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**U.S. Department of Justice  
Immigration and Naturalization Service**

*OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536*

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File:  Office: California Service Center

Date: **AUG 16 2002**

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:



**Public Copy**

**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the 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 that 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, Director  
Administrative Appeals Office

**DISCUSSION:** The approved preference visa petition was revoked by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal.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).

Upon review of the approved petition, the director determined that the petitioner had failed to demonstrate that she had placed the requisite amount of capital at risk, that she had established a new commercial enterprise, or that the investment funds had been lawfully obtained.

Counsel's initial argument is a procedural argument and will be addressed first. Counsel argues that the director did not comply with 8 C.F.R. 205.2(b) because she revoked the petition without first issuing a notice of intent to revoke. Curiously, counsel then argues that the director failed to consider the petitioner's response to the notice of intent to revoke. The confusion appears to result from the procedural history of the case.

On March 21, 1997, the director approved the petition. On September 3, 1997, the petitioner filed a Form I-485 Application to Register Permanent Residence or Adjust Status. On April 13, 1999, the director revoked the petition without first issuing a notice of intent to revoke. On September 24, 1999, the petitioner, through counsel, appealed that decision. Realizing its error, the Service reopened the petition. Since it had already revoked the petition, the director could not correct its error without reopening the petition on motion. Thus, on August 29, 2000, the Service issued a notice entitled "Service Motion to Reopen." The fourth paragraph of this notice states, "it is hereby ordered that the prior decision of the Director to revoke the petition be vacated and the petitioner be given the opportunity to present new evidence in the **Service's Intent to Revoke.**" (Emphasis in original.) The notice then continues for an additional 11 pages, concluding:

Pursuant to Title 8 Code of Federal Regulations, Section 205.2(b), the Service will not make a final decision regarding the revocation of your petition approval for thirty (30) days. During that time, you may submit any evidence you feel will overcome the reasons for revocation.

It is clear that the final 11 pages of the notice constituted the director's notice of intent to revoke and gave the petitioner ample notice of the deficiencies the director found in her petition. On July 6, 2001, in response to inquiries from counsel, the director resent the August 29, 2000 notice to counsel. The cover letter to that response stated, "on August 29, 2000, the Service reopened the revocation of the I-526 petition, and sent the petitioner and counsel a "Notice of Intent to Revoke" (**under one cover** - copy enclosed)." (Emphasis added.) On February 6, 2002, the director revoked the petition. While the director concluded that the petitioner had failed to respond to the notice of intent to revoke, the director revoked the petition on its merits.

On appeal, counsel states:

In the Decision the CSC states that it had no record of having received a response from the petitioner to the CSC's *Notice of Intent to Revoke* the I-526 petition. [Footnote 1 omitted.] However, petitioner has not received a Notice of Intent to Revoke, [footnote 2 omitted] and further petitioner actually filed a response with the CSC. [Footnote 3 omitted.] Petitioner's response should have been considered prior to the CSC issuing the Decision.

Footnote 1 cites the page of the decision where the director stated no response had been submitted. Footnote 2 asserts that the director's final decision referred to the August 29, 2000 notice as a notice of intent to revoke whereas it was actually a motion to reopen. The footnote further asserts that the petitioner never received a notice of intent to revoke. Footnote 3 refers to exhibits 2 through 6. Exhibit 2 is the receipt for the petitioner's first appeal dated September 27, 1999 and the brief and exhibits submitted at that time. Exhibits 3, 4 and 5 contain advance parole documentation. Exhibit 6 contains work authorization documentation. None of these exhibits reflect that the petitioner responded to the director's August 29, 2000 notice. As previously noted, no such response is present in the record.

