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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC-99-244-51464 Office: California Service Center Date: NOV 25 2002

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:

[redacted]

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 preference visa petition was denied 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).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise into which he had made a qualifying, at-risk investment of lawfully obtained funds. The director further determined that the petitioner had not established that he would create the necessary employment, as the petitioner relied on an investment in a regional center but the business was not clearly export-related.

On appeal, counsel argues that the director's determination that the petitioner had not established a new commercial enterprise was based on an erroneous factual premise. Counsel further states that all of the invested capital was placed at risk. Counsel next argues that the petitioner sufficiently established the lawful source of his funds and that the Service's regulations on this issue were promulgated in violation of the Administrative Procedure Act (APA). Finally, counsel argues that the petitioner presented sufficient evidence of indirect job creation and that the law does not require job creation in a regional center to be export-related.

This decision will focus on whether the petitioner has placed all of the requisite capital at risk and whether the petitioner has sufficiently established the lawful source of his funds.

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, the petitioner indicates that the business is located in an area designated as a "regional center" authorized to participate in the Immigrant Investor Pilot Program.

The petitioner states that he has invested $500,000 in CMB Development Limited Partnership II, L.P. (the "Partnership"). The general partner of the Partnership is CMB Export, LLC (the "General Partner"). In a letter dated August 15, 1997, the Service's Assistant Commissioner for Benefits designated the General Partner as a regional center. Aliens could file petitions for new commercial enterprises located within the General Partner's development area, which was identified as the former military bases in Sacramento, San Bernardino, and Riverside Counties, California. The letter explained that, to qualify for indirect employment creation, a petitioner would have to show that his new commercial enterprise was located at such a base.

The petitioner states that he is one of nine alien limited partners in the Partnership and that, of the $4.5 million collected from the limited partners, the Partnership has invested $2 million in a Canadian Company called Poly-Pacific International, Inc. ("PPII") and has lent $650,000 to a governmental agency called the Inland Valley Development Authority ("IVDA"). Both of these activities focus on the former Norton Air Force Base in San Bernardino, California.

CAPITAL AT RISK

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:
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> (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
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> (ii) In the case of a high unemployment area:
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> (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 the brief accompanying the Form I-526, counsel claimed that the Partnership was concentrating on the City of San Bernardino, site of the former Norton Air Force Base. The petitioner stated that the Partnership's investments to date were in the city and that the city had a sufficiently high rate of unemployment to qualify as a targeted employment area. He further asserted that the Partnership was restricted to investing only in targeted employment areas.

Article II of the restated partnership agreement does provide that the business of the Partnership shall be restricted to targeted employment areas located within the boundaries of the General Partner's regional-center designation. The director determined that merely declaring an intent to invest in targeted areas, however, does not mean that such investment will occur. The director noted that article II of the restated partnership agreement also states that the Partnership's investments shall facilitate increased export sales, which has not turned out to be the case. Moreover, the partnership agreement is easily revised. The restated agreement is at least the third version of the partnership agreement, and section 17.01 of the agreement explains that each limited partner has irrevocably made the General Partner its agent with full power and authority to make any amendments, changes, or modifications to the agreement.

The Partnership has thus far invested only $2 million of the $4.5 million purportedly received from the limited partners. While these funds do appear to benefit the City of San Bernardino, it is not clear where the remaining $2.5 million[1] would be invested or lent and whether those areas would be targeted. In addition, the Partnership, which is the entity intended to engage in lending and investing activities, is not located in the City of San Bernardino but rather in Corona. The petitioner has not demonstrated that Corona is a targeted employment area.

Based on the above, the director concluded that the petitioner had not established that the Partnership is and will be principally doing business in a targeted employment area. Thus, the director found that the amount of capital necessary to make a qualifying investment in this matter is $1,000,000.

On appeal, counsel correctly notes that the relevant factor is where the employment will be created, not the mailing address of the new commercial enterprise. Counsel further asserts that the requirements in the Partnership Agreement and Business Plan that investments be limited to those designed to create employment in San Bernardino are sufficient to establish that all the necessary employment will be created within the targeted employment area.

