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

(b)(6)

[redacted]

DATE: MAY 0 5 2015 OFFICE: IMMIGRANT INVESTOR PROGRAM 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Chief, Immigrant Investor Program Office (IPO), denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an immigrant investor pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petition is based on an investment in , a new commercial enterprise (NCE). According to page three of the July 2012 business plan, which the petitioner initially filed in support of the petition, the NCE is a limited partnership formed "for the purpose of funding the ground-up construction, development and management of an assisted living facility" in Texas. The business plan further provides that the NCE has a general partner, , and three limited partners, each seeking classification as an employment creation alien pursuant to section 203(b)(5) of the Act. The petitioner is one of the NCE's three limited partners. The petitioner indicated on part 2 of the petition that the NCE is located in a targeted employment area (TEA). Thus, the required amount of equity investment is $500,000.

According to a September 6, 2013 letter from Manager of which the petitioner filed on appeal, is the general partner in 13 limited partnerships, Each of the 13 limited partnerships, including the NCE, plans to build, develop and operate an assisted living facility in Texas. Mr. attached a document entitled "Exhibit A" to his letter. This attachment, as well as the July 2012 business plan, indicates that each limited partnership requires a $3.5 million investment, with $1 million to $1.5 million coming from limited partners, like the petitioner, and the remaining $2 million to $2.5 million coming from through mortgages and a line of credit.

The chief determined that the petitioner did not demonstrate that she had invested or was actively in the process of making an at-risk investment of the required $500,000. For the reasons discussed below, the petitioner has not overcome the chief's sole ground for denial. Accordingly, the petitioner's appeal will be dismissed.

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).

II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the petition on October 25, 2012, supported by the following types of evidence: (1) the NCE's corporate documents, including documents showing the petitioner's transfer of funds to the NCE; (2) documents from the United States Census Bureau relating to Texas; (3) the NCE's July 2012 business plan; (4) the NCE's corporate documents; and (5) documents relating to the source of the petitioner's funds.

On March 28, 2013, the Director, California Service Center, issued a Request for Evidence (RFE). Specifically, the director requested evidence: (1) that the NCE was located in a TEA; (2) that the petitioner's requisite capital had been placed at risk in the NCE in light of obligation to secure $2 million to invest in the NCE and the NCE's obligation to redeem the petitioner's interest in the NCE; and (3) that the NCE would meet the job creation requirements.

The petitioner filed a response to the RFE on May 7, 2013, supported by the following types of evidence: (1) documents relating to the NCE's business operation; (2) documents relating to Texas; (3) an April 8, 2013 senior housing market analysis; (4) documents relating to potential sources of funding for investment; (5) an undated letter from Mr. (6) an April 23, 2013 Agreement of Waiver; (7) an April 25, 2013 letter from and (8) documents relating to and photographs of in Alabama.

On August 21, 2013, the chief denied the petition. The chief concluded that the petitioner had not established that her funds were placed at risk because: (1) she had not shown that in addition to the three limited partners' $1.5 million investment, could raise the remaining $2 million needed for the NCE; and (2) the NCE's Limited Partnership Agreement included a mandatory redemption clause.

The petitioner filed the instant appeal, supported by the following types of evidence: (1) a September 6, 2013 letter from Mr. (2) letters from Senior Vice President/Manager of (3) loan documents; (4) Agreements of Wavier; and (5) an undated document entitled "No. 1 Amendment to the Limited Partnership Agreement." On appeal, the petitioner asserts that has secured the needed funds for the NCE and that the NCE has deleted the mandatory redemption clause from the Limited Partnership Agreement. On October 2, 2013, the petitioner submitted a September 30, 2013 letter, stating that some of the documents filed on appeal contained incorrect information. The petitioner provided additional supporting documents, including a September 17, 2013 commitment letter from Mr. and a document entitled "Exhibit A," relating to funds needed for 13 limited partnerships, including the NCE.

