



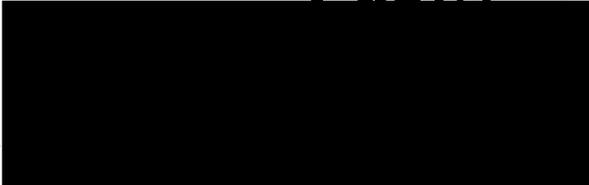
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U.S. Department of Justice

Immigration and Naturalization Service

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

Public Copy



APR 30 2001

File: [Redacted]

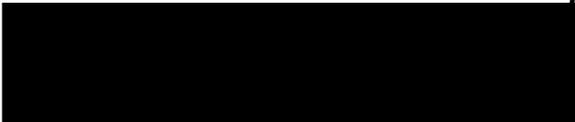
Office: Texas Service Center

Date:

IN RE: Petitioner: [Redacted]

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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).

The director determined that the petitioner had failed to demonstrate that he had made a qualifying investment of lawfully obtained funds or that he would create the necessary employment.

On appeal, counsel argues that the precedent decisions on which the director relied were improperly issued, should not be applied "retroactively" to the instant petition, and constitute an erroneous interpretation of the law.

Finally, counsel argues the petitioner should be permitted to keep his original priority date for adjustment purposes under section 245(i) of the Act even if the petition is denied because he filed the petition prior to January 14, 1998. Whether a petitioner qualifies for benefits under section 245(i) is governed by that section, is not within the discretion of this office, is not relevant to the adjudication of the petition, and will not be discussed.

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 the instant petition on January 14, 1998, based on an alleged investment in United States Export Fund II Limited Partnership (USEF II). The General Partner of USEF II is U.S. Export Services II, Inc. (USES II, Inc.). USEF II is also the managing member of United States Export Services Limited Liability

Company II (USES II, LLC or the company.) The Operating Agreement and Business Plan for USES II, LLC indicates that it will increase exports by engaging in the export of goods and services and providing assistance to other export companies.

### PRECEDENT DECISIONS

On appeal, counsel's sole argument is that the precedent decisions, Matter of Izumii, supra, Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), 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) were issued in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 553, and constituted impermissible rule making.

The Associate Commissioner publishes precedents under authority delegated by the Commissioner of the Service and the Attorney General. 8 C.F.R. 2.1. Precedent decisions are binding on all Service officers. 8 C.F.R. 103.3(c). The director, therefore, was bound to apply the relevant precedents in adjudicating the instant petition. Further, 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. They do not represent rule making requiring notice and comment pursuant to the provisions of the APA. Neither was it improper to apply the precedent to a petition that was filed prior to the issuance of the precedent. The precedent interpreted the existing regulations. Contrary to counsel's assertion on appeal, those regulations were in effect prior to the filing of the instant petition. See Counsel's brief at 3-4.

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. The court further found that the plaintiff had not demonstrated any hardship as the petitioner in that case still had his \$500,000. The petitioner of the instant petitioner has likewise not demonstrated any hardship to himself as the escrow agreement provides for a full return of the petitioner's money if the petition is not approved within 12 months of filing.

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. As the director properly relied on the precedent decision, we will examine the director's application of the precedents below.

**MINIMUM INVESTMENT AMOUNT**

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

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

*Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

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

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area,

or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

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

In a similar case involving a credit company, Matter of Izumii, supra, held that the companies receiving the loans must also be within the targeted employment area. Id. at 5. While USES II, LLC may be located in a targeted area, none of the export companies which USES II, LLC will be assisting have been identified. Therefore, the petitioner has not established that his investment will solely benefit a targeted employment area. As such, the minimum investment amount in this case is \$1,000,000.

#### **ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE**

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . which the alien has established . . . ." (Emphasis added.)

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

- (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 CFR 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 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is USEF II.

USEF II was formed on October 10, 1997. The petitioner did not execute his subscription agreement until January 1, 1998. Section 1 of the subscription agreement, in pertinent part, provides:

The Partnership has agreed to accept and admit me as a Limited Partner upon (1) my execution of the relevant documents and agreements, (2) the approval of my petition for classification as an alien entrepreneur, (3) the approval of my visa application either by the U.S. Department of State (in the case of consular processing abroad) or the Immigration and Naturalization Service (in the case of adjustment of status within the United States), and (4) the receipt of my initial cash payment capital as provided herein.

