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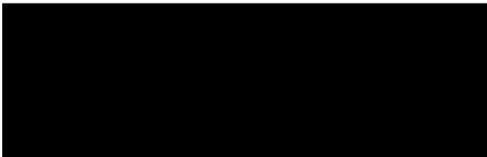
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2010  
WAC 09 162 50806

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:



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).

Σ

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, 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 May 13, 2009 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 U.S. Citizenship and Immigration Services (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 Director, Texas Service Center (TSC), 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.

The director determined that the petitioner had failed to demonstrate that the original business plan and projections continued to be viable. Thus, the 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.

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.

In reviewing this petition, we will consider whether the petitioner has established eligibility as of the filing date in this matter, May 6, 2009. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). The post-filing amendments in this matter are limited to the change of the investment structure from a letter of credit to cash and an amended business plan that includes the purchase of property for development in addition to development costs.

In addressing these changes, the history of the other petitions filed under the same regional center, as recounted in a brief from ██████████ submitted in response to the director's request for evidence warrants some discussion. In his June 13, 2009 letter, ██████████ acknowledges that the regional center amended its agreements in November 2007 after the approval of the regional center proposal in 2005. ██████████ then explains that the regional center relied on *ex parte* communications to conclude that these amended agreements were acceptable and aliens began filing Form I-526 petitions based on these 2007 agreements. As will be discussed in more detail below, the regional center has provided no basis for its reliance on such communications, assuming they even occurred. ██████████ further asserts that the Director, Texas Service Center (TSC), certified a denied petition for a CARc investor to the AAO in January 2009. ██████████ acknowledges that the AAO upheld the TSC director's denial.<sup>1</sup> According to ██████████ the TSC director then denied the remaining Form I-526 petitions filed by aliens who had invested in the same regional center. ██████████ then states that, subsequent to the AAO's decision, Service Center Operations (SCOPS)<sup>2</sup> "directed reopening and transfer of the remaining I-526 petitions [filed by aliens investing in the same regional center] from the TSC to the California Service (CSC) and allowed the investors to interfile into those petitions a package of amended documents that had been submitted for SCOPS's new approval" in addition to other new documents.

While this petition was filed after the regional center removed some of the problematic language from its operating agreement and private placement memorandum, we note the above discussion from ██████████ letter to place this petition in the context of a regional center that has repeatedly amended its agreements and business plan including well after the instant petition was filed, has relied on undocumented *ex parte* communications and has sought to circumvent the adjudicative process, which in many cases required the filing of a new petition.

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<sup>1</sup> 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.

<sup>2</sup> SCOPS is under the Domestic Operations Directorate directly under the USCIS Director. See [http://www.uscis.gov/files/nativedocuments/office\\_overviews.pdf](http://www.uscis.gov/files/nativedocuments/office_overviews.pdf).

Finally, beyond the issues addressed by the director throughout this proceeding, we find that the record lacks evidence tracing the invested funds back to the petitioner or her company as a distribution.

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> 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, [REDACTED] which proposes to invest in a project located in the Capital Area Regional Center Job Fund (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 [REDACTED]. The director did not contest that the investment will be in a targeted employment area (TEA). Thus, the required investment amount in this matter is \$500,000.<sup>3</sup>

<sup>3</sup> 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. The director's conclusion that the investment will be within a targeted employment area is based on a designation by [REDACTED] for Planning and Economic Development, Washington, D.C. pursuant to 8 C.F.R. § 204.6(j)(6)(ii)(B). [REDACTED] 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. § 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,

## PROCEDURAL HISTORY

As stated above, the petitioner filed the instant petition on May 13, 2009. Thus, as stated above, the petitioner must establish her 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 money in the development of the former 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 February 5, 2009 and an Operating Agreement dated January 22, 2009. The petitioner also submitted two Equity Investment Commitment letters for development of the former hotel dated January 9, 2008 and June 1, 2008. The June 1, 2008 letter is from , the Manager of and is addressed to Managing Member of in care of signed the letter accepting it. Finally, the petitioner submitted a business plan dated June 15, 2007 prepared by proposing that and redevelop the former Hotel.

Section 3.7 of the Operating Agreement 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 . 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 June 1, 2008 Equity Investment Commitment provides, at section 2(D), that 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 be the Owner of the Project." Thus, this commitment from 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 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

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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.

