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MAIL STOP 2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 08 184 50343 Office: SERVICE CENTER OPERATIONS Date: NOV 18 2008

IN RE: Appellant: [redacted]

PETITION: Proposal for Designation as a Regional Center Pursuant to Section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993 as amended by Section 402 of the Visa Waiver Permanent Program Act of 2000.

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Grisson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Chief, Service Center Operations, denied the proposal for designation as a regional center, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The appellant seeks designation as a 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. 102-395, 106 Stat. 1874 (Oct. 6, 1992), as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, Pub. L. 106-396, 114 Stat. 1637 (Oct. 30, 2000).

The bases of denial included: (1) the appellant's failure to demonstrate that it existed; (2) the area where the investments would take place was not documented as a qualifying rural area as defined at 8 C.F.R. § 204.6(e); (3) the vagueness of the appellant's business purposes due to the lack of identified investment targets (businesses) and evidence that these targets would participate; (4) the absence of evidence that the promissory notes available to participating aliens would be qualifying under the reasoning set forth in *Matter of Izummi,* 22 I&N Dec. 169, 191 (Comm. 1998); (5) the lack of economic analysis and forecasting tools in support of the investments proposed; (6) the failure of the draft partnership agreement to address escrow accounts and how capital would be at risk; and (7) the failure to provide bylaws, operating agreements, offering memoranda or a breakdown of the $18,500 administrative fee.

On appeal, the appellant asserts that all of the evidence found lacking could have been submitted in response to a request for additional evidence and questions why such a request was never issued. The appellant asserts that other promoters preparing proposals not only received detailed requests for additional evidence but also were able to personally meet with Service Center Operations staff. Finally, the appellant submits new evidence. This new evidence overcomes some of the bases of denial, but not all of them. For the reasons discussed below, the proposal appears, at best, to have been filed prematurely, before the entity to be designated a regional center even existed and before *specific* investment projects had been developed in cooperation with the entities that would utilize the invested funds.

I. Procedural Issues

As stated above, the appellant expresses concern that other promoters were able to meet with Service Center Operations staff. While Citizenship and Immigration Services (CIS) regulations have a provision for oral argument under certain circumstances at the appellate level (8 C.F.R. § 103.3(b)), there is no regulatory provision for oral argument during the adjudication of a proposal for designation as a regional center. Further, if the appellant is suggesting that CIS staff should have informally discussed the merits off the record, the AAO notes that *ex parte* communications are prohibited by the Administrative Procedure Act (APA), 5 U.S.C. § 706.

According to section 551(14) of the APA, "ex parte communication" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."

Section 557(d)(1) of the APA limits ex parte communications, in part, as follows:

> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;
>
> (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

Significantly, *ex parte* communications are not part of the record of proceeding and cannot be considered in future proceedings, such as the appeal before us. Thus, Service Center Operations did not err when it declined to meet with the appellant. There is no regulatory procedure in place for such a meeting and Service Center Operations would have been obligated to create a record of the meeting.

More persuasive is the appellant's assertion that Service Center Operations should have issued a request for additional evidence before denying the proposal pursuant to 8 C.F.R. § 103.2(b)(8) (2006) as in effect when the proposal was filed on December 26, 2006. Certainly, some of the issues raised by Service Center Operations could have been addressed in a request for additional evidence. The most expedient remedy for this error, however, is to consider the new evidence on appeal. Because Service Center Operations did not issue a request for evidence, the AAO may consider any evidence that the appellant submits on appeal. *Cf. Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For the reasons discussed below, the appellant has not overcome all of the bases for denial.

II. Relevant Statute and Regulations

Section 203(b)(5)(A) of the Act, as amended, 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).

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993 as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, provides:

> (a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.
>
> * * *
>
> (c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

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

> (1) *Scope*. The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

III. Analysis

A. ***Existence of Regional Center***

The original proposal, filed on December 26, 2006, constituted a business plan for Coastal Washington International Investment Company, Inc. (CWIIC, Inc.). The use of "Inc." indicates that CWIIC, Inc. was a corporation. The initial proposal did not include articles of incorporation or other evidence that CWIIC, Inc. was a corporation in good standing. On pages 5 and 6 of the proposal, the appellant identified only one executive/owner. The appellant explained that it has other "potential directors" who did not want to be identified until the appellant "has USCIS approval." Thus, Service Center Operations concluded that the record lacked evidence that CWIIC, Inc. existed as a corporate entity.