The evidence submitted does not demonstrate that the petitioner established USEF II within the meaning of 8 C.F.R. 204.6(h)(1). First, the petitioner did not execute the subscription agreement until three months after the partnership was formed. Second, the act of signing the subscription 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 \$125,000, 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 USEF II. 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 this case, the General Partner has stated its intent to recruit 95 alien investors thereby assembling capitalization of \$47.5 million. In order for all 95 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 after the requisite level of expansion, had occurred 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 95 investors who had not participated in the original establishment of USEF II would have to demonstrate that the business was expanded by at least 40 percent as of the filing date of their individual petitions.

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.

The petitioner submitted a Subscription Agreement which calls for an initial payment of \$135,000 to be placed in escrow; \$10,000 to be released immediately for legal fees, and the balance of \$125,000 to be released to the Partnership upon the petitioner's admission as a conditional permanent resident.

#### Redemption Agreements

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.

Section 3 of the Subscription Agreement provides the petitioner the right to sell back his interest in the Partnership. The petitioner elected at the end of the document for a 36 month sell back agreement. As such, 36 months after he receives his conditional permanent resident status he may exercise the right to sell to the Partnership his interest in the Partnership for \$400,000. The agreement further provides that the petitioner must have completed his capital contribution. The Subscription Agreement also contains a buy-back provision whereby the Partnership has a right to repurchase the petitioner's interest for the fair market value of that interest 36 months after the petitioner is admitted as a conditional permanent resident.

Sections 8.07 and 8.08 of the Partnership Agreement also provide for the sell-back and buy-back rights discussed above. These provisions, however, provide that the sell-back and buy-back price is the fair market value as "established and agreed to by the Partnership under the Subscription Agreement." As stated above, the sell-back price agreed to in the Subscription Agreement is not the fair-market value, but a set price: \$400,000. While the

Partnership Agreement provides that the agreed upon price may be changed, the Service must examine the terms of any agreements in effect at the time of filing. At the time of filing, the petitioner was guaranteed a return of \$400,000.

The director concluded these agreements were disqualifying under Matter of Izumii, supra. Specifically, the director stated that the petitioner was guaranteed a return of \$400,000, leaving only \$100,000 at risk. The director also concluded the redemption provisions amounted to a loan.

Even if the Service were to accept that the agreements provide for a sell-back price of the fair market value, Matter of Izumii found even those agreements were disqualifying. Matter of Izumii states:

Fair market value assumes the existence of a market. In this case, no public market exists for the . . . partnership interest. The sale of the partnership interest would not be an arms-length transaction, and the valuation of the parties would not reflect a true fair market value.

Id. at 18. As in that case, this petition involves a partnership created solely for foreign investors seeking eligibility under the entrepreneur program. There is no public market for these partnership interests. Therefore, the director correctly concluded the sell-back agreement was disqualifying.

While not discussed directly by the director, the buy-back provisions are also problematic. After 36 months, the Partnership has the absolute right to repurchase the petitioner's interest. For an investment to be considered "at risk," the investment must risk both profit and loss. See Matter of Izumii. In this case, the General Partner has an absolute right to buy the limited partner's interest regardless of the profitability 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 and assume total ownership of the enterprise. Under the buy-option, the petitioner has forfeited the absolute "risk" of enjoying the potential profits of his investment.

#### Capital Available to Employment-Creating Enterprise

As stated by the director, Matter of Izumii, provides that where the commercial enterprise is a holding company or there is otherwise an intervening entity between the investor and the employment-creating business, the full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.

The director noted that section 4.03 of the Partnership Agreement, Use of Funds Contributed by Limited Partners, provides that the Partnership will apply the limited partners' funds towards the investment in the Company and towards any fees described in section 9.03. The partnership fees specified in section 9.03 such as marketing, legal and other administrative costs are clearly not being made available to the employment-creating entity. It is acknowledged, however, that the petitioner's investment plan calls for him to invest \$25,000<sup>1</sup> beyond the requisite \$500,000. Therefore, it is not clear the partnership's expenses will be paid out of the petitioner's claimed investment of \$500,000.

The petitioner, however, did not provide any additional contribution to cover the expenses of the Company. The Operating Agreement does not provide that the Company has any source from which to pay its own expenses other than the capital contributions of the limited partners. The petitioner cannot avoid the issue of paying the holding company's expenses simply by adding an additional holding company between the Partnership and the export business(es). Therefore, the petitioner has not established that all of his capital contribution will be made available to the entity most closely responsible for the job-creation, specifically, the export business(es).

#### 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, supra, 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 her 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.