We share the director's concern regarding the General Partner's ability to amend the Partnership Agreement without consultation with the limited partners, especially in light of the amount of money yet to be invested. Nevertheless, we find that issue better discussed under whether or not the

[1] Or $1.85 million, if one were to count the IVDA loan that was not actually extended by the Partnership.

entire invested amount is sufficiently at risk. The Service has always examined partnership agreements according to their terms, finding redemption agreements problematic regardless of arguments that they might not be enforced. As such, it would be contrary for the Service to reject portions of this Partnership Agreement which are favorable to the petitioner. Thus, the minimum investment amount in this case is $500,000.

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. ...
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (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.

In his brief accompanying the Form I-526, counsel stated that the petitioner had filed at least one prior petition. As that earlier immigration effort failed, counsel asserted that the petitioner has "redesignated his $500,000 investment, ultimately for investment into the Partnership."

The petitioner submitted a wire transfer application reflecting that the petitioner transferred $500,000 from his account [redacted] at Sumitomo Bank to counsel's account [redacted] at Wells Fargo Bank on April 28, 1998. The petitioner also submitted a Wells Fargo deposit slip confirming this transaction. A letter from Wells Fargo addressed to the petitioner in care of counsel reflects that the $500,000 was deposited in a "custody account," number [redacted] A June 1, 1998 deposit receipt from First Midwest Bank reflects that CMB Development Limited Partnership II received $469,549 on that date. A letter from Wells Fargo to the petitioner confirms that $469,549.04 was transferred to CMB Development Limited Partnership's First Midwest Bank account on June 1, 1998, from custody account [redacted] Finally, a transaction receipt reflects that counsel transferred $30,450 to CMB Development Limited Partnership on August 17, 1998. This document contains no account numbers. A Wells Fargo report for the transfer, however, indicates that the funds were transferred from [redacted]

In response to the director's request for bank statements for the petitioner's account at Sumitomo, the petitioner submitted the requested statements which show that during April 1998, the petitioner transferred $502,359 into account [redacted] it appears from other accounts at the same bank, and transferred out $500,025 from the same account in two transactions. These statements show that the petitioner maintained an aggregate balance close to $500,000 in his seven accounts at this bank since December 1997.

The director concluded that the petitioner had not documented that all of the funds derived from him and that the documentation only traced the funds to CMB Development Limited, which the director determined was a different company than the new commercial enterprise into which the petitioner has allegedly invested.

On appeal, counsel summarizes the evidence submitted and asserts that when the petitioner initially transferred the funds to counsel, it was with the understanding that $470,000 would be maintained in a custody account and $30,000 would be transferred for partnership expenses. Thus, $30,000 was wired to Immigration Investment Services (IIS) and $469,549 was transferred to CMB Development Limited Partnership II on June 1, 1998. According to counsel, after the precedent decisions were issued, the investment strategy was changed to comply with those decisions. Thus, CMB Development Limited Partnership II returned the $469,549.04 to the custody account, which was transferred back in August 1998. In addition, according to counsel, IIS returned the $30,450.96 which was then forwarded to CMB Development Limited Partnership II. The petitioner submits a letter from Patrick Hogan, Managing Member of the General Partners, confirming these transactions.

Without transactional evidence tracing the funds of all investors, the petitioner cannot trace his funds to the Partnership in June, back to the custody account in August, and back to the Partnership the same month. All funds in pooled investment schemes must be separately traceable in order to avoid the situation which resulted in the criminal convictions of James O'Connor and James Geisler for their participation with the InterBank investment program. In a published decision, the judge made a finding of fact that InterBank wired much of the same money to and from the Bahamas to create the appearance of several investments. United States v. James F. O'Connor and James A. Geisler, Criminal No. 00-285-A, 8-9 (E.D. Va. Aug. 16, 2001). While we in no way suggest such criminal actions took place in this case, the InterBank situation is referenced as an example of why, when funds are moved back and forth between pooled accounts and custodial accounts, the Service must be able to trace the funds of a particular investor.

Similarly, it is not clear whether the $30,000 from the general investor account can be attributable to the petitioner, as the funds did not originate from the petitioner's individual trustee account, and the general investor account appears to be a common account.

Furthermore, in Matter of Izummi, 22 I&N 169 (Comm. 1998), the AAO discussed various features common to investment plans and found them nonqualifying. The AAO determined, for example, that an arrangement whereby a petitioner could resell his partnership interest back to the partnership for a refund of part or all of his initial contribution constituted a loan to the partnership and therefore did not constitute an "investment" within the meaning of 8 C.F.R. 204.6(e) and failed to place the capital at risk as required by 8 C.F.R. 204.6(j)(2). 8 C.F.R. 204.6(j)(2) provides that, at the time of filing, the petitioner must already have placed the full requisite amount of capital at risk in profit-generating, employment-creating activities.