As stated above, the director reopened the revoked petition on her own motion because she had failed to issue a notice of intent to revoke prior to the initial decision to revoke. Thus, the director corrected her error. The motion clearly included a notice of intent to revoke and the petitioner was clearly advised that she had 30 days in which to respond. Counsel was subsequently advised that the motion constituted the Service's notice of intent to revoke and given a copy of the August 29, 2000 notice on July 6, 2001. The petitioner has submitted no evidence that the petitioner did, in fact, respond to the August 29, 2000 notice. As such, we find no procedural error in the director's final decision. It is noted that the petitioner was advised of the director's concerns in the initial revocation issued in error, in the 12-page August 29, 2000 motion/notice of intent to revoke, and again when the latter notice was resent to counsel on July 6, 2001. Thus, we strongly disagree with counsel that the director has denied the petitioner due process by not providing an opportunity to present evidence and arguments to rebut the director's concerns.

In addition to the above argument, counsel argues on appeal that the director misapplied the regulations and erroneously relied on precedent decisions issued after the petitioner submitted this petition.

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 indicates that the petition is based on an investment in a new business in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000. In addition, she claims that the business is located in an area designated as a "regional center" authorized to participate in the Immigrant Investor Pilot Program. The petitioner contends that she is one of 90 investors in American Export Limited Partnership (AELP). The general partner of AELP is American Export Partners, LLC (AEP).

### **PRECEDENT DECISIONS**

On appeal, counsel broadly argues that the director's denial was based on the findings in Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), 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 and the precedent decisions were contrary to previous similar petitions approved by the director, past appellate decisions of the AAO, past Service memoranda and Service informational responses to inquiries. Counsel asserts that "retroactively" applying the precedent decisions issued after the petitioner filed this petition and after the Service approved the petition, constitutes reversible error.

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.

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 distinguished Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978), a case upon which counsel relies, and concluded that the AAO precedent decisions did not involve rule making. The court stated:

The provision at issue in Ruangswang contained "objective criteria (a \$10,000 investment, and one year's experience or qualified training), which the petitioner had clearly met. There "simply [was] no room for the agency to interpret the regulation so as to add another requirement." [Citation omitted.] By contrast, in applying the precedent decisions here, the INS did not add any requirement. R.L. Investment Limited Partners, *supra*.

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. See also Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001). While counsel does not attempt to distinguish any of the above cases, he cites a District Court decision within the 9<sup>th</sup> Circuit, Chang v. United States, Case No. CV-99-10518 (C.D. Calif. 2001). Counsel asserts that this decision "observed that in adopting the AAO precedent decisions the INS 'effectively changed the rules of the game.'" Counsel seriously distorts the court's decision. In fact, the court stated:

First, the INS chose to publish the Precedent Decisions in order to address a number of substantive issues that had arisen under the Immigrant Investor Program. . . .

Second, the Precedent Decisions did not change or add to any requirements of the EB-5 statute as set forth in the federal regulations. See 8 C.F.R. §204.6. Rather, the Precedent Decisions furthered the congressional intent behind the EB-5 statute. . . .

Thus, we conclude that the Precedent Decisions constitute an interpretive rule and the fact that the INS did not engage in notice and comment rulemaking was not a violation of the APA, an abuse of discretion, an action exceeding statutory authority or a violation of Due Process and Equal Protection.

Id. at 13-16. It is acknowledged that the court then stated that since the INS had approved the Form I-526 of one of the plaintiffs, the Service could not deny the Form I-829 without considering the hardship to that plaintiff. The court explained:

In effect, having already approved Plaintiff Chiang's investment program by virtue of its approval of his I-526 petition, the INS effectively changed the rules of the game by judging Plaintiff Chiang's I-829 petition under the Precedent Decisions even though Plaintiff Chiang had not altered his previously approved investment program, and had not acted in a way which would otherwise justify denial of the I-829, but for the Precedent Decisions. Although we conclude that the Precedent Decisions did not generally alter prior official action so as to require notice and comment rulemaking, there has been an official ruling as to Plaintiff Chiang, when his I-526 petition was approved.

