

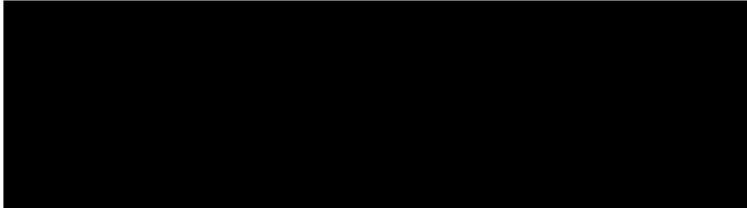
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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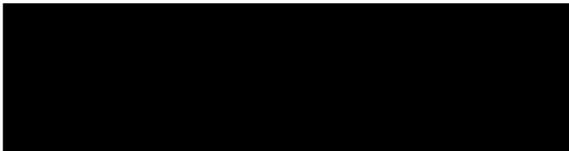
Petitioner:



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:

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

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

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 proposes to pool her investment in a designated 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).

Specifically, the petitioner proposes to invest in a limited partnership that will loan money to [REDACTED] to fund water and wastewater infrastructure projects in several Pennsylvania counties through the Pennsylvania Department of Community and Economic Development (DCED) regional center. According to the business plan, [REDACTED] is projected to repay this loan after five years "with the proceeds of long term financing or from other sources available at such time."

The director determined that the petitioner had failed to demonstrate that the proposed investment would be in an approved regional center industry or that it would benefit a targeted employment area (TEA). The director then certified the matter to the AAO pursuant to 8 C.F.R. § 103.4. The director afforded the petitioner 30 days in which to supplement the record pursuant to 8 C.F.R. § 103.4(a)(2). The petitioner submitted a response.

On certification, the petitioner submits a statement from [REDACTED] of the limited partnership, asserting that the proposed investment in water and wastewater infrastructure falls under the approved industry of transportation and that the project will create sufficient jobs within the identified TEAs. The AAO withdraws the director's TEA concerns. The AAO upholds the director's determination that the proposal does not fall within the approved industry of transportation as presented in the original regional center proposal and, thus, may not rely on indirect job creation. Finally, the AAO upholds the director's determination that the petitioner has not documented that the investment will create the necessary direct jobs.

Beyond the director's decision, the record lacks evidence that the proposal is viable as the record contains no evidence of consultation with [REDACTED]. The AAO conducts appellate review on a *de novo* basis. AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Moreover, the director certified the matter to the AAO pursuant to 8 C.F.R. § 103.4 for a review of all of the unusually complex or novel issues, including any the director may not have raised. Thus, the AAO's decision need not be limited to the director's adverse findings.

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).

The record indicates that the petition is based on an investment in a business, Pennsylvania Regional Center, LP VI, that proposes to invest in water and wastewater infrastructure through DCED.

### **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 pursuant to 8 C.F.R. § 204.6(f)(2).

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

*Rural area* means any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more.

*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).

The director concluded that the project area in its entirety did not consist of designated TEAs and rural areas and asserted that “the rural areas claimed as part of the TEA are located within [a Metropolitan Statistical Area (MSA)] and thus do not qualify for TEA purposes.” The director did not state which counties are within an MSA or the name of the MSA. The director did not incorporate a list of MSAs and the included counties into the record of proceeding. Denial of this petition cannot be based upon the serious allegations of the director without evidence offered in support of those conclusions. Just as the unproven assertions of counsel are not evidence, neither are the unsupported conclusions of the director. *Cf. Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Project Budget lists 25 counties and other “Miscellaneous regions.” The petitioner submitted evidence that the Pennsylvania Department of Labor and Industry designated several census tracts in Delaware, Montgomery, Berks, Bucks, Chester and Lehigh Counties, all of which are counties listed on the Project Budget. On certification, the petitioner submits another letter from the Department confirming that 35 Pennsylvania Counties do not fall within MSAs and are not within the boundary of any city or town having a population of 20,000 or more. The regulation at 8 C.F.R. § 204.6(j)(i) does not allow for state designation of rural areas. Nevertheless, the AAO will take into account the information in the letter pursuant to *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988) to the extent that the information is credible and verifiable.

