the county* in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate. In this case, the petitioner cannot rely on such evidence since both the metropolitan statistical area and the county in which Commerce, California, is located are non-qualifying.

Subparagraph (B) of the same section provides an alternative where the metropolitan statistical area or the county are not qualifying. Specifically, the petitioner can submit evidence from an authorized body of the government of the state in which the new commercial enterprise is located certifying that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The State of California has delegated to the EDD the authority to designate cities or geographical subdivisions of metropolitan statistical areas or counties. As noted by the director, according to the materials submitted by the petitioner, the EDD declined to designate Commerce, California, in 1998 using 1997 data. Thus, in 1997, the time of the petitioner's initial investment, Commerce, California, was not a targeted employment area according to the regulations.

Furthermore, counsel's attempt to argue that Commerce, California, suffered a qualifying unemployment rate in 1999 by comparing its unemployment rate to the national unemployment rate in 1997 is disingenuous. In order to demonstrate at any time that a local area suffers an unemployment rate 150 times the national rate, a petitioner must compare the local rate to the national rate during the same time. The petitioner has not provided any evidence of Commerce, California's unemployment rate in 1997 or the national rate in May 1999. Regardless, as Commerce, California, is not in and of itself a metropolitan statistical area or a county, it must be designated as a high unemployment area by the State. As stated by the director, the State of California did not do so in 1997. Similarly, according to the same publication issued in 2000 based on 1999 data (the time of filing), the EDD also declined to designate Commerce,

California, as a high unemployment area.[1] Counsel has not rebutted the director's contention that the State of California has not designated the tract on which W&F does business as a high unemployment area. Thus, the petitioner has not established that she is creating employment in a targeted employment area at the Commerce, California, location.

Moreover, in order to demonstrate eligibility for the reduced investment amount, the required investment amount and at least ten new jobs must benefit a targeted employment area. Some of the petitioner's claimed investment and some of the jobs created appear to relate to the new commercial enterprise's operations in New York City. The petitioner has not demonstrated that New York City is a targeted employment area.

For the reasons set forth above, the petitioner has not demonstrated an investment in a targeted employment area. Thus, the minimum investment amount in this case is $1,000,000.

INVESTMENT OF CAPITAL

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.

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:

---

[1] This information is available and can be downloaded from the Internet, www.california. org.mx/Investing/ Investdocs/InvestorVisa.pdf .

(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 petition, the petitioner claimed an initial investment of $100,000 on June 2, 1997, and a total investment of $537,000. She further claimed to own 100 percent of the corporation. On Part 4 of the petition, the petitioner indicated stock purchases of $537,000. In support of these claims, the petitioner submitted a stock ledger reflecting that the petitioner purchased 20 shares for $100,000 on June 2, 1997, and another 87.4 shares for $437,000 on April 1, 1999. The initial evidence supported the June 2, 1997 stock purchase. The 1997 tax return, December 31, 1997 balance sheet, and the December 31, 1998, balance sheet for [redacted]all reflect $100,000 in stock. In addition, the petitioner submitted a bank statement for [redacted]Marine Midland Bank account, 007-88391-3, reflecting that the petitioner wired $150,000 from her Bank of America account, 09426-03932, to [redacted] on June 2, 1997.

While [redacted] bank statements for Marine Midland in New York and Sanwa Bank in California reflect several more wire transfers from the petitioner and her spouse, the most recent transfer is dated January 1999, and is from an unknown source. We note that according to the December 31, 1997 balance sheet, the petitioner had loaned an additional $313,000 to [redacted] That amount increased to $437,000 by the end of December 31, 1998. The shareholder loan is also referenced in the business plan, which indicates that CIT would be willing to enter a factoring arrangement

with [redacted] provided the shareholder loan is made subordinate to CIT's loans. The bank statements are fairly consistent with these balance sheets, reflecting that the petitioner transferred $318,000 to [redacted] during 1997 in addition to the $100,000 stock purchased, and an additional $130,000 in 1998. In March 1998, the petitioner's spouse transferred $5,000 to [redacted] Marine Midland account. These amounts total $553,000. The petitioner did not initially submit [redacted] 1999 tax return. Thus, the petitioner's initial submission contained little confirmation of the petitioner's alleged April 1, 1999, stock purchase.