While the court referred to the approval of the I-526 as a "rule," the court held that the Service only had to consider hardship to the investor at the removal of conditions stage. This petitioner has not attained conditional status and has provided no evidence of hardship. Moreover, as stated above, this court is a district court within the 9<sup>th</sup> Circuit. The 9<sup>th</sup> Circuit Court of Appeals, in affirming the lower court decision in Golden Rainbow Freedom Fund, provided:

No doubt, Golden Rainbow and the alien investors did rely on the non-precedential position of the INS, and may suffer on that account. But there had been no formal determination at the time, and they had to know that any initial approval was conditional. **There could be no closure until there had been a second petition for removal of the condition, and a showing of compliance was required at that time.** See 8 U.S.C. § 1186b(c)(1) & (d)(1). The long and short of it is that they lost their gamble that Golden Rainbow's creative financing approach would manage to get through the whole process. The INS finally acted to prevent a perversion of the program contemplated in the statutes and the regulations. The mischief that was avoided far outweighed any detriment to Golden Rainbow or anyone else. In other words, retroactivity was not inappropriate.

(Emphasis added.) Golden Rainbow Freedom Fund v. John Ashcroft, No. 00-36020 (9<sup>th</sup> Cir. Nov. 26, 2001). This decision bears more weight than the District Court decision in Chang. Regardless, all of the federal courts that have issued opinions on this issue have concluded that 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. The precedent decisions 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. In fact, Chang, the case cited by counsel, states:

Thus, whatever the weight of the prior approvals of I-526 and I-829 petitions, they cannot be regulations having the force of law. They represented a prior administration of the EB-5 statute that the INS was free to change, not any prior published or announced interpretive rule.

Chang, supra, at 15. 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).

Furthermore, in the Service memorandum from its Office of General Counsel dated September 10, 1993, cited by counsel, it was expressly stated that as a matter of law and policy the Service should not and will not pre-approve investment schemes for groups of alien investors seeking this benefit. Each petition must be adjudicated on its merits and eligibility must be established at the time of filing. See Matter of Great Wall, 16 I&N Dec. 142 (Reg. Comm. 1977); Matter of Katigbak, 14 I&N Dec. 45 (Comm. 1971).

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 his 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."

## 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.

Counsel states that the petitioner has made an investment of \$500,000 in the form of a \$500,000 promissory note. This note provides for an initial deposit of \$200,000 into a trust account, to be released to the partnership upon approval of the immigrant visa, four annual payments of \$25,000, and a final balloon payment of \$200,000.

Relying on Matter of Izumii, the director concluded that the terms of the promissory note, Partnership Agreement, and Investment Agreement revealed that the petitioner's funds were not at risk.

As noted above, this same plan was rejected in Izumii and that decision is binding.

### **Initial Partnership Expenses**

According to section 2.A(3) of the Investment Agreement, the petitioner agreed to instruct counsel, as trustee of her escrow account, "immediately to release US\$30,000 as a refundable advance for initial expenses of the Partnership"; the remaining \$170,000 would be released upon approval of the visa application. See also section 2 of the deposit agreement.

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 placed at risk. 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 AELP for Partnership expenses is not money available for loans to export companies and therefore cannot be counted toward the petitioner's required investment amount.

On appeal, counsel argues that the petitioner met her burden by transferring the initial \$200,000 into escrow and signing the investment agreement and promissory note. Counsel states the regulations and precedent decisions do not require that the money go solely towards employment creation. Counsel further argues that since the petitioner has relinquished control over the money, it is at risk. Counsel argues that to conclude otherwise is to preclude escrow agreements as an investment tool

and negates the two year period in which to create 10 jobs. Further, counsel asserts that the director failed to delineate proper investment for the purpose of creating employment. Finally, counsel states that the Partnership is the new commercial enterprise and that all the funds were made available to the Partnership.

