U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: California Service Center Date: AUG 19 2003

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:

PUBLIC COPY

[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 preference visa petition was denied 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).

The director determined that the petitioner had failed to demonstrate a qualifying investment. On appeal, counsel argues that the petitioner has recently increased his investment.

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).

The record indicates that the petition is based on an investment in a business, Yerolemos, L.L.C. 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

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.
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> * * *
>
> *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:
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> > (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 indicated that he owned 60 percent of the new commercial enterprise and that his wife owned an additional 40 percent. He further indicated that he had invested $1,400,000 in 1997 and a total of $2,800,000. In a cover letter, the petitioner indicated that he had begun investing in 1994 with the purchase of a Holiday Motel in Henderson, Kentucky. According to the petitioner, in August 1997, he borrowed $2,700,000 secured with personal real estate separate from the new commercial enterprise to purchase the [redacted]

and remodel it into a Ramada Inn. Finally, in 1999, the petitioner added a restaurant, the [redacted] In his cover letter, the petitioner also indicates that [redacted] is his wife and [redacted] is his son.

The petitioner submitted the certificate of existence, filed July 15, 1997. An Amendment, dated December 23, 1999, indicates the following membership and capital contributions:

[redacted]	$156,693	51%
The Petitioner	$97,172.31	30%
[redacted]	$58,375.80	19%

The petitioner submitted licenses for the Ramada Inn and the [redacted] While the license for the Ramada Inn references [redacted] the license for the [redacted] references Holiday, LLC. The petitioner submitted no evidence regarding the ownership or establishment of Holiday, LLC.

As evidence of his investment, the petitioner submitted bank letters from Integra Bank and National City Bank. These bank letters are very general. More helpful is the actual loan documentation submitted. On August 15, 1997, [redacted] L.L.C. borrowed $1,050,000 from National City Bank. The petitioner, [redacted] and [redacted] all personally guaranteed this loan. On May 11, 2000, the company refinanced this loan with Bank of the West. On that date, [redacted] L.L.C. executed two loan documents with Bank of the West, one for a $1,000,000 loan and another for a $1,145,631 loan. The account numbers for these loans are [redacted] and [redacted]

The petitioner also submitted the tax returns for [redacted] L.L.C. for 1997 through 1999. The 1997 return is marked as the company's initial return and the partners' capital accounts increased from $0 to $306,974 that year. During that same time, the company's mortgages, notes and bonds increased from $0 to $1,044,444. In 1998 the partners' capital account increased to $307,241 and the mortgages, notes and bonds increased to $1,478,494. Finally, in 1999, the partners' capital account decreased to $305,121 and the mortgages, notes, and bonds inexplicably went from $1,018,281 (which is not the amount at the end of 1998) to $1,135,590.

In a limited liability company, members' capital accounts can increase and decrease due to contributions, the member's share of the company's gain or loss, or a withdrawal. Any increase due to a contribution can be considered a legitimate investment. If that money is subsequently withdrawn, however, then the petitioner has not demonstrated that he sustained the investment. While any gain due to the member's share of the company's gain cannot be considered part of that member's personal investment, a member cannot be penalized for any loss to his account due to the company's loss.

Contributions, withdrawals, and shares of the company's gains and losses should be reflected on the member's Schedule K-1. While the petitioner submitted Schedules K-1 for all three years, the only schedules that are consistent with the company's tax returns are the schedules for 1999. In 1997, the company's first year of operation, the petitioner's Schedule K-1 reflects no

contributions, a loss of $40,791, and an ending balance of negative $40,791. His wife's Schedule K-1 reflects no contributions, a loss of $27,194, and an ending balance of negative $27,194. In 1998, the petitioner's account decreased by $4,707 to negative $45,498, while his wife's account[1] decreased by $4,708 to negative $31,902. These numbers are inconsistent with the aggregate amount in the partners' capital accounts as listed on the company's tax return, Schedule L ($306,974 at the end of 1997 and $307,241 at the end of 1998). In 1999, the Schedules K-1 are consistent with the company's tax return, Schedule L; reflecting that the petitioner and his wife both began the year with capital accounts of $153,621, lost $229 as their share of the company's loss, and withdrew $831, leaving $152,561 in each account.

