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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: MAY 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:

[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, Texas 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 of lawfully obtained funds or that the new business is the entity employing the documented employees.

On appeal, counsel asserts that the petitioner is actively in the process of investing the necessary capital, that the new commercial enterprise hired a "human sources organization" to handle payroll but is the employer of the documented employees, and that the petitioner acquired her "investment" through funds from overseas, her credit, a loan through the Small Business Administration, the reinvestment of profits, and wages. Counsel argues that wages earned without authorization should be considered lawfully obtained.

The director also determined that the petitioner had not demonstrated that she had created a new commercial enterprise. The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, she need not demonstrate that she personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

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

The record indicates that the petition is based on an investment in a business, Vergison International Investments, Inc. (VII), doing business as Poinciana 247 Preschool. The record further indicates that the business is 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:
>
> > (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 she had invested $533,832. In his cover letter, counsel asserted that the petitioner had purchased an operational business for $125,000 and the building and land for $320,000. Counsel concluded that the petitioner's total investment amounted to $533,832 by subtracting the petitioner's father's contribution of $62,500 from the total assets of $606,332. While we will analyze the evidence in detail below, we note here that counsel's equation is flawed. The assets of a corporation are not equal to the equity investment in that corporation. Rather, equity is equal to assets minus liabilities. Barron's Dictionary of Accounting Terms 163 (3rd ed. 2000). Counsel further asserted that the petitioner would invest an additional $500,000 in the next two years "to expand the business and potentially to open another childcare center within the Orlando area which will employ another 10 individuals." Finally, counsel asserted that the petitioner's mother, who inherited the petitioner's father's interest, was "willing to attribute her investment amount on behalf of her daughter to accumulate the required investment capital."

We will first consider whether the petitioner has established that she had invested $533,832 as of the date of filing as claimed. In response to the director's request for additional documentation, counsel provided a chart breaking down the petitioner's claimed investment. Counsel references $125,000 for purchase of the business, $380,000 for the purchase of land, $42,000 in "personal assets" for the classrooms, and a $210,000 promissory note for "generating capital."

The standard asset purchase contract and receipt for the business, dated November 10, 1995, reflects a purchase price of $125,000. The price was to be paid with a $12,000 deposit, $53,000 at closing and an additional $60,000 to be financed through a "purchase money mortgage" to be paid to the sellers. The security agreement for this loan does not identify the collateral, but indicates that it will be used primarily "in the business or other use" as opposed to "for personal, family or household purposes." Thus, the record strongly suggests that the "mortgage" was secured by the business assets being purchased, as mortgages generally are. Further, the record does not indicate that monthly payments were paid by the petitioner as opposed to being paid out of VII's proceeds as a normal operating expense.

Initially, the petitioner submitted a contract for the purchase of [redacted] The purchase price is set at $350,000. The contract indicates that the petitioner would assume a $172,000 mortgage with Southern Bank and would purchase a new mortgage for $113,000 from

the sellers [redacted] and [redacted] Addendum A reflects that the new $113,000 mortgage "shall be secured by a second mortgage on the subject Real Property and shall be in form customarily used in Central Florida." The sale appears to have closed by May 8, 1996, the date of the warranty deed from th[redacted] to the petitioner. In December 1997, the petitioner appears to have refinanced the financing on this property for a $380,000 construction loan with the Money Store. The December 18, 1997 letter from the Money Store reflects that $253,409 of the loan would be used to "Refinance Debt" and another $60,000 would be used to "Refinance Debt – BA." The Settlement Sheet for the disbursement of $326,060 reflects that $144,486.52 of the construction loan would be used to refinance a debt with Colonial Bank and $102,728.97 would be used to refinance a debt with [redacted] and [redacted] The second page reflects that subsequently $60,000 would be used to refinance a debt with First Florida Mortgage and $6,193.51 would be paid to [redacted] and GE Capital Small Business Financial to "Refinance Debt: Working Capital."

The record includes a December 24, 1997 Money Store mortgage on the personal property of the petitioner's parents a[redacted] The December 12, 1997 Construction Financing Agreement reflects that the $380,000 loan from the Money Store "shall be secured by a deed of trust or mortgage, which is applicable, covering the Property, and by such other collateral as required by the loan agreement." The same document defines "Property" as 247 Doverplum.

