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: APR 23 2010

WAC 09 039 51806

IN RE: Petitioner: [redacted]

PETITION: Petition by Entrepreneur to Remove Conditions Pursuant to Section 216A of the Immigration and Nationality Act, 8 U.S.C. § 1186(b)

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, California Service Center, denied the preference visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on certification pursuant to the regulation at 8 C.F.R. § 103.4. The director's decision will be affirmed.

The petitioner was granted conditional lawful permanent residency 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 claimed 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, Philadelphia Industrial Development Corporation (PIDC), was designated as a regional center by U.S. Citizenship and Immigration Services (USCIS) on March 19, 2003. The petitioner now seeks to remove conditions on lawful permanent residence status pursuant to section 216A of the Act, 8 U.S.C. § 1186(b).

The ultimate issues in this matter are (1) whether the petitioner could withdraw his investment in the regional center project reviewed when the petitioner was granted conditional residence and reinvest in an unrelated project without USCIS review or approval (2) whether the new investment is within a targeted employment area and, thus, eligible for a reduced investment amount and (3) whether the new investment demonstrates how the regional center's bridge loan allows the petitioner to be credited with the statutorily required job creation.

The director initially determined that the petitioner had made a material change and failed to demonstrate that he had sustained the investment proposed in the initial Form I-526 filing. On motion, counsel submitted a brief and additional evidence. The director withdrew the finding that the petitioner had made material changes but reaffirmed the initial finding that the petitioner had not sustained the original investment. The director also determined that the petitioner had not established that the new investment was in a targeted employment area and, thus, whether the alien continued to qualify for a reduced investment amount of $500,000. 8 C.F.R. § 204.6(f)(2). Finally, the director questioned whether the new investment project had generated sufficient employment to qualify all of the investors in this project for removal of conditions. The director certified the matter to the AAO pursuant to 8 C.F.R. § 103.4(a)(5). There is no appeal procedure for a Form I-829. The regulation at 8 C.F.R. § 103.4(a)(5), however, allows the director to certify any decision to this office whether or not the case is appealable. On certification, counsel submits a brief and additional evidence.

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.

For the reasons discussed below, we uphold the director's decision given the petitioner's failure to execute the plan presented in support of the Form I-526 petition by not only switching to a project that

USCIS had never reviewed but also by financing different expenses with the original project than those projected in the original business plan. In addition, the evidence submitted to establish that the new investment falls within a targeted employment area covers an address other than where the new investment occurred. Finally, while we concur with the director that the record lacks sufficient evidence of employment creation, our concern derives from the investment scheme.

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).

Section 216A(a)(1) of the Act provides:

> Conditional basis for status.-Notwithstanding any other provision of this Act, an alien entrepreneur (as defined in subsection (f)(1)), alien spouse, and alien child (as defined in subsection (f)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

Section 216A(c)(1)(A) of the Act provides that the alien entrepreneur must submit a petition which requests the removal of such conditional basis. Section 216A(d)(1) of the Act provides that each petition shall contain facts and information demonstrating that the alien invested or is actively in the process of investing the requisite capital and that the alien sustained the investment actions throughout the conditional residence period.

On May 27, 2005, the petitioner filed a Form I-526 petition based on his investment in [redacted] a partnership formed to invest in PIDC, a designated regional center pursuant to Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993. 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 asserted that the new commercial enterprise would invest in Tommy D's Home Improvement, Inc. (Tommy D's), a discount seller of close-out or discounted building materials used for home improvement.

ORIGINAL FORM I-526 FILING

The original cover letter for the Form I-526 provided:

> The partnership has been formed for the purpose of making an investment or a series of investments in the form of loans or equity investments in the PIDC Regional Center. The initial investment opportunity reviewed by an agreed upon by all prospective limited partners is Tommy D's Home Improvement, Inc., a development project described in section 3.2 below. By unanimous resolution of the limited partners, other investment opportunities and all activities ancillary thereto located in the PIDC Regional Center will be undertaken.
>
> *Because of the clarification recently requested by the Examiner for an unrelated PIDC Regional Center application, we wish to clarify that the Partnership was formed for the ongoing conduct of lawful business. The purpose of the Partnership is to operate as an ongoing commercial enterprise that makes an initial, well defined investment, in this case, Tommy D's, and such other future investments as some or all of the limited partners may approve. Accordingly, the Limited Partnership Agreement enables that once the initial investment is realized upon, a limited partner(s) not electing to participate in subsequent investments recommended by PIDC and the general partner to withdraw and to receive his or her share of the amount realized from the Tommy D's investment in a manner consistent with the Limited Partnership Agreement. The remaining limited partners who elect to participate in the subsequent investment(s) will remain in the Partnership and may be joined by new limited partners, all of whom, consistent with the Limited Partnership Agreement, will unanimously approve the new investment proposal.* The Limited Partnership Agreement is dated November 10, 2004, and is attached at Exhibit 5.2. The Memorandum from Counsel to the Partnership is attached as Exhibit 5.3.
>
> 3.2 Description of the Investment. The first investment of the Partnership is a development project entitled the Tommy D's Expansion Plan. See Exhibit 3.2(a) for a comprehensive business plan. Consistent with the confines of the PIDC Regional Center application and designation, retail sale of home improvement materials is a specified category of the trade industry, which is a target industry of the PIDC Regional Center.

