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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2010
SRC 08 209 52822

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:

This is the decision of the Administrative Appeals Office 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 you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), denied the preference visa petition. The director then reopened the matter on U.S. Citizenship and Immigration Services (USCIS) motion at the direction of Service Center Operations (SCOPS).[1] Subsequently, the director, California Service Center (CSC), denied the petition, which is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4. The director's ultimate conclusion that the petition is not approvable will be affirmed.

The petitioner filed the instant petition on June 23, 2008 seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petitioner claims eligibility based on an investment in a regional center pursuant to section 610 of the Judiciary Appropriations Act, 1993, Pub. L. 102-395 (1993) as amended by section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000). The regional center, the Capital Area Regional Center Job Fund (CARc), was designated as a regional center by USCIS on November 25, 2005. On May 20, 2008, USCIS issued an e-mail acknowledging that CARc had obtained a new escrow agent and had a new address. Subsequently, aliens began filing Form I-526 petitions based on an investment in CARc. These petitions were supported by substantially amended agreements from those submitted with the original regional center proposal in 2005. The Form I-526s petitions did not disclose that these agreements had been amended from the 2005 agreements. In response to concerns raised by the TSC director, confirmed by the AAO on certification, CARc sought an amendment of the proposal in March 2009, which was approved. A June 2009 amendment request appears to remain unadjudicated.

As acknowledged in correspondence submitted by the petitioner, after the AAO affirmed the denial of a similar petition involving an investment in CARc on certification, expressly advising that post-filing material changes could not be considered, the TSC director denied the petition on March 7, 2009, concluding that certain provisions in the Operating Agreement and Private Placement Memorandum were disqualifying. On March 24, 2009, the TSC director reopened the matter advising that another decision would be issued upon further review. According to a June 13, 2009 letter from [redacted] submitted in response to a request for evidence from the CSC director, SCOPS "directed reopening and transfer of the remaining I-526 petitions [filed by aliens investing in the same company] from the TSC to the California Service (CSC) and allowed the investors to interfile into those petitions a package of amended documents related to the regional center that had been submitted for SCOPS's new approval" in addition to other new documents.

As will be discussed in detail below, the petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). All of the case law on this issue focuses on the policy of preventing unqualified petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition" in the context of a

[1] SCOPS is under the Domestic Operations Directorate directly under the USCIS Director. *See* http://www.uscis.gov/files/nativedocuments/office_overviews.pdf.

petition filed under section 203(b)(5) of the Act.) This reasoning has been extended to nonimmigrant visa petitions, which do not have priority dates, *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l. Comm'r. 1978), suggesting an implicit policy that, in addition to the integrity of the preference system, another consideration is administrative difficulty in reviewing repeated amendments in the context of a single adjudication. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). The designated precedent decisions are binding on all USCIS employees, including SCOPS. 8 C.F.R. § 103.3(c). Given the above, had the petitioner simply filed a new petition upon resolution of the issues identified by the TSC director, many if not all of the issues raised in this decision might have been resolved.

After first issuing a request for evidence and a subsequent notice of intent to deny, the CSC director determined that the petitioner had failed to demonstrate that the original business plan and projections continued to be viable. Thus, the CSC director denied the petition on November 25, 2009 and certified that decision to the AAO pursuant to 8 C.F.R. § 103.4. In compliance with the regulation at 8 C.F.R. § 103.4(a)(2), the director provided notice to the petitioner, through counsel, and advised that a brief could be submitted directly to the AAO within 30 days.

In response, counsel, through the submission of a brief by [redacted] asserts that the regional center is seeking a second approved amendment to the regional center proposal that will include the regional center's current business plan. Counsel submits [redacted] brief and several exhibits, most of which relate to agreements that postdate the filing of the petition. Subsequently, counsel submits the December 23, 2009 approval letter of the latest amendment request. Significantly, the director advised: "This project approval in conjunction with the most recent approved general proposal amendment will allow current investors in this project to proceed with **re-filing** their respective Forms I-526, Immigrant Petitions by Alien Entrepreneurs with the appropriate fee." (Emphasis added.)

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Moreover, this matter was certified to us pursuant to 8 C.F.R. § 103.4 for our review of *all* of the unusually complex or novel issues, including those expressly deemed resolved by the director. Thus, our decision need not be limited to the adverse findings of the director.

On certification, [redacted] acknowledges the AAO's *de novo* review, but states that "there is no reason to create new issues here, and if that were to happen the investors should receive prior notice of issues to address [the] AAO, since the certification decisions did not project a need to address such issues." While USCIS is required to give notice of derogatory information unbeknownst to the petitioner, 8 C.F.R. § 103.2(b)(16)(i), there is no requirement for USCIS to issue either a Notice of Intent to Deny prior to issuance of a decision at the Service Center or for the AAO to do so while a case is on certification.