In the initial brief, counsel claimed that the capital contributed to the Partnership was immediately at risk, that the investments by the limited partners were made in cash rather than promissory notes, and that the limited partners had no contractual right to exit the Partnership and recover all of their invested capital even if their petitions for immigrant status were denied. He asserted that the investment arrangement contained no provisions for prohibited redemption agreements, prohibited guarantees of return on the investments, or prohibited reserve accounts.

Counsel did state, however, that if a limited partner failed to obtain approval of his immigrant-investor petition within 24 months, that limited partner would have the contractual right to withdraw from the Partnership and request payment of the then-present value of his interest. He claimed that this right to withdraw was not a money-back guarantee, since the money invested in PPII and lent to IVDA had already been given to those entities. The Partnership would, in the event of withdrawal, give the limited partner a share of Partnership assets including a distribution of shares in PPII, plus a pro rata share in the Partnership's stream of income, plus a pro rata share of cash on hand.

Section 8.06 of the restated partnership agreement states that the Partnership is not obligated to redeem or purchase a limited partner's interest at any time or under any circumstances. Section 8.07 of the agreement, however, sets forth the right of "termination." A limited partner's interest may be terminated by the partner after 24 months if he is unable to obtain conditional resident status within that period or if he obtains such status but is unable to have the conditions removed. The limited partner would receive funds and/or property, in liquidation of the then-present value of his terminated interest, within six months.

Section 8.07 of the agreement further provides that a limited partner may terminate his interest prior to the 24 months, upon his whim or upon his failure either to achieve conditional resident status or to have the conditions removed. In this event, the limited partner's payment would be reduced by "expenses" of $20,000 or $60,000, depending on whether he had filed the Form I-526 yet and whether the petition had been approved at the time of termination. In other words, a petitioner may choose to terminate his interest, and receive a refund, even if his Form I-526 is approved.

Whether counsel calls this a right of redemption or a right of termination, funds are still returned and the effect is the same; funds are prevented from being placed at risk. Counsel conceded in his brief that, while the General Partner had the legal right to invest all of the capital in the Partnership's possession and eliminate all cash on hand:

> In fairness and consideration of the expectations of the Limited Partners to obtain U.S. immigration status, unless Petitioner can obtain approval of his I-526 petition from INS, it is unlikely the General Partner would tie-up Partnership Capital any more than it already has done with the Poly-Pacific and IVDA investments. The General Partner retains the discretion to do what it considers to be fair for its Partners.

In a declaration dated July 15, 1999, Patrick Hogan, the managing member of the General Partner, stated that he was reluctant to deploy funds until he could determine whether even one of the limited partners would be able to obtain approval.[2] Under the provisions of the termination section, however, the General Partner might also be reluctant to deploy funds even if a limited partner did obtain an approval, as that limited partner would still have the right to terminate his interest at any time after the approval.

Insofar as whether the petitioner could receive a full refund of $500,000 via the termination provision, it should be noted that the Partnership had, as of June 29, 1999, $1,736,168.38 in cash available. It also had a $270,000 note receivable to be paid by Immigration Investment Services on or before January 31, 2001, which is less than two years after the filing of the instant petition (July 19, 1999). This $270,000 note bears seven-percent annual interest, which amounts to $18,900 per year. The IVDA note bears 6.5-percent annual interest, which yields the Partnership $42,250 per

[2] It is noted that this reluctance appears to violate section 4.01.3 of the restated partnership agreement, which states that use of capital shall not be conditioned on approval of immigrant status for limited partners.

year. The PPII preferred shares pay a five-percent annual return, which amounts to $100,000 per year.

The PPII shares are also convertible to common stock, at any time within five years, at a ratio of 1.54 common shares to one preferred share. The petitioner had stated elsewhere in his brief that the Partnership could sell its common shares immediately upon converting them and, even at a per-share price of only $1 per common share, the Partnership would realize a return of $4,666,508.[3] It is noted that $4,666,508 divided by nine limited partners is $518,500.88, which is more than each partner's share of $500,000. In other words, whether the Partnership converted its shares in order to give a withdrawing limited partner cash or simply gave the limited partner his share of PPII shares, the shares plus the income stream plus other cash on hand appear to be sufficient to refund the entire $500,000 to each limited partner.[4]

While the director did not raise this issue, this office has raised concerns regarding the termination rights in the reversal of a certified approval of a petition filed by another limited partner. Thus, on appeal, counsel anticipates our concerns and addresses them as follows.