(Emphasis in original.)

According to the cover letter, the investment would fund an expansion plan that included the purchase and renovation of a new warehouse. The cover letter projects the creation of 42 direct and 26 indirect jobs as calculated through a Regional Input-Output Modeling System (RIMS) wholesale trade multiplier. The Partnership would invest through a five-year loan to Tommy D's.

The business plan stated that the objective of the partnership would be to operate as an ongoing series of investments that serve the best interests of the limited partners and in a manner that furthers the economic development of Philadelphia. The plan references a PIDC advisory agreement with the Partnership that requires PIDC to recommend investments to the Partnership. PIDC recommended the Tommy D's investment. The petitioner provided USCIS with a flier, financial statements, a budget and a job summary for Tommy D's. The budget for the expansion project provides that the investment loan from the Partnership would be used as follows:

Permanent inventory build-up	$1,000,000
Warehouse acquisition	$560,000
Expansion costs	$600,000
Recent and projected leasehold improvements, furniture fixture, machinery & equipment	$470,000
Soft costs	$20,000
	$2,650,000

Significantly, neither the business plan nor the budget suggests that Tommy D's would use the investment funds to pay off interim financing or an existing mortgage.

The Limited Partnership Agreement defines "Investment" as including the Qualifying Investment and any other investment made by the Partnership in a Target Business which qualifies pursuant to the Program and excludes Temporary Investments. The agreement further defines "Qualifying Investment" as the accepted agreement listed in The Confidential Information Memorandum (CIM) Amendment.[1] The agreement also defines "Target Business" as a business that had undertaken to create and maintain the number of qualifying jobs required pursuant to the Program in the Target Employment Area.

Section 3.1 of the agreement states that the Partnership was formed as a commercial for-profit entity for the purpose of making the Qualifying Investment and, by Unanimous Resolution of the Limited Partners, other Qualifying Investments in a Target Business operating in the Targeted Employment Area, and all activities ancillary thereto.

Section 3.3 of the agreement provides that a qualifying investment is deemed approved by execution of the subscription agreement. In addition, any future investments must be approved by unanimous resolution.

[1] In a subsequent submission, the petitioner documented that the agreement was amended in 2006 to add a definition of "other investment" as one that falls within the geographic area of the PIDC Regional center other than the Qualifying Investment and Temporary Investments. This amendment appears consistent with the definition of "investment" in the original agreement and does not appear to be a material change to the agreement. This conclusion is not determinative as to whether the petitioner materially altered or sustained the actions described in the business plan.

The CIM Amendment provided indicates that the Partnership was formed for the purpose of making a loan to Tommy D's, which would be used for "expansion costs, including machinery and equipment, inventory build-up and working capital required for its expansion" and included information about the disbursement of a loan to Tommy D's, security for this loan and the borrower's budget. Once again, no mention is made of refinancing an existing loan.

Finally, the petitioner provided an opinion from [redacted] of [redacted] concluding that the Partnership is "ongoing" because it was formed to invest in Tommy D's but allows limited partners to withdraw from the Partnership without forcing a dissolution.

Given the above, while the partnership agreement did provide for investments subsequent to the investment in Tommy D's, it appears that these provisions were included to demonstrate that the Partnership was formed for the ongoing conduct of lawful business as required at 8 C.F.R. § 204.6(e) (definition of *commercial enterprise.*)

FORM I-829 FILING

On November 26, 2008, the petitioner filed the Form I-829 at issue in this proceeding. Prior counsel's cover letter indicates the petitioner's investment of $530,000 created 12 jobs. In the initial brief, prior counsel explained that the Partnership included five equity investors who were accorded conditional lawful permanent resident status pursuant to section 203(b)(5) of the Act. Pursuant to 8 C.F.R. § 204.6(g), the investment must create at least 10 jobs per investor if all investors are to have their conditions removed.