As noted by counsel, 13 of the 25 counties that the project will cover are not within an MSA. The AAO has confirmed the assertions in the Department of Labor and Industry letter by reviewing a list of MSAs and the included counties available at the Office of Management and Budget’s website: <http://www.whitehouse.gov/sites/default/files/omb/assets/bulletins/b10-02.pdf>.<sup>1</sup> Thus, the AAO is satisfied that the areas claimed to be rural areas do, in fact, meet the definition of rural at 8 C.F.R. § 204.6(e). Moreover, the regulations expressly delegate the authority to designate TEAs, on the basis of high unemployment, to the states. Thus, the AAO does not contest the census tracts designated in the Department of Labor and Industry letter. While the director claims that the areas are “gerrymandered,” the letter designates specific census tracts that have qualifying unemployment.

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<sup>1</sup> Accessed on July 8, 2011 and incorporated into the record of proceedings.

These designations raise less concerns about circumventing congressional intent than adding portions of qualifying subdivisions to the non-qualifying subdivisions where the investment will take place for the sole purpose of making this otherwise non-qualifying subdivision qualifying.

The remaining issue is whether an investment in a larger project that will cover areas that do not qualify as TEAs or rural areas in addition to areas that do justifies the reduced investment amount. Counsel persuasively notes that the economic analysis predicts sufficient qualifying jobs solely within the TEAs and rural areas. The petitioner has established that the creation of additional jobs outside those areas does not preclude consideration for the reduced investment amount.

In light of the above, the minimum investment amount in this matter is \$500,000.

### **REGIONAL CENTER ACTIVITIES**

The regulation at 8 C.F.R. § 204.6(m)(7) states, in pertinent part:

An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

The regulation at 8 C.F.R § 204.6(m)(4) provides that regional centers must submit proposals to U.S. Citizenship and Immigration Services (USCIS) in order to obtain approval to participate in the pilot program.

On November 18, 2005, DCED applied for designation as a regional center. The proposal advised the industries for which DCED was requesting approval. The cover letter explains "Transportation" as follows:

Transportation is a vital component of the U.S. economy. As a sizable element of the country's Gross National Product, transportation moves people and goods, employs millions of people and consumes a large amount of resources and services produced by other sectors of the economy (Exhibit 8-A). Industry case studies have long demonstrated the relationship between transportation and the economy, and this is becoming increasingly clear as trade and service industries become more and more dependent on reliable and efficient transportation networks. Moreover, the economic importance of the U.S. transportation system goes well beyond its borders. It affects the ability of U.S. businesses to compete in the expanding global economy.

Considerable development efforts have been devoted to repairing, maintaining, improving, and expanding the transportation infrastructure and transportation services in the Commonwealth of Pennsylvania. Improvement and expansion plans in public transit, airports, and other programs indicated that the industry in Pennsylvania –

whether ground, air, or water transportation – will require a larger workforce to satisfy the continued and growing demand for transportation services (Exhibits 8-B, 8-C, 8-D and 8-E).

Trucking and warehousing, which comprise the largest sector of the transportation industry, will be primary target enterprises for the Pennsylvania Regional Center.

This information also appears in the proposed Confidential Information Memorandum. Nothing in this discussion suggests that DCED was including the “transportation” of water and wastewater through pipes as part of the transportation industry. Instead, the letter references the transportation of people and goods via waterways. Exhibit 8-A was a “Pocket Guide to Transportation,” exhibit 8-B included Pennsylvania Transportation and Warehousing Statistics, exhibit 8-C included an Evaluation of Statewide Long-Range Transportation Plans and exhibit 8-D included the Pennsylvania Department of Transportation (PennDOT) 2005 Twelve Year Plan.

On certification, [REDACTED], Manager, asserts that the regional center proposal cover letter was not intended to fully define transportation and that the business plan as a whole allows for the conclusion that water and sewer projects fall under transportation. Nevertheless, it is notable that the cover letter and Confidential Information Memorandum made no mention of water and wastewater pipes. The AAO will also, however, examine the supporting documentation.

