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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: Texas Service Center Date: JUL 23 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: SELF-REPRESENTED

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, Texas Service Center. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is now before the AAO on motion. The petitioner's motion will be rejected as untimely, the Bureau will reopen the matter on its own motion, the previous decision of the AAO will be withdrawn, and the petition will be denied.

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

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds or that the new commercial enterprise would create the necessary jobs.

On appeal, the petitioner requested an additional 30 days in which to submit a brief and/or evidence. The director received the appeal, dated December 7, 2000, on December 8, 2000. On June 6, 2001, the AAO summarily dismissed the appeal, concluding that the record contained no additional information from the petitioner. On June 30, 2001, the petitioner submitted a letter to the director asserting that she had, in fact, submitted additional materials to the AAO. The petitioner did not enclose the necessary fee for a motion to reopen or reconsider. Thus, the director returned the letter to the petitioner with a request for the proper fee. The director received the petitioner's motion with fee on July 27, 2001.

8 C.F.R. § 103.5(a)(1)(i) provides that any motion to reopen or reconsider must be filed with fee within 30 days of the decision it seeks to reopen except that failure to timely file a motion may be excused if the failure to file timely was reasonable *and* beyond the control of the petitioner. The fee requirement for motions was stated on the AAO's June 6, 2001 decision. Thus, the petitioner's failure to file the motion with fee was not beyond the control of the petitioner.

Nevertheless, the petitioner has submitted a certified mail receipt reflecting that the petitioner mailed additional materials to the AAO on January 6, 2001, which were received by the AAO a few days later. Thus, the AAO's June 6, 2001 decision was in error. In light of that information, we will reopen the matter on Bureau motion, withdraw our summary dismissal, and consider the petitioner's appeal on its merits.

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).

On the Form I-526, the petitioner indicates that the petition is based on an investment in [redacted] and [redacted]. In a separate cover letter, the petitioner explains that she initially incorporated [redacted] to buy, develop and sell or rent properties and that she subsequently formed [redacted] which "now owns and runs all the properties." The petitioner further indicated that these businesses were 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.
>
> * * *
>
> *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.

Initially, the petitioner submitted evidence that she incorporated [redacted] in June 1995 and [redacted] in October 1994. [redacted] was authorized to issue 7,500 shares at one dollar par value and [redacted] was authorized to issue 10,000 shares at one dollar par value. The petitioner also submitted stock certificates reflecting that she and her husband each purchased 5,000 shares of [redacted] in November 1994.

As evidence of her investment, the petitioner submitted First Union "CAP" account statements for account 99 80354 961 for the period of May 1994 through January 1997 reflecting deposits totaling $1,025,611.50. While the account holder is not listed on these statements, credit advices addressed to [redacted] confirm that it is the account holder for account 99 80354 961. The credit advices further reveal that the petitioner's spouse[1] was the remitter for $30,705 on July 8, 1994, $30,325 on July 8, 1994, $17,225.20 on October 3, 1994, and $39,941 on October 19, 1994. The remaining credit advices, which account for another $200,960.02 in deposits, are from [redacted] and "California." The [redacted] was the petitioner's previous business in the United Kingdom. The petitioner also submitted several deposit slips that either do not reflect the source of the funds being deposited or are indicative of sources other than the petitioner or her spouse. Finally, the petitioner submitted a debit advice indicating that [redacted] transferred $100,000 back to [redacted] of California on August 12, 1994.

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[1] While the individual claimed as the petitioner's spouse has the same last name, the petitioner has not submitted a marriage certificate establishing the relationship.

In his April 6, 2000, request for additional documentation, the director noted that while the funds were deposited with [redacted] the petitioner had not submitted any evidence of the relationship between [redacted] and the new commercial enterprises listed on the petition, including the existence of [redacted] LLC. The director also requested evidence as to how the funds had been used.

In her initial response, received June 28, 2000, the petitioner stated:

> THE [redacted] UK, LTD. transmitted funds to [redacted] was the only incorporated body able to receive funds from the UK. Other non-wired funds came from sales of commodities and debts. Your inquiry into how depleted funds were used are explained by contracts for the purchase of the first nine properties listed in my summary letter. These contracts are enclosed.