As evidence of how the allegedly invested funds were used, the petitioner submitted construction contracts with Construction Innovators, L.L.C. and Robert Crego. The contract with Construction Innovators dated March 6, 2000, is for $674,681 and the contract with Robert Crego, dated October 27, 1997, is for $108,250. [redacted] signed both contracts on behalf of [redacted] L.L.C., in 2000 as the Chief Manager and in 1997 as the owner.

On April 29, 2002, the director requested additional evidence regarding the loans used to finance the purchase of [redacted] and the renovations. In response, the petitioner submitted previously submitted documentation and an August 15, 1997, warranty deed for the [redacted] The cover letter asserts "the property referred [sic] in the deed is also the collateral against the loan." The petitioner also submitted a letter from Independence Bank in Kentucky dated July 1, 2002, confirming [redacted]/Holiday L.L.C. has approximately $64,770.00 in checking accounts on deposit with us." Given the reference to two companies and more than one checking account, it is not clear how these funds were allocated. The letter further states that the petitioner maintained a certificate of deposit with a balance of $400,952.

On August 9, 2002, the director issued a notice of intent to deny. In this notice, the director noted the lack of evidence of a dedicated bank account for [redacted] L.L.C. and requested an accounting of funds transferred to the company.

In response, the petitioner claimed an investment of $460,000 cash and $2,000,000 in personal guaranties. More specifically, the petitioner asserts that he made a down payment of $349,810.50 and contributed another $196,831.43 in cash when refinancing in 2000. The petitioner also indicates that his certificate of deposit with a balance of $400,952 is committed to the business as part of the petitioner's personal guaranty and that another $482,000 is "readily available" in that the petitioner "certifies to commit these funds" to [redacted] LLC. The petitioner notes that these funds could be garnished by Bank of the West should [redacted] default on its loan.

The petitioner submitted the settlement documents for the purchase of the [redacted] from [redacted] These documents reflect that [redacted] L.L.C. paid a $25,000 deposit in

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[1] The Schedules K-1 allegedly relating to the petitioner's wife in 1998 and 1999 are issued to [redacted] While the petitioner alleges that [redacted] and [redacted] are one and the same, he provides no evidence to support that allegation.

addition to the $349,810 due at closing. An October 23, 2002, letter from National City Bank asserts that the petitioner withdrew $349,810 in July 1997 to purchase the [redacted] The letter further asserts that the petitioner currently maintained a savings account with a balance of $652,605.76 as collateral for two loans, account numbers [redacted] and [redacted] The record, however, contains no evidence regarding these loans, such as the borrower and how the borrowed funds were used. The petitioner also submitted two personal guaranties, one on 100 percent of the $1,000,000 loan from Bank of the West, account number [redacted] and the other on 30 percent of the $1,145,631 loan from Bank of the West, account number [redacted] The $1,000,0000 guaranty includes the following provision:

> GUARANTY SECURED BY CALIFORNIA RESIDENTIAL PROPERY. "Guarantor acknowledges that this Guaranty is secured by a Deed of Trust in favor of Lender on real property located in Vanerburgh County, Indiana. . . ."

Finally, the petitioner submitted a letter dated September 5, 2002, from Independence Bank asserting that the petitioner has $80,144.92 in his checking account and a $402,447.33 certificate of deposit. Since this letter is from the same bank as the July 2002 letter from the same bank, it appears that the letters reference the same certificate of deposit.

The director concluded that the maximum investment established included the $349,810.50 down payment, the $196,831.43 cash at refinancing, and the $300,000 in monthly loan payments since 1997. Thus, the total investment accepted by the director was $846,641.93. The director dismissed the loans because they were not payable in two years and the petitioner had not demonstrated that the loans were secured as specified in *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998).