As stated above, our major concern with the favorable findings by the CSC director is that they are in contravention of binding regulations and longstanding precedent and federal court decisions holding that a petition must be approvable when filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Wing's Tea House,* 16 I&N Dec. at 160; *Matter of Katigbak,* 14 I&N Dec. at 49. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d at 261. Specifically in the context of a Form I-526 petition, the AAO stated, in a precedent decision, that 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 USCIS requirements. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. at 114, that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

[redacted] references an AAO decision on a previous Form I-526 petition involving a CARc investor. In that decision, we held that amendments to agreements or business plans that postdate the filing of the petition would not be considered. Thus, [redacted] is aware that this office has consistently conformed to the requirement that a petition must be approvable when filed and that material changes that postdate the filing of the petition will not be considered. The regional center's decision to continue to pursue these petitions while simultaneously seeking amendments upon amendments, sometimes submitted to USCIS outside the adjudicative process through *ex parte* communications, does not diminish the binding nature of the regulation and precedent and federal court decisions cited above. Thus, we continue to hold that the petitioner must establish his eligibility as of the date of filing and withdraw any inference in the director's decision to the contrary.

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).

As will be discussed in more detail below, an investment must consist of capital placed at risk for the purpose of generating a return, 8 C.F.R. § 204.6(j)(2), and must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi,* 22 I&N Dec. at 179.

The record indicates that the petition is based on an investment in a business, CARc JOB Fund-I, LLC, (the Fund) which proposes to invest in a project located in CARc, a designated regional center pursuant to section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993 as amended by section 402 of the Visa Waiver Permanent Program Act, 2000. The regulation at 8 C.F.R. § 204.6(m)(1) provides, in pertinent part: "Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section." The regulation at 8 C.F.R. § 204.6(m)(7) allows an alien to demonstrate job creation indirectly. The petitioner asserts that the new commercial enterprise will invest in the renovation of the Hotel.

PROCEDURAL HISTORY

The petitioner filed the instant petition on June 23, 2008. Thus, as stated above, the petitioner must establish his eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. The petitioner is a member of the Fund and proposes to invest in CARc, which proposes to invest the Fund's money in the development of the former Hotel in a joint venture with As will be discussed below, the original business plan presupposed ownership of the property to be developed and discussed a collaboration with

In support of the petition, the petitioner submitted a Private Placement Memorandum dated January 1, 2008 and an Operating Agreement dated November 1, 2007. In addition, the petitioner submitted a subscription agreement indicating that the application fee had been waived and that the expense fee had been deferred. The petitioner also submitted a March 7, 2008 Equity Investment Commitment letter from the Manager of the Fund. The commitment letter is addressed to Member of in care of however, did not sign this letter accepting its terms. Further, the petitioner submitted a business plan dated June 15, 2007 prepared by proposing that redevelop the former Hotel. Finally, the petitioner submitted a July 30, 2007 letter from of the Washington, D.C. Office of the Chief Financial Officer, confirming CARc's methodology in combining Ward 2 with other areas to reach an unemployment rate sufficient to qualify the Ward 2 as a targeted employment area (TEA), defined at 8 C.F.R. § 204.6(e).

The November 1, 2007 Operating Agreement defines "Capital Contribution" as including the fair market value of services. This agreement also references reserve accounts in several locations, including the definitions of Available Capital and Fund Expenses. Nothing in the agreement precludes management from diverting invested funds into those accounts. Section 3.4(b) of the Operating Agreement, provides that in determining members' equity, the manager "shall have the right to apportion the Organizational Costs among the Class A Units." Thus, the members' accounts will be reduced in value for the organizational costs incurred by the Fund. In addition, Section 6.4(a) provides that a $35,000 expense fee is due from members. While this fee may be waived, the same paragraph provides that in addition to these fees, "the Fund shall reimburse the Manager and

its Affiliates for all direct, out-of-pocket costs incurred by the Manager, its Affiliates, members, employees or agents in connection with the sale of Units and the receipt of Capital Contributions." Subparagraph (b) further discusses a quarterly portfolio management fee and reimbursement costs to be paid to management. Subparagraph (c) discusses the payment of transaction fees to the managers. Finally, section 3.7 allows the manager and members to enter separate agreements setting forth additional rights and obligations governing the members' acquisition and ownership of Units or other interest in the Fund. That said, we acknowledge that section 12.2 provides that the Operating Agreement "constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and fully supersedes any and all prior or contemporaneous agreements or understandings by the parties pertaining to the subject matter hereof."

The March 7, 2008 Equity Investment Commitment provides, at section 2(D), that the Fund's investment could be in the form of a letter of credit issued by a commercial bank. The letter of credit would only be released to the Project's senior lender upon the substantial completion of the Project's construction. In addition, section 2(A) provides that the first condition for closing is that the "Developer shall have the Project in a legal ownership entity." Thus, this commitment from the Fund contemplates that the aliens' investments would be invested in the joint venture only once the developer owns the project, specifically, the former Hotel. We acknowledge that the June 15, 2007 Business plan prepared by lists the acquisition costs for the purchase of the building. That said, it was clearly contemplated that the Developer would acquire the property prior to any investment by the Fund. The Condominium Schedule on the second to last page of the business plan lists an acquisition date of November 1, 2007, prior to the June 1, 2008 Equity Investment Commitment and the date of filing in this matter. Under Section IV, Development Timeline, the plan indicates that closed the hotel on July 31, 2007, reflecting that which is affiliated with the developer according to page 13 of the Private Placement Memorandum, already owned the hotel property as early as July 31, 2007.

