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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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: EAC-98-081-50070 Office: Vermont Service Center Date: JAN 1[illegible] 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, Vermont 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 a qualifying investment, the source of the funds allegedly invested, or that the allegedly invested funds had been made available to the employment-generating enterprise. The director also found that the "sinking fund" described in the Partnership Agreement was disqualifying.

On appeal, counsel argues that the petitioner provided sufficient evidence of the investment and the source of those funds. Counsel notes that the petition was filed as a "skeletal" petition and argues that the director should not have denied the petition without first issuing a request for additional evidence. Counsel further argues that the terms of the Partnership Agreement were not disqualifying, especially after the agreement was amended. Finally, counsel argues that the director erred in relying on precedent decisions issued after the petition was filed.

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 record indicates that the petition is based on an investment in a business, Invest in America, L.P. The General Partner of Invest in America is InterBank Corporate Services, Inc. and the initial Limited Partner is InterBank Group, Inc. Invest in America was formed for the purpose of acquiring interests in "operating companies" that would agree to subcontract employees from Invest in America. The operating companies were purportedly based in a targeted employment area or rural area for which the required amount of capital invested has been adjusted downward. The director did not contest that the *proposed* employment would occur in a targeted employment area or a rural area. Thus, the required amount of capital in this case would be $500,000.

On appeal, counsel herself raises the issue of criminal allegations leveled against the founders of InterBank, James O'Connor and James Geisler upon which the director did not rely. As counsel

raised the issue on appeal, however, we will consider her arguments. Counsel attempts to characterize the investigation as improper, stating that it was "secretly initiated" and that the Service seized documents that "decapitated" the headquarters of the operation. Counsel further accuses the service of raising "ungrounded suspicions" and providing misleading information to the operating companies that created an "adversarial" relationship that ultimately led to the "temporary" closure of the operating companies as of June 1999.[1]

The government's allegations against James O'Connor, president of InterBank, and James Geisler, a paid consultant of InterBank, were not "ungrounded." Rather, both individuals were tried on criminal charges relating to the Invest in America scheme in federal court. United States v. James F. O'Connor and James A. Geisler, Criminal No. 00-285-A (E.D. Va. Aug. 16, 2001), [hereinafter Decision]. In a 49 page opinion, the judge made significant findings of fact regarding the Invest in America scheme and found the defendants guilty of all charges, including immigration fraud, tax fraud, wire fraud, and money laundering. On January 11, the judge sentenced Mr. O'Connor to 124 months and Mr. Geisler to 112 months. They were also ordered to pay restitution of $17.6 million. The judge's findings of fact seriously undermine the credibility of the documentation submitted in support of this petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).

INVESTMENT OF CAPITAL

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

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

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[1] Counsel makes other allegations about the Service's handling of the EB-5 program that are simply irrelevant to the adjudication of this petition. As the allegations are distorted, however, they reflect on counsel's credibility. For example, counsel asserts that no EB-5 petitions were approved in 1999. As evidence of this "fact," however, she relies on a survey performed by AILA in January of that year. In fact, the Service did approve approximately 140 EB-5 petitions that year.

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

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner filed the instant petition on January 23, 1998. The accompanying cover letter stated that the petition was submitted as a "skeletal petition," and additional evidence would be submitted upon receipt of a request for additional documentation.

The initial submission included considerable documentation relating to the alleged new commercial enterprise itself, Invest in America, L.P. While the petitioner indicated on the Form I-526 that the initial investment of $500,000 was made on an unspecified date, the initial submission included no evidence of this alleged investment.

Subsequently, the petitioner submitted evidence regarding an amendment to the partnership agreement. This supplemental submission, however, included no evidence of the petitioner's alleged investment of $500,000.

The director concluded that the petitioner had not established that any of the petitioner's funds had been invested into the Partnership.

On appeal, counsel argues that Service policy at the time was not to reject "skeletal petitions," filed immediately before the expiration of 245(i). Counsel argues that pursuant to this policy and in accordance with 8 C.F.R. 103.2(a)(8), the director should not have denied the instant petition without first requesting additional evidence.

