U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 2 7 2013 Office: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter for further action and consideration.

The petitioner seeks classification as an employment creation alien (EB-5) pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicated that the petition is based on an investment in the [redacted] the designated regional center (RC), pursuant to section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000), section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); section 144 of Pub. L. No. 110-329, 122 Stat. 6574 (2008); section 101 of Pub. L. 111-8, 123 Stat. 524 (2009); and section 548 of Pub. L. No. 111-83, 123 Stat. 2142 (2009). The new commercial enterprise (NCE) identified within the regional center is [redacted] The NCE was to release the petitioner's funds to the [redacted] the job creating entity (JCE) upon the approval of the petitioner's Form I-526. As the NCE proposes to create jobs within a targeted employment area (TEA), the required amount of capital in this case is $500,000.

I. LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) 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
>
> (ii) 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).

II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the petition on June 8, 2011, supported by evidence relating to the following issues: (1) the establishment of the NCE; (2) the lawful source of the petitioner's funds; (3) the NCE's location within a TEA; (4) the transfer of the petitioner's capital into escrow; (5) RC related documents; and (6) identity documents.

On April 10, 2012, the director issued a request for evidence (RFE). Specifically, the director requested: (1) evidence that the NCE was located in a TEA; (2) evidence the petitioner will maintain her

investment and that the investment will remain at risk throughout her period of conditional residency pursuant to 8 C.F.R. § 216.6(a)(4)(iii); (3) a more detailed business plan; and (4) evidence relating to the methodologies used to estimate job creation. The petitioner responded on June 28, 2012, with additional documentation.

On December 7, 2012, the director denied the petition determining that: (1) deference should not be accorded to the present petition based on the approval of four other petitions that relied upon the approved March 16, 2011, RC amendment as it appeared "that the approval of those petitions may have been legally deficient"; (2) the March 16, 2011, RC amendment "approval letter from the USCIS did not approve any actual or exemplar projects for the Regional Center . . . [and the] business plan and proposed $42 million loan from the NCE to the JCE was not specifically approved by USCIS as part of the Regional Center amendment"; (3) the alleged 2009 agreement for the NCE to provide the JCE with EB-5 related funds occurred before the RC was approved to invest in the educational services industry and as a result no reasonable nexus existed between the post-completion infusion of EB-5 capital and the expenditures incurred by the JCE to build the dormitory; (4) that the petitioner's investment will not remain at risk throughout her period of conditional residency; and (5) the methodologies utilized to estimate job creation within the RC were not sufficiently reliable.

On January 9, 2013, the petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, counsel asserts: (1) deference should be accorded to approve this petition not solely based on the four previously approved petitions, but also because the petitioner in the present case followed the business plan submitted with the approved March 16, 2011, RC amendment; (2) the director ignored documentation on record as well as longstanding USCIS policy to accept bridge financing; (3) the petitioner's capital was placed at risk as the petitioner relinquished control over the funds placed in escrow; and (4) the job creation methodologies the director questioned are contained within the March 16, 2011, RC amendment approval.

If the RC amendment the director approved on March 16, 2011 contained a comprehensive business plan satisfying the requirements set forth at *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), then that business plan should be afforded deference. In order to determine the extent of the amendment request, the AAO has obtained the record of that proceeding. The March 16, 2011 letter approves a request to amend the RC to include Educational Services among the approved industries. That is the industry at issue in this matter. According to the RC's February 2011 comprehensive business plan, the JCE was to use the investors' funds, released from escrow upon approval of the Forms I-526, "over the course of several years as the [JCE] progresses with certain acquisitions and construction efforts, to benefit the

Page 12 of the February 15, 2011, response to the director's RFE relating to the RC amendment identified the plan to invest $42 million in the educational services sector. This response also indicated that the attached comprehensive business plan explained the planned investment in more detail. The referenced business plan outlined the history of the planned project and indicated that the NCE and the JCE began discussing the planned investment in March 2009. Page five of the business plan provided greater detail regarding the planned investment in the which

would house students. The business plan noted that the residence was completed and was already in use. Specifically, the plan stated:

> Following the 2009 discussion between the [JCE] and the [NCE], construction of the was completed recently for a total cost of $52 million, with the understanding that the [NCE] would provide financial support to the [JCE].