██████████ 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 July 31, 2009, the director issued a notice of intent to deny the petition. The director questioned whether funds backing a letter of credit would be sufficiently at risk and ██████████ 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, ██████████ 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,<sup>4</sup> 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;

(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

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<sup>4</sup> Those documents from the regional center record of proceeding referenced in this paragraph have been added to the record of proceeding in this matter.

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<sup>5</sup> mention a new Operating Agreement and Private Placement Memorandum that differ radically from those approved in 2005, may not serve as 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 (9<sup>th</sup> 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:

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. managers had thought that all of the documents submitted for regional center approval had reflected that USCIS had accepted them for all purposes. has amended documents to address USCIS' unexpected questions about these documents.

We reiterate that any delays were caused by CARc's decision to dramatically 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 prior to the first Forms I-526 filed, formal, informal or otherwise, even referencing those documents.<sup>6</sup>

Regarding the director's concern that a letter of credit does not sufficiently place the investors' funds at risk for job creation, asserts that is not requiring the typical collateral from the contractors. Rather, in accordance with normal business practices, 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 sell or the restaurant space not attract lessees. does not explain how this risk relates to job creation resulting from the already completed construction.

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<sup>5</sup> Specifically, none of the communications from USCIS mention the new agreements.

<sup>6</sup> As stated above, the May 20, 2008 electronic 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.

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, [REDACTED] 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 [REDACTED] 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, [REDACTED] had already acquired the project property. Thus, only the \$119,041,531 in development costs remained to be funded.

The petitioner also 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 [REDACTED] cash acquisition cost, due to elimination of [REDACTED] mezzanine debt as a result of [REDACTED] foreclosure of the [REDACTED] 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 [REDACTED] 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 [REDACTED] 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 [REDACTED] explaining that the company has taken title to the [REDACTED] 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 [REDACTED]

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

On certification, [REDACTED] 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 [REDACTED] to provide \$25 million. An undated loan document from [REDACTED] 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 [REDACTED] 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 (7<sup>th</sup> ed. 1999).

### 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 generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien

must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The 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. at 179. While the Operating Agreement, which supports an approved regional center amendment, may resolve previously raised concerns regarding fees, more discussion of the necessity of making all of the invested funds available for job creation is warranted. The June 1, 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, [REDACTED] as Manager of [REDACTED] 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 [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 [REDACTED] 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 [REDACTED]

It is not clear where the funds to pay these fees would derive. As [REDACTED] would only be providing a letter of credit, it is possible that these fees would not derive from [REDACTED] 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 [REDACTED] 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 [REDACTED] 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, [REDACTED] 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 [REDACTED] 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 [REDACTED] 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 [REDACTED]

(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, [REDACTED] deposits the invested funds into the Project Capital Account. Thus, section 5(b) clearly calls for fees to be paid to the manager of [REDACTED] from an account into which the invested funds have been placed.

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. 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, however, 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 without 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 [REDACTED] 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.

Further, 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 [REDACTED] 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 [REDACTED] 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.

Finally, while [REDACTED] has attempted to address the AAO's concern about potential side agreements, as expressed in our previous decision referenced by [REDACTED] he mischaracterizes our concern. In the previous decision referenced by [REDACTED] the AAO stated that the ability to create side agreements is problematic because 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 216(A) of the Act to demonstrate that the petitioner's funds remained at risk for job creation during the two year conditional period.

In light of the above, the petitioner has not demonstrated that, as of the date of filing, her 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<sup>7</sup> 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:

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<sup>7</sup> 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).

- (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;<sup>8</sup>
- (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 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,<sup>9</sup> 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

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<sup>8</sup> 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).

<sup>9</sup> 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).

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 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 [REDACTED] had already incurred those costs as the plan indicates [REDACTED] already owned the [REDACTED] 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 [REDACTED] 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, [REDACTED] 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 [REDACTED] manager. By August 2009, due to the foreclosure on the [REDACTED] the business plan was amended to include the reacquisition of this property. [REDACTED] 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<sup>10</sup> 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, [REDACTED] and [REDACTED] were assuring USCIS that the default on the [REDACTED] property was a strategic maneuver to eliminate [REDACTED] interest and that [REDACTED] would vacate the notice of default. The notice was not vacated, however, and [REDACTED] foreclosed on the property, resulting in the need to reacquire the property. During this 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 [REDACTED] 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.

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<sup>10</sup> See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.