Counsel's argument is flawed for several reasons. First, the petition was not rejected. Thus, the director did not violate Service policy not to "reject" skeletal petitions. Moreover, 8 C.F.R. 103.2(a)(8) states that where there is no evidence of ineligibility but necessary information is missing from the record, the director shall issue a request for additional evidence. In the instant petition, however, the record did contain evidence of ineligibility. Specifically, as will be discussed below, the Partnership Agreement contained disqualifying provisions. Thus, the director was not required to request additional evidence.

Regardless, the most appropriate remedy for the director's failure to request additional evidence is to consider on appeal or motion the documentation that might have been submitted in response to such a request for evidence. The petitioner, however, does not submit any evidence of a personal investment on appeal. Thus, the petitioner has not established that additional evidence existed which would have established that the petitioner invested any personal funds into Invest in America, L.P.

As stated above, on the Form I-526, the petitioner indicated a personal investment of $500,000 on an unspecified date. On Section 4 of the petition, the petitioner indicated the investment consisted of $500,000 in "property" transferred from abroad and no debt financing.

On appeal, counsel asserts for the first time that many of the Invest in America, L.P. investors actually borrowed their investment funds. She states:

> As an additional market attractor, InterBank promoted significant financing opportunities with independent lending institutions which were neither owned nor controlled by any InterBank entity or principal. The independent lending institutions provided up to U.S.$400,000 in cash financing to qualified individuals for the purchase of limited partnership units of the Invest in America Limited Partnerships. The lenders required each borrower to submit a loan application presenting a detailed individual financial profile.

Counsel adds, "in addition, the lenders required borrowers to pledge their limited partnership interest as security for the loan." Counsel concludes:

> This type of capital investment complied with the regulatory definition of "capital" since it did not involve using assets of the enterprise as collateral security, the investors' own assets were the sole security for any loans comprising

> part of the original investment, and the investor was personally and primarily liable for repayment of the loan to the outside financial institution.

The investment of cash obtained as a loan from a third party is not simply an investment of cash that need not be examined further. In Matter of Soffici, 22 I&N 158 (Comm. 1998), the new commercial enterprise itself was the borrower, not the petitioner. However, the decision states:

> Even if it were assumed, arguendo, that the petitioner and [the new commercial enterprise] were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital."

Id. at 162. Thus, the precedent exists for examining third party loans as contributions of indebtedness, not cash.

If we were to accept all unsecured third-party loans as contributions of cash, and not indebtedness, a businessman who obtains a business loan secured by the assets of the business but funnels the funds through his own account first is contributing cash, and not indebtedness. Therefore, whether the loan was secured by the businessman's assets, the assets of the business, or completely unsecured would be irrelevant. The regulations, however, clearly preclude such financing. The fact that a petitioner obtains his third loan from his own business instead of a bank does not change the situation.

Furthermore, if the term "indebtedness" in the definition of "capital" only referred to a promise by the petitioner to pay the new commercial enterprise, as was the case in Matter of Izummi, 22 I&N 169 (Comm. 1998) and Matter of Hsiung, 22 I&N 201 (Comm. 1998), then the definition in its entirety would be absurd. The definition precludes "indebtedness" secured by the new commercial enterprise. Secured loans are secured by the assets of the promisor or a co-signer, and never the promisee. For example, if party A owes money to party B, it would make no sense for party B to risk his own assets as security. In the event of default by party A, party B would owe himself. As such an arrangement is utterly irrational, there would be no reason for the regulations to address it. Since the regulations *do* preclude indebtedness secured by the assets of the new commercial enterprise, it is clear that "indebtedness," as used in 204.6(e), is not limited to the petitioner's promise to pay the new commercial enterprise, but includes third party loans.

In summary, the regulations preclude the investment of unsecured indebtedness. Since the definition of "invest" would be meaningless otherwise, third party loans must be included as indebtedness. Therefore, the requirements for promissory notes set forth in Matter of Izummi[2] and Matter of Hsiung[3] must be met. This conclusion is supported by language in Matter of Soffici.

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[2] The promissory note must be substantially due in two years. Matter of Izummi, supra, at 25.

[3] The assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a

8 C.F.R. 204.6(j)(2)(v) requires the following evidence of investment:

> 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.

As the record did not and does not contain the promissory note for the alleged financing of the investment, the petitioner has not established that the financing complies with requirements set forth in Matter of Izummi and Matter of Hsiung.[4] Moreover, assuming that the loans existed and that they were secured only by the petitioner's partnership interest, the petitioner bares no risk of losing any of his previously owned assets.