III. ISSUES PRESENTED ON APPEAL

A. Capital Investment

The regulation at 8 C.F.R. § 204.6(e) defines capital and investment. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she 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 petitioner must show actual commitment of the required amount of capital. The regulation then lists the types of evidence the petitioner may submit to meet this requirement.

Even if a petitioner transfers the requisite amount of money, she must establish that she placed her own capital at risk. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1042 (E.D. Calif. 2001) (citing *Matter of Ho*, 22 I&N Dec. 206, 209 (Assoc. Comm'r 1998)). Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. *Matter of Ho*, 22 I&N Dec. at 210.

The petitioner has not shown that she has placed the required amount of capital at risk for the purpose of generating a return on the capital. While not determinative, page 31 of the Confidential Private Offering Memorandum explicitly states that "[a]n investment in the partnership is purely for immigration benefits and not for commercial return on investment." For the reasons discussed below, the documents in the record do not establish that the petitioner has placed the requisite capital investment at risk to generate a return.

1. Additional Investment Funds

The July 2012 business plan provides that the NCE requires a total investment of $3.5 million, $1.5 million of which will come from three limited partners, including the petitioner, each investing $500,000, and $2 million will come from [redacted] According to pages eight and nine of the business plan, the initial phases of the project include architectural and engineering fees, costing $87,000, and construction of the assisted living facility, costing $1.87 million. The petitioner has submitted evidence showing that on September 28, 2012, she wired $500,009 to an account ending in [redacted], which lists [redacted] as its owner and a balance of $4,542,555.18 after receiving the petitioner's funds. The evidence further shows that on September 28, 2012, [redacted] wired $500,000 from its account ending in [redacted] to the NCE. On October 9, 2012, 11 days later, the NCE's account ending in [redacted] received a $500,000 wire from [redacted] One document, which bears the name of the [redacted] Wire Transfer Department, but is not on bank letter head and bears no signature, stamp or indicia of originating from an online banking site, reflects the "Originator Bank Info" as the petitioner. The petitioner has not shown whether the $500,000 the NCE received on October 9, 2012 derived from the petitioner's September 28, 2012 $500,009 wire to [redacted] or funds already in the

account of before the petitioner's wire. The petitioner has also not explained why it took 11 days for a September 28, 2012 wire to appear in the NCE's account on October 9, 2012. In addition, the petitioner has not provided information relating to or an explanation as to why she wired the funds to rather than to the NCE or directly. The record does not contain an escrow agreement identifying or any other entity as an escrow agent. The petitioner has also not submitted evidence that the other two limited partners, and , have each invested $500,000 in the NCE, although the NCE's balance was $1,500,073 after the October 9, 2012 transfer.

Moreover, the petitioner has not shown that, at the time of filing, had raised or secured a commitment for $2 million to invest in the NCE. To show has secured the necessary funds, on appeal, the petitioner files four letters from Mr. to show that has agreed to lend money and extend a line of credit to These letters do not establish that had secured the necessary funds to invest in the NCE when the petitioner filed her petition on October 25, 2012. First, it is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In other words, the petitioner cannot secure a priority date based on the anticipation of future events. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (adopting *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that the United States Citizenship and Immigration Services (USCIS) cannot "consider facts that come into being only subsequent to the filing of a petition.") Mr. letters postdate the filing of the petition. As such, the petitioner has not shown that at the time of filing, on October 25, 2012, had secured the necessary funds or a commitment for the funds to invest in the NCE. Without the additional funding from the petitioner's claimed investment of $500,000 was not at risk, as the additional funding was needed for the project before the NCE could undertake any meaningful business activity. *See Matter of Ho*, 22 I&N Dec. at 210.

Second, Mr. letters include inconsistent information. The June 19, 2013 letter provides that the costs to construct and operate 10 assisted living facilities are $32.5 million and the 10 loans will total $12.5 million, while exhibit A to Mr. September 18, 2013 letter lists the costs for 10 projects as $35 million. In addition, Mr. letters provide inconsistent information relating to the guarantors of the loan. Specifically, the June 19, 2013 letter provides that the guarantors of the loan include " not including " According to the September 16, 2013 and September 17, 2013 letters, however, the guarantors do not include or , but do include The petitioner has provided inconsistent evidence and "it is incumbent upon [her] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or evidence], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not provided any competent objective evidence to explain or reconcile the inconsistent evidence.

