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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File  Office: Nebraska Service Center Date:

APR 30 2001

IN RE: Petitioner: 

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

IN BEHALF OF PETITIONER:



Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

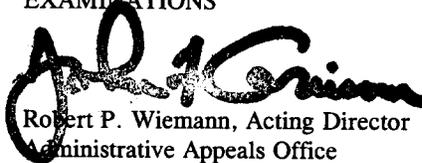
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was revoked by the Director, Nebraska Service Center. The Associate Commissioner, Examinations, summarily dismissed a subsequent appeal. The matter will now be reopened on Service motion, the appeal will be reviewed on its merits, and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993.

The director revoked the petition finding that further review of the record revealed that the petitioner failed to establish eligibility on several grounds. The director found that the structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a five-year period, did not constitute a qualifying investment. The director also found that the structure of the petitioner's investment did not constitute a qualifying "at risk" investment for the purposes of this proceeding. The director further found that the petitioner failed to adequately document the source of his funds and thereby failed to establish that the funds were obtained through lawful means.

In response to the director's decision, the petitioner filed an appeal on March 11, 1999. The Administrative Appeals Unit (AAU), acting on behalf of the Associate Commissioner for Examinations, summarily dismissed the appeal on February 21, 2001. The record, however, contains a brief that the AAU failed to consider in its previous decision. Therefore, the previous decision of the AAU is vacated and the appeal will be reviewed on its merits.

On appeal, counsel challenges the reasoning in Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), the precedent decision upon which the director's decision was based.

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

- (i) which the alien has established,
- (ii) 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
- (iii) 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 petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition is based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to \$500,000.¹ The petitioner contends that he is one of eight investors in [REDACTED] Limited Partnership (the "Partnership"). The general partner of [REDACTED] LP is [REDACTED] Inc. and the special limited partner is [REDACTED] Limited Liability Company. The petitioner also stated that the Special Limited Partner is designated as a "regional center" that is eligible to satisfy the employment creation provision by demonstrating indirect employment creation through revenues generated from increased exports. The petitioner stated that he is in the process of investing \$500,000 in the Partnership. The petitioner's investment of capital is in the form of \$300,000 placed in a trust account and a promissory note with the Partnership for the remaining \$200,000.

PRECEDENT DECISIONS

On appeal, counsel broadly argues that the director's denial was based on the findings in Matter of Izumii, supra, and three other precedent decisions pertaining to the immigrant investor classification, and that the decisions ignore well-settled Service interpretation of the immigrant investor provisions. Counsel asserts that the precedents improperly promulgated new rules and that the precedents were improperly applied retroactively. Counsel further asserts that the director's denial was contrary to previous similar petitions approved by the director, that the precedent decisions were contrary to past appellate decisions of the AAO, and that the decisions were contrary to past Service memoranda and Service informational responses to inquiries.

Counsel essentially argues that the precedent decision on which the director relied was violative of the Administrative Procedure Act (APA), 5 U.S.C. § 553, and constituted improper rule making. The argument is not persuasive.

¹ While not discussed by the director, the petitioner has not provided any evidence, such as a lease or deed, regarding the location of [REDACTED] Inc., the employment-creating entity. Therefore, while Oxnard, California may be a targeted employment area, it is not clear that the petitioner will be creating/preserving employment in Oxnard.

The immigrant investor classification was first introduced into law with the Immigration Act of 1990 and the Service thereafter published the current implementing regulations for the classification following the notice and comment procedures required by the APA. Petitions under this program were not widely received for the first several years after enactment. There was a sharp rise in petition receipts starting in approximately Fiscal Year 1996. The influx of new receipts was not primarily due to individual investors, as were the early receipts, but reflected groups of alien investors recruited by U.S. companies, typically organized as limited partnerships. The Service observed that provisions of some of these investments conflicted with the existing regulations. The Service instituted a temporary administrative hold on the adjudication of the petitions pending a review of the issues involved. The Service identified specific fact patterns that required clarification beyond the plain language of the regulations, and ultimately published Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), followed by Matter of Izumii, *supra*, Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998), and Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998). These decisions were published as precedent decisions, binding guidance in the adjudication of these petitions.