Counsel misreads Izumii, and, thus, the director's concerns. Izumii does not hold that the funds must be applied toward salaries and job advertisements. Rather, Izumii states that the funds must be available to the entity which will be responsible for creating the employment, whether directly as an operational company or indirectly as an export company in a Regional Center. This entity may or may not be the new commercial enterprise listed on the petition. A petitioner cannot avoid investing in the job creating entity by creating layer upon layer of holding companies, each of which takes its share of the invested funds. To accept counsel's argument would result in an approvable petition where the petitioner "invests" sufficient funds in a credit company which lends only \$10 of that money to an export company in a Regional Center and retains the remaining money for fees and to insure that the petitioner may sell back her interest. Clearly, in such a situation, it would be ludicrous to apply the indirect employment "methodologies" to the amount of money "invested" in the credit company as opposed to the money which actually trickles down to the export company which is responsible for generating indirect employment. Nor does this result in the prohibition of investing through escrow agreements. As long as the enterprise's business activity meets the requirements in Matter of Ho, supra, an irrevocable escrow agreement might demonstrate that the petitioner is actively in the process of investing any funds in that account depending on the facts of the case. There is no requirement that all of the money has already been used for employment generating purposes at the time of filing, just that the money be fully committed to the employment generating enterprise at that time. The petitioner then has two years to substantially complete his investment and generate the necessary employment.

### **Annual payments**

According to section 2.B of the Investment Agreement executed by the petitioner, the petitioner must make four annual cash payments of \$25,000 each, totaling \$100,000, commencing one year from the date she 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. In other words, the petitioner would receive at least \$125,000 in annual distributions during the four years.

It is noted that the petitioner's obligation to make her annual payments is conditioned upon the Partnership making its guaranteed annual distributions to her. Section 2.C of the investment agreement states:

In the event of the bankruptcy, the insolvency, or the failure of the partnership to pay the annual return on capital, to pay the sell option price, or to pay any judgment, the Partnership shall be deemed to be in breach of its obligations to the Limited Partners under the American Export Limited Partnership Agreement, and I, as a Limited Partner, shall have no further obligations to the Partnership, and furthermore, I shall not be obligated to make any further cash payments under the Limited Partnership Agreement, this Investment Agreement or the Promissory Note.

As stated in Matter of Izumii, supra, an alien may not receive guaranteed payments from a new commercial enterprise while she owes money to the new commercial enterprise. As the Partnership receives no infusion of new funds from the petitioner, the schedule of annual payments intended to represent \$100,000 does not constitute a contribution of capital. Therefore, the director concluded these provisions were non-qualifying.

On appeal, counsel argues that even though the petitioner would not be obligated to do so, she might continue to make her investment payments if the Partnership failed to pay the guaranteed returns and that this issue should be examined at the Form I-829, removal of conditions stage.

Counsel's argument is not persuasive. The Service must evaluate an investment agreement by its very terms. While counsel accuses the director of speculating, the terms of the petitioner's investment indicate that she will be paid a guaranteed return in addition to profits, not that the guaranteed returns will be paid from profits if those profits occur. It is, in fact, counsel who asks the Service to speculate that the petitioner will continue to make payments she is not obligated to make. Finally, as stated above, the Service must evaluate the terms of the agreements submitted as evidence of eligibility. Under counsel's interpretation, the Service would have to approve every petition based on a disqualifying investment agreement because a possibility exists that the petitioner could make payments she is not obligated to make and refuse to accept payments she has a right to receive.

### **Redemption agreement**

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," (emphasis added). The sell-option price is equal to 75 percent of the initial payment plus all additional capital contributed less the first four payments. In other words, the sell-option price is \$150,000 plus any capital contributed beyond the required annual payments. At the same time, the Partnership may exercise a buy option for the same price.