The petitioner submitted a list of 57 properties allegedly bought and sold by the businesses. The petitioner submitted settlement documents confirming the following:

Date of Purchase	Sales Price	New Loan	Purchaser
1. June 23, 1994	$155,134.88	$0	Petitioner's spouse
2. July 15, 1994	$55,603.74	$43,514.97	Florida West
3. July 15, 2004	$55,584.24	$43,514.97	Florida West
4. July 15, 2004	$25,580.58	$19,723.59	Florida West
5. July 27, 1994	$153,687.30	$118,400.00	Petitioner's spouse
6. Aug. 15, 1994	$56,872.66	$41,240.16	Florida West
7. Nov. 10, 1994	$47,259.13	$0	Fribri
8. Nov. 11, 1994	$261,925.16	$200,000.00	Petitioner as private residence.

Of the seven properties other than the petitioner's personal residence documented in the record, the petitioner indicated that three had been sold. The record does not establish that the mortgages financing the sales of all but two of these properties were not secured by the properties themselves, as is usually the case. As quoted above, the definition of capital at 8 C.F.R. § 204.6(e) provides that financing secured by the assets of the new commercial enterprise cannot be considered part of the qualifying investment. Assuming none of these properties were purchased with funds from the sale of other properties and omitting the mortgages and the funds used to purchase the petitioner's personal residence, these settlement documents reflect capital expenditures of no more than $283,327.96.

Regarding [redacted] LLC, the petitioner submitted the Articles of Organization for the company and evidence that they were filed on September 2, 1999. The petitioner listed $161,204.24 in expenses incurred by [redacted] The petitioner submitted a contract for the purchase of land by the petitioner's spouse for the construction of the storage lots dated March 8, 2000. The contract lists a closing price of $156,000, $100,000 to be financed.

According to the contract, should the zoning changes requested by the petitioner be rejected, the petitioner's spouse will be refunded his $15,000 deposit.

The petitioner also submitted company tax returns for [redacted] and [redacted] for 1994 through 1997. According to these returns, [redacted] began in 1994 with $1,000 in stock, $29,000 in paid-in-capital, and $49,509 in shareholder loans. The stock and paid-in-capital remained constant through 1997 while the shareholder loans decreased to $41,205 by the end of 1995, $40,993 by the end of 1996, and $2,432 by the end of 1997. [redacted] began in 1994 with $10,000 stock, $243,000 in paid-in-capital, and no loans from shareholders. Curiously, at the beginning of 1995, some of these numbers were vastly different although they should have been the same. Specifically, Schedule L for 1995 reflects $10,000 in stock, but only $41,096 in additional paid-in-capital and $114,709 in loans from shareholders. These new stock and paid-in-capital numbers remained constant through 1997. The shareholder loans decreased to zero by the end of 1995, increased to $19,223 by the end of 1996, and increased again to $110,945 by the end of 1997.

Subsequently, the petitioner submitted 1998 tax returns for both [redacted] and [redacted] During 1998, [redacted] stock and paid-in-capital remained unchanged and shareholder loans decreased to zero. During 1998, [redacted] stock and paid-in-capital also remained unchanged but shareholder loans increased to $139,835.

The director noted that a corporation is a separate and distinct legal entity from its owners or stockholders, citing *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) and *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Thus, the director concluded that the petitioner had not established that the money transferred from [redacted] constituted the petitioner's personal investment. Citing *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997) for the proposition that the reinvestment of proceeds by the business cannot be considered the petitioner's personal investment, the director concluded that the petitioner had not established that the funds deposited while the business was operational could be considered the petitioner's personal investment. Noting that loans to the new commercial enterprise cannot be included in a petitioner's personal investment, the director determined that the tax returns did not support a personal investment by the petitioner of $1,000,000.[2]

On appeal, the petitioner reiterates that she and her spouse owned 100 percent of [redacted] The petitioner further asserts that even if the Bureau concludes that she has not already invested $1,000,000, she should have another two years to complete her investment. Finally, the petitioner appears to argue that all three of her companies should be considered part of the new commercial enterprise, and she appears to indicate that she would restructure the companies under a single corporation if required.

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[2] The director indicated that he was relying on numbers provided on Schedule K of the tax return when, in fact, those numbers are reflected on Schedule L.

The petitioner submits a 2000 tax return for [redacted] LLC reflecting total capital accounts decreasing from $115,316 to $91,154. The accompanying Schedules K-1 reflect that the petitioner and her husband began the year with capital accounts of $57,658 each, each contributed $53, and each was assigned a $12,134 loss. Finally, the petitioner submits a letter from [redacted] CPA. Ms. Stover asserts that although there was no plan to repay the funds reflected as shareholder loans on the various tax returns, they were listed as such "for accounting purposes only." Ms [redacted] further asserts that additional capital will be reflected as paid-in-capital as there is no intention to repay the funds. Ms. [redacted] also asserts that the petitioner has additional funds in Europe that she intends to invest in the various companies.