Prior counsel further explains that on May 22, 2008, the Partnership was advised that "because of unanticipated financial circumstances, which occurred after the investment loan was funded, the Tommy D's Project would be unable to comply with the forms and conditions of the Partnership's investment loan." Specifically, according to prior counsel, the sub-prime mortgage bank losses precluded Tommy D's from meeting job creation projections. Tommy D's inability to demonstrate the necessary job creation required by statute resulted in a default requiring repayment of the loan. Prior counsel continues that by unanimous resolution, the limited partners approved a new project, the Butcher & Singer project.

Prior counsel explains the history of the Partnership's investment as follows. First, the Partnership released the $2,500,000 million loan to [redacted] with Tommy D's as the guarantor on September 16, 2005. Of this loan, $1,378,987.52 was used to pay off **interim financing, $304,000** was used to pay off an existing mortgage and $295,062.29 was paid **directly to** [redacted]. On December 2, 2005, the final investor's $500,000 was released **from escrow to** [redacted]

Prior counsel does not suggest that any of the funds were used for permanent inventory build-up, warehouse acquisition, expansion costs, leasehold improvements, furniture, fixture, machinery or equipment, the budget items identified in support of the Form I-526.

Prior counsel explains that it was anticipated that [redacted] would repay $1,500,000 by December 31, 2008. In fact, [redacted] repaid $363,671.91 on October 17, 2008. The

remaining $1,136,328.75 was expected to be repaid from the sale of properties owned by [redacted] personally. The remaining $1,000,000 would be repaid on or before September 16, 2010.

Upon the default by Tommy D's, the Partnership agreed to loan $1,500,000 to SBI Restaurant Partners, LP (SBI), a subsidiary of the Starr Restaurant Organization, LP (SRO) to develop a new restaurant, Butcher & Singer. The project would fund a 134-seat 7,600 square foot upscale "supper club." According to prior counsel, construction on the restaurant started in mid-July 2008 and the restaurant opened October 27, 2008. The cost for the project was $1,978,513, of which $1,500,000 was financed by the Partnership's loan, due to be repaid by SBI on September 16, 2010. Prior counsel explained that PIDC made an interim loan of $1,500,000 to the Partnership to fund the loan to SBI on September 10, 2008. Prior counsel did not explain where PIDC obtained this money. If the money derives from other alien investors, it raises the question as to which investors should be credited with any jobs allegedly created with this money.[2]

Prior counsel concluded that the investment created 10 direct and four indirect jobs at Tommy D's and an additional 44 direct and six indirect jobs at Butcher & Singer. The employment Summary Form completed by Tommy D's in January 2005 indicates that it employed 44 employees at that time. The petitioner did submit an undated list of employees for Tommy D's and Butcher & Singer that lists 10 new employees at Tommy D's. The "Follow-Up Employment Summary Forms" completed by Tommy D's through November 2008, however, indicate that while employment at Tommy D's did increase briefly, as of November 2008, employment at Tommy D's had returned to only 44 workers. Thus, the November 19, 2008 letter from PIDC concluding that Tommy D's had created 10 direct and 4 indirect jobs is not supported by the record.

The petitioner submitted evidence that escrow funds for four investors were transferred to the Partnership on August 26, 2005. The remaining investor's funds were transferred to the Partnership in March 2006.[3] On September 19, 2005, the Partnership transferred $2,000,000 to Fidelity Title Abstract Company. Attached to the letter requesting the $2,000,000 transfer to Fidelity Title Abstract Company is a closing statement documenting refinancing of a $1,378,987.52 loan from The Reinvestment Fund, Inc. for a total cost of $2,000,000. On this document, the Partnership is listed as the lender, [redacted] are listed as the borrowers and Fidelity Title Abstract Company is listed as the settlement agent. The petitioner also submitted a September 7, 2005 letter from [redacted] of Lending for PIDC, confirming that PIDC had reviewed a "total of $2,000,000 in applicable paid invoices/cancelled checks" and determined that the funds were "consistent with the approved project budget." The closing document, however, reveals that the $2,000,000 was actually used to refinance an existing loan and not for any of the expenses listed in the original Tommy D's budget presented in support of the Form I-526, quoted above.

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[2] We raise this concern irrespective of the fact that PIDC Regional Center LP II invested in a different restaurant affiliated with SRO.

[3] The bank statements reveal that the funds for five investors were transferred to the Partnership on that date but that on August 31, 2005 the Partnership returned the funds for one investor to escrow.