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;
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> (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

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U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, supra, at 4.

[4] In his decision convicting James F. O'Connor, President of the InterBank Group, and James A. Geisler, a paid consultant of InterBank, the judge found that a "loan book" contained 187 alien clients' names, but only 11 of those signed any loan documents. Decision at 7, note 9. The judge also found that the loans were shams, created by funneling the same funds through a Bahamian bank numerous times to create the appearance of several investments. Decision at 8-9.

> the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, 22 I&N 206, 211 (Comm. 1998); Matter of Izummi, supra, at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

As stated above, the petitioner did not even provide evidence of the alleged investment. As such, the director concluded that the petitioner could not demonstrate the source of the alleged investment.

On appeal, counsel argues that the petitioner submitted a bank statement and a check as evidence of an investment. Counsel further argues that InterBank hired several experts to confirm that the evidence of the petitioner's assets was legitimate. Counsel's arguments are not persuasive. The petitioner did not submit any transactional documentation such as a cancelled check. The petitioner submitted only the screen print discussed above. A document reflecting that funds existed in an account at one time is not evidence that those funds constitute the personal investment of the individual identified as the "for the benefit of" account holder.[5]

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[5] In his decision, the judge made several findings of fact, including that Mr. O'Connor and Mr. Geisler devised a "sham loan transaction." Decision at 8. The judge stated:

> To implement the scheme, InterBank, at the direction of O'Connor and Geisler, first opened a "For the Benefit of" (FBO) account at First Union National Bank (FUNB) in Virginia on behalf of a particular alien client, depositing therein the alien's original $100,000 to $150,000 investment in the EB-5 program. Approximately 24 hours after a particular FBO account had been opened, InterBank, again at the direction of O'Connor and Geisler, wired money, usually between $350,00 and $400,000, from a Virginia account controlled by O'Connor and Geisler, to an account controlled by [redacted] in the Bahamas. Jones was then instructed, by facsimile sent from InterBank to wire the money back to a specific FBO account at FUNB in Virginia, raising the total amount of the funds in the particular FBO account, at least for that specific moment, to $500,000. . . . Once Jones had wired the specified funds back to a specific FBO account in Virginia as instructed, Miller, at the direction of O'Connor and Geisler, ordered a print screen from FUNB which, in all cases, reflected an account balance of $500,000 in the particular FBO account. The purpose of the print screen, which was typically sent to InterBank by facsimile, was to serve as false proof to the INS that a particular client had invested the requisite $500,000 in the EB-5 visa program, when, in fact, no such amount had been invested.

Even assuming InterBank employees actually investigated the legitimacy of the documentation of assets,[6] the director did not question the legitimacy of that documentation. Rather, the director found that the petitioner had not established that these assets were the source of the petitioner's investment. As stated above, counsel now appears to acknowledge that the petitioner did not personally contribute the full $500,000 as she alleges for the first time on appeal that many of the InterBank investors actually borrowed the funds allegedly invested.

Finally, counsel is not persuasive when she argues that a mere criminal background check is sufficient to establish the lawful source of the invested funds. The Service's strict adherence to the regulations regarding the source of a petitioner's funds has been specifically upheld in a federal court. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 22 (E.D. Calif. 2001), affirmed 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. The court found that the "hypertechnical" requirements for establishing the lawful source of an investor's funds serve a valid government interest: confirming that the funds utilized are not of suspect origin.

RESERVE ACCOUNTS

The regulations provide that a 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. 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.)

Section II of the operating agreement between Invest in America and the operating company, Market Makers, provides:

> Five years from the date hereof, and extending until the sixth anniversary of the date hereof, Market Makers, LLC will redeem its member shares from Invest in America, L.P. Such redemption will be made at par ($10,000 per share interest.) Market Makers, LLC will tender cash, and have no remaining obligation to Invest in America L.P. whatsoever.

Decision at 8-9. Thus, the screen prints were, in fact, used to document funds that were never invested by alien investors. In light of this fact, the director's conclusion that screen prints alone were insufficient evidence of the petitioner's contribution of funds was not in error.