Contrary to counsel's assertion, published precedent decisions represent the Service's interpretation of the statute and the regulations and are used to provide guidance in the administration of the Act. The four decisions did not create new standards or new rules.

In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court concluded that the AAO precedent decisions did not involve rule making. Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.)

Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. Therefore, the director properly relied on the precedent decisions in the adjudication of this petition.

The additional argument that immigrant investor petitions were adjudicated by the Service and that some were erroneously approved prior to the precedents being issued is immaterial to the director's findings in the instant case. The Service is not bound to treat acknowledged past errors as binding. See Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327 (9th Cir. 1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517-518 (1994); Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987). In the same manner, the AAO is not bound by past unpublished appellate decisions which may have been issued in error. Nor are Service officers inexorably bound by internal memoranda or by written responses to inquiries from the legal community. The legal opinions from the Service's Office of General Counsel cited by counsel are opinions prepared at the request of the Associate Commissioner to assist in developing adjudicatory policy. The publication of a precedent decision in a subject area supersedes any previous non-binding guidance in that subject area and represents the Service's final interpretation of the regulations pertaining to the facts presented. See 8 C.F.R. 103.3(c).

Accordingly, counsel's argument that early internal Service legal opinions based on general fact patterns and early adjudicative decisions issued without the benefit of binding precedents constitute "well-settled INS policy interpretation" is without merit. The further argument that any corrections to adjudicative decision making was improper or that an administrative agency is bound by past erroneous decisions is simply not tenable. That is simply the process by which any administrative agency must necessarily perform its function. See National Labor Relations Bd. v. Seven-up Bottling Co. of Miami, 344 U.S. 344, 349 (1953). For these reasons, it is reiterated that the four pertinent precedent decisions issued by the Associate Commissioner were properly issued and the director was correct in relying on those decisions. Therefore, counsel has failed to sustain her argument that the director's decision should be reversed because the precedents on which the director relied were unlawful, improperly issued, and may not be applied "retroactively."

ESTABLISHMENT OF NEW COMMERCIAL ENTERPRISE

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. 204.6(j)(4)(ii).

According to the plain language of § 203(b)(5)(A)(i) of the Act, a petitioner must show that he or she is seeking to enter the United States for the purpose of investing in a new commercial enterprise that "the alien has established." A petitioner must establish eligibility as of the date the petition was filed. Matter of Katigbak, 14 I&N Dec. 45 (Comm. 1971).

In this matter, the new commercial enterprise on which the petition is based is Rakar, LP. The record shows that the organizing documents for the General Partner were filed with the California Secretary of State on January 15, 1997. However, the certificate indicates the principal office is in Illinois and the Partnership Agreement references an unspecified date in 1996 as the establishment date pursuant to filing with the Illinois Secretary of State.

In describing the Partnership as the new commercial enterprise, the petitioner submitted a list of eight limited partners, including himself. It was also stated in the document that the General Partner holds 59 percent ownership of the Partnership, the special limited partner holds 1 percent, and that the limited partners, as a group, hold the remaining 40 percent.

The petitioner submitted an English-language document titled "Investment Agreement and Power of Attorney" wherein he agreed to become a member of the Partnership and agreed to the capital contribution provisions. The document is not dated, and bears the

signature of the petitioner, executed in Taipei, Taiwan. Section 1(C) of the Investment Agreement provides:

The Partnership has agreed to accept and admit me as a Limited Partner upon (a) my execution of the relevant documents and agreements, (b) the approval of my petition for classification as an alien entrepreneur, (c) the approval of my visa application either by the U.S. Department of State (in the case of consular processing abroad) or by the Immigration and Naturalization Service (in the case of adjustment of status within the United States), and (d) the receipt of my initial cash payment capital as provided for therein.

The evidence submitted does not demonstrate that the petitioner established [REDACTED] LP within the meaning of 8 C.F.R. 204.6(h)(1). First, the petitioner has not adequately shown the date on which the Partnership was formally established in the State of Illinois. Second, the act of signing the Investment Agreement, in and of itself, did not admit the petitioner as a limited partner. Pursuant to the Investment Agreement, the petitioner's admission to the Partnership is contingent on the occurrence of four events: execution of the relevant documents, making the initial cash payment of \$300,000, approval of the visa petition, and admission as or adjustment to United States permanent resident status. As the petition has not been approved and the alien has not been admitted as a lawful permanent resident, the alien is not yet a limited partner of [REDACTED] LP. A petitioner cannot be said to have established a business where there is no actual ownership interest in that business. Therefore, it cannot be concluded that the petitioner established a new commercial enterprise within the meaning of the Act. For this reason, the petition may not be approved.

