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

U.S. Citizenship and Immigration Services

B7

[redacted]

DATE: JUL 18 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

cc: [redacted]

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on certification. The decision of the director will be affirmed.

The petitioner seeks 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's claimed investment is through a U.S. Citizenship and Immigration Services (USCIS) designated regional center, Lake Buena Vista Regional Center, pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002).

The director, noting that the petitioner was essentially purchasing a vacation resort condominium, determined that the petitioner had failed to demonstrate an at-risk investment. On May 4, 2011, the director certified the matter to the AAO pursuant to 8 C.F.R. § 103.4. This matter was certified to the AAO pursuant to 8 C.F.R. § 103.4 for a review of all of the unusually complex or novel issues, including those expressly deemed resolved by the director. Thus, the AAO's decision need not be limited to the adverse findings of the director.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner's new co-counsel requests oral argument before the AAO. First, this request is untimely. The regulation at 8 C.F.R. § 103.3(b)(1) requires that any request for oral argument be submitted within the time allowed for meeting other requirements. The 30-day briefing period for the certified decision ended on June 6, 2011. The petitioner failed to request oral argument within that period. The request for oral argument dated July 5, 2011 is untimely. Second, a petitioner must explain in writing specifically why oral argument is necessary. 8 C.F.R. § 103.3(b)(1). Oral argument is limited to cases in which cause is shown. A petitioner or his counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, all issues are adequately addressed in writing and counsel has shown no cause for oral argument. Therefore, for both of these reasons, the petitioner's request for oral argument is denied.

Counsel also requests that the AAO "consolidate" this certification with other appeals. Counsel cites no legal authority for the AAO to "consolidate" similar cases and the AAO knows of no such authority. Therefore, the AAO denies that request.

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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

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:
>
> (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

> (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).

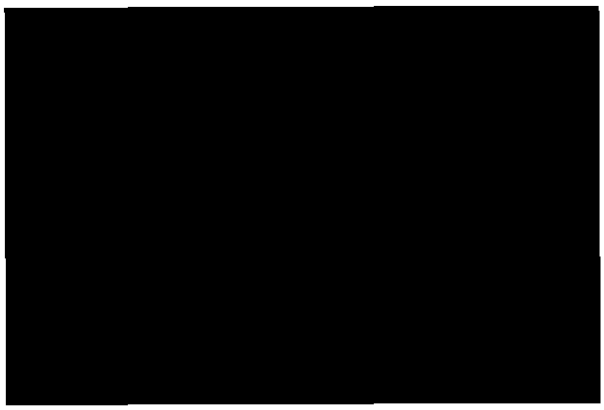
In this matter, the petitioner's investment has yet to be released to the new commercial enterprise. A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm'r 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

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

> *State designation of a high unemployment area.* The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526. Before any such designation is made, an official of the state must notify the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.

The record indicates that the petition is based on an investment in a business, [redacted] located in a targeted employment area for which the required amount of capital invested has been adjusted downward.

Pursuant to 8 C.F.R. § 204.6(i), the petitioner submitted a March 25, 2010 letter from [redacted] Director of the Florida Agency for Workforce Innovation's Labor Market Statistics Center. [redacted] designates eight "contiguous" census tracts as a targeted employment area based on the average unemployment rate in the designated area. A rough outline of the designated area overlaying a census tract map downloaded from http://factfinder.census.gov is as follows:



The development is in census tract 170.07, which is at the Southwest tip of the designated area.

In response to the director's notice of intent to deny, the petitioner submitted a similar letter dated March 14, 2011. This letter conforms to the requirements of the regulation at 8 C.F.R. § 204.6(i). Thus, the required amount of capital in this case is $500,000.[1]

TROUBLED BUSINESS

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

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) **during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526**, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

(Bold Emphasis added.)

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[1] According to the census tract breakdown [redacted] provides, the actual tract where the jobs will be preserved has an unemployment rate of 6.7 percent, well below the national average of 9.4 percent or above in 2010. *See* http://data.bls.gov/cgi-bin/surveymost, accessed July 8, 2011 and incorporated into the record of proceeding. Thus, the tract would not qualify by itself. Only through "gerrymandering" the area as is apparent from the above map is [redacted] able to designate the area as falling within a designated targeted employment area. As stated in the text of this decision, the designation letter complies with the regulation at 8 C.F.R. § 204.6(i); thus it is sufficient evidence to document a targeted employment area under 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 census tract 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. *See* Comments of Senator Paul Simon, 136 Cong. Rec. S17106-01, 1990 WL 165401 (1990). While the AAO is bound by the regulation 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.