Section 4 of the investment agreement and Section 8.05 of the Limited Partnership Agreement specify that the sell-option price is payable 180 days after the exercise of the sell option. The agreements do not specify whether the petitioner is obligated actually to make the last payment of \$200,000 if she exercises her sell option; both her responsibility to pay and her right to sell ripen at the same time. Section 8.05.C of the partnership agreement provides that once the Partnership pays the sell-option price, "all amounts owed under such Selling Limited Partner's Investor Note shall be

deemed satisfied by the Partnership....” Similarly, under section 8.06.C, after the Partnership pays the buy-option price, “all amounts due and owing under the Investor Note shall be discharged by the Partnership....” It is not known what amount would still be owed if the petitioner is obligated to pay the \$200,000 prior to the exercise of the buy or sell option. If the petitioner can avoid making this last payment by exercising her sell option, this amount of \$200,000 cannot be considered to have been placed at risk.

Even if the petitioner is obligated to make this balloon payment prior to exercising her sell option, the \$200,000 still cannot be said to be at risk because it is guaranteed to be returned, regardless of the success or failure of the business. If the investment agreement executed by the petitioner is controlling, then the moment she made this last payment, the petitioner could exercise her sell option, and \$150,000 of the money would be immediately returned; \$150,000 of the \$200,000 would never be at risk. In this situation, the petitioner’s agreement to make this payment of \$200,000 is, in essence, a debt arrangement for \$150,000 of those funds. Specifically, she provides \$200,000 in exchange for an unconditional, contractual promise that \$150,000 of it will be repaid later at a fixed maturity date (six months later).<sup>1</sup> Such an arrangement is specifically prohibited by the regulations. See 8 C.F.R. 204.6(e).

As stated in Matter of Izumij, *supra*, an alien cannot enter into a partnership knowing that she already has a willing buyer in a certain number of years, nor can she be assured that she will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of her cash payments under a promissory note, an alien investor may not enter into any agreement granting her the right to sell her interest back to the partnership. The petitioner here has already entered into such an agreement. \$150,000 of the \$200,000 is, at best, a debt arrangement and cannot be considered to be at risk.

On appeal, counsel argues that exit agreements are customary and the Service should not characterize such agreements as debt arrangement with little risk. As an example of how the AAO precedent decisions did not change or add any requirements to this program, the District Court in Chang, a case cited by counsel, stated:

For example, the essential holding of Izumij is that, for purposes of meeting the statutory and regulatory definition of “invest” (or “contribution of capital”), an alien may not condition his investment (whether it be \$500,000 or \$1 million) on a promise from the enterprise receiving his money that the alien will get his money back after a set period of time. [Citation omitted.] The AAO concluded that such an arrangement is a loan and therefore contrary to the governing regulation, which bars debt arrangements from qualifying as the required investment. 8 C.F.R. 204.6(e). This conclusion rationally advances the job-creation purpose of the statute (see S. Rep. No. 55, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 5, 21 (1989)) to require that a qualifying EB-5 investment be in the nature of equity rather than a loan. If an alien places his money fully at risk with no expectation of reimbursement, he is more likely to be involved

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<sup>1</sup> The risk that the petitioner might not receive payment if the Partnership fails is no different from the risk any business creditor incurs.

in the enterprise (even if he is only a limited partner, since a limited partner can at least suggest strategies for the enterprise) and his entrepreneurial talents are more likely to be brought to bear on advancing the enterprise's success, with the concomitant creation of jobs that Congress wanted.

Chang, supra, at 14.

Regardless of counsel's objections, Izumii is binding. For the reasons discussed in the first section of this decision, the director correctly relied upon Izumii. Therefore, the director correctly concluded the redemption agreements were disqualifying.

### Cash reserves

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.A(i) of the agreement, the banks holding these accounts shall invest the funds "in securities or other financial instruments and obligations in amounts sufficient to satisfy the requirements of **Section 8.05**," (emphasis in original). Section 4.04.B adds that the general partner "shall deposit with the Banks from the Initial Cash Payments sufficient Reserve Funds to satisfy the Partnership obligations under **Section 8.05** and to defray such costs and expenses of the Partnership as determined by the General Partner," (emphasis in original). Section 8.05 of the partnership agreement is entitled "Limited Partner Sell Option" and sets forth the timing and price of the sell option. As mentioned earlier, under the investment agreement, this petitioner would be entitled to a sell-option price of \$150,000.