Prior to his discussion of whether the petitioner had demonstrated an at-risk investment, the director noted in the employment-creation section of his intent to revoke notice that the petitioner appeared to be loaning money to [redacted] *Intent to Revoke*, p. 6. The director then questioned whether the petitioner had demonstrated an at-risk investment, concluding that the evidence did not reflect deposits with the new commercial enterprise. The petitioner submitted the 1999, 2000, and 2001 tax returns for [redacted] These returns reflect that [redacted] stock increased to $300,000 during 1999 while the shareholder loans decreased from $337,000 to $262,538 in 1999, to $255,338 in 2000, and to $197,382 in 2001.

In response, counsel asserted that the petitioner wired more than $582,000 from her personal account to the new commercial enterprise's accounts in New York and California. In his final decision, the director noted that the petitioner had not explained the $400,000 loan referenced in the business plan. In addition, the director questioned whether a dedicated bank account was set up for [redacted] On appeal, counsel discusses the petitioner's use of two bank accounts for [redacted] but does not address the director's concern regarding the funds loaned to [redacted] The petitioner submits no new documentation.

While the tax returns reflect that the petitioner increased her investment by $200,000 in 1999, it does not indicate that she invested an additional $437,000 that year as claimed on the stock ledger. Moreover, as stated above, the 1997 and 1998 transfers to [redacted] are consistent with the $100,000 stock and $437,000 loan reflected on the December 31, 1998, balance sheet. The loans decreased by $174,462 to $262,538 by the end of 1999. Thus, the petitioner cannot claim that the entire $200,000 of new capital that appeared in 1999 is accounted for by converting her loan to stock. Therefore, the petitioner must demonstrate that she contributed an additional $25,538 in 1999 to account for her investments and loans. Finally, not only did the petitioner loan a substantial portion of her claimed investment to [redacted] she also recovered some of her loaned funds in 2000 and 2001, leaving a total of $497,382 in stock and loans by the end of 2001. This amount is less than the $1,000,000 minimum investment required, and even less than the $500,000 reduced minimum investment amount claimed by the petitioner.

In light of the above, the petitioner has not resolved the loan issue raised by the director in both his notice of intent to revoke and his final decision.

The director's concern regarding the lack of evidence of a dedicated bank account for [redacted] is not supported by the record. The record reflects that the petitioner opened three accounts for [redacted] two in New York and one in California, two of which are referenced by the director in other parts of his decision. The confusion appears to arise from the relationship between [redacted]

and three other companies that operate or did operate out of the same address in Commerce, California. Adding to the confusion, the petitioner also submitted several checks drawn on account at Sanwa Bank.[2] While these checks were mixed in with checks drawn on the same bank, and list as having the same address as W&F, the checks reveal that the two companies had separate accounts with different account numbers.

The petitioner transferred the majority of her funds, $400,000, into New York account at Marine Midland Bank. During June and July 1997, transferred $65,000 from the Marine Midland account to also issued checks to for $17,356.82, $7,019.04, and $4,036.80 during November 1997 and January 1998. The address for as reflected on bank statements, was Commerce, California. In addition, during June and July 1997, transferred $122,000 to also located at During July 1997 issued checks totaling $25,000 to On March 23, 1998 transferred $3,000 back to As noted by the director, the photographs of submitted show that the names of both and appeared on the door for

As stated above, the record contains checks issued by These checks list the company's address as On December 7, 1998 issued a check for $8,680 to

The record also contains leases tying to On March 17, 1997, eased On June 30, 1997, assigned the lease to On April 23, 1998, leased on its own. On January 11, 1999, eased with On December 10, 1999 leased for which it already was the assignee, with In New York, and are also connected. assigned its May 1, 1997, lease to as of May 1, 2001.

The record contains a connection to a fourth company On January 12, 1998, billed While the wire transfer information on bank statements discussed above reflects address as the bill has an address of The petitioner submits a lease for that address listing as the tenant. The petitioner provides no explanation for submitting the lease of or its relationship to the petitioner but we note that the petitioner received $5,000 from the company on October 3, 1996.

---

[2] The petitioner provides no explanation for submitting these checks or the relationship between and the new commercial enterprise.

