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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

[redacted]

B7

DATE: NOV 04 2011 Office: CALIFORNIA SERVICE CENTER

[redacted]

IN RE: Petitioner: XIUQIN LI

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]

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.

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, and certified her decision to the Administrative Appeals Office (AAO). The AAO affirmed the director's decision in part. The matter is now before the AAO on motion. The AAO will reaffirm its prior decision.

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, Pennsylvania Regional Center, LP VI, 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, Aqua PA 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 submitted 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 withdrew the director's TEA concerns. The AAO upheld 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. The AAO also upheld the director's determination that the petitioner has not documented that the investment will create the necessary direct jobs. Finally, beyond the director's decision, the AAO concluded that the record lacks evidence that the proposal is viable as the record contained no evidence of consultation with Aqua PA.

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.

On motion, the petitioner submits a new letter from dated August 26, 2011, in which he continues to assert that water and wastewater pipes fall under transportation. mischaracterizes the AAO's decision as accepting that water and wastewater infrastructure falls under "the broader transportation industry" and asserts that the AAO's decision was overly reliant on industry codes. The AAO did not, in fact, accept that water and wastewater infrastructure fall under transportation and only discussed industry codes for the purpose of rebutting the petitioner's assertions as to the significance of the codes. Specifically, on certification discussed the industry categories under the job calculation methodology RIMS II, Standard Industry Classification (SIC) codes and North American Industry Classification System (NAICS) codes and concluded:

> Therefore, we respectfully submit that RIMS II industry categories, SIC codes and NAICS codes all confirm that pipeline transportation, including the pipeline transportation of water, is a valid and recognized subsection under the overall "Transportation" industry.

Solely in response to this assertion, the AAO pointed out that while transportation *and* utility industry codes are aggregated as noted by when those industries are broken down between transportation and utilities, infrastructure for water and wastewater falls under a separate industry code from transportation. Despite having relied heavily on these codes on certification, now asserts that "because the ways RIMS II and NAICS/SIC codes classify industry subsectors do not necessarily address the complexities of a given EB-5 project, they have not been and should not be determinative of whether a project qualifies under a target industry." Thus, now appears to concede that the industry codes do not, in fact, support a finding that water and wastewater pipes fall under transportation.

Counsel submits a letter dated August 26, 2011 from . and an August 25, 2011 letter from the office of the Secretary of Transportation for Pennsylvania, signed on behalf of . Counsel also submits a new economic analysis dated August 24, 2011. Finally, counsel resubmits other documents, including a March 24, 2010 loan request approval between . The record does establish interest in the project.

For the reasons discussed below, the AAO reaffirms its prior conclusions.

I. Law

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).

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.

II. Prior Decisions

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 [redacted]. In its July 27, 2011 decision, the AAO determined that the investment falls within a targeted employment area; thus, the minimum investment amount is $500,000.

On November 18, 2005, [redacted] applied for designation as a regional center. The proposal advised the industries for which [redacted] was requesting approval. In the AAO's previous decision, the AAO reviewed the discussion of transportation in the cover letter and the proposed Confidential Information Memorandum (CIM), concluding that [redacted] explained transportation as the transport of people and goods via land, air and water and asserted that the regional center would focus on trucking and warehousing. The regional center proposal cover letter explained "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 CIM. 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, asserted 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. On motion, [redacted] reasserts that [redacted] "never defined any form of transportation subsector of the transportation industry" and, thus, the AAO should use the "generally accepted definition of transportation." As noted in the AAO's previous decision, the cover letter and CIM made no mention of water and wastewater pipes. Significantly, the AAO did not solely base its decision on the absence of any discussion of water and wastewater infrastructure in the cover letter and CIM. The AAO also thoroughly examined the supporting documentation.

Specifically, the AAO stated:

> 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 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. 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.

On motion, does not contest the AAO's conclusion that the regional center proposal did not include documentation referencing water and wastewater infrastructure. Instead, asserts:

> [The above documents] were only included to demonstrate the Commonwealth of Pennsylvania's already planned transportation projects, and therefore, why the transportation industry would be a[n] appropriate target industry for . It is clear that these reports were only included to support a general and broad definition of the "Transportation" target industry and were not intended to limit or otherwise restrict the definition of the "Transportation" target industry for investments.

concludes that because more specificity was not required at the regional center stage, and because regional center proposals prior to those submitted on the new Form I-924 were not required to provide industry codes, it is not fair or reasonable to exclude water and wastewater infrastructure from approved regional center projects in this matter. This assertion, however, does not resolve the question of what the recognized definition of transportation includes.

The AAO concluded that counsel listed transportation and water and sewer infrastructure separately in his cover letter for the Form I-526 petition. On motion, notes that counsel repeatedly referenced water and wastewater infrastructure under his discussion of the target industry. Counsel, however, described the target industry as follows: "Transportation/Infrastructure." As noted in the AAO's previous decision, under this heading counsel stated: "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." The AAO concluded that if transportation includes water and sewer systems, it is not clear why counsel listed them separately. assertion that this sentence falls under counsel's description of transportation is illogical, since by that reasoning all infrastructure projects, including telecommunications, could fall under transportation. The regional center approval does not cover "infrastructure" projects and the AAO does not read "transportation" and "infrastructure" as synonymous or interchangeable.

On certification, asserted that Aqua PA "is principally in the business of the pipeline transportation of water and wastewater between its treatment facilities and its customers." continued:

> 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, natural gas and biofuels.

then noted 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:

The AAO noted that while aggregated, sanitary services are clearly listed separate from transportation with a separate numerical designation.