On September 25, 2009, the director approved an amendment whereby the regional center requested designation as a troubled business. The director approved a similar amendment on January 28, 2010. In both approval letters, the director stated:

> EB-5 immigrant investors will be required to submit evidence to show that the commercial enterprise, for which capital funds have been or will be invested, is a troubled business as [of] the filing of the Form I-526. Otherwise, the enterprise will not qualify as a troubled business for the purpose of capital investment and job creation.

Thus, the director placed the petitioner on notice that he would need to demonstrate that the commercial enterprise receiving the "investment" was a troubled business as of the date of filing the Form I-526, in this case August 17, 2010.

The petitioner submitted the 2008 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for Schedule L reflects a net worth at the beginning of 2008 of $11,820,377. Schedule K, line 18, and schedule M-1, line 1, both reflect a net loss of $2,528,784, more than 20 percent of $11,820,377. The , however, did not sign the return. Moreover, this return does not cover the 12 or 24 month period prior to the filing date of August 17, 2010. While the petitioner submitted application for an extension to file its 2009 tax return, it remains that the record lacks other evidence of its finances in 2009 and the first eight months of 2010, such as an annual report or an audited financial statement (or even a reviewed financial statement). It is the petitioner's burden to provide the required initial evidence. The petitioner has not done so.

Moreover, as will be discussed in more detail below, neither the petitioner nor has invested or will invest in Lake Buena Vista Resort. Instead, proposes to serve as a customer, purchasing condominium units that would be deeded to the petitioner once USCIS removes the conditions on his residence. Significantly, while the new agreements the petitioner submitted in response to the director's request for additional evidence remove the requirement that eventually deed the property to the petitioner, the company will still only serve as a customer, not an investor.

In light of the above, the petitioner must demonstrate how his investment will *create* at least new 10 jobs, directly or indirectly.

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.

None of the above examples include purchasing developed real property from a developer.

Original Documents

The business plan includes the following information on page 11:

> A total of 100 investors, with an investment of $500,000 each, plus administrative and legal costs, will be solicited through the job preservation phase of the program. Current condo/hotel inventory will be conveyed to repay project indebtedness. Investors will receive one 2-bedroom condo and rights to one-half of a 3-bedroom unit via equity in the [redacted]
>
> * * *
>
> Investors will receive regular income from the project.

Page 15 of the business plan explains the exit strategy as follows:

> Each investor will receive the equivalent equity in the LLC of one 2-bedroom condo/hotel unit and one-half of a 3-bedroom unit. The investor shall be able to select his 2-bedroom unit from a current inventory list. Upon the investor's desire and notice to the LLC of his intent to exit the program, the 2-bedroom unit will be deeded to him, and the market value of the 3-bedroom unit will be returned upon liquidation of the interest by the Manager within a six month period thereafter.

Page 38 of the business plan discusses the interest of foreigners in investing in real estate, including the purchase of condominiums. Page 42 states that investors will have use of the condos for two weeks annually.

Page 99 of the business plan discusses the benefits of the "investment" proposal as follows:

> Here, investors have access to a vacation spot in Orlando, and because of the project's offering of hotel rental income of the foreign investor's space when not in use, both parties have an increased economic benefit by investing in [redacted]

The introduction of the Offering Memorandum states:

> On or before subscribing for Member Interests, a Subscriber will be contacted by the Company to select one or more specific Units within the Resort (from those offered at such time by the Developer) which will be reserved by the Developer and acquired by

> the Company upon such Subscriber's Net Proceeds being released from the Project Escrow Account to the Company.
>
> * * *
>
> To the extent that Subscribers make a Minimum Investment, the Net Proceeds from each Subscriber not used to acquire a Designated Unit (the "Non-Designated Unit Portion," i.e. the balance of $166,666.66 remaining after using $333,333.33 of the Subscriber's Net Proceeds for one Designated Unit) will be aggregated and used by the Company, to the extent of each whole Unit Price, to purchase additional Units ("Non-Designated Units"), with any surplus to be used by the Company as working capital.
>
> * * *
>
> As described in more detail in the Operating Agreement, after a Subscriber becomes a "Redemption Eligible Member," such Subscriber will be entitled to cause the Company to purchase its Member Interest by conveying to such Subscriber its Designated Units plus, to the extent such Subscriber's Net Proceeds included a Non-Designated Unit Portion, an amount equal to the cash proceeds generated from a sale of that Non-Designated Unit Portion of a Non-Designated Unit (the "Cash Portion").
>
> * * *
>
> If a Redemption Eligible Member elects to have its Member Interest redeemed by the Company, such Redemption Eligible Member will receive deeded title to its Designated Unit(s) in exchange for its Member Interests in the Company at closing of the Member Interest redemption.