The petitioner's arguments and the new documentation do not address the director's concerns. Whether or not the petitioner and her spouse own 100 percent of [redacted] a corporation is a separate legal entity from its shareholders. The petitioner has not demonstrated that the funds transferred from [redacted] represent her personal investment. Moreover, the petitioner has not demonstrated the relationship, if any, between this corporation and [redacted] London, which also transferred funds to [redacted]

The petitioner's offer to reorganize the three companies that appear to be the basis of the petitioner's claimed eligibility is not persuasive. 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 invested in three separate companies and only listed two of those companies on the Form I-526. The petitioner cannot now offer to restructure these companies.

When considering the three companies, we must take into account that the law requires an investment in "a" new commercial enterprise. The definition of "commercial enterprise" at 8 C.F.R. § 204.6(e) provides:

> Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of *a holding company and its wholly-owned subsidiaries*, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

The petitioner's three companies are not wholly owned subsidiaries of a single holding company or each other. Regardless, even if we consider the petitioner's investment in all three companies, the petitioner has not demonstrated a sufficient investment.

The total stock and additional paid-in-capital in [redacted] and [redacted] as of the end of 1998, the most recent information provided, was $81,096. This information is inconsistent with the claim of a $1,000,000 investment. 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). Ms [redacted] explanation that the shareholder loans were not intended to be repaid and were, in fact, capital represented as loans "for accounting purposes" is not sufficient. Ms. [redacted] provides no supporting evidence that representing capital as loans on a tax form submitted to the Internal Revenue Service (IRS) and signed by an officer of the company under penalty of perjury constitutes acceptable accounting practice condoned by the IRS. If Ms [redacted] is asserting that the petitioner has provided false information regarding her investment to one federal agency under penalty of perjury, it is not clear why the petitioner should have any credibility before this Bureau. 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. *Id.*

Moreover, the record does not support Ms [redacted] assertion that there was no intention to repay the loans. As stated above, the shareholder loans to [redacted] decreased to $41,205 by the end of 1995, $40,993 by the end of 1996, and $2,432 by the end of 1997. At the beginning of 1995, the loan to Fribri amounted to $114,709, decreased to zero by the end of 1995, increased to $19,223 by the end of 1996, to $110,945 by the end of 1997, and to $139,835 by the end of 1998. These numbers reflect that [redacted] steadily repaid its loan to the petitioner and Fribri repaid its loan in 1995 before borrowing additional funds.

Even if we accepted Ms [redacted] argument, any money represented as loans no longer appearing on the 1998 tax returns cannot be considered a sustained investment. Regardless of whether it was originally a loan or capital, it remains that the petitioner withdrew those funds from the corporations. Even considering the $139,835 in loans that remained as of 1998 (the petitioner has not submitted 1999 tax returns for [redacted] and [redacted] which might better reflect the petitioner's capital contribution as of the March 13, 2000 filing date), the petitioner's total investment in [redacted] and [redacted] amounts to only $220,931. The remaining investment in [redacted] approximately $115,316 according to the 2000 tax return,[3] still brings the petitioner's investment to approximately one-third of the required $1,000,000.

The evidence of capital expenditures by [redacted] and [redacted] is not inconsistent with the numbers just discussed. The purchase of the first seven properties acquired by these two companies required only $283,327.96 in cash. As implied by the director, any money reinvested

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[3] Without all the schedules K-1 dating back to the formation of [redacted] we cannot determine the exact capital contribution. The schedule K-1 contains the following information: (1) the capital contributed by the partner (acceptable evidence of an investment), (2) the increase in the partner's capital account from proceeds (not an investment by the petitioner), (3) any losses assigned to the partner (not an adjustment to the partner's investment) or (4) withdrawals (which must be deducted from any capital contributed).

from sold properties cannot be considered the petitioner's personal investment. *See generally De Jong v. INS, supra*; *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

Similarly, the bank statements and credit advices are not indicative of a significantly greater investment. Assuming that the petitioner or her spouse were the source of all the deposits before the company had been operating for two months and all of the wire transfers through December 1994, those deposits total $463,835.04.[4] Even if we considered the wire transfers after December 1994, for which the petitioner has not submitted credit advices tracing the funds back to the United Kingdom, the amount totals $492,276.19. As [redacted] returned $100,000 to [redacted] in August 1994, the net amount transferred to [redacted] is only $392,276. The petitioner attempts to include the purchase of her personal residence as part of her investment. Thus, it appears that the almost $62,000 paid for her house may have originated from the money transferred from the United Kingdom to [redacted] Even if the companies do not have a separate headquarters from the petitioner's house, we cannot conclude that the full amount spent on the petitioner's personal residence is part of the petitioner's investment. Thus, we must subtract $62,000 from the $392,276 possibly contributed by the petitioner to [redacted] leaving only $332,276. Even this amount fails to take into consideration that all of the funds wired to [redacted] may not have originated from the petitioner personally.