Moreover, in a business venture of this type, the Limited Partnership is conceived of and developed by the General Partner. The General Partner then recruits investors to serve as limited partners. In order for all eight alien limited partners to satisfy the "establishment" provision of § 203(b)(5) of the Act, wherein the limited partnership is presented as an original business pursuant to 8 C.F.R. 204.6(h)(1), the General Partner must complete its recruitment of those investors prior to "establishing" the Partnership. See also Matter of Izumii, supra.

There are additional provisions whereby investors may satisfy the establishment requirement by investing in an existing business. 8 C.F.R. 204.6(h)(2) provides that an alien investor may demonstrate that he or she has purchased an existing business, and restructured or reorganized that business, such that a new enterprise results. 8 C.F.R. 204.6(h)(3) provides that an alien investor may demonstrate that he or she has invested in and expanded an existing business with the result of a 40 percent increase in the net worth

or the number of employees of that business. It would be difficult, if not impossible, for a petitioner in a limited partnership, where partners join sequentially, to satisfy either of these requirements.

Due to the inherent nature of a limited partnership, no individual partner or partners purchase the business in its entirety and therefore could not satisfy the establishment requirement under 8 C.F.R. 204.6(h)(2). Additionally, merely adding investment capital to an existing business would not result in any restructuring or reorganizing of the business. If the business were restructured or reorganized so that a new business resulted, it would negate the business plan of any existing investors.

Similarly, it is improbable in a limited partnership of three or more investors, each of whom invest the same amount of capital, to satisfy the establishment requirement by expanding an existing business by at least 40 percent as required under 8 C.F.R. 204.6(h)(3). An existing business is made "new" by virtue of a substantial increase in its net worth or in its number of employees. In order for a pre-existing business to be made new, the pre-existing business must have been fully functioning and doing business. The petitioner must also demonstrate that the "new business," that is the business as expanded, was established as of the filing date of the petition. Each investor, therefore, must demonstrate that the requisite 40 percent expansion of the business had already occurred as of the filing date of the petition and that the expansion was the result of his or her individual investment. In this case, each and every one of the 30 investors who had not participated in the original establishment of [REDACTED] LP would have to demonstrate that the business was expanded by at least 40 percent as of the filing date of their individual petitions.

For the above reasons, the director concluded the petitioner had not established a new commercial enterprise. On appeal, counsel argues:

The mere filing of a certificate of limited partnership is a simple matter. However, the establishment of a new commercial enterprise is not instantaneous. establishment is a process and is not completed upon the filing of a certificate and giving the enterprise a name. The process of establishing an enterprise evolves as capital is contributed by limited partner investors, who join together for the purpose of investing in the enterprise, thereby participating in its establishment.

Finally, counsel argues:

The utilization of corporations and partnerships as investment vehicles presupposes that someone other than

the alien has created the partnerships or corporations.

Counsel's arguments are not persuasive. We do not agree that the establishment of a new commercial enterprise is an ongoing process which continues indefinitely after the Partnership Agreement has already been signed and filed with the State while new capital is sought. Moreover, it is not at all clear that the use of partnerships and corporations presupposes those structures would be created by someone other than the alien. Counsel provides no reason why a foreign investor is unable to create his own partnership or corporation either by himself or in concert with other foreign investors or U.S. investors.

Moreover, while not discussed by the director, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, supra, at 10.

According to the business plan, the partnership plans to preserve/create employment at the General Partner, [REDACTED] Inc. There is no evidence that the petitioner participated in the establishment of, restructured, or expanded that corporation.

In light of the above, the petitioner has failed to show that he has established a new commercial enterprise, as required by § 203(b)(5)(A)(i) of the Act.

MANAGEMENT

8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the ULPA, he is sufficiently engaged in the management of the partnership. Section 8.01 of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the Illinois Limited Partnership Act. However, under Section 18.01 of the Partnership Agreement, all limited partners irrevocably appoint the General Partner and Special Limited Partner as his or her true and lawful attorney and agent. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Section 8.01, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA. As such, the petitioner is a purely passive investor.