On September 3, 2008, the TSC director issued a request for additional evidence. In this notice, the director expressed concerns regarding certain terms in the Operating Agreement and the methodology in concluding that the investment would be within a targeted employment area. In response, of CARc, responds to these concerns and asserts that CARc will amend some of the provisions with which the director expressed concern. The petitioner submitted a June 1, 2008 Equity Investment Commitment letter from CARc, this one signed by This letter continues to utilize a letter of credit.

As stated above, the TSC director, expressly basing his decision on the reasoning of a certified decision recently issued by the AAO on a similar CARc investment case that raised several concerns relating to the Fund's 2007 Operating Agreement,[2] concluded that the provisions relating to reserve accounts, interim investments, membership units in exchange for services and the waiver of expense fees from the aliens were disqualifying. The TSC director then expressly stated that a petition must

[2] The AAO found that, at the time of filing, the investment area had not been designated as a targeted employment area and that the provisions for capital in exchange for services, reserve accounts, management fees, interim and series investments, redemption of funds not invested and the ability to enter into side agreements were disqualifying.

be approvable when filed, citing *Matter of Katigbak,* 14 I&N Dec. at 49. Thus, the director denied the petition on March 7, 2009.

On April 3, 2009, the TSC director, reopened the matter advising that the case would be further reviewed. A subsequent brief from asserts that SCOPS directed that the petition be reopened in response to a request from CARc.

On April 14, 2009, the petitioner supplemented the record with an amended Operating Agreement and an amended Private Placement Memorandum, as well as a March 27, 2009 letter from SCOPS approving the amendment agreements as an amendment to the regional center proposal. The Operating Agreement was amended and supplemented on January 22, 2009, after the date of filing. Similarly, the Private Placement Memorandum is dated February 5, 2009, also after the date of filing. Section 3.1(a) of the amended Operating Agreement states that EB5 Members must contribute cash as capital.

The amended Operating Agreement now includes section 6.4(d) which provides:

> Anything to the contrary in this Section 6.4 or elsewhere herein notwithstanding the Expense Fee, Management Fee, Transactional Fees and other monies payable hereunder including amounts for Fund expenses to create reasonable reserves, with respect to an EB-5 Member shall be paid first from income of the Fund allocable [*sic*] to such member's Capital Account and, to the extent such income is insufficient to pay the full amount due, thereafter from such member's Capital Account, but only to the extent of the excess, if any, of such Member's Contributed Capital over the EB-5 Minimum Capital Requirement of such Member. Any amount that may not be timely payable as a result of this Section 6.4(d) shall be payable, together with interest as provided in Section 6.4(a), out of the Net Income of the Fund subsequently allocable to such Member's Capital Account.

Sections 3.7 and 12.2 remain unchanged.

The Private Placement Memorandum was revised to provide that interim investments would only be made for such length of time "as is reasonably required to invest such funds in Real Property."

Finally, the petitioner submitted a December 7, 2007 letter from Washington, D.C. delegating the authority to designate TEAs pursuant to 8 C.F.R. § 204.6(j)(6)(ii)(B) to the for Planning and Economic Development. The petitioner also submitted an October 3, 2008 letter from for Planning and Economic Development, Washington, D.C. designating a combination of wards and certain census tracts in Ward 2 as a TEA.

On May 13, 2009, the CSC director issued a Request for Evidence. In this request, the CSC director raised concerns regarding the issuance of membership units in exchange for services or loans, the ability of the manager and members to enter separate agreements and the investment of funds into interim investments that might result in the loss of investment funds. The CSC director also noted

the use of construction loans for the development and that the aliens' investment would only be used as a letter of credit. In light of this limited commitment, the CSC director questioned how these funds would be "at risk." The CSC director concluded with the following language:

> Be advised, while the deficiencies noted above should be addressed in response to this request, changes to the investment scheme, the job creation activity etc may materially affect eligibility for this benefit and may not be allowed. USCIS will evaluate each change independently and depending on the nature and scope of that change, may or may not deem it to be material. Explanations and legal arguments addressing materiality of any change may be submitted with the response.

In response, asserts that changes to the operating agreement and private placement memorandum were informally approved by of the USCIS Foreign Trader, Investor and Regional Center Program (FTIRCP) in 2007. The record, however, contains no evidence to support CARc's belief that the amendments had been approved, formally or otherwise.