Counsel asserts on appeal that a limited partner can only take advantage of the termination provisions if that partner is unable to obtain immigration benefits. Section 8.07, however, expressly allows a limited partner to terminate his interest for at least a partial refund "earlier than the twenty-four month period, or if the Limited Partner is unable to obtain conditional residence (or removal of conditions)." Regardless, this provision still raises the concern that the Partnership will refrain from investing all of the money to ensure that any Limited Partner who fails to obtain immigration benefits will be able to obtain a refund.

In any event, as is verified by the Partnership's current situation, the termination provision prevents the full amount of capital from being placed at risk. 8 C.F.R. 204.6(j)(2), however, requires that at the time of filing of a petition, the entire amount of capital must already have been placed at risk.

IVDA loan

Similarly, this office raised concerns with respect to the IVDA loan regarding the termination rights in the reversal of a certified approval of a petition filed by another limited partner. Again, counsel anticipates our concerns at this level and discusses them on appeal.

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[3] PPII's shares are traded on the Alberta Stock Exchange. As an aside, it should be noted that the subscription agreement by which the Partnership agreed to purchase the preferred shares states that any shares that remain unconverted as of April 1, 2004, may be repurchased by PPII at their original issue price.

[4] According to section 6.01 of the restated partnership agreement, the General Partner may purchase, at the Partnership's expense, liability and other insurance to protect Partnership assets. It is not known if this includes insurance against termination.

In his brief accompanying the Form I-526, the petitioner explained that, whereas his earlier petition based on the Partnership had been denied because the Partnership had not commenced any concrete business activity, the Partnership had now irrevocably invested $2.65 million of the $4.5 million collected from the limited partners. See Matter of Ho, 22 I&N 206 (Comm. 1998). He referred to the $2 million invested in PPII and the $650,000 lent to IVDA.

It is clear that the IVDA loan does not constitute a qualifying investment. First, as discussed earlier, the Partnership had nothing to do with the loan since it was the General Partner who extended the loan in June 1998. The General Partner merely assigned the right to repayment to the Partnership a year later.

Second, the record contains no evidence of the basis on which the Partnership acquired this right to repayment. It is not known if, for example, the Partnership purchased the note from the General Partner, and if so, at what discount. The act of purchasing loans, though, is not the type of at-risk, employment-creating activity contemplated by the regulations. If the Partnership did not pay for the note, then a default by IVDA would risk nothing. The Partnership would simply lose a gratuitous source of income.

Third, the various arrangements evident in the record raise serious questions as to the assignment itself. The Partnership's business plan states, "It is the intention of [the General Partner] to garner the support of at least 40 foreign national investors to its proposed regional center activities." The name of the Partnership here is CMB Development Limited Partnership **II**, implying that other partnerships exist. The petitioner's alleged funds have transferred easily through a number of different accounts, including a common "investor account" belonging to counsel and an account belonging to a different partnership. The funds routed to this Partnership on the petitioner's behalf have come from both the general investor account containing other investors' money and the petitioner's individual trust account. Section 4.01.2 allows limited partners' funds to be deposited in custody accounts authorized by the General Partner. Funds and "investments" appear to be passed around easily among the limited partners, counsel, the General Partner, and the various partnerships. It is not clear whether the assignment of the IVDA note was a mere convenience in order to allow this Partnership to be able to point to an additional use of its $4.5 million, or if the note would subsequently be assigned to another partnership to enable that set of limited partners to claim eligibility for immigrant-investor status.

Fourth, as a general matter, lending money to a government agency does not constitute a qualifying investment. It is similar to purchasing a municipal bond.

For these reasons, the IVDA loan does not constitute a qualifying investment.

Anticipating these concerns as they have been previously expressed in a previous Administrative Appeals Office decision regarding another limited partner, counsel asserts that the Partnership's funds were used to finance the loan, that the IVDA could default on the loan, that the petitioner had already "invested" when the funds were transferred to the Partnership and the Partnership's subsequent use of those funds is "immaterial," and that this situation involving a loan by the Partnership is not the same as a petitioner who loans money to the new commercial enterprise.