[6] Counsel implies that the Service should accept her assurances that InterBank employees have sufficiently investigated all potential investors. The conviction of the founders of InterBank on charges arising from the use of false loans to create the appearance of an investment provides a clear example of why the Service must require transactional evidence that clearly demonstrates the path of all invested funds.

In order to guarantee that Market Makers would have the funds to redeem its shares in five years, Mr. O'Connor and Mr. Geisler agreed upon the following resolution:

> The following plan to provide for the redemption of shares being proposed by James F. O'Connor, and seconded, by James A. Geisler, and unanimously carried, Market Makers, L.C. will proceed with the agreement with Invest in America, L.P., and using commercial paper, high-grade, high yield securities, and/or a mixture of investment grade instruments will create a sinking fund for the liquidation of the obligation to repurchase the shares. It is anticipated that 45-50% of the sum advanced by Invest in America, L.P., will be used to create the reserves. These funds may not be used for any other purpose, and may not be pledged as collateral by the company, or otherwise placed in jeopardy that would compromise the ability of the company to liquidate the redemption provisions of the above referenced agreement.

These reserve funds are, by resolution, not generally available to the job-creating entity. As stated in Matter of Izummi, supra, reserve funds that are set aside to redeem an interest cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk. Relying on Izummi, the director concluded the reserve funds were disqualifying.

On appeal, counsel argues:

> The assertion by the Service that reserves eliminate risk is fundamentally flawed and extremely naïve. The plan for creation of a reserve fund as the partnership raises additional capital, is clearly a conservative and prudent fundamental of sound business practices. The contemplation of a reserve fund should not be a reason for denying an immigrant investor application where the primary requirement is to show the likelihood of investing capital and creating jobs.

Finally, counsel quotes Senator Paul Simon from the legislative record of the EB-5 program:

> The million-dollar requirement or lesser amounts in rural and high unemployment areas should apply to the entire investment, including reserves, and need not be applied only to the operational costs of the enterprise.

We do not find that Izummi conflicts with Senator Simon's intent. Izummi does not preclude the use of any reserve funds. A company may have a legitimate business reason to create a reserve fund. For example, a company may need to prevent the distribution as dividends of funds needed to pay a tax liability or mortgage. Where, as in the instant case and in Izummi, the reserve fund is set up to guarantee the return of the alien's investment, it would be ludicrous to conclude that the alien's investment is at risk. Counsel herself concedes that sinking funds are accounts set up for the redemption of a long-term *debt*. We concur. The sinking fund in this case was set up to redeem Invest in America's interest in Market Makers and, ultimately, the investor's interest. The investor's interest, therefore, is nothing more than a loan. Debt arrangements with the new commercial enterprise are specifically excluded from the definition of invest at 8 C.F.R. 204.6(e).

CAPITAL AVAILABLE TO EMPLOYMENT-GENERATING ENTITY

Matter of Izummi, supra, found that cash reserves set aside to assure that money would be available to refund investors after two years were disqualifying as the funds were not being used for business purposes related to job-creation. Id. at 21-23.

The director noted that the only operating agreement was the one between Invest in America and Market Makers. The director further noted that Market Makers had agreed to form a "sinking fund" with 45-50% of the funds. Thus, the director concluded that the petitioner had not demonstrated that all of his investment funds would be available to the employment-generating entity.

On appeal, counsel argues that a holding company with subsidiary operating companies is a structure expressly permitted in the regulations. The director, however, did not object to the structure of the business. Rather, the director stated that the evidence did not establish that the funds would be made fully available to the business creating the jobs. In light of the reserve fund, we concur with the director.

Nevertheless, the record does not reflect that Invest in America is structured in a way that complies with the regulations. 8 C.F.R. 204.6(e) provides, in pertinent part:

> 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 noncommercial activity such as owning and operating a personal residence.

(Emphasis added.) On appeal, however, the petitioner submitted the alleged 1997 tax return for Market Makers and purchase contracts for other operating companies. The 1997 tax return for Market Makers includes several Forms K-1, reflecting several partnerships had an ownership interest in that company. Thus, Market Makers is not a wholly-owned subsidiary of the partnership in which the petitioner purportedly invested. In addition, the purchase contracts reveal that InterBank Capital, Inc. only purchased a majority interest in Highland Framers of Northern California, Inc., North Valley Lumber and Truss, Inc., and Valley Construction, Inc. As such, those companies are not wholly owned subsidiaries of the Partnership.