The regional center record of proceeding, reviewed by this office,[3] contains a copy of a May 21, 2007 letter from CARc managers to advising of amendments to the operating agreement. The letter references an upcoming May 23, 2007 meeting with The regional center record of proceeding, however, includes no record of this meeting, rendering it *ex parte*. A September 21, 2007 letter from CARc to requests a certificate of good standing but makes no reference to amended agreements. A December 12, 2007 e-mail from CARc's special immigration counsel at the time followed up on a request for a notice of change of address and advised that CARc's escrow agent had changed. While CARc's counsel references a May 2007 meeting with CARc's counsel does not mention any amendments to the operating agreement or inquire as to whether those amendments are acceptable. A May 20, 2008 e-mail message from (FTIRCP) to CARc's counsel confirms CARc's use of a new escrow agent and the company's address change. This detailed e-mail message makes no mention of amendments to the operating agreement other than those changing the escrow agent. These documents do not support claim that CARc repeatedly sought approval of the amended agreements and relied on some type of informal communication that the agreements were acceptable.

Section 557(d)(1) of the APA limits *ex parte* communications, in part, as follows:

> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

[3] Those documents from the regional center record of proceeding referenced in this paragraph have been added to the record of proceeding in this matter.

> (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

Significantly, *ex parte* communications are not part of the record of proceeding and cannot be considered in future proceedings including those relating to Forms I-526 filed based on the approved regional center. Finally, the opinion of a single USCIS official is not binding and no USCIS officer has the authority to pre-adjudicate an immigrant-investor petition. *Matter of Izummi,* 22 I&N Dec. at 196. CARc's informal and *ex parte* communications with a USCIS official, none of which[4] mention the new Operating Agreement and Private Placement Memorandum that differ radically from those approved in 2005, is not a basis for this office to waive the investment requirements set forth in the regulations and precedent decisions or the requirement that material changes are not permitted after the date of filing. *See Golden Rainbow Freedom Fund v. Ashcroft,* 2001 WL 1491258 *1 (9th Cir.) (reliance on a non-precedential position of legacy Immigration and Naturalization Service (INS), now USCIS, is a "gamble" and does not create retroactivity concerns).

then notes that on March 17, 2009, CARc submitted an amendment request to SCOPS, which was approved. continues that the issues raised in the director's request for evidence were resolved through the regional center amendments and should not be "re-hashed in the context of numerous I-526 adjudications with investors." Rather than address the director's question as to whether these amendments are material, concludes:

> The Fund has prepared the responses below to the CSC request for evidence that many investors have received, but the all-or-nothing adjudication of the service center and AAO context is the wrong type of forum for this kind of review in which larger USCIS policymaking should be managed, in which a dialogue of consideration should be conducted with a goal of getting an enterprise/project to approval, and from which the resulting approval can be relied on confidently by the Fund in marketing the investment, by the investors and the Developer in committing their capital, and by the local governmental and elected officials who have supported the CARc Regional Center and its projects.

As stated above, asserts that after SCOPS approved the amended agreements, it directed the TSC director to reopen this petition and those of other Fund investors. These decisions were reopened despite the conclusion by the TSC director, citing *Matter of Katigbak,* 14 I&N Dec. at 49, that a petition does become approvable at a future date if the alien, after the date of filing, becomes eligible under a new set of facts. In an attempt to comply with *Matter if Izummi,* 22 I&N Dec. at 175-76, the CSC director's May 13, 2009 request for evidence advised that material changes postdating the filing of the petition would not be accepted. Nevertheless, rather than address

[4] Specifically, none of the informal communications from USCIS mention these new agreements.

whether the amendments are material, asserts that the CSC director erred in raising concerns addressed by those amendments.

continues:

> The Fund has been seeking approval of numerous initial I-526 petitions for over a year and has been substantially delayed by the inability to obtain such approval. The Fund's managers had thought that all of the documents submitted for regional center approval had reflected that USCIS had accepted them for all purposes. The Fund has amended documents to address USCIS' unexpected questions about these documents.

We reiterate that any delays were caused by CARc's decision to substantially change the agreements approved in 2005 and to rely on purported informal communications as to the acceptability of those documents. We also reiterate that the petitioner has been unable to produce any correspondence from any USCIS office, formal, informal or otherwise, even referencing those documents.[5]

Regarding the director's concern that the funds could be invested in risky interim investments, responds that the amended Operating Agreement and Private Placement Memorandum were approved by SCOPS in March 2009. notes that amended section 2.4 of the Operating Agreement and section VI of the Private Placement Memorandum limit interim investments to interest bearing accounts, government securities or other short term investments.

Regarding the ability to obtain Class A units through services, notes that this provision is not present in the amended Operating Agreement. Regarding the inclusion of provisions that allow the manager to enter into separate agreements with the members, asserts that the Fund needs the flexibility to change investment vehicles should something render the current investment plan unfeasible.[6] asserts that the regional center is aware of its responsibility to advise USCIS of any decision to withhold or withdraw funds from a commercial enterprise.