We do not find these arguments persuasive. While we agree with counsel that a petitioner may invest equity in a lending institution, the petitioner in this case is not investing in a company that provides lending services to customers. Rather, the petitioner is "investing" in a "company" that is essentially an investment conduit for the petitioner. While we acknowledge that limited partnerships are an acceptable business form, since this case involves what is essentially a pass-through investment, unlike a shareholder and director of a bank, we must carefully examine the ultimate character of the investment.

Contrary to counsel's assertion, how the Partnership uses the "invested" funds is material. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho, supra). In addition, Matter of Izummi, supra, held that funds used to pay partnership expenses not related to the employment-generating entity cannot be considered part of the investment. Thus, the Service may look beyond whether the funds were transferred to the Partnership.

Patrick Hogan, president and CEO of the General Partner, actually concedes that funds from prior partnerships were used to loan the $650,000 to IVDA. That the Partnership subsequently purchased an existing loan is not an employment-generating activity regardless of whether the petitioner risks default. As such, we cannot conclude that those funds are properly at risk for purposes of this program.

Future activities

8 C.F.R. 204.6(j)(2) requires that, at the time of filing, the full requisite amount of capital must already be placed at risk in profit-generating, employment-creating activities. The Partnership here has expended only $2 million of its $4.5 million thus far. According to Mr. Hogan's declaration, the Partnership "intends to invest its remaining Capital for redevelopment purposes at the former Air Force Base" and is "considering additional investment opportunities." As stated in 8 C.F.R. 204.6(j)(2), however, a mere intent to invest is not sufficient to show a present, irrevocable commitment. In addition, considering that the termination provision of the partnership agreement allows termination even in the event a limited partner's immigrant petition is approved; that the termination provision allows for terminations after two years; and that the termination provisions are a significant factor for the General Partner when it "retains the discretion to do what it considers to be fair for its Partners," the remaining funds may never be invested.

The investments so far already deviate from the business plan. For example, the Partnership's Business plan, page 13, includes the following "portfolio mix" for the full $4.5 million allegedly invested:

Public Sector - Direct	$900,000
Public Sector - Indirect	$450,000
Asset Based Credit Lines	$900,000
Permanent Working Capital Investment	$225,000

Capital Equipment Acquisition	$225,000
Equipment Leasing	$450,000
Tenant Improvement Investment	$225,000
Real Estate Acquisition Investments	$675,000
Equity Investment	$450,000

Yet, the Partnership purchased $2,000,000 in equity investments when it purchased the shares of PPII.

The Partnership's purported intent to invest in additional activities sometime in the future does not represent the placement of capital at risk. The record contains no irrevocable investment or escrow agreements whereby the Partnership's funds will be committed upon approval of the investors' visa petitions.

For all of the reasons discussed above, it cannot be concluded that the petitioner has met the investment requirements of the regulations, and the petition must therefore be denied.

SOURCE OF FUNDS

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

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (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
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, supra at 210-211; Matter of Izumii, supra at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, 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 the brief accompanying the Form I-526, counsel acknowledged that his earlier petition had been denied because he had failed to submit sufficient evidence of the lawful source of his investment funds. Counsel asserted that the petitioner was the sole owner of Cal-Mex Trading, Inc. and H&K Associates and that he received a large inheritance. The petitioner submitted several tax returns for Cal-Mex, Inc., H&K Associates (of which the petitioner is a 50 percent owner), and himself. The petitioner's uncertified tax returns reflect that he earned a total of $588,402 between 1993 and 1997, or an average of $117,680 per year. The petitioner also submitted an uncertified translation of a "verification" from the Kanto Law Office in Japan confirming that in 1991 he inherited 55,000,000 yen or $495,5000 in addition to real estate, timber land, furniture, and other personal belongings. As stated above, the petitioner also submitted evidence that in April 1998, he transferred $500,000 from his account at Sumitomo Bank in California to counsel. Finally, the petitioner submitted August 1998 statements from three accounts showing a total of $89,688.11 plus two annuities.

In response to the director's request for additional documentation, the petitioner submitted his Sumitomo bank statements from December 1997 through May 1998. These statements reflect that the petitioner maintained an aggregate balance in these accounts of over $490,000 from December 1997 through April 1998. In April 1998, the petitioner transferred $502,359.43 from some of his other accounts at Sumitomo into accoun[redacted]and transferred out a total of $500,025.