All of the above methods of examining the petitioner's claimed cash contributions, the equity and debt contributions listed on the tax returns, the non-financed amount spent on purchasing real estate, and the amount transferred from the United Kingdom, reflect an investment of less than one-third of the required $1,000,000 investment. Even a significant percentage of this amount appears to have been lent to the corporations. Thus, the petitioner has not established an equity investment of $1,000,000.

While the petitioner is essentially correct that she need only demonstrate that she is "actively in the process" of investing, she must demonstrate that the full $1,000,000 is fully committed to the new commercial enterprise. The petitioner has not demonstrated that additional funds were fully committed to the new commercial enterprise at the time of filing. Specifically, the petitioner has not demonstrated that such funds were set aside in an irrevocable escrow account or that she had executed a properly secured promissory note in favor of any of her companies. In fact, the record contains no evidence of any remaining funds available for investment.

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[4] As stated above, the petitioner cannot rely on the reinvestment of proceeds. The petitioner indicated that she has sold some of the initial properties. Any deposits of sales proceeds or of rental income cannot be considered the petitioner's personal investment. The petitioner has not established that she, her spouse, or [redacted] were the source of any deposits after the end of June 1994 when the first property was purchased. In fact, the petitioner did not submit any credit advices or other evidence tracing the funds back to the petitioner dated after December 1994. Thus, the petitioner has not even demonstrated that the wire transfers deposited with [redacted] after December 1994 originated with the petitioner or her spouse.

In addition, the petitioner has not demonstrated that at the time of filing the new commercial enterprise was irrevocably committed to any capital expenses. For example, while the petitioner references "negotiations" for additional land for storage facilities and a management company, there is no evidence that any of the petitioner's companies are irrevocably committed to these purchases. Thus, even had funds been contributed to the corporations for these anticipated expenses, those funds would not have been at risk.

At best, the petitioner has demonstrated no more than one-third of the required investment. The petitioner has not demonstrated that it is reasonable to expect that after investing only one-third of the investment between 1994 and 2000, she would be able to invest the remaining two-thirds in the next two years. The petitioner's tax returns for 1995 through 1999 show negligible income.

Finally, while not discussed by the director, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm. 1998). A petitioner cannot meet the investment and employment generating requirements separately; there must be some nexus between the two. We note that the bulk of the petitioner's investment has been in purchasing and renovating real estate for resale or rent. The petitioner has not demonstrated that this is an employment generating activity, other than for short-term contractors for the renovations. Much less of the petitioner's investment has gone into the mini-storage business and, as of the date of filing, no funds had been invested in purchasing a management company, where the bulk of the employment is projected. This issue demonstrates why, even if we accepted that a petitioner could establish eligibility based on an investment in more than one company, difficulties arise in determining whether there is any nexus between the bulk of the petitioner's funds and the projected employment creation. In this case, there appears to be little nexus between the two.

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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> > (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.* 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).

As stated above, the petitioner initially submitted a few credit receipts tracing funds deposited with [redacted] back to the petitioner's spouse, [redacted] and [redacted] While the petitioner claimed to have owned [redacted] she submitted no evidence of this ownership.

In response to the director's request for additional evidence regarding the source of the petitioner's funds, the petitioner submitted a letter from [redacted] a taxation consultant with the British Institute of Bankers. Mr [redacted] asserts that British banks require evidence of the lawful acquisition of any funds being transferred abroad. In addition, Mr [redacted] asserts that [redacted] had a net worth in excess of $640,000, which the petitioner transferred to the United States. Mr. [redacted] continues that the petitioner subsequently transferred $370,000 to the United States obtained from "various debtors." Mr [redacted] concludes that the petitioner has no outstanding creditors and that there are no judgments against her.

The director rejected Mr. [redacted] letter as insufficient. On appeal, the petitioner submits considerable documentation regarding [redacted] The new documentation reflects tha [redacted] was incorporated on September 1, 1992. On January 6, 1994, the petitioner's spouse entered into an agreement to acquire travel agencies under the name o [redacted] and subsequently sell that chain to [redacted] for seven percent of the gross annual sales of the chain.