INVESTMENT

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. All capital shall be valued at fair market value in United States dollars. ...

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 non-commercial activity such as owning and operating a personal residence.

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.

The director found that the terms of the petitioner's promissory note and investment plan were defective. Both are similar to the promissory notes and investment plan rejected in Matter of Izumii. Specifically, the promissory note is not fully due until five years after the petitioner obtains conditional residence and the investment provisions provide for partnership expenses, reserve funds, guaranteed payments, and a redemption agreement.

Promissory Note

As evidence of his investment, the petitioner submitted a promissory note. The terms of the note provide for an initial deposit of \$300,000 into a trust account, to be released to the partnership upon approval of the immigrant visa, four annual payments of \$35,000, and a final payment of \$60,000.

Relying on Matter of Izumii, supra, the director held that the petitioner must substantially complete payments on the promissory note prior to the expiration of the two-year conditional period of permanent residence in order for the promissory note to be considered a qualifying contribution of capital. See 8 C.F.R. 216.6(a)(4)(iii). The director rejected the five-year payment

schedule offered by the petitioner finding that the petitioner would not have substantially completed making the necessary investment at the expiration of the two-year period of conditional residence and, in fact, would have paid only \$70,000 of the \$200,000 as of that date.

On appeal, counsel asserts that the precedent decision requiring substantial completion of the investment within the two-year conditional period constitutes a new rule not found in the statute or the regulations. Counsel also argues that the analysis set forth in Matter of Izumii should not be applied retroactively to cases filed prior to its issuance. Counsel finally argues that requiring completion of payments on a promissory note within two years defeats the purpose of such an instrument and asserts that the five-year payment schedule of the petitioner should be accepted as a qualifying contribution of capital.

As discussed above, the director properly relied on Matter of Izumii. Accordingly, the director's finding that the petitioner must substantially complete all of the payments of a promissory note within the two-year conditional period in this matter is affirmed.

Counsel's additional argument that the Izumii interpretation defeats the purpose of utilizing a promissory note in seeking this benefit is without merit. The precedent held that where a promissory note is submitted as evidence that the alien is "in the process of investing" the required capital, the payments on the promissory note must be substantially completed within the two-year conditional period, in the same manner as the payments on a cash investment must be substantially completed within the two-year period, in accordance with 8 C.F.R. 216.6(c)(1)(iii).

Contrary to counsel's argument, the use of long-term promissory notes, extending beyond the two-year conditional period, arguably defeats the express purpose of the immigrant investor program, that is, attracting an infusion of capital to the United States economy and creating jobs within a defined period of time. Accordingly, the terms of the petitioner's promissory note disqualify the note from being considered an investment or evidence of being in the process of investing.

Money Set Aside For Partnership Expenses

The petitioner furnished a letter from the Wells Fargo Bank, Los Angeles, California dated August 4, 1997, verifying that \$299,980 had been received and deposited into a custody account with [REDACTED] or [REDACTED], on behalf of their law firm, as Trustee. According to section 2.A(3) of the Investment Agreement, the petitioner agreed to instruct counsel, as trustee of the escrow account:

immediately to release US\$30,000 to the Partnership as a refundable advance for initial expenses of the Partnership; and that if, as and when my visa application is approved by the Department of State in the case of consular processing abroad, the aforementioned balance of the bank escrow account will be transferred to the Partnership and simultaneously I will be admitted into the Partnership as a Limited Partner.

The payment of initial Partnership expenses and costs is not the type of profit-generating activity contemplated by the regulations; it does not evidence the placement of capital at risk for the purpose of generating a return on the capital. See 8 C.F.R. 204.6(j)(2). As stated in Matter of Izumii, supra, if the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based. The \$30,000 paid to the Partnership for unspecified expenses is not money available for investment in job creating activities. Therefore, the petitioner's investment plan would not constitute an investment of at least \$500,000 into an employment creating enterprise, but something less.

On appeal, counsel argues that a petitioner must invest \$500,000 or \$1,000,000 and create 10 jobs, but that the two requirements are separate and that the funds need not all be applied towards job creation.