On March 30, 2006, the Partnership transferred $500,000 to an account at Mellon Bank referenced as "further credit _____ The bank statements also reflect transfers to the Partnership from PIDC referencing payments and interest from Tommy D's. These payments include $8,794.76 on an illegible date in February 2006, $16,788 on May 31, 2006, $19,168.25 on December 29, 2006, $18,854.05 on July 5, 2007, $355.10 on October 11, 2007, $19,166.54 on January 2, 2008, and $18,958.21 on July 1, 2008. As of August 30, 2008, however, only $19,679.13 remained in the Partnership's account.

On September 10, 2008 PIDC transferred $411,000 from its "concentration account" to the Partnership and on September 18, PIDC transferred $408,000 from the same account to the Partnership. On September 10, 2008, the Partnership transferred $411,000 to SBI's account at HSBC bank and on September 22, 2008, the Partnership transferred $408,000 to the same account. On October 16, 2008, PIDC transferred $261,218.91 to the Partnership which the Partnership then transferred to SBI the next day. On October 17, 2008, PIDC transferred $363,671.25 to the Partnership as a payment of principal from Tommy D's and the Partnership returned the funds to PIDC on the same date in satisfaction of some of the loan from PIDC. On November 1, 2008, PIDC transferred $419,781.09 to the Partnership, which transferred those funds to SBI on the same date.

On May 14, 2009, Land America Financial Group, Inc. issued a check to the Partnership for $1,156,060.63. On certification, counsel explains that this check is from [redacted] and that, pursuant to an agreement, PIDC collected and deposited the funds. On May 18, 2009, PIDC transferred $1,148,167.88 to the Partnership referencing "Tommy D's."

A May 22, 2008 letter from the Partnership's General Partner, however, advises that employment at Tommy D's was 53 in November but is down to 36. A June 30, 2008 letter to the Partnership's investors advises that the Partnership had concluded that it is unlikely Tommy D's would create the necessary jobs and that PIDC had approved the Butcher & Singer investment.

The June 4, 2008 budget for the Butcher & Singer project is as follows:

Construction	$836,837
Fees	$140,000
Furniture, fixtures and equipment	$387,330
Kitchen	$40,000
IT Systems	$10,000
Signage	$10,000
Pre-Opening Costs	$554,346
Total	$1,978,513

Prior counsel asserted, however, that construction on the restaurant started in mid-July 2008. Thus, the petitioner has not explained why all of the construction fees and the design expenses set forth under fees in the subsequent budget breakdown would remain outstanding in September 2008 when the Partnership extended the loan to SBI.

On June 29, 2009, the director advised that the petitioner had impermissibly materially changed the investment structure and questioned whether the employees at SBI would also be counted for investors in PIDC Regional Center LP II. In response, counsel asserts that the petitioner sustained his investment in the Partnership and in employment-generating businesses and that PIDC Regional Center LP II invested in a different SRO affiliated restaurant, Continental Midtown and, thus, would not be counting employment generated at Butcher & Singer.

On August 3, 2009, the director denied the Form I-829 petition, concluding that the petitioner redirected his investment and that jobs were apparently being counted for two regional center partnerships.

On motion, counsel asserts that the petitioner invested in the Partnership and sustained his investment in the Partnership. Counsel further asserts that no material change was made because the original limited partnership agreement permitted the Partnership to investment in investments other than the Qualifying Investment. Counsel reiterates that PIDC Regional Center LP II invested in a different restaurant affiliated with SRO.

The director accepted that the petitioner had not materially changed the terms of the limited partnership agreement but concluded that the petitioner had not sustained the original investment project that had been reviewed extensively when the Form I-526 petition was filed. The director also questioned the link between each investor and the jobs at Butcher & Singer due to the bridge loan from PIDC and the failure to receive the funds back from Tommy D's. The director also noted the lack of evidence that Butcher & Singer falls within a Targeted Employment Area. We will consider counsel's response below.

LAW AND ANALYSIS

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

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

The regulation at 8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
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> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
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> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

The record before the director contained no evidence regarding whether the address of Butcher and Singer, 1500 Walnut Street in Philadelphia, is a targeted employment area. Thus, the director concluded that the petitioner must demonstrate an investment of $1,000,000. On appeal, the petitioner submits evidence of several census tracts designated as high unemployment areas. An arrow is included on one of the maps identifying 1500 Market Street, stated to be in qualifying census tract four. Butcher and Singer, however, is located at 1500 Walnut Street. According to the U.S. Census Bureau, http://factfinder.census.gov, accessed April 22, 2010 and incorporated into the record of proceeding, 1500 Walnut Street is located in census tract eight. The record contains no evidence that census tract eight is within a targeted employment area.

In light of the above, the petitioner must demonstrate an investment of $1,000,000. For purposes of addressing counsel's additional assertions, however, we will consider the petitioner's claimed $500,000 investment.