The director noted that all of the above financing was secured by assets other than those owned by the petitioner. On appeal, counsel merely asserts that the record reflects that the petitioner invested $125,000 initially, an additional $48,000 in equipment, supplies, licenses, and training staff, and would spend an additional $300,000 to $500,000 to expand the school. Counsel fails to address the director's concern regarding the use of the corporate assets as security for the financing that constitutes the bulk of the claimed investment.

Of the initial $125,000 paid for the business, only $65,000 was not financed. According to counsel, the petitioner's father contributed $62,500 at that time, leaving only $2,500 that might have been contributed by the petitioner.[1] Of the $350,000 paid for the property and building, $172,000 of that cost was the assumption of a mortgage and $113,000 was a new mortgage secured by the property. Thus, the petitioner could only have contributed $65,000 towards this purchase. As quoted above, the definition of "capital" at 8 C.F.R. § 204.6(e) precludes indebtedness secured by the assets of the new commercial enterprise. *Matter of Soffici*, 22 I&N Dec. 158, 162-163 (Comm. 1998) specifically states that the petitioner's personal guaranty on a loan secured by the assets of the new commercial enterprise does not transform the loan into one where the petitioner is primarily and personally liable and the assets of the new commercial enterprise do not secure any of the indebtedness. Thus, certainly the fact that the personal assets of the petitioner's parents may also secure the $380,000 Money Store loan does not make that loan a personal investment by the petitioner.

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[1] The record does not contain any transactional documentation such as cancelled checks or wire transfer receipts reflecting that the petitioner contributed cash to the corporation or in its behalf.

Counsel references the invoices submitted and the corporate tax returns as evidence of the petitioner's investment of other assets. We note that many of the invoices are for school supplies through 2001, which are a normal operating expense of running a school. Normal operating expenses paid from proceeds after the initial start up costs of the business are not capital expenditures by an investor. The checks that were submitted for payment of some of these expenses are all issued on the corporate account.

Counsel is correct that the 2000 corporate tax return reflects $606,332 in assets. As stated above, however, a company's assets are not necessarily indicative of its shareholders' investment. A corporation can acquire assets from funds loaned to it by shareholders or third parties. These liabilities cannot be considered part of the petitioner's personal investment. We note that the definition of "invest" at 8 C.F.R. § 204.6(e) quoted above precludes loans to the new commercial enterprise. Thus, we must consider all of the information contained in the corporation's tax returns, especially the balance sheet section, schedule L.

The record contains corporate returns for 1997, 1999, 2000 and 2001. In 1997, the corporation began the year with $1,000 in stock, no additional paid-in-capital, no mortgages,[2] and $124,481 in loans from shareholders. The corporation's stock and lack of additional paid-in-capital remained constant through 1999. During 1997, the corporation acquired a mortgage of $380,000 (documented as discussed above) and increased its loans from shareholders to $193,836. Given the numbers for the beginning of 1999, in 1998 the corporation increased its loans from shareholders to $202,335 and decreased its mortgage to $361,444. In 1999, the loans from shareholders decreased to $196,336 and the mortgage increased to $373,801. During 2000 the corporation's common stock remained at $1,000 but additional paid-in-capital increased to $93,140. The corporation's mortgage decreased to $348,408 and loans from shareholders remained constant at $196,336. Finally, in 2001, the corporation's mortgage decreased to $341,065, its loans from shareholders remained constant at $196,336, its stock remained constant at $1,000 and its additional paid-in-capital actually decreased to $92,727.

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 reinvestment of 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); and *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner. As noted by the court in *De Jong*, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Thus, any reinvestment of proceeds by VII cannot be considered the petitioner's personal investment.

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[2] The refinancing information contained in the documentation for the $380,000 Money Store loan raises questions regarding the indication that VII had no mortgages prior to the end of 1997.

Any business, if operated long enough, could accumulate $1,000,000. The use of proceeds to pay normal operating costs and to slowly grow a business over several years is not the type of infusion of capital contemplated by the regulations. The tax returns are consistent with this view, reflecting stock and additional paid-in-capital of no more than $94,140 at any time. Moreover, the petitioner has not even sustained that minimum investment, having withdrawn some of her additional paid-in-capital by the end of 2001. Thus, the returns do not support the petitioner's claim to have already invested $533,832 at the time of filing.