Regarding the director's concern that a letter of credit does not sufficiently place the investors' funds at risk for job creation, asserts that the Fund is not requiring the typical collateral from the contractors. Rather, in accordance with normal business practices, the Fund is merely restricting the final draw on invested capital to once the construction is complete. concludes that once the construction is complete, the investors' funds will be at risk should the condominiums not

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[5] As stated above, the May 20, 2008 e-mail message from FTIRCP mentions only the change in escrow agent and the change of address. We are unable to infer from this message that is also approving the amendments to the Operating Agreement and Private Placement Memorandum, documents that are not mentioned in this message.

[6] The AAO's concern about these potential side agreements, as expressed in our previous decision referenced by is that they have the potential for disqualifying arrangements not revealed to USCIS, such as a guaranteed return of funds. While the amended agreements have now been approved by SCOPS, we emphasize that it will be the petitioner's burden at the Form I-829 removal of conditions stage mandated pursuant to section 206(A) of the Act to demonstrate that the petitioner's funds remained at risk for job creation during the two-year conditional period.

sell or the restaurant space not attract lessees. does not explain how this risk relates to job creation resulting from the already completed construction.

The petitioner submitted a June 23, 2009 request for approval of an amended plan for the project addressed to SCOPS but no evidence that this amendment request was approved. Significantly, on June 17, 2009, "all petitions and applications related [to] EB-5 immigrant classifications and Regional Center proposals must be filed at the California Service Center (CSC)." *See* Domestic Operations, *EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions* HQDOMO 70/6.1.8 AD09-04, June 17, 2009, p. 7. It can be presumed that applications to amend a regional center proposal would be included within applications related to regional center proposals. Thus, it does not appear that SCOPS was the appropriate authority to approve amendments on June 23, 2009.

In addition, the petitioner submitted a July 2, 2009 letter from acknowledging that had defaulted on its loan for the Watergate but advising that an agreement had been reached between and affiliates, pursuant to which would move to vacate the notice of default. Thus, as of this filing, there was still no need to reacquire the property for development.

The petitioner submitted a July 24, 2009 Equity Investment Commitment letter designed to "supersede in all respects the prior commitment letter, dated June 1, 2008." Section 2(b) of this new letter requires that the invested funds be transferred in cash to the Project's capital account. Thus, the Fund no longer plans to simply issue a letter of credit. As will be discussed below, however, this letter also provides for large fees to be paid to the Fund's manager from this account. As with the June 1, 2008 letter, this new letter identifies the project budget as that identified in the original business plan. The total budget in the business plan is $205,352,942, which includes $86,311,411 in prior acquisition costs and $119,041,531 in future development costs. As discussed previously, at the time this business plan was prepared, had already acquired the project property. Thus, only the $119,041,531 in development costs remained to be funded.

On July 31, 2009, the director issued a notice of intent to deny the petition. The director continued to question whether funds backing a letter of credit would be sufficiently at risk and the Fund's ability to divert invested funds into interim investments. In addition, as was mentioned as a co-developer with on the first page of the business plan, the director inquired as to the viability of the redevelopment project in light of that company's bankruptcy.

In response, notes that the Fund had amended its commitment letter to eliminate the letter of credit. also addresses the director's concerns regarding interim investments and concludes that CARc is negotiating with the bank to reacquire the Hotel.

The petitioner submitted an August 2009 business plan, superseding the June 15, 2007 plan. On page 9, the new plan states:

> While the physical redevelopment plan and its total cost of $205 million remains unchanged from the original business plan, the project has a revised total development cost of approximately $133.9 million, with $104.3 million of that cost allocated to the hotel and $29.6 million allocated to the condo. This variance arises from a reduction of approximately $40 million in cash acquisition cost, due to elimination of mezzanine debt as a result of foreclosure of the partnership loan; and approximately $31 million from a combination of lower than originally projected financing costs and a shifting of the costs to the residential owners and commercial tenants for finish and improvements of the individual condominiums and independently operated restaurant, spa and retail shops ($205 million minus $40 million minus $31 million equals $134 million).

The plan then states that the Fund would provide $25,000,000 in equity. Additional funding would include $28,545,195 in sponsor equity and $80,317,794 in debt. In addition, the plan indicates that is now willing to provide a construction loan of 60 percent of the total project cost.

The petitioner also submitted an August 18, 2009 letter from explaining that the company has taken title to the property and has received letters of intent from several parties interested in acquiring the hotel. The letter, addressed to CARc, invites a best and final offer. Finally, the petitioner submitted an unsigned Confidentiality Agreement addressed to

On November 17, 2009, the petitioner supplemented the record with a November 10, 2009 letter from to advising that has "secured control of the subject property and are ready to proceed with the development and business plan outlined therein on or before December 16, 2009." Finally, the petitioner submitted a November 10, 2009 offer to purchase the Hotel from The price is listed as $41,500,000, requiring a $4,150,000 deposit. The submission did not include any new information from

On November 25, 2009, the CSC director denied the petition. The CSC director accepts that the petitioner had resolved all issues regarding the Operating Agreement and Private Placement Memorandum but states that future changes may result in additional inquiries. We acknowledge that the TSC director reopened this decision at the direction of SCOPS and that the CSC director allowed the petitioner to supplement the record, although the CSC director did initially advise that material changes postdating the petition would not be accepted. Regardless of the purpose behind the decision to reopen this matter and the ultimate acceptance of amended documents by the CSC director, the AAO's relationship with the service centers is comparable to the relationship between a court of appeals and a district court. Thus, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). The AAO, and in fact

all USCIS employees, are bound by the regulatory authority and precedent decisions discussed above which state in no uncertain terms that a petition must be approvable when filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

The director then concludes that the development project is not viable because foreclosed on the property and that the reacquisition costs exceed those previously estimated.