The Exit Strategies on pages 12 and 21 provide similar information to the final paragraph quoted above.

Page 7 of the Offering Memorandum states:

> The Company has been organized to acquire, own and operate condominium hotel units in the Resort (the "Units"). The Company will acquire the Units from the Developer pursuant to Purchase Agreements.

On page 8, the memorandum provides that [redacted] will manage the Units.

Page 35 states:

> Pursuant to the Management Agreement, the Company, as the owner of the Units, may from time to time have the right to occupy its Units on favorable terms for limited amounts of time and during specific times of each year. The Company will attempt to devise a method of making these Units available to the members on a fair basis.

The risks described in the memorandum, starting on page 50, are those inherent in all "real property investments" such that the value of the condominium may fluctuate.

Section 2.04 of the Operating Agreement states that the Developer has agreed to sell a combination of resort condominiums for a fixed price and that members will have the option to select specific Units. Section 7.07 allows members, upon having their conditions on residence removed, may redeem their interest through the transfer of their designated unit and a cash portion.

The record includes the management agreement between is responsible for setting the rental rates. Section 9(b) states:

> If Owner or "Friend of Owner" wishes to use the Unit, Owner or Friend of Owner shall be permitted to use the Unit without either the payment of any rental income to Owner, or the payment of any fees or commission to Company; provided, however, Owner will be responsible for paying the Company the standard departure fee.

The Owner's usage is limited to 14 days annually.

The petitioner also submitted a unit reservation whereby he selected his condominium.

On certification, counsel asserts that the AAO has only stated that a "guaranteed buy-back for a guaranteed price" is problematic and asserts that no price is guaranteed for the sale of the condominiums. As quoted by counsel, however, the relevant precedent decision states that the petitioner "may not enter into any agreement granting him the right to sell his interest back to the partnership" and must "go into the investment not knowing for sure *if he will be able to sell his interest at all*." (Emphasis added.) *Matter of Izummi,* 22 I&N Dec. 169, 186-87 (Comm'r 1998). In fact, the decision expressly states that the petitioner may not invest "knowing he already has a willing buyer in a certain number of years." *Id.* at 186. In this matter, while the value of the condominiums in the future is unknown, it remains that the offering memorandum states that the petitioner "will be entitled to cause the Company to *purchase its Member Interest* by conveying to such Subscriber its Designated Units plus, to the extent such Subscriber's Net Proceeds included a Non-Designated Unit Portion, an amount equal to the cash proceeds generated from a sale of that Non-Designated Unit Portion of a Non-Designated Unit (the "Cash Portion")." (Emphasis added.) The director correctly concluded that this agreement constitutes an impermissible redemption agreement.

Ultimately, the petitioner, through a pooled investment vehicle, has purchased a developed condominium which he may enjoy rent free 14 days a year, and to which he will have full title after approval of a Form I-829 petition to remove conditions on residence. Counsel suggests on certification that the service center has misunderstood the nature of the development and that the condominiums are non-residential resort hotel suites rather than residential resort condominiums. Counsel asserts that the development is zoned for commercial rather than residential use and that "local government zoning rules prohibit property owners from living on the property, filing for 'homestead exemption or a reduction of property taxes . . . and using the property as a 'primary residence.'" Counsel cites language which he attributes to "Paragraph 16.1 of the Condominium Documents recorded in the Official Records of Orange County, Florida" in support of the claim that the units are non-residential. Counsel fails to submit any corroborating evidence, such as the actual condominium document from which he quotes, to support these assertions. Without documentary evidence to support these claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Whether or not the petitioner will ever be permitted to reside in the condominiums on a permanent basis, it remains that the agreements and business plan contemplate that the petitioner will at least own the condominium for rental purposes. Rather than investing in the developer, it is clear that [redacted] is purchasing real estate from the developer as a customer. The purchase of inventory is economically beneficial to the seller and the seller is likely to use at least some of its sales proceeds to continue its business. Such an arrangement, however, does not make every customer an investor. In order to boost the troubled real estate market, Congress could have created a program that provides immigration benefits to aliens who, either individually or through a pooled investment vehicle, purchase U.S. real estate. Section 203(b)(5) of the Act, however, is not that program. Rather, section 203(b)(5) of the Act requires an investment in a business.