Third, the June 19, 2013 letter provides that "this commitment shall remain effective until 7/31/13" and that the "Bank shall have no further obligation hereunder after that date." The petitioner, however, has not submitted evidence showing an extension of the July 31, 2013 effective date. While the September 17, 2013 letter purports to extend the term of the commitment through September 5, 2014, the

signatures all appear on separate pages and are exact copies of the signature pages supporting the September 16, 2013 letter, which does not extend the term of the commitment. Thus, the record does not establish which letter the signatories executed.

2. Redemption Clause

On appeal, the petitioner does not challenge the chief's finding that the presence of a mandatory redemption clause in section 8.5 of the Limited Partnership Agreement precludes a finding that the petitioner's funds are at risk. *See* 8 C.F.R. § 204.6(e) (excluding a contribution of capital in exchange for an obligation from the definition of "invest"); 8 C.F.R. § 204.6(j)(2)(iv) (providing that evidence of stock "may not include terms requiring the new commercial enterprise to redeem it at the holder's request.") For the petitioner's money to be truly at risk, the petitioner cannot enter into a partnership knowing that she has a willing buyer in a certain number of years, nor can she be assured that she will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. *Matter of Izummi*, 22 I&N Dec. at 186; *see also R.L. Investment Ltd. v. INS*, 86 F. Supp. 26 1014 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001). Instead, the petitioner asserts that the mandatory redemption clause is no longer in place because all three limited partners executed an Agreement of Waiver in April 2013, waiving the enforcement of section 8.5(b), and because the NCE deleted both section 8.5(b) and 8.5(c) in an undated document entitled "No. 1 Amendment to the Limited Partnership Agreement."

The regulation at 8 C.F.R. § 204.6(j)(2) requires specific initial evidence documenting that the petitioner has already committed the capital and placed that capital at risk. Specifically, that regulation provides: 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." The regulation further states that 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."

It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); 72 Fed. Reg. 19100 (Apr. 17, 2007) (adopting 8 C.F.R. § 103.2(b)(1), originally proposed at 69 Fed. Reg. 69549 (Nov. 30, 2004); 59 Fed. Reg. 1455, 1458 (Jan. 11, 1994) (explaining in the commentary to 8 C.F.R. § 103.2(b)(12) that supplemental evidence must establish eligibility for the benefit when the petition was filed); *Matter of Katigbak*, 14 I&N Dec. at 49 (holding that a beneficiary may not demonstrate eligibility as a member of the professions based on coursework that postdates the filing of the petition). Ultimately, the petitioner cannot secure a priority date based on future events. *Matter of Izummi*, 22 I&N Dec. at 175-76 (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition"); *see also EB-5 Adjudications Policy*, PM-602-0083, p. 24 (May 30, 2013) (citing *Matter of Izummi*, 22 I&N Dec. at 176 and 8 C.F.R. § 103.2(b)(1) for the proposition that a petitioner cannot establish eligibility under a new set of facts during the pendency of the Form I-526 petition); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 1025, 1038 n.4 (E.D. Calif. 2001), *aff'd*, 345 F.3d 583 (9th Cir. 2003) (upholding a finding that a

construction management agreement with substantive changes "could not be accepted for the first time on appellate review"); *cf Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978) (requiring eligibility at the time of filing even for nonimmigrant petitions that do not involve priority dates); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Act. Reg'l Comm'r 1977) (holding that consideration of whether the petitioner has the ability to pay the proffered wage should necessarily focus on the circumstances as of the date of filing, later codified at 8 C.F.R. § 204.5(g)(2)); *Matter of Wing's Tea House*, 16 I&N Dec. at 160 (holding that a petitioner cannot rely on experience the beneficiary gained after the priority date for purposes of establish eligibility).