Counsel misreads Matter of Izumii and the director's decision. We do not require that the funds only be used for salaries and other hiring expenses; rather the funds must be made available to the entity which will be creating the employment, in this case, [REDACTED], Inc. According to the Investment Agreement, the release of \$30,000 was for unenumerated "initial expenses of the Partnership." 8 C.F.R. 204.6(j)(2) requires that the petitioner place "the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." (Emphasis added.) In Matter of Izumii the Associate Commissioner explained that the Service is not prohibiting the payment of expenses of the partnership or even of the immigration-related fees, but that any funds dedicated to such expenses could not be included as part of the minimum capital contribution which must be dedicated to generating a return.

Guaranteed Returns ,

According to section 2.B of the Investment Agreement executed by the petitioner, the petitioner must make four annual cash payments of \$35,000 each, totalling \$140,000, commencing one year from the date he is admitted to the Partnership. Section 3 of the Investment Agreement, however, states:

I shall receive a return on the cash I have contributed to the Partnership in the amount of 10% per annum, payable annually, commencing one year from the date I am admitted to the Partnership as a Limited Partner and ending four years thereafter.

The petitioner would also receive a share of any profits exceeding this 10 percent return. The Partnership Agreement explains that the percentage return is computed on the basis of the total cash contributed at the time the distribution is made. As stated in Matter of Izumii, supra, an alien may not receive guaranteed payments from a new commercial enterprise while he or she owes money to the new commercial enterprise. In this case, the petitioner would receive at least \$141,000 in annual distributions during the four years in which he is obligated to make annual payments of \$35,000, an amount in excess of his total \$140,000 contribution. Under these terms the commercial enterprise would not receive an infusion of new funds from the petitioner; in fact the Partnership would pay out more in returns than the petitioner's contribution. Therefore, the schedule of the four annual payments intended to represent \$140,000 cannot be considered a qualifying contribution of capital toward the \$500,000 target.

Counsel argues that the director's conclusion that the guaranteed returns would be paid out of the funds already "invested" is impermissible speculation and that the Service should make this type of determination at the removal of conditions stage. Counsel further argues that:

The AAO rule states that the "alien cannot receive guaranteed payments while he still owes money to the enterprise." The petitioner in this case has not received any payments.

It is not pure speculation to conclude that an agreement which guarantees a return of \$141,000 while requiring only \$140,000 in payments will not result in the infusion of additional capital beyond the initial \$300,000 invested. The Service does not need to wait two years to determine whether or not this agreement will result in the infusion of new capital. According to its very terms, it will not. Arguing that the Partnership may not perform on its obligations is not persuasive. It is not clear how counsel wishes the director to evaluate the investment if not by examining its terms to which both the Partnership and petitioner agreed.

Furthermore, the fact that the petitioner has not yet received his first annual guaranteed interest payment is irrelevant. Those terms are part of the agreement(s) submitted to satisfy the capital investment requirements. Eligibility must be established at the time of filing. Based on the guaranteed return terms of the Investment Agreement, the petitioner has not established that he is making a qualifying investment.

Redemption Agreement

Section 6 of the Investment Agreement provides for the return of the petitioner's investment if he fails to have his conditions removed for failure to create the necessary employment. The director concluded this provision was an impermissible redemption agreement.

On appeal, counsel argues that the above provision is not a redemption agreement. While the above provision cited by the director is not a buy or sell option provided to the petitioner, the petitioner has made an investment knowing that if the enterprise fails and cannot generate sufficient employment he will receive his money back. Clearly, this provision decreases the normal commercial risk which typical investors experience.

Counsel also argues that there is no legal authority that a redemption agreement constitutes a debt arrangement. When the redemption agreement, however, provides that one party has the right to redeem his interest for the full amount that he paid for the interest, the results are the same as if it had been a loan. The name of the agreement is not determinative. Rather, the terms of the agreement must be examined. A guaranteed return of a predetermined amount of money is a guaranteed return of a predetermined amount of money whether it is called a "loan" or a "redemption agreement."

While not discussed by the director, Section 4 of the Investment Agreement provides:

After the fifth anniversary of my admission to the Partnership, I, as a limited partner, may exercise a sell option under which I have the right to require the Partnership to purchase from me my limited partnership interest.