Even if the petitioner had established an investment of $533,832 at the time of filing as claimed, she would still need to establish that she had irrevocably committed at least an additional $466,168 as of that date. As evidence that the petitioner was actively in the process of investing $1,000,000 and had irrevocably committed the full $1,000,000 at the time of filing, the petitioner submitted an "Investment and Subscription Agreement" and a promissory note. In the subscription agreement, the petitioner agrees to purchase securities of $1,000,000 in VII. The petitioner would pay $533,832 initially in cash or cash equivalent, $250,000 within one year of approval of the instant petition, and an additional $250,000 within two years of approval of the instant petition. The agreement permits the annual payments to be made in cash equivalent. The promissory note provides:

> The obligations of the Maker set forth herein are not secured by the assets of the Corporation, the new enterprise, but by the personal assets of the Maker which are identified in the attachment hereto, an[d] the Maker is personally and primarily liable for the obligations undertaken herein.

The attachment includes the petitioner's home address, [redacted] "Bank Accounts," and "Stocks and Bonds." Neither the bank accounts or securities are identified or valued. In response to the director's request for additional documentation, the petitioner submitted a warranty deed granting property to her father and [redacted] and a special warranty deed granting property to her in 1998. The record contains no evidence that the petitioner owns any interest in the first property. The warranty deed for the petitioner's property does not identify the property other than the legal description and does not indicate either the value of the property or whether it is subject to a mortgage. We note that the petitioner's address is sometimes listed as [redacted] suggesting she might own property other than [redacted] Further, even if she does own [redacted] her personal tax return for 2000, schedule A, reflects that she paid $8,715 in interest on a home mortgage that year.

Finally, the promissory note provides that interest shall only accrue in the event of default and that:

> Such default shall not be deemed to have occurred and any such interest shall not commence to run, however, unless and until the written notice thereof is given by the Corporation to the Maker.

In her final decision, the director stated, "a review of the Promissory Note and attachment shows that the petitioner merely listed her assets on a separate sheet of paper." On appeal, counsel asserts that "all the personal assets securing the promissory note are located in Florida and amenable to seizure by the note holder, in this case the new commercial enterprise." The petitioner submits a personal bank statement for National Bank reflecting a balance of $3,182.37 as of August 15, 2002.

As noted by counsel, *Matter of Izummi*, *supra*, at 191-194, provides that a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that he has placed his assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. *Matter of Hsiung*, 22 I&N Dec. 201, 203-204 (Comm. 1998). Otherwise, the note is meaningless.

The petitioner's promissory note to pay VII cannot be considered capital or evidence that the petitioner is actively in the process of investing. The most obvious flaws are that the "Bank Accounts" and "Stocks and Bonds" are not specifically identified, the record contains no evidence that VII's interest in the petitioner's house a[redacted]s been perfected, or that the assets have an adequate fair market value. Regarding perfection, there is no evidence that VII has recorded its interest in the petitioner's house. Were a bank to ultimately loan the $500,000 to the petitioner that she claims she will seek, its own interest in the petitioner's house would supercede VII's interest if that interest is not properly recorded.

Most significantly, the record does not establish that the assets have an adequate fair market value. As stated above, the petitioner has not established the value of her house, which appears to be subject to a mortgage. Moreover, even on appeal, the record contains evidence of a single bank account with approximately $3,000 and no evidence of stocks or bonds. Finally, funds in bank accounts can easily be dissipated. Unless the funds exist in an escrow account or trust account in favor of VII, no guarantee exists that the money contained in the accounts would remain there for the entire period of the promissory note. *Matter of Izummi, supra*, at 192.

Thus, the fair market value of the promissory note is far less than the $500,000 pledged by the petitioner. Moreover, as no interest occurs on the note unless the petitioner defaults and is so advised of the default, the future value of the $500,000 to be fully paid in two years is far less than $500,000 today. We cannot conclude that a third party would pay $500,000 for assignment of the note.

Finally, the petitioner has not demonstrated that she has the funds to pay her obligation on the promissory note or that the additional expenditures in the next two years are reasonable. As evidence of the petitioner's ability to pay the $500,000 pledged, counsel implies the petitioner will borrow such funds. The record contains no evidence that any bank is offering to loan this sum. Moreover, as with the loans already obtained, any new loan partially secured by the assets

of the business could not be considered the petitioner's personal investment. *See Matter of Soffici*, *supra*, at 162-163.