On appeal, counsel argues that the petitioner has now invested the necessary funds upon purchasing new property for the Acropolis. The petitioner submits documentation reflecting that the petitioner, through [redacted] purchased [redacted] in Evansville, Indiana on February 21, 2003, for $506,000 cash. The petitioner also submits several checks issued by Holiday, L.L.C. and an official check remitted by the petitioner to himself for $420,259 on February 20, 2003.

While we agree with the director that the loans cannot be considered a qualifying investment by the petitioner and that the cash invested is less than the required $1,000,000, we reach this conclusion differently. Moreover, the director's inclusion of the company's normal operating expense of its monthly mortgage payment as the petitioner's personal investment is in error. Thus, we must conclude that the petitioner has invested a far smaller amount than that allowed by the director.

The case upon which the director relies, *Matter of Hsiung, supra*, involved a loan by the petitioner to the new commercial enterprise. That is not the situation in this case. Rather, the corporation itself has borrowed funds from a third party, a bank, and the petitioner has personally guarantied these loans. This situation is more analogous to another precedent decision, *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998). As in the instant case, the new commercial enterprise

in *Matter of Soffici* purchased a hotel with funds borrowed from a bank. The petitioner in that case issued a personal guaranty. The AAO stated, "even if it were assumed, arguendo, that the petitioner and Ames Management were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of 'capital.'" *Id.* at 163. When considering the petitioner's personal guaranty, the AAO acknowledged that any debts from Ames Management to the petitioner in that case were subordinated to those owed to the bank, that the petitioner had agreed to make any mortgage payment not made by Ames Management, and that the bank had the right to proceed against the petitioner without first proceeding against Ames Management. *Id.* Nevertheless, the AAO concluded that since the guaranty did not prohibit the bank from proceeding against the company, the guaranty did not "change the character of the mortgage; the assets of Ames Management are still primarily securing the mortgage." *Id.* In a footnote, the AAO questioned why the bank would not proceed against the company first, as the guaranty in that case did not specify personal assets with a fair market value equivalent to the loan amount. *Id.* at 163, n. 2.

In the instant case, the petitioner has not submitted all the loan documents between [redacted] L.L.C. and Bank of the West. Most commercial loans, even those guarantied by others, are primarily secured by the assets of the borrower. While the petitioner did submit a letter from attorney Kenneth Kasacavage asserting that [redacted] L.L.C. had no mortgages, liens, or encumbrances, his credibility is diminished due to his lack of explanation for the loans documented in the record and the mortgages, notes, and bonds reflected on the company's tax returns. The petitioner, in his response to the director's request for additional documentation, concedes that the warranty deed for the former [redacted] property secures the loans. The petitioner has not demonstrated that the May 11, 2000, loans were not secured with any assets of [redacted] L.L.C. For example, the record contains no official documentation from Bank of the West confirming that [redacted] L.L.C., the named borrower on the loan documents, is not liable on the loan it took out. Further, as in *Matter of Soffici*, *supra*, the petitioner in the instant petition has not demonstrated that he owns personal assets with a fair market value equal to that of the loan he is fully guarantying, $1,000,000. The language regarding the collateral for that guaranty is confusing. The guaranty references residential property in California and property in Indiana in the same paragraph. The petitioner has not submitted any evidence that he personally owns outright any property in either state and that the property has a fair market value of at least $1,000,000.

In light of the above, we concur with the director that the funds borrowed by [redacted] L.L.C. cannot be considered part of the petitioner's personal investment.

While we also concur with the director that the $349,810.50 down payment for the [redacted] could be considered a qualifying investment, the record does not demonstrate that the petitioner committed these funds as an equity investment. We note that the December 23, 1999, amendment to the company's certificate of existence indicates that the capital contribution of the petitioner and his wife was only $155,548.11. Thus, the petitioner might have merely loaned some of his claimed investment to the new commercial enterprise. Even assuming that the petitioner contributed as capital the down payment, the $25,000 deposit and the $196,831.43 paid at the time of refinancing, those funds constitute the total of the petitioner's possible

investment as documented in the record. The total of these funds is $571,641.93, barely more than one half of the required investment.