In this case, the petitioner filed the petition on October 25, 2012. At the time of filing, the petitioner submitted a Limited Partnership Agreement, which she signed on August 15, 2012. The agreement included an "Exit Option for Limited Partners" section on page 27. Section 8.5(b)(2) provided that "[f]ollowing the Fifth Anniversary date of each limited partner, General Partner [redacted] is obligated to cause the Partnership to redeem the Partnership Interest of such Limited Partner at any time, and from time to time." Section 8.5(c)(1) similarly provided, "[in] the event that Partnership generates and accumulates adequate fund[s] through its operations, the General Partner shall redeem the Partnership Interest of each Redeeming Limited Partner and shall . . . cause the Partnership to pay to such Redeeming Limited Partner an amount equal to such Redeeming Limited Partner's unrecovered Capital Contribution." As such, the petitioner has not shown that at the time of filing, her $500,000 claimed capital investment constituted evidence of funds that were at risk, under the regulation at 8 C.F.R. §204.6(j)(2).

Moreover, the petitioner has not shown that *Matter of Izummi*, 22 I&N Dec. at 175-76, or any other legal authority, permits the post-filing waiver of the otherwise mandatory redemption clause. On appeal, the petitioner asserts that "No. 1 Amendment to the Limited Partnership Agreement" seeks to rectify inconsistencies between the Limited Partnership Agreement and the Confidential Private Offering Memorandum. In *Matter of Izummi*, we "recognized," without discussion, amendments that "cause[d] the partnership agreement to conform to the other agreements that th[e] petitioner had originally executed and submitted with his Form I-526." In this case, however, the petitioner has not shown that the August 2012 Limited Partnership Agreement and the July 2012 Confidential Private Offering Memorandum are inconsistent with respect to the NCE's obligation to redeem the petitioner's claimed capital investment. Similar to clause 8.5 in the Limited Partnership Agreement, page 26 of the Confidential Private Offering Memorandum includes an "Exit Strategy" section that provides: "[t]he Partnership intends to redeem the investor's units from proceeds generated through its operation of the Project, or refinancing the Project, or possibly a sale of the Project." The Confidential Private Offering Memorandum further provides that "[t]he Partnership should have sufficient funds to redeem the Limited Partners at the time of the Project's conclusion . . . . If, however, the Partnership has inadequate funds to redeem the Limited Partners, then the Partnership will evaluate its options as that point, including sale, mortgage or otherwise disposal of the Project's assets, including the Project property." While the Confidential Private Offering Memorandum contemplates that the NCE might not have the funds to fulfill its obligation, the petitioner's risk was only that of a creditor, not an equity investor. *Matter of Izummi,* 22 I&N Dec. at 185.

Ultimately, the petitioner has not documented that she had fully committed her funds and placed them at risk as of the date of filing. Rather, subsequent to that date, she waived the redemption clause at section 8.5(b) of the Limited Partnership Agreement in an attempt to conform to USCIS requirements set forth in the regulatory definition of invest (as of 1991) and a 1998 precedent decision after the director, in the RFE, identified the redemption clause as a deficiency. The April 2013 waivers are not probative of eligibility as of the date of filing. *Matter of Izummi*, 22 I&N Dec. at 175, 183 n. 15 (precluding a material change in a redemption provision (a buy option exercisable after seven years instead of three years) in an effort to make an apparently deficient petition conform to USCIS requirements). In addition, the April 2013 waivers only waive the provision at 8.5(b) of the Limited Partnership Agreement. Section 8.5(c) also obligates the NCE to redeem the limited partnership interests. On appeal, the petitioner submitted an undated amendment to the Limited Partnership Agreement eliminating both 8.5(b) and (c). Only the general partner, however, signed the amendment.

Accordingly, the petitioner has not demonstrated that, as of the date of filing, she had placed her funds at risk. Even as of the date of appeal, the petitioner has not signed any agreement waiving clause 8.5(c).