Even if the petitioner personally borrowed the funds and invested them into VII, it would still constitute an investment of indebtedness, not cash. If the term "indebtedness" in the definition of "capital" only referred to a promise by the petitioner to pay the new commercial enterprise, as was the case in *Matter of Izummi*, *supra*, and *Matter of Hsiung*, *supra*, then the definition in its entirety would be absurd. The definition precludes "indebtedness" secured by the new commercial enterprise. Secured loans are secured by the assets of the promisor or a co-signer, and never the promisee. For example, if party A owes money to party B, it would make no sense for party B to risk his own assets as security. In the event of default by party A, party B would owe himself. As such an arrangement is utterly irrational, there would be no reason for the regulations to address it. Since the regulations *do* preclude indebtedness secured by the assets of the new commercial enterprise, it is clear that "indebtedness," as used in 8 C.F.R. § 204.6(e), is not limited to the petitioner's promise to pay the new commercial enterprise, but includes third party loans. Thus, whether the petitioner or VII borrows the funds, the assets of VII cannot even partially secure the loan in order for the funds to constitute the petitioner's personal investment.

Regarding whether the petitioner can be expected to actually expand the school and/or purchase an additional school, the petitioner submitted an attorney letter from [redacted] asserting that the petitioner has retained Ms. [redacted] to assist with the zoning and other legal matters regarding an expansion of the school. The petitioner also submitted a letter from the contractor indicating that they had completed a Boundary, Topographic and Location Survey at a cost of $3,800 and that the budget for the design and permitting would be between $15,000 and $20,000. This documentation does not reflect that the petitioner is committed to spending an additional $500,000 on improvements to the school. The record does not include a contract for the expansion or even an estimate of the total costs for the expansion.

In light of the above, the petitioner has not demonstrated that she had invested the $533,832 as of the date of filing. In addition, the promissory note for the remaining funds is not adequately secured and cannot serve as evidence of capital or that the petitioner is actively in the process of investing the remaining funds. Finally, the petitioner has not demonstrated that the method by which she plans to acquire the remaining funds would constitute a personal investment by her.

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*, *supra*, at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of 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, neither counsel nor the petitioner addressed this issue, although the petitioner submitted a single personal tax return for 2000. In response to the director's request for additional documentation, counsel asserted that the petitioner sold her property in Belgium for $176,000, invested $62,500 initially towards the $125,000 purchase of the business, and borrowed the $380,000 used to refinance the purchase of the property and fund construction. Counsel then refers to $210,000 promised by the petitioner to the company and asserts that the remaining $300,000 for construction will be borrowed. Finally, counsel refers to the petitioner's personal tax returns for 1995 through 2001 as evidence that the petitioner contributed additional "personal assets." The petitioner submitted a foreign language document regarding the sale of her property, but did not submit her personal tax returns for 1995 through 2001.

The director noted the lack of a translation for the foreign language document. In addition, the director rejected the reinvestment of proceeds on which the petitioner personally had not paid taxes. Finally, the director noted that the petitioner had been working without authorization.

On appeal, counsel refers to the sale of the petitioner's home in Belgium, the alleged contribution of $62,500, and an additional alleged investment of $48,000 originating from the petitioner's "personal credit and from business profits that were reinvested in the enterprise."

Finally, counsel asserts that the Legal Immigration and Family Equity Act (LIFE Act), Pub. L. 106-553 (2000) removes unauthorized employment as a basis of ineligibility to adjust status. The petitioner submits a translation for the sales documentation of her home.

We acknowledge that, were the petition approvable, the petitioner's unauthorized employment would not make her inadmissible. The petitioner's admissibility is not at issue at this stage, however. Any funds obtained through unauthorized employment were not lawfully obtained. Nevertheless, the record reflects that the petitioner's unauthorized wages do not represent the bulk of the claimed investment. Rather, the vast majority of the petitioner's claimed investment resulted from the reinvestment of proceeds and funds borrowed through loans secured by the assets of the new commercial enterprise. While these funds are not unlawful, they do not represent the petitioner's personal investment for the reasons discussed above. Finally, we note that the record does not contain transactional documentation for the $62,500 allegedly contributed initially or the $48,000 allegedly contributed from "personal assets." Thus, we cannot trace the path of those funds from the petitioner to the business. As stated above, if the $48,000 simply constitutes the reinvestment by the corporation of its own proceeds, those funds cannot be considered the petitioner's personal investment.