We do not concur with the director that the petitioner can be credited with the corporation's payment of its normal operating expenses; specifically, the $300,000 in monthly mortgage payments. The record contains no transactional evidence, such as cancelled checks issued by the petitioner on his personal account, reflecting that the petitioner personally paid the mortgage payments from his own account. The company's tax returns reflect substantial interest expenses, suggesting that the company itself paid the monthly mortgage expense. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the payment of normal operating expenses from proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) for the propositions that the reinvestment of proceeds cannot be considered capital.

It is acknowledged that the commercial enterprise in *De Jong* was a corporation, and not a limited liability company. Regardless, a reinvestment of proceeds is simply not an infusion of new capital into a business. We note that a federal court, in an unpublished decision, has upheld our interpretation of "invest" as applied to a sole proprietorship, whose owner bears more risk than members of a limited liability company. In *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003), the court stated:

> The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing Mirriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.

Id. at 4-6.

Moreover, the tax returns and amendment to the company's certificate of existence are inconsistent with an investment of even $571,641.93. As stated above, the tax returns never reflect an investment of more than $307,241, and some of that was subsequently withdrawn. The December 23, 1999, amendment to the company's certificate of existence reflects a combined investment from the petitioner and his wife of only $155,548.11 while the petitioner's son

apparently contributed an additional $156,693. The petitioner has not submitted company tax returns or amendments after 1999 that might reflect the petitioner's investment as of the date of filing, August 2, 2001. Regardless, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, any tax returns submitted on motion or in support of a new petition would need to be certified as filed with the Internal Revenue Service.

Finally, the petitioner's investment after the date of filing documented on appeal is not helpful. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Bureau requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). At the time of filing, the petitioner had not established that any funds not yet invested had been irrevocably committed to the new commercial enterprise. Specifically, the record contains no secured promissory note executed by the petitioner to pay Yerolemos, L.L.C. the remaining investment funds.[2] Nor does the record reveal that the funds had been placed in an irrevocable escrow account.

Regardless, while the new property was deeded to the petitioner and his wife, some of the funds used for the purchase derived from Holiday, L.L.C. Thus, it is not clear whether the new Acropolis restaurant is part of the new commercial enterprise as identified on the petition. The record contains no evidence regarding the ownership of Holiday, L.L.C. or when it was organized. Moreover, without audited balance sheets or tax returns certified as filed with the Internal Revenue Service, we cannot determine whether the funds were invested or loaned to Holiday, L.L.C.

In light of the above, even if the petitioner were to resolve the inconsistencies regarding the number of members of Yerolemos, L.L.C. and their capital contributions, and establish the ownership of Holiday, L.L.C., at best the petition was filed prematurely.

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:

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[2] Such a promissory note would need to meet the requirements set forth in *Matter of Hsiung*, *supra*.

(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 his burden of establishing that the funds are his own funds. *Id.* An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho, supra*, at 211. 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).

The petitioner did not address this issue in his initial submission. In response to the director's request for additional documentation, the petitioner submitted letters from the mayors of two cities in Cyprus asserting that for 25 years the petitioner operated a transportation company, the assets of which he began selling off in 1994. The petitioner also submitted a letter from Soteris Soteriou, President of the Regional Transportation Company of Larnaca confirming that he purchased buses from the petitioner, paying him $200,000 in 1994 and $196,000 in 1997. Andreas Zantis confirms that he purchased buses and taxis from the petitioner, paying $40,000 in 1984, $60,000 in 1994, $110,000 in 1995, and $36,000 in 1998. Finally, Tassos Turinos of Unica Tours (Trading) Ltd. indicates that he purchased a bus from the petitioner in 1995 for $95,000. These amounts total $737,000.

The director did not raise this issue again in his notice of intent to deny or his final notice of denial. Much of the money from the bus purchases, however, was paid to the petitioner in 1995

or earlier, when he had only invested in a hotel in Kentucky that is not part of the new commercial enterprise. It is not clear how much of these funds remained in 1997 when the petitioner began investing in the new commercial enterprise. The record does not contain the petitioner's personal tax returns reflecting his income from his transportation company or his investment in Kentucky.

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.