The petitioner submitted a promissory note as evidence of his obligation to pay the Partnership the remaining \$400,000. The note indicates that it is secured by the petitioner's personal assets. An "addendum" to the note lists several of the petitioner's assets, including investment accounts and property. Cash accounts are

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<sup>1</sup> An additional \$10,000 was also placed in escrow and immediately released to pay legal expenses.

easily dissipated and cannot serve as adequate security. In addition, the appraisal of the property does not clearly indicate whether the property is subject to a mortgage. Finally, the costs of pursuing the assets have not been taken into account.

**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 petitioner 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, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) 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. Matter of Izumii, supra, 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).

The petitioner submits bank letters documenting account balances of \$125,000 in his escrow account, \$93,026 in a personal Ameritrade account, \$65,352 in a personal Nations Securities account, and

\$100,000 in a certificate of deposit account. The petitioner also submitted a real estate appraisal for property worth \$303,500. Finally, the petitioner submitted an "attestation" signed by counsel asserting the petitioner had attested to the lawful source of his funds.

The escrow statement does not indicate the source of the \$125,000 deposited in that account. Therefore, the petitioner has not established the source of his initial investment funds. In addition, the petitioner has not provided any documentation of his employment or other sources of income which might account for his assets. Such documentation is required by the regulations as quoted above. As such, the petitioner has not established the lawful source of his funds.

#### SOURCE OF OTHER FUNDS

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.**

The petitioner has not provided any evidence of the source of funds for the other investors in USEF II.

#### REGIONAL CENTER CONSIDERATIONS

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

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 resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

8 C.F.R. 204.6(m)(7) states, in pertinent part:

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.

In Matter of Izumii, supra, the Associate Commissioner determined that, regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted employment areas in order for a petitioner to be eligible for the reduced minimum capital requirement. Furthermore, under the pilot program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. Id. The location of the new commercial enterprise is not controlling.

The operating agreement indicates the Company was formed for the following purpose:

to engage in the exporting of goods and services from the United States, and to provide business services, financial and other related services resulting in increased exports by United States companies engaged in exporting merchandise.

The Business Plan provides no additional clarification as to what exactly the Company will be doing. There is no indication the Company will actually be manufacturing goods for export or will be operating a shipping company. Specifically, the Business Plan does not identify any goods or propose purchasing shipping vessels. Therefore, it is not clear how the Company will "engage in the exporting of goods and services." If the Company will be providing loans to export companies, as suggested in the Business Plan, those companies must be within the Regional Center in order to qualify for indirect job creation. As none of these businesses have been identified, it is not clear the Company will solely benefit the Regional Center.

Even if we accepted that the petitioner's investment would solely benefit a regional center, the petitioner has not established the requisite indirect employment creation. Regarding indirect job creation, 8 C.F.R. 204.6(m)(7)(ii) further states:

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.

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

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

The Business Plan indicates that:

it is reasonably expected that United States Export Services II, LLC will support \$38 million in U.S. exports in the first full year that 95 investors are admitted into the Partnership.

The Plan, however, provides no explanation as to how it determined this number. As stated above, the Business Plan contains absolutely no evidence of what type of services it will be providing or goods it might export. The Business Plan fails to identify any companies which would be willing to accept the type of assistance the Company plans to offer, whatever that assistance may be. The Business Plan includes no evidence of negotiations between the Company and any export businesses. Nor does the Plan evaluate other companies providing similar assistance to export companies. Thus, \$38 million in exports appears to be pure speculation, based entirely on the fact that \$38 million in exports would account for 980 indirect jobs according to the methodologies used, allowing each of the 95 limited partners to qualify for the entrepreneur program.

Moreover, the methodology used by the Business Plan is not appropriate, as the Plan defines the Company as a credit company but assigns it the input-output code of a wholesaler. Nor is it clear why an investment of \$1,000,000 would amount to output of \$1,819,000 as appears to be claimed at the bottom of the last page of the plan. Therefore, the petitioner has not established that his investment will indirectly create 10 jobs.

In light of the above, the petitioner cannot rely on indirect employment creation, and, even if he could, has not established that his investment would create 10 indirect jobs.

**DIRECT 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:

*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.

The petitioner has also failed to demonstrate that his investment will create the required number of jobs directly. The petitioner does not claim to have already created 10 direct jobs.

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.

The Business Plan does not indicate the petitioner's investment will create any direct employment.

#### MANAGEMENT

Beyond the decision of the director, the petitioner will not be engaging in the enterprise. 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 7.01 of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the Maryland Revised Limited Partnership Act. However, under Section 17.01 of the Partnership Agreement and section 9 of the Subscription Agreement, all limited partners irrevocably appoint the General 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 7.01, 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.

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.