Nor has the petitioner demonstrated that she has liquid assets worth $500,000 with which to repay the money she plans to borrow to fulfill her obligation on the promissory note to the corporation. If we were to accept borrowed funds as lawfully acquired without ascertaining whether the petitioner has the lawfully obtained funds with which to repay the loan we would permit criminals to simply borrow lawful funds from banks and repay those loans with the proceeds of criminal enterprises.

In light of the above, the petitioner has not demonstrated an investment of lawfully obtained funds amounting to $533,832 as claimed since those funds, while lawful, did not originate from her. As the petitioner has not demonstrated that she even possesses $500,000 to repay the anticipated loan to complete her investment, we cannot conclude the loan will be repaid with lawfully obtained 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:
>
> (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.

On the petition, the petitioner claimed that the business had one employee at the time of her investment and 12 currently. In his initial cover letter, counsel asserted that the petitioner increased employment at the school from five or six at the time of purchase to twelve. The petitioner submitted undated Forms 941 revised in 1998, 1999, and 2000. Unlike state quarterly wage reports, Forms 941 do not reflect the number of employees each month. The Form 941 revised in 1998 is blank regarding how many employees were employed as of the pay period including March 12 but reflects wages of $46,760. The three Forms 941 revised in 1999 reflect wages of $40,626, $44,553, and $43,545. Curiously, while one of the 1999 forms reflects 16 employees as of the pay period including March 12, another form revised in 1999 lists that number as 19. One Form 941 revised in 2000 reflects $34,613 in wages and that 13 workers were employed at VII during the pay period including March 12. The other Form 941 indicates that no returns would be filed in the future and that April 20, 2000 would be the final Form 941 filed by VII. Finally, the petitioner submitted VII's W-3 for 2000 indicating that the company issued 24 Forms W-2. None of this documentation reflects the number of full-time employees working at any one time.

The petitioner also initially submitted payroll records for December 31, 2000. These records reflect 13 current employees other than the petitioner. In response to the director's request for additional documentation, the petitioner submitted 21 Forms W-2 for 2001 issued by Epix I, Inc. Only five of the Forms W-2 reflect wages that can account for full-time employment at minimum wage. Finally, the petitioner submitted a business plan asserting that the expansion of the school would require an additional three to four employees.

The director acknowledged counsel's claim that Epix I handles the payroll for VII but concluded that the Forms W-2 listing Epix I as the employer could not establish that VII employed ten full-time employees.

On appeal, counsel reiterates his claim that Epix I handles the payroll for VII. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not include a contract between VII and Epix I or at least a letter from Epix I confirming the relationship. Even if we confirmed the relationship, if Epix I is a human resources firm serving several clients and issues Forms W-2 for all of its clients, it is not clear how Forms W-2 issued by Epix I establish that all of the employees are employees of VII and not another client of Epix I.

Regardless, as stated above, Forms W-2 do not establish that all of the employees worked full-time at any one time. The only payroll records are from December 2000 and fail to reflect the number of hours worked by the 13 current employees. In addition, the petitioner failed to submit Forms I-9 despite counsel's acknowledgement in his appellate brief that such documentation is required. Thus, the petitioner has not established that any of VII's employees are qualifying.

Finally, as stated above, while the law no longer requires that a petitioner personally establish the new commercial enterprise, the law still requires the creation of 10 new jobs. The record does not reflect how many employees the daycare center employed prior to the petitioner's purchase of the business. While counsel states that the daycare center previously employed five or six employees, counsel's assertions are not evidence. The petitioner submitted the daycare center's 1994 tax return reflecting wages of $107,544 including officer compensation. VII's 2001 tax return reflects that it paid $192,866 that year. The wages for the school from 1994 and 2001 do not reflect that VII has increased employment by over ten full-time positions. The petitioner's business plan is not comprehensive. The prediction that VII will require three to four additional employees is insufficient. The business plan fails to provide job descriptions or projected hire dates for the prospective employees. Moreover, it is not clear that three to four additional employees will fulfill the employment creation requirement as the record does not establish the number of employees at the daycare center prior to the petitioner's purchase of that business.

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.