As noted by [REDACTED] on certification, the Pocket Guide to Transportation discusses pipelines. The first reference to pipelines, however, is on page three and includes only oil and gas pipelines. Page five references “gas transmission pipelines.” The pipeline discussion on page 42 references only federal pipelines funded under the Pipeline Safety Fund. Thus, the remaining generic references must presumably only include oil and gas pipelines. The Pennsylvania Transportation and Warehousing statistics do include pipeline transportation, but do not specify that they include water and wastewater pipes.

DCED included an “Industry Overview” of the Transportation Industry. This document discusses the application of “intelligent transportation systems,” defined as “the application of advanced information processing and communications, sensing, and control technologies to surface transportation.” Next, the document discusses PennDOT’s future plans, including highway construction, realignment and preservation and major bridge projects. The document concludes by noting the following PennDOT budget items for 2004-2005: highway and bridge construction, highway and bridge maintenance, mass transportation, transit assistance for older individuals, local road maintenance, rail freight assistance, air transportation and welcome centers. Nothing in this document suggests that DCED intended to invest in water and wastewater infrastructure.

The 2005 Twelve-Year Plan included in support of the regional center proposal listed funding for aviation, rail freight, public transit and highways/bridges. DCED also included an Evaluation of Statewide-Long-Range Transportation Plans prepared by the U.S. Department of Transportation, Federal Highway Administration. The plan includes a discussion of the Pennsylvania transportation system but makes no mention of water and wastewater infrastructure.

In his cover letter for the instant petition, counsel states: "Considerable development efforts have been devoted to repairing, maintaining, improving, and expanding the Commonwealth of Pennsylvania's infrastructure and its support services including transportation, telecommunications, and water and sewer systems." If transportation includes water and sewer systems, it is not clear why counsel lists them separately. Counsel also acknowledges that [REDACTED] "is subject to regulation by the Pennsylvania Public Utility Commission" rather than PennDOT, the state agency that oversees programs and policies affecting highways, urban and rural public transportation, airports, railroads, ports and waterways.<sup>2</sup> While not determinative, the fact that Pennsylvania's department overseeing transportation does not oversee water and sewer systems is one more factor suggesting that these structures are not transportation related.

On certification, [REDACTED] asserts that [REDACTED] "is principally in the business of the pipeline transportation of water and wastewater between its treatment facilities and its customers." [REDACTED] continues:

Pipeline transportation is the transportation of goods through a pipe, most commonly, liquids and gases. Any chemically stable substance can be transported through a pipeline, and common goods transported by pipelines include sewage, slurry, and water as well as fuels, such as oil, nature gas and biofuels.

[REDACTED] quotes from the following book: [REDACTED] [REDACTED]). According to [REDACTED] the book states that pipelines "are an extremely important and extensive mode of land transport." The quote discusses the transport of oil, gas, slurry and water. One reference to the transport of water in this publication does not resolve the issue. As discussed above and below, the remaining evidence suggests that water and wastewater pipes fall under a separate industry from transportation.

[REDACTED] then notes that the RIMS II econometric model considers "Transportation and public utilities" as an industry "aggregation" and that another industry is "Pipelines, freight forwarders, and related services." The RIMS II information provided includes the following industry aggregation:

**Transportation and public utilities:**

Transportation	65.0100-65.0702, 78.0100
Communications	66.0000-67.0000
Electric, gas, and sanitary services	68.0100-68.0302, 78.0200

While aggregated, sanitary services are clearly listed separate from transportation with a separate numerical designation.

<sup>2</sup> See the Pennsylvania Department of Transportation Handbook, page 1, available at <http://www.dot.state.pa.us/PennDOT%20Factbook/about%20the%20department.html> accessed July 8, 2011 and incorporated into the record of proceeding.

As noted by [REDACTED] the list of regional multipliers by SIC Code also aggregates "Transportation, Communications, and Utilities." The industry number and title under this aggregation follows:

**65A Railroads and related services; passenger ground transportation:**

65.0100 Railroads and related services

65.0200 Local and suburban transit and interurban highway passenger transportation.

**65B Motor freight transportation and warehousing:**

65.0300 Motor freight transportation and warehousing

**65C Water transportation**

65.0400 Water transportation

**65D Air Transportation**

65.0500 Air transportation

**65E Pipelines, freight forwarders, and related services:**

65.0600 Pipelines, except natural gas

65.0701 Freight forwarders and other transportation services

65.0702 Arrangement of passenger transportation

**66 Communications, except radio and TV:**

66.0000 Communications except radio and TV

**67 Radio and TV broadcasting:**

67.000 Radio and TV broadcasting

**68A Electric services (utilities):**

68.0100 Electric Services (utilities)

**68B Gas Production and distribution (utilities):**

68.0200 Gas Production and distribution (utilities)

**68C Water and sanitary services:**

68.0301 Water supply and sewerage systems

68.0302 Sanitary services, steam supply, and irrigation systems

The proposed project clearly falls under Code 68C, which does not appear to fit under transportation any more than Code 67, radio and TV broadcasting, which is also included in this aggregation.

[REDACTED] evaluation of the impact of the proposed project includes Appendix A that lists the industry multipliers used. The industries include utilities; chemical manufacturing; retail

trade; retail estate; professional, scientific and technical services; management of companies and enterprises and households. The Appendix does not list transportation.

According to its website, [www.dot.state.pa.us/PennDOT%20Factbook/organization.htm](http://www.dot.state.pa.us/PennDOT%20Factbook/organization.htm), accessed July 8, 2011 and incorporated into the record of proceedings, the Pennsylvania Department of Transportation is organized as follows: Highway Administration, Safety Administration, Planning, Aviation and Rail Freight, Local and Area Transportation and Administration. The Safety Administration issues licenses and manages driver safety programs and the Planning division develops the 12 year plan that serves as the blueprint for "highway, bridge, aviation, rail freight and mass transit improvements."

The Pennsylvania Department of Environmental Protection (DEP), however, manages the state's water program according to its website, [www.depweb.state.pa.us/portal/server.pt/community/water/6008](http://www.depweb.state.pa.us/portal/server.pt/community/water/6008) (accessed July 8, 2011 and incorporated into the record of proceedings). Specifically, DEP's Water Management Team includes: The Bureau of Water Standards and Facility Regulation, The Bureau of Watershed Management, the Bureau of Waterways Engineering and The Water Planning Office.

The above information, including the documentation the petitioner submits on certification, demonstrates that while water and wastewater utilities may be aggregated with transportation, they do not fall under transportation. While a letter from [REDACTED] Executive Director of the DCED asserts that DCED "always intended" to include water pipeline systems within the definition of transportation, the regional center application, discussed above, does not support that assertion. Instead, the application suggests that DCED only contemplated the transportation of people and goods via ground, air or water, with a primary target being trucking and warehousing.

In light of the above, the AAO concurs with the director that the petitioner has not proposed to invest in an industry approved for the DCED regional center and, thus, cannot rely on indirect job creation.

### **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(e) states, in pertinent part:

*Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, “employee” also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

\* \* \*

*Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur’s spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

*Full-Time Employment Defined* – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Finally, 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.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff’d* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates,

within the next two years, and when such employees will be hired.” To be considered comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (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. at 213. 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 petitioner has not contested the director’s conclusion that the petitioner’s proposal does not explain how the new commercial enterprise will create sufficient direct jobs for employees that meet the regulatory definition of “employee” and “qualifying employee” at 8 C.F.R. § 204.6(e). In fact, the petitioner has never claimed that the investment will create the necessary direct jobs and has not submitted a business plan detailing how the investment will create direct jobs. Thus, the AAO concurs with the director’s determination that the petitioner has not established that the investment will create the requisite direct jobs.

Finally, beyond the decision of the director, the record contains no evidence that [REDACTED] is or would be interested in the proposed five-year loan that it would need to repay with the proceeds of a long-term loan. Rather, the petitioner submitted a loan proposal that DCED drafted and a commitment letter from DCED. The record lacks a similar letter from [REDACTED] or even evidence that they received and reviewed DCED’s commitment letter. While the petitioner asserts that [REDACTED] will not enter into a loan agreement prior to the approval of the Form I-526 petitions, some documentation from [REDACTED] indicating their interest in the loan is required if USCIS is to gauge whether the business plan is reasonable even with respect to indirect job creation.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition may not 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. Accordingly, the decision of the director denying the petition will be affirmed.

**ORDER:** The director's January 12, 2011 decision is affirmed. The petition is denied.