Finally, beyond the decision of the director, the record reflects that a significant amount of the $500,000 allegedly invested was for administrative and immigration legal costs. Page 6 of the Private Placement Memorandum permits a refund of the investment if the Service denies the Form I-485. The refund is the full purchase price less $30,000 for legal expenses, filing costs, and other

expenses associated with the processing and filing of the Investor's application. The petitioner does not claim to have paid more than $500,000 to Invest in America. As such, according to the agreement, the Partnership would use $30,000 of the $500,000 to pay the petitioner's immigration legal costs. Matter of Izummi, supra, provides that the Service has an interest in examining, to a degree, the manner in which funds are being applied. Id. at 11. The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. Thus, even if the petitioner had established a personal contribution of $500,000, that amount would need to be reduced by $30,000. While a petitioner need only be "in the process" of investing, the full investment amount must be fully committed. The record does not reflect that the petitioner had placed an extra $30,000 in escrow to be released to the Partnership in the next two years or otherwise irrevocably committed those funds to the Partnership.

RESERVE ACCOUNTS

As stated in Matter of Izummi, supra, an alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Id. at 18. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one.

The AAO further stated that the alien must go into the investment not knowing for sure if he will be able to sell his interest at all after he obtains his unconditional permanent resident status; and if he is successful in selling his interest, the sale price may be disappointingly low (or surprisingly high and more than what he paid). This way, the alien risks both gain and loss. To allow otherwise transforms the arrangement into a loan. Id.

The Private Placement Memorandum provides:

> Unless otherwise agreed, approximately five (5) years after the closing of the Offering, an affiliate of the General Partner will repurchase its member interest of the Venture Business(es) from the Partnership. Repurchase will be for the price paid for the member interest. Limited Partners will tender their respective Limited Partnership interest to an affiliate of the General Partner, and withdraw from the Partnership in the order they were admitted into the Partnership. All distributions upon a sale of the Business(es) are intended to be made under the Partnership Agreement within ninety (90) days after the sale, as part of the dissolution and liquidation of the Partnership.
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> . . .
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> Following Liquidation, each Limited Partner is entitled to a *pro rata* distribution up to repayment of the Purchase Price of his Unit(s) (less reimbursements for legal expenses, offering expenses, and any other out of pocket expenses paid on behalf of the investor) through liquidation of the Partnership's assets.

Section 8.02 of the Partnership Agreement states:

> Special Information and Voting Rights. Five (5) years after the closing of the Offering, on the anniversary date of the investment, each Venture Business will repurchase its member interests from the Partnership. Said repurchase must be for the par value of the member interest. Upon the redemption of the Venture Business(es)'s member interest, any of the Limited Partners may, at their option, elect to tender their respective Limited Partnership interest to the Partnership, and withdraw from the Partnership. However, neither the General Partner nor the Limited Partner will be obligated to repurchase Unit(s) from any person. All distributions upon a sale of the Business will be made under the Partnership Agreement within ninety (90) days after the sale, as part of the dissolution and liquidation of the Partnership, unless otherwise provided for hereinabove. All distributions upon a sale will be made pursuant to Article XIV hereof within sixty (60) days after the sale, as part of the dissolution and liquidation of Partnership interests.

The director concluded that the redemption provisions were disqualifying. The petitioner was assured a willing buyer after five years and the petitioner's interest was limited to the purchase price, precluding any chance of profit. The director acknowledged that these agreements had been amended, but concluded they did not effect the petitioner's eligibility as of the date of filing since the amendments occurred after the date of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izummi, supra, at 7.

On appeal, counsel argues that the original Partnership Agreement only contemplated the repurchase of the limited partner interests, but that no such repurchase was required. Counsel further argues that the director should have considered the new policy that was issued in response to a Service hold on the petition. Finally, counsel challenges the determination in Matter of Izummi that redemption agreements reduce the risk of an investment. Counsel states:

> The Service is incorrect in concluding that redemption of member interests or buy backs are impermissible because they limit or reduce risk. Any agreement to repurchase is only as valuable as the ability of the purchaser to perform.