In response to questions about these relationships expressed in the director's intent to revoke notice, counsel asserted that Emperor Industries is a client of Counsel's assertion does not resolve this issue. Counsel has not explained why would pay money to its clients as opposed to receiving money from its clients. Further, the record contains customer list. It does not include any of the above companies. If these companies were suppliers, it can be expected that bills and invoices reflecting that relationship would be available. While the record contains numerous bills and invoices, the record contains only a single bill from

Moreover, we cannot ignore that pears to be another company run by the petitioner and her husband. The record contains a letter from on letterhead that lists the same phone number as the number for listed on the petition. The letter is signed by the petitioner as a director and secretary of and indicates that her husband has been the president of since June 1997. The record contains data from the California Business portal, http://www.ss.ca.gov. That information reveals that the petitioner is the agent for service of process for and her address is listed as the mailing address for the corporation. Thus, the movement of funds through to Industries is more consistent with serving as a conduit for funds to be invested in Industries than a client relationship with Moreover, if the petitioner and her spouse control funds, they could have simply removed any funds routed through

Finally, the record does not support counsel's assertion that has moved to its own independent space. The petitioner did submit an August 15, 2000 lease reflecting that rented space at The corporate information for at the California Business Portal, however, reflects that was also listing that address as its mailing address as of May 24, 2002. Similarly, the California Business Portal reflects that also has a mailing address at as of July 16, 2003. Thus, and still occupy the same space.

As noted by the director, the California Business Portal also indicates that has a "suspended" status as of May 4, 2002. Regardless, it remains that in 1997 transferred $122,000 to , another company apparently operating out of Thus, it is incumbent upon the petitioner to explain the relationship between and The petitioner has not done so.

Finally, even if the petitioner had established that was a targeted employment area, much of the alleged investment was transferred to New York account. It is not clear that at least $500,000 of the alleged investment went to benefit the company's operations in Regardless, as the petitioner has not demonstrated that was a targeted employment area, the minimum investment amount is $1,000,000. The petitioner has not claimed or documented an investment of at least $1,000,000.

SOURCE OF FUNDS

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. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 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)(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, the petitioner submitted her and her spouse's foreign tax returns and their joint United States tax returns. While the petitioner did not provide the U.S. dollar to Hong Kong dollar exchange rate for every year of foreign tax returns provided, the exchange rate as reflected in a March 8, 1997 contract between the petitioner and [redacted] is 7.73. We will use this rate to approximate the foreign earnings of the petitioner and her spouse. The petitioner earned HK$163,13 ($21,114.23) in 1994, HK$176,767 ($22,867.66) in 1995, and HK$105,000 ($13,583.44) in 1996. The petitioner's spouse earned HK$92,766 ($12,000.78) in 1990,

HK$117,744 ($15,232.08) in 1991, HK$176,767 ($22,867.68) in 1992, and HK$200,000 ($25,873.22) in 1995. Together, they earned $40,253 in 1997 and $120,030 in 1998.

In addition, on August 3, 1990, the petitioner purchased a "workshop unit" for HK$680,000 ($87,968.95). She sold this unit on November 19, 1992 for HK$1,261,125 ($163,146.83). On July 8, 1996, the petitioner sold property for HK650,000 ($84,087.97). The record does not reflect when the petitioner purchased this second piece of property or what she paid for it. The record also does not reflect whether the petitioner mortgaged either property. Finally, on March 8, 1997, the petitioner sold property to [redacted] of [redacted] The contract indicates that [redacted] a supplier of [redacted] agreed to apply the $430,194.05 purchase price against accounts payable by [redacted] to [redacted]

In his notice of intent to revoke, the director concluded that the petitioner had not traced the funds allegedly invested into [redacted] back to their source. In response, the petitioner submitted her 1996 and 1997 bank statements for Bank of America Account, [redacted] and Hong Kong Bank account, [redacted] These statements reflect deposits from [redacted] the petitioner, and her spouse.

The director concluded that the petitioner had still not provided a sufficient explanation for the movement of funds, and had not traced the funds back to their source. On appeal, counsel does not address this concern, and the petitioner fails to submit any additional documentation.

We concur with the director. The petitioner's income and that of her spouse since 1990 cannot account for the accumulation of $500,000 after normal living expenses. The petitioner has other business interests, and has not established that the funds acquired from the sale of property in 1992, five years before the petitioner established [redacted] remained untouched and available for investment into [redacted] The property sold in 1996 can only account for a small portion of the petitioner's alleged investment. The contract with [redacted] waives $430,194.05 of accounts payable by [redacted] The record does not reflect that [redacted] subsequently transferred the $430,194.05 it no longer owed to [redacted] to the petitioner for investment into [redacted] Finally, the petitioner has not provided any explanation for the funds transferred to her by [redacted] Moreover, these funds were transferred to the petitioner's accounts at Bank of America and Hong Kong Bank. These accounts are not the source of the funds transferred to W&F.