On certification, asserts that these documents are the basis of a regional center amendment before the CSC director that, if approved, would resolve the director's concerns. As mentioned above, counsel subsequently submits evidence that this new amendment request has, in fact, been approved in a letter that explicitly advises investors to refile their petitions.

The petitioner submits a December 8, 2009 updated financing plan, a November 30, 2009 letter of interest from to provide $25 million. An undated loan document from listing the borrower as "To Be Determined" for the lesser of 50 percent of the total acquisition and development costs, 45 percent of the "as stabilized" value or minimum debt service coverage. This financing postdates the filing of the petition. Finally, the petitioner submitted a letter from advising that based on the renovation budget of $80 million for a property included on the National Register, the project would be eligible for a $16 million tax credit.

We will evaluate the above evidence under the appropriate regulations below. In doing so, we will not consider material changes that postdate the filing of the petition. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49. "Material" is defined as "having some logical connection with the consequential facts" and of "such a nature that knowledge of the item would affect a person's decision-making process; significant; essential." Black's Law Dictionary 991 (7th ed. 1999).

MINIMUM INVESTMENT AMOUNT

The director did not contest that the investment will be in a TEA. The November 25, 2005 letter designating CARc as a regional center states that TEA determinations must be made on a project-by-project basis depending on the location of the project. The director's conclusion that the instant project is within a TEA appears based on the October 3, 2008 letter from pursuant to 8 C.F.R. § 204.6(j)(6)(ii)(B). Specifically, while the initial filing included an earlier letter purporting to designate a TEA from there is no evidence that had been designated to determine TEAs within Washington D.C. by the city's mayor pursuant to 8 C.F.R. § 204.6(i). letter, however, postdates the filing of the petition. As no proper designation had been made as of the date of filing, the petition could never be approved and, thus, the director should have advised that this issue has only been resolved for future petitions.[7] *See* 8 C.F.R. §§ 103.2(b)(1),

[7] The proposed investment will be wholly and entirely within Ward 2, a ward that is not itself suffering high unemployment in relation to the national unemployment rate. designation includes Ward 2, but, of necessity, includes other wards and census tracts within D.C. to reach the necessary average unemployment rate. The director's conclusion that we must accept the designation is a reasonable interpretation of 8 C.F.R.

(12); *Matter of Katigbak,* 14 I&N Dec. at 49. In addition, a petitioner must demonstrate that the location of the investment was "considered" a TEA at the time of filing or investment. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm'r. 1998), (cited with approval in *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001)). As the petitioner's funds remained in escrow as of the date of filing and had yet to be invested, the petitioner must demonstrate that the area in which he proposes to invest was a TEA as of the date of filing. Significantly, many, if not all, of our concerns might have been resolved had the petitioner filed a new petition upon resolution of the issues identified in the TSC director's first decision rather than continue to pursue the instant unapprovable petition based on amendment after amendment.

In light of the above, the minimum investment amount *for the instant petition* is $1,000,000. The petitioner does not claim to have invested more than $500,000 or to be actively in the process of investing $1,000,000. On this basis alone, the petition must be denied. For purposes of analysis, however, the remainder of this decision will consider the petitioner's investment plan as if the minimum investment amount had been met.

INVESTMENT OF CAPITAL

The regulation at 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.

The regulation at 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

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§ 204.6(j)(6)(ii)(B). That said, it is clear that the petitioner's investment of only $500,000 wholly within a ward that is not itself suffering high unemployment completely undermines the congressional intent underlying section 203(b)(5)(C)(ii) of the Act. Specifically, Congress intended that the reduced investment amount would encourage investment in areas that are truly suffering high unemployment. While we are bound by 8 C.F.R. § 204.6(j)(6)(ii)(B), it would appear that this regulation has produced unintended consequences that are contrary to congressional intent.

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.

As quoted above, the definition of capital does not include compensation for services. The amendment precluding an alien investor seeking benefits pursuant to section 203(b)(5) of the Act from receiving membership units in exchange for services postdates the filing of the petition. That said, the petitioner in this case, prior to the date of filing, executed a subscription agreement committing $500,000 cash to the Fund. As this amendment is not consequential to this alien's investment, the amendment relating to this issue is not a material change in this case.