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 portions of the initial \$200,000 and/or the remaining \$300,000 into the reserve 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.<sup>2</sup> As stated in Matter of Izumii, supra, reserve funds that are not made available for purposes of job creation

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<sup>2</sup> Even if, after five years, the petitioner elected to remain in the Partnership instead of exercising her 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.

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 concluded the reserve funds were disqualifying.

On appeal, counsel argues the reserve funds are permissible because the investment requirement and employment requirement are separate; thus, the funds need not be applied solely to salaries and job advertisements. As discussed above, counsel misreads Izumii. Izumii does not require that funds be applied solely to salaries and job advertising, but that the funds be made available to the entity most closely responsible for job creation. It remains, the petitioner has not established her full investment will be made available to the entity most responsible for job creation, whether directly or indirectly through exports.

### **Fair market value of promissory note**

The petitioner claims that her promissory note is evidence that she has committed \$500,000 to AELP. Promissory notes may qualify as capital themselves or as evidence that a petitioner is “in the process” of investing other capital, such as cash.

For a promissory note to constitute capital, it must be secured by assets belonging to the petitioner. 8 C.F.R. 204.6(e) (definition of “capital”). In addition, the assets must be specifically identified as securing the note, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, and the assets must be fully amenable to seizure by a U.S. note holder. Matter of Hsiung, Int. Dec. 3361 (Assoc. Comm., Ex., July 31, 1998).

The director found that there was no evidence that any of the petitioner’s assets are formally attached as security for the promissory note. Counsel argues on appeal that the security interest of the promissory note was secured according to Service policy at the time the petition was filed and that there was no requirement that the security interest actually be perfected.

Again, the finding in Matter of Hsiung, *supra*, is binding. The petitioner does not submit additional evidence on appeal to demonstrate that the security interest has been perfected as required by the precedent.

The promissory note does not meet the definition of “capital.” Even if it did, the regulations at 8 C.F.R. 204.6(e) further provide that all capital must be valued at fair market value in U.S. dollars. When determining the fair market value of a promissory note being used as capital, factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered. Matter of Hsiung, *supra*.

In order for foreign assets, including real estate, to be considered as acceptable security, a petitioner must establish that the laws of the foreign country in which the assets are located would recognize, and permit execution of, a judgment of a court of the United States or of any State with respect to the foreign assets.<sup>3</sup> In the alternative, the petitioner must establish that the courts of that foreign

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<sup>3</sup> This, for example, could take the form of a transfer of ownership of the property to the creditor or it could take the form of a court-ordered liquidation and transfer of assets to the creditor.

country would themselves recognize and enforce the promissory note absent the judgment of an American court. Otherwise, the promissory note would clearly not have the value attributed to it by the petitioner. The petitioner here has not presented any evidence as to laws of the Republic of China regarding the seizure of assets.

Even if assets can be reached under the laws of the applicable foreign country, considerable expense and effort would be involved in pursuing them. These factors would reduce the fair market value of a promissory note secured by foreign assets. It is not clear to what extent the value of the petitioner's promissory note should be reduced since the petitioner has not submitted any evidence as to the cost of enforcing a judgment against the property listed on the summary.

In addition, the petitioner has submitted no evidence as to the present value of the promissory note. The petitioner has failed to establish that the promissory note has any fair market value at all, let alone \$300,000 or \$500,000. Of course, as discussed above, the promissory note here does not even meet the definition of "capital."

Under certain circumstances, a promissory note that does not itself constitute capital could instead constitute evidence that the petitioner is "in the process of investing" other capital, such as cash. Whether a petitioner uses a promissory note as capital or as evidence of a commitment to invest cash, she must show that she has placed her assets at risk. In establishing that a sufficient amount of her assets are at risk, a petitioner must demonstrate, among other things, that the assets securing the note are hers, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value. Matter of Hsiung, supra. The petitioner fails on all counts.