The director did not explain why the business plan submitted at the regional center amendment stage fails to comply with *Matter of Ho,* 22 I&N Dec. at 213. Moreover, the March 16, 2011 approval letter, in the first sentence of the Focus of Investment Activity section, references the submission of both a general proposal and a business plan. The March 16, 2011 letter does not advise that the director is only approving the general proposal, and not the business plan submitted and referenced in the approval letter. Thus, the director should have afforded deference to this plan. Regardless, if the plan submitted in support of the present Form I-526 is the same plan submitted in support of the approved Forms I-526 referenced by counsel, the plan is also due deference. *EB-5 Adjudications Policy,* PM-602-0083, 23 (May 30, 2013).

The director next asserted that even if deference were appropriate, any approval based on the business plan would be legally deficient. Recent policy guidance expands on the concept of legally deficient as follows:

> Since prior determinations will be presumed to have been properly decided, a prior favorable determination will not be considered legally deficient for purposes of according deference unless the prior determination involved an objective mistake of fact or an objective mistake of law evidencing ineligibility for the benefit sought, but excluding those subjective evaluations related to evaluating eligibility. Unless there is reason to believe that a prior adjudication involved an objective mistake of fact or law, USCIS should not reexamine determinations made earlier in the EB-5 process. Absent a material change in facts, fraud, or willful misrepresentation, USCIS should not re-adjudicate prior USCIS determinations that are subjective, such as whether the business plan is comprehensive and credible or whether an economic methodology estimating job creation is reasonable.

EB-5 Adjudications Policy, PM-602-0083, 24 (May 30, 2013). Thus, the AAO is remanding the matter to the director to determine whether prior adjudications involved an objective mistake of fact or law rather than a subjective determination relating to credibility and reasonableness. In making that determination, the director should take into account the following:

> Since it is the commercial enterprise that creates the jobs, the developer or the principal of the new commercial enterprise, either directly or through a separate job-creating entity, may utilize interim, temporary or bridge financing – in the form of either debt or equity – prior to receipt of EB-5 capital. If the project commences based on the interim or bridge financing prior to the receipt of the EB-5 capital and subsequently replaces it with EB-5 capital, the new commercial enterprise may still receive credit for the job

> creation under the regulations. Generally, the replacement of bridge financing with EB-5 investor capital should have been contemplated prior to acquiring the original non-EB-5 financing. However, even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs. For example, the non EB-5 financing originally contemplated to replace the temporary financing may no longer be available to the commercial enterprise as a result of changes in availability of traditional financing. Developers should not be precluded from using EB-5 capital as an alternative source to replace temporary financing simply because it was not contemplated prior to obtaining the bridge or temporary financing.

EB-5 Adjudications Policy, PM-602-0083, 15-16 (May 30, 2013).

In light of the above, the AAO will remand the matter back to the director for consideration under the policies set forth in the May 30, 2013 memorandum quoted above.

III. TRANSLATIONS

As an additional issue, the regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

While not addressed by the director in her decision, the petitioner submitted translations that do not comport with the regulation. Instead the translations are accompanied by a single blanket certification that does not identify any specific document. Moreover, while the blanket certification contains a seal, that seal does not appear on the translations themselves. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value. Thus, the director may wish to request translations that comply with 8 C.F.R. § 103.2(b)(3).

IV. SUMMARY

Therefore, this matter will be remanded. The director must issue a new decision, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). The petitioner has not met that burden.

ORDER: The director's decision dated December 7, 2012, is withdrawn; the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.