The sell-option price is fixed by the Investment Agreement and Partnership Agreement, section 9.05, to equal the petitioner's total contributed capital, less the first four payments.

As stated in Matter of Izumii, supra, an alien cannot enter into a partnership knowing that he or she already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of the cash payments under a promissory note, an alien investor may not enter into any agreement granting him the right to sell his interest back to the partnership. Id.

The Partnership Agreement at section 9.07, also provides a buy-option whereby the General Partner, through the Partnership, may

acquire each limited partner's interest at any time "after the third anniversary of the Limited Partner's admission" for an amount equal to the Limited Partner's Adjusted Invested Capital plus any unpaid returns. For an investment to be considered "at risk," the investment must risk both profit and loss. See Matter of Izumii, supra. In this case, the General Partner has an absolute right to buy the limited partner's interest at a fixed price regardless of the profitability or the worth of that interest. Under such terms, in the event the enterprise is highly successful and profitable, the General Partner could purchase the limited partner's interest at a fixed price and assume total ownership of the enterprise.

To constitute business "risk" an investment must risk both profit and loss. See Id. Under the sell-option, the petitioner does not risk loss. Under the buy-option, the petitioner has forfeited the absolute "risk" of enjoying the potential profits of his investment. Such provisions have not been shown to be consistent with standard business practices and have been found to be inconsistent with a qualifying at-risk investment as contemplated by the statute.

The potential "risk" that the General Partner might default on its contractual obligation to purchase the limited partner's interest is not persuasive in that it does not constitute the type of risk "in a profit-generating enterprise" within the meaning of 8 C.F.R. 204.6(j)(2). Risk of default within the investment group is not the same as risk of failure in the commercial enterprise. Furthermore, whether or not the petitioner exercises his sell-option, that option does exist and thereby negates the normal risk of his business investment.

Fair Market Value of Promissory Note

Pursuant to 8 C.F.R. 204.6(e) all capital must be valued at fair market value. By definition, fair market value rests in the present value of the commodity. As stated in Matter of Izumii, 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, supra. Otherwise, the note is meaningless.

Counsel indicated in the memorandum accompanying the Form I-526 that the petitioner's promissory note, exhibit 4, was secured.

Exhibit 4 does not contain a promissory note. Instead, it contains a "summary of real estate" and an appraisal of property valued at \$302,035. While the Investment Agreement obligates the petitioner to make the four annual installments and the final payment, there is no mention of security. The record does not contain an actual promissory note.

To establish that a promissory note is secured by the petitioner's personal collateral, it is not sufficient merely to identify personal assets. As stated in Matter of Hsiung, *supra*, "[m]erely 'identifying' assets as securing a loan, without perfecting the security interest, is not meaningful since the note holder cannot be assured that the identified assets will remain available for seizure in the event of a default." The funds allegedly securing the note were not placed into any type of escrow account or other guaranteed financial instrument securing the promissory note. Nor is there any evidence that the real property has in any manner been attached as security for the note.

In addition, submitting one-time bank balances of foreign held accounts does not satisfy the petitioner's burden of proof. Personal bank accounts are readily dissipated. Funds available at the outset of the petitioner's investment may not be available throughout the life of the promissory note. The petitioner also failed to establish, under Taiwanese law, the extent to which those assets are amenable to seizure by a U.S. note holder in the event of a default. Further, as one of the pieces of property is owned entirely by his wife according to the appraisal report, the petitioner has not documented that Taiwanese law would allow for this property to be seized to satisfy the petitioner's personal obligation.

In addition to discussing the requirements for promissory notes, the director stated, "there is no information on the note or a separate attachment to show the assets securing the note."

On appeal, counsel reiterates her argument that the director should not have relied upon Matter of Izumii and challenging the reasoning of that case. As stated above, Matter of Izumii is controlling precedent. Counsel fails to address the director's concern regarding the absence of any promissory note or security agreement.