Furthermore, the schedule of payments under a promissory note, whether the note is used as capital or as evidence of a commitment to invest cash, is relevant to the issue of whether a petitioner has committed the requisite amount of her personal funds in good faith. It is also relevant to the issue of the amount of funds at risk in, and available to, the job-creating enterprise(s). As stated in Matter of Izumii, supra, nearly all of the money due under a promissory note must be payable within two years, without provisions for extensions. Under this petitioner's schedule of payments, she would have paid the initial \$200,000 plus the first annual payment of \$25,000, minus the first guaranteed annual distribution of \$20,000, by the time she sought removal of the conditions of her permanent resident status.<sup>4</sup> \$205,000 is far short of the requisite \$500,000 and hardly evidences a good-faith commitment of funds.

We uphold the director's decision for the reasons stated above. Beyond the director's decision,<sup>5</sup> we also note the additional deficiencies in the record.

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<sup>4</sup> §§ 216A(c)(1) and (d)(2) of the Act provide that such a petition must be filed within the 90-day period preceding the second anniversary of a petitioner's admission as a conditional permanent resident.

<sup>5</sup> An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 29 (E.D. Calif. 2001).

**SOURCE OF FUNDS**

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

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, 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 her burden of establishing that the funds are her 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). These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

In support of the petition, the petitioner submitted a promissory note purportedly secured by “the personal assets of the maker which are identified in the Attachment hereto,” a list of bank accounts with balances totaling \$777,460.37, bank letters confirming the balances of those accounts and two separate dates, and the petitioner’s resume.

The Service is entitled to inquire into the source of a petitioner’s purported assets and does not require affirmative evidence that she is or has been engaged in criminal activity. 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.

### **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 documentation regarding the source of the funds from the other investors.

### **ESTABLISHMENT OF A 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 she is seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise that **she** has

established. As counsel maintains, the new commercial enterprise at issue here is AELP. AELP, however, was established on March 25, 1996. The petitioner dated the various partnership documents December 13, 1996 and December 15, 1996, and the initial step of transferring approximately \$200,000 occurred on December 13, 1996.

At Part 4 of the Form I-526, the petitioner indicated that she was establishing a new commercial enterprise by creating an original business, as opposed to expanding an existing business or purchasing and reorganizing one. While AELP is a new commercial enterprise, in that it was formed after November 29, 1990, the petitioner had no hand in its creation and was not present at its inception.<sup>6</sup> See Matter of Izumii, supra. She did not become involved with AELP until more than a year after it was founded. Therefore, she has not created an original business.

With one "investment" of \$500,000, it is not possible for this petitioner to expand AELP, which counsel said has 36 other approved limited partners, by 40 percent; the petitioner cannot rely on 8 C.F.R. 204.6(h)(3) to show that she has established a new commercial enterprise. The petitioner has not purchased AELP, nor does she intend to change its form or function; therefore, she cannot demonstrate the requisite restructuring or reorganization provided for in 8 C.F.R. 204.6(h)(2).

Finally, according to the Investment Agreement, the petitioner's admission to the partnership is conditioned, in part, on approval of her petition and her admission as a permanent resident. 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 AELP. 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.

We note that the establishment of a new commercial enterprise is not an ongoing process which continues over a year after the Partnership Agreement has already been signed and filed with the State. Moreover, it is not at all clear that the regulatory acceptance of partnerships and corporations presupposes those structures would be created by someone other than the alien. There is no reason why a foreign investor is unable to create her own partnership or corporation either by herself or in concert with other foreign investors or U.S. investors. Finally, we note that the regional center concept is not negated by the establishment requirement. First, a foreign investor is not precluded from involvement in the business prior to the application for classification as a regional center. Second, regional centers need not be business entities. For example, a petitioner could establish a new commercial enterprise in a geographical area previously designated as a regional center.