Especially where indirect employment creation is being claimed, and the nexus between the money and the jobs is already tenuous, USCIS has an interest in examining, to a degree, the manner in which funds are being applied. *Matter of Izummi,* 22 I&N Dec. at 179. The nexus is even more tenuous where job preservation rather than job creation is the basis of the eligibility claim. The claim that the petitioner meets the legal requirements of section 203(b)(5) of the Act, which requires an investment in a commercial enterprise, by purchasing a condominium through a pooled investment vehicle is not persuasive. The petitioner's only investment is in developed real estate. As the purchase of real estate from a developer is not an investment in that developer, the petitioner has not documented a qualifying investment.

Amended Documents in Response to the Notice of Intent to Deny

In response to the director's notice of intent to deny, the petitioner submitted a new offering memorandum, a new subscription agreement and a new operating agreement. These agreements contain material changes to the original documents. A petitioner must establish eligibility at the time

of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175 1998). On certification, counsel asserts that the changes are not material because the director's conclusion that the original agreement was problematic was in error. That decision further provides, however, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. 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).

In light of the above, these new agreements cannot support the approval of the instant petition. Moreover, these new agreements do not resolve all of the above problems. The AAO acknowledges the assertion that these documents form the basis of an approved regional center amendment. If true, that approval was in error. Thus, it would be appropriate for the director to reconsider that approval in light of the concerns expressed below, namely that the new amendments still contemplate a passive investment in already developed real estate rather than an investment in an ongoing commercial enterprise.

On certification, counsel asserts that the only change in the amendment is that the petitioner may not designate a condominium ahead of time. The AAO finds that the changes do not resolve the AAO's concerns that the business plan is primarily a passive real estate investment in developed condominiums through the purchase of inventory from a developer rather than an investment in a job creating enterprise. Significantly, the new offering memorandum still provides that [redacted] will own and operate condominium hotel units that it will acquire from the developer, and that [redacted] will manage the condominiums pursuant to a management agreement. The new exit strategy is as follows:

> Approximately four to six years after the date of the initial acquisition of the Units, provided all conditions have been removed under the [redacted] described under "Immigration Matters" for all Members, the Manager may determine to dissolve the Company, sell, for fair market value, all of the Company's Units and distribute the net proceeds of such sale to the Members in final liquidation of the Company.

The risks described in Annex A-7 remain those inherent to the real estate market, such as a decline in market value and rental income.

The Operating Agreement defines "Units" as those condominium units [redacted] purchases from the developer. Section 2.08 allows [redacted] to sell property to members. Section 9.01 allows the manager to elect to dissolve the company after October 15, 2015. The sale of all or substantially all of the assets also dissolves the company. Pursuant to Section 9.02(c), when winding up, the liquidator may distribute the assets (in this case the condominiums) in kind.

Significantly, the petitioner did not submit a new business plan or a new management contract. The business plan information quoted above still envisions a pooled investment to purchase real estate where the investors may use that real estate rent free for 14 days annually, which is allowed in the management contract.

Nothing in the documents precludes the same end result, whereby will deed the condominiums to the investors once they have removed conditions on their residence. Even if such an end result is no longer contemplated, the ultimate investment, a passive purchase of real estate for rental purposes, is simply not an investment in a new commercial enterprise. Instead, will purchase inventory (condominiums) from a developer. Thus, the amended agreements do not resolve the ultimate deficiency; namely that the petitioner seeks to purchase real estate, either individually or through a pooled investment vehicle, rather than invest in a commercial enterprise.

EMPLOYMENT CREATION

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

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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.

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

> *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 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 petitioner claimed that it will be preserving jobs in a troubled investment and therefore need not create the requisite number of jobs. As stated above, the petitioner has not demonstrated that the developer is a troubled business. Moreover, the petitioner, through [redacted], is not investing in the developer but, rather, purchasing real estate from the developer. Thus, the petitioner may not rely on job preservation. The petitioner has never explained how purchasing condominiums will create any jobs directly or indirectly. Moreover, the petitioner failed to submit an economic analysis with reasonable methodologies to explain how the investment will create or preserve jobs. Assuming the regional center submitted such an analysis with the regional center application, the regulation at 8 C.F.R. § 204.6(j)(4)(iii) makes clear that the petitioner must submit the analysis with the Form I-526 petition, however, the petitioner failed to do so.

In light of the above, the petitioner has not submitted evidence that his condominium purchase will meet the job creation requirements of section 203(b)(5) of the Act and the pertinent regulations.

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 decision of the director is affirmed. The petition is denied.