In light of the above, the petitioner has not adequately traced the path of her funds back to their source.

---

[3] As stated above, the record contains a lease for [redacted] at the same address from which [redacted] billed [redacted] The record also contains information linking [redacted] to [redacted] The petitioner provides no explanation for submitting [redacted] lease or the relationship between the three companies.

EMPLOYMENT CREATION

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.

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

> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(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 the Service 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, supra*. 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. at 213.

Initially, the petitioner submitted nine Forms I-9, six for individuals residing in California, two for individuals residing in New York, and the final form for an individual residing in New Jersey. The petitioner also submitted fourth quarter wage reports for 1998 reflecting that [redacted] employed three employees in New York and five in California. The petitioner submitted eight Forms W-2 issued by [redacted] in 1998, two of which are inconsistent with full-time employment for the year.

The petitioner also submitted a business plan reflecting that [redacted] requires a chief executive officer, a financial officer, a sales manager, sales force, and administrative personnel. The plan continues: "At this time there are an indeterminate number of personnel that will be required as business volume continues to increase, EXCEPT it is mandatory that not less than ten (10) employees are required." An employee names list reflects a receptionist and a salesman in New York as well an accountant, an accounts receivable employee, a warehouse manager, two warehouse workers, and a shipping clerk in California.

In his notice of intent to revoke, the director concluded that the business plan was not sufficiently comprehensive. In response, the petitioner submitted [redacted] Forms W-2 for 2000 and 2001. These forms reflect that in 2000 [redacted] employed nine workers in California, four of whom could not have worked full-time year-round; two employees with unknown addresses whose wages are consistent with full-time employment; four employees from New York whose wages are consistent with full-time employment; and one employee from New Jersey whose wages are consistent with full-time employment. In 2001, [redacted] employed 10 employees from California, six of whom could not have worked full time year-round; three with unknown addresses, two of

whom could not have worked full-time year-round; seven employees from New York; and one employee from New Jersey.

In his final decision, the director concluded that the record still lacked a comprehensive business plan. On appeal, counsel asserts that the business plan was appropriate, and that the creation of 10 employees was "clearly documented by the tax returns that were submitted with the application."

Where the petitioner has already created 10 jobs, a comprehensive business plan is not required. In this case, the petitioner claims to have already created 10 jobs. Thus, while a comprehensive business plan might have resolved some of the complexities discussed above, it would not be required if, in fact, the petitioner had created the ten jobs. The Forms W-2, however, are not necessarily evidence that the petitioner employed the total number of individuals receiving those forms full-time throughout the year. We cannot consider positions for which there might have been turnover more than once. Thus, we must look at the recent quarterly wage reports.

The quarterly wage reports in the record reflect the following California employment in 2001: nine in January, 10 in February, 12 in March, seven in April, seven in May, seven in June, five in July, seven in August, seven in September, six in October, five in November, and five in December. These numbers include the petitioner. [redacted] employed six employees in January through March of 2001. The above numbers reflect that the number of employees in California has been decreasing, not increasing. The record contains little information regarding the number of employees in New York after March 2001. Thus, it is unknown whether those numbers also decreased in late 2001.

Moreover, as stated above, the record contains evidence of [redacted] relationship with at least four other businesses that were or are located at the same address. This information raises the concern that all the employees documented might not be new employees of [redacted] A petitioner must create 10 new positions. If [redacted] has simply assumed some of the duties previously performed by [redacted] transferring the positions performing those duties from [redacted] is not creating any new employment.

As the petitioner has not demonstrated the creation of 10 full-time jobs, we must examine the business plan. We concur with the director that the business plan was not appropriate. It did not include job descriptions or a hiring plan as required.

Finally, the above information indicates that the petitioner is creating some jobs in New York City. The petitioner has not established that she would create at least 10 full-time jobs in [redacted] Thus, even if we accepted that [redacted] was a targeted employment area, the minimum investment would still be $1,000,000, as the petitioner has not demonstrated that the creation of 10 jobs will occur in [redacted]

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.