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<sup>6</sup> It could perhaps be argued that the date of filing of the Certificate of Limited Partnership was not the date of AELP's creation, that AELP is still in the process of being created, and that therefore the petitioner is part of the original creation of AELP. If so, the petition has been filed prematurely; the Act requires that the petitioner "has established" the commercial enterprise already. Accomplishment of a business's purposes would be too speculative if it were based on successfully attracting unidentified future investors.



For the above reasons, the petitioner has failed to show that she 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, she is sufficiently engaged in the management of the partnership. Article VII of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the South Carolina Uniform Limited Partnership Act. However, Section 8 of the Investment Agreement and Power of Attorney, the petitioner irrevocably appointed AEP as her attorney-in-fact exercisable in connection with the petitioner’s being admitted as and acting as a Limited Partner of the Partnership. 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 Article VII, 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.

**APPROVED REGIONAL-CENTER ACTIVITIES IN TARGETED EMPLOYMENT AREAS**

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).

On October 19, 1995, AEP filed its articles of organization with the State of South Carolina. On March 25, 1996, AELP filed its certificate of limited partnership with the State of South Carolina, and AEP was designated as AELP's general partner. Both AEP and AELP are located in Charleston, South Carolina.

In a letter dated February 8, 1995, the Assistant Commissioner for Adjudications designated AEP a regional center and specified that individuals could file petitions with the Service "for new commercial enterprises located within the eight-county coastal areas, or Lowcountry, of South Carolina."

According to the business plan submitted, AELP has established a commercial credit corporation subsidiary, American Commercial and Export Credit Company, Inc. This credit company will extend asset-based loans to export companies "throughout the Southeast." The capital provided by the alien investors to AELP will be used to purchase stock in the credit company, and the credit company will use this money to secure loans from an institutional bank lender. This other lender will increase the capital by a factor of three or four.

The business plan states: "The first target area will be Colleton, Georgetown and Newberry counties in South Carolina, and the handful of companies located there which AEP considers good investment targets." Counsel claims in his brief accompanying the Form I-526 that the petitioner's money will go to those areas. Counsel submits 86 Form I-526 approval notices, allegedly for other AELP investors.

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 Associate Commissioner analyzed the same AELP/AEP investment plan in Izumii and found that the actual and proposed loan activities of the subsidiary credit company at issue here were not within the regional center and had not been demonstrated to be within targeted employment areas.

The credit company's track record of extending or purchasing non-qualifying loans and using an insufficient amount of AELP's investors' funds does not advance the petitioner's claim that her funds would be invested properly. No evidence exists that this petitioner would be able to claim the next qualifying loan, if one ever occurred, ahead of the other 86 investors whose funds have not been properly applied. As the petitioner has not demonstrated that her investment will provide benefits solely within a regional center and a targeted employment area, the petitioner must demonstrate both direct employment creation and a minimum investment of \$1,000,000.

### **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(g) deals with multiple investors and states, in pertinent part:

(1) The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time employees.

(2) 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.

As stated earlier, the subsidiary credit corporation here has not extended loans in the past to export-related businesses located within the geographical limitation of the regional center. No reason exists to believe that this petitioner's money will be lent to businesses within the geographical area.

Therefore, she must establish direct employment creation. The petitioner has failed to show that AELP has hired or will hire a sufficient number of employees to allocate 10 full-time positions to each of the 71 previously-approved petitioners as well as to this petitioner and the remaining petitioners whose cases have not been decided.

**CONCLUSION**

The petitioner is ineligible for classification as an alien entrepreneur because she has failed to demonstrate that she has invested, or is in the process of investing, the requisite amount of capital. In addition, she has failed to document the source of her assets and has failed to establish a new commercial enterprise. She has further failed to show that her plan will meet the employment-creation requirement.

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

**ORDER:** The petition is denied.