It is acknowledged that the Partnership Agreement provides that the General Partner and the initial Limited Partner are not obligated to repurchase the investors' interests. Notwithstanding the "Partnership Law Opinion" in the record to the contrary, however, this provision on its face only relieves the General Partner and Limited Partner *individually* from repurchasing the investors' interests. Moreover, it is not sufficient to demonstrate that the Partnership could have purchased the investors' interests for less than the initial purchase price. The petitioner must also "risk" gain.

Nothing in the original Partnership Agreement reflects that the Partnership was obligated to purchase the interest for more that the purchase price if it increased in value.

Counsel's argument regarding the amendments is not persuasive. Counsel argues that Matter of Katigbak can be distinguished and that in this case the petitioner only had to demonstrate that capital "was likely to be invested." Neither the law nor the regulations use the standard "likely to be invested." On the contrary, 8 C.F.R. 204.6(j)(2), as quoted above, provides:

> 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.

(Emphasis added.) The Service must evaluate the terms of the Partnership Agreement as they existed at the time of filing to determine whether the petitioner had placed the required amount of capital at risk as of the date of filing. The amendments all occurred in May 1998, several months after the petitioner filed the instant petition.

In addition, the amendments do not resolve the issue. The amendment to the Partnership Agreement provides, "the second sentence of Section 8.02 of the Original Agreement is hereby amended by deleting the words 'par value' and substituting the words "fair market value." The amendments also add the following sentence, "any repurchase of Limited Partnership interests or Units by the General Partner or the Partnership pursuant to this Section 8.02 shall be at fair market value."

The Private Placement Memorandum was amended as follows:

> LIMITED PARTNER EXIT STRATEGY The second sentence of the paragraph labeled "Limited Partner Exit Strategy" of the PPM is hereby amended by deleting the words "the price paid" and substituting therefore the words "fair market value." In addition, a new sentence reading as follows is hereby added to the paragraph labeled "Limited Partner Exit Strategy" of the PPM immediately following the last sentence:
>
> > Any repurchase of Limited Partnership interests or Units by the General Partner or the Partnership shall be at fair market value.

Market Makers and the Partnership entered into a new agreement that included the following terms. The limited partner could only sell shares or interests it owns in Market Makers for "fair market value." Market Makers could only repurchase its shares or interests from the limited partners for "fair market value." Finally, fair market value would be determined by Price Waterhouse.

Matter of Izummi, supra, states:

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

Id. at 18. We find the reasoning applicable to this case as well. Counsel asserts:

> InterBank intended to repurchase the interests of each of the individual partners, after at least five (5) years, in order to regain 100% ownership of the newly created venture business operating companies. In this manner, InterBank hoped to attract initial venture capital for its new operating companies, establish profitability, then buy-out the initial investors so that InterBank could make a public offering of shares in the new operating companies as the sole owner-offeror.

First, 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). Moreover, even if we accepted counsel's assertion as true, the investors' "investment" was simply a loan of initial venture capital. Regardless, counsel's assertion is directly contradicted by the evidence, which reveals that InterBank had agreed to sell back its interest to Market Makers. Thus, unlike Matter of Izummi, in this case the Partnership will have completely divested itself of its investments in the operating companies when it buys out the limited partners. Thus, it does not appear that any market for the Partnership interests would exist for the general public or even aliens seeking to adjust status under the entrepreneur program.

Regardless of counsel's objections, Matter of Izummi is binding. For the reasons discussed at the end of this decision, the director correctly relied upon Matter of Izummi. Therefore, the director correctly concluded that the redemption agreements were disqualifying.

EMPLOYMENT CREATION

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

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

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

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

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213. In a 1997 unpublished decision, the AAO reversed a Service Center's decision that found that the InterBank business plan was insufficient. Counsel quotes that decision at length. While the plan, as written, may have appeared credible when reviewed, counsel states on appeal that the operating companies were temporarily closed due to the Service's investigation. Thus, it is not now reasonable to conclude that the petitioner will create any employment.