We concur with the director that the Mr. [redacted] letter is insufficient. The petitioner did not submit corporate tax returns confirming Mr [redacted] assertion regarding the net worth of [redacted] Nor does the record contain official evidence, such as a letter from a

high level bank official or a statement of relevant British law, regarding the responsibility of British banks to confirm the source of funds deposited with them. Regardless, the Bureau is not required to rely on an investigation made by another entity. It is the petitioner's burden to trace the path of any invested funds.

The petitioner has now established her spouse's interest in [redacted]nd that he contracted for the sale of a chain of travel agencies. The contract, however, suggests that the petitioner's spouse first had to acquire those agencies. The petitioner did not submit evidence of the number of agencies her spouse actually acquired, the price he paid for those agencies, how he acquired the funds to purchase those agencies, and the price he finally received for the newly formed chain. While the petitioner submitted five years of tax returns, because she is basing her eligibility claim on an investment made in 1994, returns for 1994 through 1997 are not applicable. Rather, the petitioner's British returns for 1989 through 1994 might be more informative. Such returns might confirm her claim of a successful business and the sale of that business if British tax returns include income from the sale of a business interest. In light of the above, the petitioner has still not satisfactorily established the lawful source of her funds.

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:
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> (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
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> (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.

Finally, 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

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).

On the petition, the petitioner indicated that she had created three jobs and would create an additional job. In a separate cover letter, the petitioner indicated tha[redacted]wned and rented 26 properties, employing one maintenance worker and one construction employee. The petitioner continued that she would add a third employee when the mini-storage business opened. The petitioner concluded that in two years she would double the properties managed by Fribri, acquire two additional mini-storage facilities, and purchase a management company that would then account for 10 to 12 employees total.

The director requested tax records, Forms I-9, or other similar documents for 10 qualifying employees or a comprehensive business plan explaining the need for not fewer than 10 employees in the next two years as well as a hiring schedule. In response, the petitioner submitted the tax returns discussed above. From 1994 through 1997, the period documented by company tax returns [redacted]paid no wages or officer compensation. [redacted]paid no wages or officer compensation until 1997, when it paid $17,710 in wages. The petitioner also submitted two Forms W-4 and a payroll document for the month ending July 31, 2000, reflecting two employees with no monthly or quarterly data but year-to-date wages of $1,200 and $7,540. Finally, the petitioner submitted a quarterly wage and withholding report for the first quarter of 2000 reflecting that [redacted]had one employee during that quarter.

The director concluded that the record did not demonstrate that the petitioner had already created the required 10 jobs and, thus, the petitioner must submit a comprehensive business plan. The director stated that 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. The director then quoted *Matter of Ho, supra,* as follows:

> 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.

The director concluded that the employment claims made by the petitioner did not amount to a comprehensive business plan. On appeal, the petitioner argues that she has two years in which to create ten jobs, and notes that, while she only employs two full-time employees, she has employed several contractors over the years.

The petitioner submits the 2000 tax return for [redacted] reflecting that it paid $900 in wages for the entire year and a document entitled "Comprehensive Business Plan for Second Mini-Storage Facility and Basis for Another Two Developments." This plan contains a statement of cash flow, a statement of development costs, and other financial data. The plan also compares storage facility risk with other real estate development investments, noting the low management costs and failure rates for storage facilities.

While the petitioner is correct in saying that she need not have already created 10 full-time jobs, if she has not done so, she must submit a comprehensive business plan that meets the requirements above and credibly explains the need for a total of ten employees. The petitioner's plan does not meet the requirements quoted above. The record still contains no hiring schedule, list of job titles and job descriptions. Thus, the petitioner has still not submitted a sufficiently comprehensive business plan that credibly explains the need for 10 to 12 employees in the next two years to support what are ultimately passive real estate and development investments. While the petitioner now claims to have only created two full-time positions, the record does not even support that claim. The documentation reflecting two employees indicates that only one of them earned wages consistent with full-time employment. Similarly, the $900 in wages for [redacted] LLC reflected on its 2000 tax return is not consistent with having a full-time employee. Thus, from 1994 to 2000, the petitioner created only a single full-time position. Such job growth is not consistent with an ability to create a total of ten jobs within the next two years by continuing with the exact same types of investments. Finally, while not discussed by the director, the petitioner has not submitted Forms I-9 for the two documented employees. As such, the petitioner has not established that they are qualifying employees.

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 AAO's decision of June 6, 2001 is withdrawn. The petition is denied.