The full amount of the requisite investment, however, must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. at 179. The initial operating agreement dated November 1, 2007 allows for the creation of reserve accounts and lists many management fees. The amendment stating that the accounts and fees could not be funded from the aliens' initial $500,000 investment postdates the filing of the petition and is material to this alien's investment. As the use of the $500,000

investment is a consequential fact and knowledge of this fact affects our decision making process, this amendment constitutes a material change to the original agreement. As such, this amendment cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

Similarly, section 2.4 of the Operating Agreement and section VI of the Private Placement Memorandum limiting interim investments to interest bearing accounts, government securities or other short-term investments postdates the filing of the petition. These amendments impact whether the invested funds would be placed in secure interim investments that do not risk the loss of the money that is to be placed at risk for job creation. Thus, they are material. As such, we will not consider these amendments. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

In light of the above, we withdraw the director's conclusion that the previous concerns regarding the operating agreement have been resolved for the instant petition. The agreements originally submitted did not guarantee that the invested funds would be placed at risk for job creation.

While the new Operating Agreement may resolve this issue within the Fund for future petitions, more discussion of the necessity of making all of the invested funds available for job creation is warranted. The March 7, 2008 Equity Investment Commitment letter provides at section 5(B):

> 1. Upon execution and delivery of all the mutually acceptable Investment Documentation under the terms of this Commitment Letter ***and*** delivery of the Cash Equity and/or the LOC as provided herein, GCMA, as Manager of the Fund, shall receive a one time commitment fee of one percent (1.0%) of the Fund Equity and/or the LOC actually received;
>
> 2. Upon issuance and delivery of the Cash Equity and/or the LOC by the Fund, [redacted] shall receive a one time original fee of one and one-half percent (1.5%) of the Cash Equity and/or the LOC actually received, plus reimbursement of its legal, documentation and recording costs in connection with the commitment of Fund Equity in an amount not to exceed $100,000; and
>
> 3. In connection with any distribution to the Fund upon the sale of the Project, [redacted] shall receive a disposition fee equal to one percent (1%) of the greater of the amount of the Fund's allocable interest in the proceeds realized from such sale, or the Fund's Equity. Such disposition fee shall reduce the amount that, but for the payment of the disposition fee to [redacted] would otherwise be distributed to the Fund.

It is not clear where the funds to pay these fees would derive. As the Fund would only be providing a letter of credit, it is possible that these fees would not derive from the Fund's investment. The July

24, 2009 letter, however, is more explicit and provides for greater fees to be paid to [redacted] Specifically, the same section of that letter provides:

> Subject to the conditions listed below, the Developer agrees to pay the following fees:
>
> 1. Upon execution of this Commitment Letter, [redacted] as the Fund Manager shall receive an underwriting fee of Twenty-five Thousand Dollars ($25,000), less any sum previously paid, altogether representing a contribution by the New Developer to his Capital Account.
>
> 2. Upon delivery of a mutually acceptable Investment Documentation under the terms of this Commitment Letter, the Manager shall receive a Fifty Hundred [*sic*] Thousand Dollar ($50,000) deposit to be applied toward its cost to review the Investment Documentation.
>
> **3.** Upon execution and delivery of all of the mutually acceptable Investment Documentation under the terms of this Commitment Letter *and* delivery of the Fund Equity as provided herein, the Manager shall receive a one time origination fee of one and one-half percent (1.50%) of the Fund Equity received, **payable from the Project's Capital Account.**
>
> 4. Upon delivery of the Fund Equity, the Fund shall receive a one time commitment fee of two percent (2.0%) of the Fund Equity of the Fund Equity received, **payable from the Project's Capital Account**; and
>
> 5. Upon delivery of the Fund Equity, the Manager shall receive an annual Project and Asset management Fee ("PAM") equal to One-half of One Percent (0.5% p.a.) of the Approved Project Budget, payable quarterly, in advance, **from the Project Capital Account** during the construction phase and thereafter from the Operating Cash Flow of the Project.
>
> 6. In connection with any distribution to the Fund upon the sale of the Project, the Manager shall receive a disposition fee equal to one percent (1%) of the greater of the amount of the Fund's allocable interest in the proceeds realized from such sale, or the Fund Equity. Such disposition fee shall reduce the amount that, but for the payment of the disposition fee to the Manager, would otherwise be distributed to the Fund.

(Bold emphasis added.) While the developer is responsible for directing payment of the above fees, the fees will derive from the Project Capital Account. According to the final paragraph of Section 2(B), closing will occur when, among other conditions, the Fund deposits the invested funds into the Project Capital Account. Thus, section 5(b) clearly calls for fees to be paid to the manager of the Fund from an account into which the invested funds have been placed. As noted above, the

petitioner in this case did not pay an application fee and his expense fee was deferred. Nothing in the July 24, 2009 letter, however, indicates that the payment of fees to will be deferred.