3. Business Activities

The petitioner has not presented sufficient evidence showing that the NCE has undertaken actual business activities such that the petitioner's $500,000 claimed capital investment may be considered at risk. *Matter of Ho*, 22 I&N Dec. at 210, states:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's *de minimis* action of signing a lease agreement, without more, is not enough.

That case concludes: "Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement." *Id.* Review of the record reveals that the petitioner did not initially support the petition with any documentation of the NCE's business activity.

In response to the director's RFE, the petitioner submitted documents, all dated in either April or May 2013, relating to: (1) assignment of a commercial contract of land purchase to the NCE for $10; (2) the appointment of the NCE's president and vice-president; (3) the NCE's acceptance of April 2013 and May 2013 proposals from (4) a $995 payment for an April 8, 2013 market analysis report on the senior housing market; and (5) an April 10, 2013 letter from Mr. to expressing interest in financing assisted living projects. The evidence is insufficient to show that the petitioner's claimed capital investment had been placed at risk as of the date of filing, on October 25, 2012. As noted, a petitioner must establish eligibility at the time of filing the petition; 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)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49; *see also Matter of Izummi*, 22 I&N Dec. at 175-76; *Spencer Enterprises, Inc.*,

229 F.Supp. at 1038 n. 4. At the time of filing, the petitioner had not established any business activity such that her claimed investment funds could be considered at risk. *See Matter of Ho*, 22 I&N Dec. at 210. In fact, although page seven of the Confidential Private Offering Memorandum, which the petitioner submitted initially, provides that was to develop and manage the construction phase, the petitioner has not since submitted any evidence showing involvement with the NCE. Similarly, according to page seven of the Confidential Private Offering Memorandum and page four of the July 2012 business plan, the NCE was to develop, build and operate a 22-unit assisted living facility. Page two of the April 8, 2013 Senior Housing Market Analysis, however, discusses the development of a 30-bed assisted living facility. The changes in contractors and facility size demonstrate the minimal commitment of the petitioner and the NCE to the project, as described in the initial filing, at the time of filing. *See generally Spencer Enterprises, Inc.*, 229 F.Supp. at 1042.

Even if the petitioner had shown the NCE's obligation to pay for the accepted services, the petitioner has not shown that there has been performance under the proposals. As such, at most, these documents indicate the NCE's prospective investment arrangements entailing no present commitment, which are not sufficient to show that the petitioner's $500,000 claimed capital investment had been placed at risk. *See* 8 C.F.R. § 204.6(j)(2). Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. *Matter of Ho,* 22 I&N Dec. at 210.

In light of the above, the petitioner has not demonstrated that she has placed the required amount of capital at risk in the NCE for purpose of generating a return on the capital placed at risk. *See* 8 C.F.R. § 204.6(j)(2).

4. Administrative Fee

The petitioner has not shown that the $500,000 the NCE received from on October 9, 2012 constitutes her investment of at least $500,000 in the NCE. First, as discussed, the petitioner has not shown that the $500,000 the NCE received on October 9, 2012 derived from the $500,009 the petitioner wired to . Second, according to page eight of the Confidential Private Offering Memorandum, "the Partnership will receive from each subscribing investor an administrative fee of $39,000 (the "Administrative Fee") . . . . The Administrative Fee shall be paid directly to the Partnership upon subscription by each individual investor." The petitioner has not provided evidence, such as bank documents, showing that she has paid the NCE $39,000, in addition to the $500,000 claimed capital investment. Without evidence of the petitioner's payment of $39,000 beyond the $500,000 payment, the petitioner has not shown that she has invested at least $500,000, the minimum required amount of equity investment, in the NCE.

In light of the above, the petitioner has not demonstrated that she has placed the required amount of capital at risk in the NCE for purpose of generating a return on the capital placed at risk. *See* 8 C.F.R. § 204.6(j)(2).

IV. SUMMARY

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.