Reserve Funds

Beyond the decision of the director, the provisions in the Partnership Agreement authorizing the maintenance of reserve funds were unacceptable according to Izumii. The definitions section and section 4.04 of the Partnership Agreement state that the general partner may deposit portions of the limited partners' capital contributions, designated as "reserve funds," in escrow or sub-escrow accounts. According to section 4.04(B) of the agreement,

the Partnership shall deposit "sufficient Reserve funds to satisfy the Partnership obligations under **Section 9.05**," (emphasis in original). Section 9.05 of the Partnership Agreement is entitled "Limited Partner Sell Option" and sets forth the timing and price of the sell option,

Section 4.03.B explains that after all the requirements of section 4.04.B are satisfied, any funds remaining from the initial cash payments and all subsequent capital contributions may be used to meet the obligations of the Partnership, as determined by the general partner in its sole discretion, with any excess to be used in the business of the Partnership.

In other words, pursuant to the above sections of the Partnership Agreement, the general partner would be obligated to deposit sufficient funds such that the deposits and their earnings (from securities or other financial instruments) would enable the Partnership to fulfill its own obligations to buy back Partnership interests. The creation and maintenance of these reserve funds take priority over any other use of the capital contributions. Under these terms, any leftover money would be used for other Partnership obligations, and whatever was left thereafter would then finally be used for business activities.

These reserve funds are, by agreement, not available for purposes of job creation.² As stated in Matter of Izumii, *supra*, reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk. Relying on Izumii, the director correctly concluded the reserve funds were disqualifying.

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;

²Even if, after five years, the petitioner elected to remain in the Partnership instead of exercising his redemption option, the reserve provisions would still preclude the capital from being placed at risk during the two-year conditional period, as required by the regulations.

(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, supra; Matter of Izumii, supra at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. at 26. 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).

In the brief submitted with the initial petition, counsel asserted the petitioner accumulated his funds through his career as a civil engineer and through gifts from his mother. In support of the petition, the petitioner submitted an appraisal of land allegedly securing the promissory note; his Master of Science and Bachelor of Engineering degrees from the National Taiwan Ocean University; and certificates of accounts showing balances of \$35,855.14, \$39,285, \$53,840.63, \$17,946.87, and \$150,824.90.

The director concluded that the petitioner had not submitted evidence to demonstrate how his assets were accumulated over time, such as tax records, and had not shown the path of the funds resulting in the two bank accounts and the property.

On appeal, counsel argues that tax returns are only a possible form of evidence to show lawful source of funds and are not required, that the petitioner has provided evidence that he obtained his funds in a lawful manner through his employment income and gifts from his mother and that the consulate is in a better position to determine lawful source of funds.

Counsel's argument is not persuasive. While counsel asserts that the petitioner did document how he accumulated his funds, there is simply no such evidence in the record. The petitioner did not submit certified copies of his tax records from Taiwan as required by 8 C.F.R. 204.6(j)(3) as applicable or even an employment letter confirming the years worked and salary earned. The petitioner failed to provide an affidavit from his mother attesting to her alleged gifts.

The Service is entitled to inquire into the source of a petitioner's purported assets and does not require affirmative evidence that he is or has been engaged in criminal activity.³ Without income tax statements, historical bank accounts, earnings statements, or employment letters, it is impossible to determine whether the petitioner's lawful income can account for the large sums of money in the petitioner's bank accounts. While it is true that the regulations provide that a petitioner must only submit the listed documentation "as applicable," where the petitioner alleges to have obtained the funds partially through wages and investment income (including the investment of gifted funds), tax returns are undeniably applicable.

Finally, the inquiry into the lawful source of investment funds does not end upon a petitioner's claim that his funds include a "gift."⁴ The petitioner has failed to meet his burden under 8 C.F.R. 204.6(j)(3).

OTHER SOURCE OF FUNDS

³It appears from the language "is and has been engaged in criminal activities," that counsel believes that in order for the Service to have the right to request further information, the Service must be aware that a petitioner is currently a criminal.

⁴Any petitioner intending to conceal the true source of his funds, such as for example a third-party loan, criminal or other unlawful activity, or earnings not subjected to appropriate taxation, could offer the convenient explanation that the funds were a gift. Presenting a corroborating statement from a family member or "friend" would not be difficult, nor would transferring the funds first to the family member's account and then documenting their transfer into a newly established account belonging to the petitioner. The petitioner should not interpret this as an accusation that he has engaged in wrongdoing with respect to the source of his funds; rather, this is an explanation of why the Service cannot merely accept without further question every claim that funds are a "gift" and therefore lawfully obtained.