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.
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> * * *
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> *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 generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The full amount of the requisite investment 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. 169, 179 (Comm'r. 1998). While counsel notes on certification that the job creating enterprise and the new commercial enterprise are not always the same and notes that *Matter of Izummi* does not preclude prospective investments, nothing in that decision suggests that the alien is free to move his investment from the prospective project presented to USCIS in support of the Form I-526 to a project that USCIS has never reviewed in any respect.

The regulation at 8 C.F.R. § 216.6(a)(4) states that a petition for removal of conditions must be accompanied by the following evidence:

> (i) Evidence that a commercial enterprise was established by the alien. Such evidence may include, but is not limited to, Federal income tax returns;
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> (ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and
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> (iii) Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.
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> (iv) Evidence that the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Forms I-9.

The director relied on *Chang v. United States of America*, 327 F. 3d 911 (9th Cir. 2003), which held that, during the adjudication of a Form I-829, USCIS could not review whether the initial plan submitted with the Form I-526 was qualifying, only whether the alien sustained that plan. The director reasoned that this decision is consistent with the proposition that an alien cannot switch plans between the Form I-526 petition and Form I-829 petition. On certification, counsel asserts that the director's reliance on *Chang*, which, as noted by counsel, reversed USCIS' retroactive application of precedent decisions at the Form I-829 stage, stands that case "on its head." Counsel is not persuasive.

While *Chang*, 327 F. 3d at 927, held in favor of the aliens who had relied on the approval of their Form I-526 petitions, the court's reasoning is relevant to the matter before us. Specifically, the court stated that the Form I-526 approval may not be "decoupled from [Form] I-829 approval." *Id.* The court further stated that Form I-829 approval is predicted by Form I-526 approval and "successful execution of the approved plan." *Id.* Requiring the petitioner to execute the plan as presented to USCIS is not merely a technical requirement. As noted by the court in *Chang*, 327 F. 3d at 927, far more evidence is required in support of the Form I-526 petition. At the Form I-829 stage, the

petitioner is not required to submit such evidence. Thus, if counsel's assertions are accepted, the alien would never need to provide the type of extensive documentation for the new plan that is typically required under 8 C.F.R. § 204.6, the regulation specifying the evidence to be submitted in support of a Form I-526. As noted by counsel, the *Chang* court did focus on the aliens' good faith reliance. Counsel does not explain, however, how an alien can rely on the approval of a Form I-526 for an investment project that USCIS did not review as part of that adjudication.

A recent memorandum, Donald Neufeld, Acting Associate Director, Domestic Operations, *Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)*, December 11, 2009, addressed changes in Form I-526 plans. (Memo at p. 5) This memorandum states:

> The statutory structure of the EB-5 program and relevant precedent decisions limit an alien entrepreneur's options when a planned investment project fails. The capital investment project identified in the business plan in the approved Form I-526 must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment.

The memorandum then provides a procedure whereby an alien whose investment project fails during the conditional period may file a new Form I-526. (Memo at p. 6.) We acknowledge that this memorandum postdates the filing of the Form I-526 in this matter. That USCIS subsequently created a discretionary remedy for aliens whose projects fail during the conditional period does not require USCIS to consider a new business plan that was not subject to the normal review process at the Form I-526 stage in the matter before us. Had USCIS reviewed the Butcher & Singer business plan in the context of a Form I-526 petition, it might have raised serious concerns about this plan, such as how the investors' loan during the final stages of construction that purports to cover preliminary costs such as design fees can truly be credited for creating any jobs and where PIDC acquired the $1,500,000 to loan to the Partnership. These are not concerns that can or should be addressed in the context of a Form I-829 petition.

As was explained in the initial cover letter to the Form I-526, the purpose of allowing the Partnership to invest in multiple projects was to allay concerns that the Partnership was not "ongoing," and not to permit the Partnership to abandon the approved project to invest in a project that had yet to be reviewed in any respect by USCIS as part of the Form I-526 adjudication.

Moreover, as discussed, the Partnership's original investment in Tommy D's did not comply with the business plan, which made no mention of refinancing an existing mortgage. Had the petitioner disclosed this plan, USCIS might have questioned how replacing one loan with another loan would create jobs. Notably, such financing did not, in fact, create any jobs.

As stated above, the new investment has not been shown to be in a targeted employment area allowing the petitioner to invest less than $1,000,000, the petitioner did not sustain his investment and the new investment cannot be credited with the statutorily required job creation. For all of these reasons, considered in sum and as alternative grounds for denial, this petition cannot be approved; thus, the petition remains denied.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The petition is denied.