The director concluded that Cal-Mex could not be considered a source of funds since the petitioner had not demonstrated "that at least a portion [of the money derived from Cal-Mex] was in the petitioner's account prior for [sic] the said investment." Also, the director determined H&K Associates could not be considered a source of the petitioner's "investment" because the company itself did not earn money. The director further concluded that inheritance documents were "vague" and did not contain a seal. In addition, the director noted that the petitioner's tax returns were filed jointly with his wife and reflect three dependents, concluding that the petitioner's income could not account for the accumulation of $500,000 in addition to household expenses.

On appeal, counsel argues that the petitioner established that he personally was the source of the "investment" and that the record contains no evidence "to support even an inference that the petitioner's capital came from an unlawful source." Counsel argues that Congress did not intend for the petitioner to bear the burden of establishing that his funds were lawfully obtained. In addition, counsel argues that the petitioner complied with the regulations by submitting tax returns. Counsel notes that the director did not assert that the petitioner had failed to comply with the regulations by not submitting the required documentation, but, instead, questioned the "level" of the petitioner's income.

More specifically, counsel asserts that evidence that the petitioner had maintained sufficient funds prior to the investment was submitted since the Sumitomo statements reflect sufficient funds since December 1997. Counsel further asserts that H&K Associates' tax return was only submitted to comply with the regulations and concedes that the petitioner did not derive his funds from this business. Counsel questions the director's characterization of the inheritance documentation as "vague," and asserts that "better" documentation is not available in Japan so long after the inheritance takes place. Counsel notes that the director did not allege that the Service has evidence that the petitioner did not inherit the money and property claimed. Counsel further questions the director's determination that the petitioner's income could not account for the accumulation of $500,000, asserting that the petitioner's income reflects a steady flow of cash. Counsel asserts that the director's reliance on Matter of Treasure Craft of California, supra, is inappropriate since that case only required evidence beyond "going on the record" in cases where facts to the contrary are commonly known. Finally, counsel argues that the Service's regulations regarding this issue were promulgated illegally since the proposed rule did not set forth the types of evidence necessary to demonstrate a petitioner's source of funds.

We will address counsel's challenges to Service regulations and application of those regulations first. Counsel argues at length that the Service promulgated the "source of funds" regulation (8 C.F.R. 204.6(j)(3)) illegally, in violation of the Administrative Procedure Act (APA), because the proposed regulations did not include any specific evidentiary requirements on this issue.[5] As counsel himself concedes, however, the Service is bound by its regulations. Counsel has not demonstrated that any federal court has overturned the regulation in question. In fact, as stated above, while not addressing specifically whether the regulation violated the APA, the Eastern District Court of California found that the requirements set forth in that regulation "are hypertechnical requirements to serve a valid government interest; i.e., to confirm that the funds utilized in the program are not of suspect origin." Spencer Enterprises, Inc. v. United States, supra, at 22. Thus, the director did not err in relying on 8 C.F.R. 204.6(j)(3).

We also disagree with counsel that a petitioner can meet his burden by simply providing five years of tax returns regardless of the information on those returns. If the director cannot evaluate whether the income levels on the tax returns can account for the accumulation of the invested funds, there is no point in requiring such documentation. The fact that an individual can demonstrate some legal income is not evidence that all his income is lawfully acquired. In fact, evidence of large assets in the absence of substantial wage or investment earnings is inherently suspicious without credible documentation of a civil judgment, gift, or inheritance. We will discuss the evidence of the petitioner's inheritance below.

Nor do we find that counsel has persuasively distinguished Matter of Treasure Craft of California. In that case, the Regional Commissioner stated:

> It has been decided that the burden of proof to establish eligibility for the benefits sought rests with the petitioner in visa petition proceedings (Matter of Brantigan,

[5] We note that the proposed regulations did require lawfully obtained capital as part of the definition of "capital."

> 11 I. & N. Dec. 493). *Therefore*, counsel's argument that the petitioner need only go on record as stating that training is not available outside the United States is rejected in this matter.