8 C.F.R. 204.6(g)(1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.**

(Emphasis added.) Based on the petitioner's assertions, [REDACTED] LP's total capitalization will come from the petitioner, seven identified alien investors, and the Special Limited Partner. The petitioner bears the burden to identify the source of all of these funds and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition. There is no evidence identifying the source of the investment capital of the seven other alien investors or of the General Partner. The petitioner therefore failed to meet the requirements of 8 C.F.R. 204.6(g)(1) and the petition may not be approved on this basis as well.⁵

EMPLOYMENT CREATION

8 C.F.R. 204.6(m)(7) states:

An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States.

⁵ This interpretation is consistent with the above discussion finding that all partners in a limited partnership must be identified prior to "establishing" the new commercial enterprise. A partner cannot document the source of investment capital from another as yet unidentified partner. To satisfy the source of funds provision, all partners must be identified and submit documentation of the source of their capital.

(ii) *Indirect job creation.* To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

8 C.F.R. 204.6(j)(4) states:

(i) 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.

(ii) *Troubled Business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

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

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

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.

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.

8 C.F.R. 204.6(e) states that:

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Finally, 8 C.F.R. 204.6(j)(4)(iii) states, in pertinent part:

To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports.

The business plan accompanying the petition indicates the partnership will use the invested funds to eliminate, restructure,

and reduce the General Partner's long term debt. The plan indicates that [REDACTED] Inc. was a troubled business and that the infusion of the petitioner's funds will maintain the 44 jobs at the corporation. The plan also indicates [REDACTED] Inc. will hire 80 new employees in the next two years and that, in the alternative, since the Special Limited Partner is a regional center, the petitioner can rely on indirect job creation.

In order to qualify as a troubled business, the business must demonstrate that it has suffered a loss equal to at least 20 percent of its net worth prior to the loss. The petitioner submitted balance sheets and financial statements for 1994 and 1995 reflecting a net worth of \$394,484 as of December 31, 1994 and a net loss of \$92,318, more than 20 percent of \$394,484. There is no indication, however, that the financial statements are audited documents. The petitioner also failed to submit tax returns certified as filed by the Internal Revenue Service. Furthermore, the petitioner must show the business suffered a loss in the 12 or 24 month period prior to the date of filing. The petition was filed September 6, 1997. The record does not establish the operating gains or losses for [REDACTED] Inc. between December 31, 1995 and September 6, 1997. As such, the petitioner has not established the corporation suffered a loss during that period. Therefore, the record does not establish that [REDACTED] Inc. is a troubled business.

Regarding indirect employment creation, the petitioner has not documented any connection to a regional center other than claiming that the Special Limited Partner is a designated regional center. Without evidence that [REDACTED] Inc. will be participating in any of the regional center activities for which the Special Limited Partner was designated, we cannot conclude the petitioner can claim indirect employment creation. Moreover, the petitioner has not submitted any methodologies for determining indirect job creation.

In light of the above, the petitioner must demonstrate that he has or will create 10 direct new jobs. The petitioner does not claim to have already created 10 new jobs and, thus, must submit a comprehensive business plan. In Matter of Ho, supra, the Associate Commissioner set forth minimum standards for a qualifying business plan on which to base an immigrant investor visa petition.

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. 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 therefore. Most importantly, the business plan must be credible. (Emphasis added.)

The "Comprehensive Business Plan" does not meet this standard. The plan simply states that the Partnership will assist the corporation by reducing, eliminating, and restructuring the corporation's long term debt. The plan provides no explanation, however, for why this reduction in debt will allow the company to hire an additional 80 workers in two years, nearly tripling its current work force. In addition, the plan provides no job descriptions or approximate dates of hire.

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to meet the capital investment minimum of \$500,000, has failed to demonstrate that he has created a new commercial enterprise, has failed to show that he has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of his investment capital and that it was obtained through lawful means, and has failed to demonstrate that the investment will result in the requisite employment creation. For these reasons, the petitioner has failed to overcome the decision of the director and the appeal must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden. Accordingly, the petition will be denied.

ORDER: The Associate Commissioner's decision of February 21, 2001 is vacated. The petition is denied.