As noted by , the list of regional multipliers by SIC Code also aggregates "Transportation, *Communications, and Utilities*." (Emphasis added.) Significantly, water and sewer infrastructure (68C) are listed separately from the various types of transportation (65A-E), including pipelines (65E), and falls under utilities (68A-C). The AAO concluded that the proposed project does not appear to fit under transportation any more than radio and TV broadcasting (67), which is also included in this aggregation.

The AAO next noted that 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; real estate; professional, scientific and technical services; management of companies and enterprises and households. The AAO found the omission of transportation from Appendix A significant. On motion, the petitioner submits a new analysis from jointly signed by assert that EB-5 projects have impacts beyond their industry and that the original analysis was looking at the project's impact on various industries rather than classifying the The letter uses an example of a hotel, asserting that a reasonable multiplier might be for the construction industry rather than hotel operation. This letter is not a persuasive explanation as to the lack of any transportation impact in the initial analysis.

quoted from the following book: *Transport Systems* (2009). According to 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. The petitioner has never submitted a copy of the quoted material. Going on

record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The AAO concluded that a single reference to the transport of water in this publication did not resolve the issue.

Next, the AAO noted that counsel acknowledged that "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. The AAO confirmed this information via the department's website, *see* accessed July 8, 2011 and incorporated into the record of proceeding. According to that website, PennDOT 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 AAO noted that the department that manages the state's water program is the Pennsylvania Department of Environmental Protection (DEP). (accessed July 8, 2011 and incorporated into the record of proceeding). 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.

That AAO concluded: "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 motion, the petitioner submits a letter from the office of the Secretary of Transportation for Pennsylvania, signed on behalf of the Secretary and dated August 25, 2011. The letter states:

> Although PennDOT does not directly regulate water and wastewater treatment infrastructures or companies such as ., we can confirm that pipeline transportation is a valid subsector of the transportation industry and that we consider the pipeline transportation of water and wastewater between residential and commercial properties to treatment facilities by companies such as Aqua Pennsylvania, Inc. to be within the pipeline transportation subsector.
>
> I can also confirm that and similar companies must comply with PennDOT regulations, including obtaining PennDOT Highway Occupancy Permits for much of its day-to-day construction and repairs.

III. Analysis

A. State Agency Letters

The petitioner bears the burden to establish eligibility for an immigration benefit and may submit any relevant evidence to support his or her case. *See* section 291 of the Act. Neither the Act nor its accompanying regulations mandate that USCIS accept evidence, without question, as proof of eligibility for a particular benefit. USCIS, in its discretion, considers all evidence in the entire record and gives it due weight in light of that record.

On motion, counsel refers to the PennDOT letter as an "industry expert opinion." The AAO recognizes that the letter from the Pennsylvania Department of Transportation (PennDOT) has some value. However, the record contains considerable evidence that is inconsistent with the PennDOT statement.

There is a difference between advisory opinion letters and letters attesting to fact based on personal knowledge. This letter begins with a clarification that PennDOT does not regulate water and wastewater treatment infrastructure. Because PennDOT does not claim or provide evidence of expertise with respect to the water and waste water industries at issue in this case, the letter does not help the AAO in making its decision in this case. USCIS, in its discretion, may consider advisory opinion statements as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS also may give less weight to such letters that are not corroborated, in accord with other information, or are in any way questionable. *Id.* at 795; *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (discussing the varying weight that may be given expert testimony based on relevance, reliability, and the overall probative value).

Furthermore, there is no statutory provision or regulation requiring USCIS to defer to a state official's letter regarding whether a project falls within a particular industry. While the regulations at 8 C.F.R. §§ 204.(6)(i) and (j)(6)(ii)(B) allow states to designate high unemployment areas, the regulations do not allow for states to determine whether an alien has met a particular eligibility requirement under the Act. USCIS is ultimately responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought. 19 I&N Dec. at 795.

The record contains multiple documents that contradict the opinion of PennDOT. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not contain independent objective evidence resolving the inconsistencies between the PennDOT letter and the other evidence of record relating to the transportation industry. Even if USCIS accepted the PennDOT's conclusions, it does not override USCIS's ultimate authority and discretion to determine if an alien has established eligibility for the benefit sought. *Id.*

B. Investment

Beyond the decision of the director and the AAO's previous decision, the AAO notes a provision at Subsection 6 of the Pennsylvania U.S. Immigrant Investment Fund Amended and Restated Escrow Agreement dated July 27, 2009, which discusses the return of funds to the investor. Specifically, Subsection 6(b) provides that the escrow agent will return the funds to the petitioner "upon the earlier to occur of":

(i) Escrow Agent's receipt of notice from the Promoter that the Investor's I-526 Petition has been refused by the United States Government or subscription has terminated, or

(ii) The case of a New Investor or consenting Investor, 15 months after the date of the Escrow Agent's receipt of the Investor's Subscription Proceeds, and otherwise 12 months after the date of the Escrow Agent's receipt of the Investor's Subscription Proceeds.

The agent, U.S. Bank National Association, received the petitioner's funds on May 3, 2010. It has been more than 15 months since that date. Thus, any funds transferred to escrow are no longer at risk. For this additional reason, the petition may not be approved.

For the above stated reasons, considered both in sum and as separate grounds for denial, the 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.

ORDER: The AAO's decision of July 27, 2011 is affirmed. The petition is denied.