(Emphasis added.) Only then does the Regional Commissioner go on to take administrative notice of facts contrary to those alleged by the petitioner in that case. The use of the word "therefore," emphasized above, clearly indicates that the Regional Commissioner was rejecting the petitioner's unsupported statements "on the record" because the petitioner bore the burden of proof. The "common knowledge" discussion that follows the above quote simply constitutes additional reasons to reject the petitioner's unsupported statements. Regardless, the proposition that a petitioner cannot simply "go on the record" regarding the source of his funds is reaffirmed in both Matter of Soffici, 22 I&N 158 (Comm. 1998) and Matter of Ho, supra. We are bound by those precedent decisions, which have been upheld by every federal court to review them, including the Ninth Circuit. Golden Rainbow Freedom Fund v. John Ashcroft, No. 00-36020 (9th Cir. Nov. 26, 2001).

In light of the above, the director was correct to rely on Matter of Treasure Craft of California. As we have rejected counsel's allegations of legal errors, we must examine whether the director made any errors of fact, as also alleged by counsel.

We acknowledge that the director does not appear to have considered the Sumitomo statements that reflect that the petitioner maintained over $490,000 in that bank from December 1997 through April 1998 when he transferred $500,000 to counsel. Nevertheless, we share some of the director's other concerns. The petitioner's income as reflected on his tax returns as the total household income to cover a family of five does not appear to account for the accumulation of $500,000. Thus, we must look to the petitioner's inheritance as a possible source of funds. We do not agree with the director that the "verification" of the petitioner's alleged inheritance is "vague." Nevertheless, the petitioner submitted uncertified translations of this documentation despite the requirement in 8 C.F.R. 103.2(b)(3) that all translations be certified. In addition, the director's statement that the documentation bears no "seal" appears to reflect the director's concern that the documentation is, essentially, a letter from a Japanese law firm. While counsel asserts that "better" documentation was not available seven years after the event, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). 8 C.F.R. 103.2(b)(2)(ii) provides that when a record is not available, the petitioner must provide "an original statement on government letterhead establishing this from the relevant government or other authority." The petitioner has provided no official documentation from a probate court or similar Japanese authority evidencing the inheritance. Nor has the petitioner submitted his Japanese tax return from 1991. While we acknowledge that the regulations only require five years of tax returns, in a case where the funds originate from an eight years old event, it can be expected that the petitioner provide older documentation.[6]

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[6] 8 C.F.R. 204.6(j) provides that the Service may request evidence in addition to the evidence required by 8 C.F.R. 204.6(j) where deemed appropriate.

Moreover, even if we accepted the uncertified translation of a letter from a law firm regarding the petitioner's inheritance, he received that inheritance seven years before transferring the $500,000 to counsel. The petitioner has not demonstrated that he maintained his inheritance untouched during those seven years. It is noted that in 1993, the petitioner was only earning $14,108 interest on his investment accounts whereas he was earning $29,045 in interest by 1997, an increase of 106 percent.

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

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

(Emphasis added.) According to page 29 of the restated partnership agreement, the General Partner has invested $5,000 in the Partnership[7] while the nine alien limited partners have each invested $500,000. These nine limited partners are: the petitioner [redacted]

The director determined that the petitioner has not presented any documentation whatsoever as to the sources of funds contributed by the General Partner and the other eight limited partners.

On appeal, counsel does not address this issue directly. In his declaration, Patrick Hogan, president and CEO of CMB Export LLC, the General Partner, personally vouches for the lawful source of all of the Partnership's funds. We do not find this assertion persuasive. In another pooled investment scheme, the promoters of InterBank vouched for the lawful source of their investors' funds. In a published decision, however, the judge in the criminal trial of the two promoters made a finding of fact that the funds were simply wired to and from the Bahamas for each investor. United States v. James F. O'Connor and James A. Geisler, supra. While we do not suggest criminal malfeasance in this case, we note the InterBank case as an example of why we need more than the assurances of the promoters.

The petitioner could perhaps argue, with respect to the eight limited partners, that such evidence has been or will be furnished with those aliens' petitions and does not have to be provided here. It should be noted, however, that each petition must be fully documented on its own, and each petitioner must demonstrate eligibility on his own. A petitioner cannot rely on documentation that may or may not have been submitted by a different petitioner. The petitioner fails to meet the requirements of 8 C.F.R. 204.6(g)(1), and the petition must be denied.

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[7] The notes to the Partnership's financial statements for the periods ending June 30, 1999, and March 31, 1999, say instead that the General Partner has invested $3,000.

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 appeal is dismissed.