We reject counsel's argument that the investigation itself led to the firing of workers or the closure of legitimate businesses. In his decision, the judge stated:

> After they had created false evidence, through the use of the sham loan transactions and misleading print screens, that each alien client had invested the requisite $500,000 into the EB-5 program, O'Connor and Geisler next devised a scheme to create false evidence that such investment had generated, or would generate within two years, at least ten new American jobs. Thus, at some point in the scheme, O'Connor and Geisler directed that certain InterBank employees be paid, at least on the business records, by Market Makers. In furtherance of the scheme, from January 1996 until August or September 1998, Market Makers leased a small office in Winchester, Virginia from Richard Hardison, on the second floor of a trucking terminal. Also, in April 1997, InterBank leased a small office in Avon Park, Highlands County, Florida from Robert Young. O'Connor and Geisler intended both of these sites to serve as phantom operational centers of Market Maker's purported new commercial enterprise, a telemarketing business in which the alien clients were allegedly investing their funds for the purpose of creating ten jobs. Indeed, InterBank, through O'Connor and Geisler, falsely reported to the INS in the EB-5 applications that each alien client had invested the requisite $500,000 in Market Maker's new telemarketing business. The INS was further falsely advised that this new telemarketing business was to have multiple employee operational centers in both Winchester, Virginia and Highlands County, Florida. In fact, however, just one employee -- an InterBank employee --worked at the Winchester

> location, and one employee -- Geisler's brother-- worked at the Highlands County location.

Decision at 11-12. In light of the above and the lack of IRS certified wage and withholding reports, the employment payroll report for June 29, 1999 submitted on appeal is not credible.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

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

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

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

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

In Matter of Izummi, a petitioner who became a limited partner in a limited partnership over 19 months after the establishment of the limited partnership was found to have had no hand in the partnership's creation and was not present at its inception. Matter of Izummi, supra, at 29.

On appeal, counsel discusses the legislative history of the entrepreneur program, referencing language that the Service should be flexible regarding the form of the entity used. This

language, however, has nothing to do with the requirement that the petitioner personally establish the new commercial enterprise.

In this case, the supplemental materials reveal that as of May 1998, the General Partner and the initial Limited Partner were the only partners in Invest in America, and that the alien investors would only obtain an interest if the Service approved their petitions. Thus, at the time of filing, the petitioner did not even have an ownership interest in the Partnership. In light of the fact that the petitioner never had an ownership interest in Invest in America, we cannot conclude that he "established" this Partnership.

RELIANCE ON AAO PRECEDENT DECISIONS

Counsel argues that the precedent decisions upon which the director relied represented new rules improperly implemented in violation of Administration Procedures Act. Counsel cites several federal cases in support of her argument. She asserts that the precedent decisions depart from long established practice and cites additional case law. Thus, she concludes that the "retroactive application" of these decisions, which were issued after the instant petition was filed, was improper. Counsel argues that the petitioners invested "substantial sums of money – indeed, sometimes their life savings."[7]

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 Izummi, 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).

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

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[7] In his decision finding Mr. O'Connor and Mr. Geisler guilty of immigration fraud, among other charges, the judge stated, "not a single alien client invested the requisite $500,000 in a new commercial enterprise." Decision at 13. The judge noted that most clients provided only between $100,000 and $150,000, but some invested as little as $50,000 or none at all.

See R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) *affirmed on appeal* R.L. Investment Limited Partners v. INS, No. 00-15627, slip op. 15813 (9th Cir. Nov. 20, 2001); Golden Rainbow Freedom Fund v. Janet Reno, supra, *affirmed on appeal* Golden Rainbow Freedom Fund v. John Ashcroft, No. 00-36020 (9th Cir. Nov. 26, 2001); Spencer Enterprises, Inc. v. United States, Case No. CIV-F-99-6117 (ED Calif. 2001).[8]

Regarding the "retroactive" application of the precedent decisions, the 9th Circuit, in affirming the lower court decision in Golden Rainbow Freedom Fund provides:

> 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.

Golden Rainbow Freedom Fund v. John Ashcroft, supra. Given the consistent view of the federal courts that the precedent decisions at issue did not involve rule-making and did not violate the Administrative Procedure Act, we do not find counsel's arguments in this area to be persuasive.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

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

ORDER: The appeal is dismissed.

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[8] It is acknowledged that Chang v. United States, Case No. CV-99-10518 (C.D. Calif. 2001) found that while the precedent decisions did not constitute legislative rule making the Service should consider hardship claims at the removal of conditions stage. The reasoning of the 9th Circuit in Golden Rainbow Freedom Fund, supra, however, quoted in the body of this decision supercedes this lower court decision in the same circuit.