We acknowledge that this letter likely was included in the 2009 documents that served as a basis for the most recent regional center amendment request, approved December 23, 2009. Without attempting to readjudicate the issue, we must raise the following concerns, accepting that the above letter does not preclude the approval of a petition supported by this letter. Specifically, it will be the petitioner's burden when filing a Form I-526 based on the July 24, 2009 letter to demonstrate that the Project Capital Account will include sufficient funds to pay these fees the use of any of the $500,000 being invested by each alien. While this may be a complicated burden, the regional center's decision to mix the investor funds into an account that will be paying large fees to the Fund's manager and the director's apparent acceptance of this plan does not relieve the alien investor from demonstrating that the full $500,000 will go towards job creation in conformance with *Matter of Izummi*, 22 I&N Dec. at 179. This decision is a designated precedent decision pursuant to 8 C.F.R. § 103.3(c) and, thus, is binding on all USCIS employees in the administration of the Act.

Finally, we concur with the director that the letter of credit to be released once construction is complete does not resolve how those funds would be available for job creation. The record documents the costs and job creation as a result of the renovations. It is not clear how funds released after the development would contribute to job creation. While attempts to explain how these funds would be at risk once construction is complete, he does not explain how they will have been made available for job creation during the two-year conditional residency period. The July 24, 2009 letter, which eliminates the use of a letter of credit, postdates the filing of the petition. Similarly, the proposed use of these funds for the down payment on the reacquisition of the property, while now providing an explanation as to how the invested funds will contribute to job creation, is also a post-filing amendment. We conclude that both of these changes are material in that they are significant, essential and affect our decision making process. Thus, these post-filing amendments cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

In light of the above, the petitioner has not demonstrated that, as of the date of filing, his investment would be sufficiently at risk and available for job creation during the conditional residency period.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4) states:

> (i) *General.* 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.

* * *

(iii) *Immigrant Investor Pilot Program.* To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports[8] resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

The regulation at 8 C.F.R. § 204.6(m)(3) provides:

Requirements for regional centers. Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;[9]

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as

[8] After these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

[9] As stated in the previous footnote, after these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

> reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and
>
> (v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported,[10] and/or multiplier tables.

The regulation at 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.

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 USCIS 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,* 22 I&N Dec. 206, 213 (Comm'r. 1998). 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

[10] As stated in the previous footnotes, after these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

> 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.

The original business plan, while setting forth acquisition costs, clearly indicates that had already incurred those costs as the plan indicates already owned the property. Thus, any future investment would focus on the development of that property. In addition, the original commitment letter would require only a letter of credit from the Fund, not to be released until completion of the construction, with little explanation as to how the funds supporting that letter of credit would be used for job creation during the two-year conditional residency period.

By July 2009, the Fund had abandoned the idea of merely offering a letter of credit and committed to providing cash to a capital account from which large fees would be paid to the Fund's manager. By August 2009, due to the foreclosure on the the business plan was amended to include the reacquisition of this property. asserts on certification that these amendments have all been included in a request for an approved amendment to the regional center proposal. As stated above, the director has now approved the amendment. Thus, at issue is whether these changes are material.

In *Matter of Izummi*, 22 I&N Dec. at 175, the AAO considered counsel's assertion that a non-precedent decision by the AAO had approved a "completely different business plan that abandoned the troubled-business claim and substituted a plan to create a new business instead." The AAO responded that the decision referenced by counsel was not a binding precedent pursuant to 8 C.F.R. § 103.3(c) and concluded "that acceptance of the new business plan at such a late date was improper and erroneous." *Id.* at 175. While the facts in *Matter of Izummi* involved amendments to agreements rather than a business plan, that decision opines that the reasoning requiring a petition to be approvable when filed[11] applies to material changes in business plans as well. *See also Spencer Enterprises v. U.S.,* 229 F.Supp.2d 1025, 1038 n. 4 (E.D. Cal. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (accepting an AAO determination that business plan amendments submitted for the first time on appeal could not be considered).

While we recognize that business plans often require some flexibility to deal with unforeseen circumstances, the business plan and the terms of the commitment letter in this matter have been amended with nearly every filing. These amendments go far beyond mere clarifications. USCIS should not and cannot be required to constantly respond to these continuous amendments in the context of a single petition. As late as July 2009, were assuring USCIS that the default on the property was a strategic maneuver to eliminate interest and that would vacate the notice of default. The notice was not vacated, however, and foreclosed on the property, resulting in the need to reacquire the property. During this

[11] *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49.

proceeding, there was clearly a time when the reacquisition was in doubt and, thus, the entire project was questionable. The resolution of those problems must form the basis of a new petition. While the new plan now reduces development costs to account for the new acquisition costs, the amendment to shift costs of the commercial establishments to the tenants may impact the predictions of job creation due to the joint venture's investment included in the initial petition and, thus, would appear to be a material change. While the evidence submitted on certification reveals that the developer has secured sufficient financing, those commitments all postdate the filing of the petition. Securing the necessary financing is a material issue.

In light of the above, while purports to address the director's final concerns expressed in the certified decision, the resolution of those concerns relates to a materially changed business plan from the plan and commitment letter initially submitted. Therefore, the new business plan must form the basis of a new petition as stated in the director's December 23, 2009 letter approving the latest amendment request to the regional center proposal.

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.