On appeal, the appellant asserts that the regulations do not require evidence of existence and asserts that such evidence could have easily been submitted in response to a request for additional evidence. The

appellant submits confirmation that Coastal Washington International Investment Company, L.L.C. organized effective June 6, 2008, almost one month after Service Center Operations denied the proposal.[1]

The regulation at 8 C.F.R. § 204.6(j) notes that additional evidence other than that specified in the regulations may be required. Clearly, only an entity that exists can be designated as a regional center. Thus, it is reasonable to require evidence of the proposed regional center's existence. We concur with the appellant, however, that the absence of organizational documentation is the type of issue that can, under certain circumstances, be easily resolved with a request for additional evidence. The evidence submitted on appeal, however, reveals that the appellant is not capable of resolving this issue as of the date the proposal was filed. As the nonexistence of the regional center at the time the proposal was filed is not a flaw that can be remedied for the reasons discussed below, remanding this matter to the director for further action would be repetitive and unreasonably delay final action in this matter. *See generally Deering Milliken, Inc. v. Johnston,* 295 F.2d 856, 867 (4th Cir. 1961) (finding that a second remand by the National Labor Relations Board would cause unreasonable delays).

A nonexistent entity cannot be designated as a regional center. In this matter, the entity originally identified as the proposed regional center still does not exist as a public or private economic unit. The regulations define a regional center as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e). Specifically, CWIIC, LLC is organized as a limited liability company and not as a corporation as implied on the original business plan. The address for CWIIC, Inc. listed on the business plan and Form I-290B Notice of Appeal does not match the address listed for CWIIC, LLC on the certificate of formation.

The fact that CWIIC, LLC now exists is not persuasive. The regulation at 8 C.F.R. § 103.2(b)(1) provides that an applicant or petitioner must establish eligibility "at the time of filing the application or petition." The regulation at 8 C.F.R. § 103.2(b)(12) provides that an application or petition "shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed." *See also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971); *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Regl. Commr. 1977); *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Regl. Commr. 1977); *Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Commr. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") While the above cases involved immigrant petitions with priority dates, we note that this reasoning has been extended to nonimmigrant visa petitions, which do not have priority dates. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Regl. Commr. 1978).

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[1] On September 29, 2008, we verified that that Coastal Washington International Investment Company is not a registered corporation in Washington State via a search at the state's public website, http://www.secstate.wa.gov/corps/search.aspx (copy incorporated into the record of proceeding). Rather, the only result at this site is for the limited liability company organized in June 2008.

As CWIIC, Inc. did not exist as an economic unit on December 26, 2006 and CWIIC, LLC came into being after the date of filing and, in fact, after the proposal was denied, we uphold this basis of the Service Center Operations decision.

B. ***Targeted Employment Area***

The amount of capital required to be invested pursuant to section 203(b)(5) of the Act is $1,000,000 per alien. Section 203(b)(5)(C)(i) of the Act. This amount may be adjusted to one half that amount, or $500,000, in the case of an investment "made in a targeted employment area." Section 203(b)(5)(C)(ii) of the Act. *See also* 8 C.F.R. § 204.6(f). The appellant indicates that the regional center proposal is based on proposed investments in businesses, infrastructure or public entities located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000. In cases involving a regional center, the regional center activities must "benefit companies located in targeted employment areas" if the investing aliens are to be able to rely on the reduced investment amount. *Matter of Izummi,* 22 I&N Dec. at 172-73.

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).

Initially, the appellant submitted maps of the counties and a list of unemployment rates by Metropolitan Statistical Areas (MSA). The list, however, does not include all of the included counties for each MSA. The appellant also submitted page 2 of a 3-page list of what may be unemployment rates[2] by county for counties in Washington, including Grays Harbor and Pacific Counties. The business plan referenced websites for statistics about each county.

Service Center Operations concluded that the appellant had not established that the geographic area identified in the proposal, Grays Harbor and Pacific Counties in Washington State, were targeted employment areas based on high unemployment statistics or qualification as rural.

On appeal, the appellant submitted evidence that Grays Harbor County was a targeted employment area based on high unemployment in 2007 and 2008 but Pacific County was not. The appellant also submitted evidence that Grays Harbor County does not have a city with a population of 20,000 or more. The website referenced in the original business plan, www.co.pacific.wa.us, confirms that Pacific County has a total population of just over 20,000 and four incorporated cities, each with a population of less than 3,000. We have also reviewed the list of MSAs at http://www.whitehouse.gov/omb/bulletins/fy2008/b08-01.pdf (accessed October 16, 2008), which lists all included counties. This review confirms that neither Grays Harbor County nor Pacific County is within an MSA.

In light of the above, we are persuaded that the proposed benefits would occur within a rural area. Thus, we withdraw Service Center Operations' adverse finding on this issue.

C. ***Business Proposal and Economic Analysis***

The regulation at 8 C.F.R. § 204.6(m)(3) provides:

> *Requirements for regional centers.* Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:
>
> (i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased

[2] The website address at the bottom of the list reflects that it was printed from the Bureau of Labor Statistics' website and includes the text "unemploy. . .."

> export sales, improved regional productivity, job creation, and increased domestic capital investment;
>
> (ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;
>
> (iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;
>
> (iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and
>
> (v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

The appellant submitted a business plan, a draft partnership agreement and a draft promissory note.

On page 3 of the plan, the appellant proposed that the limited partnerships that would invest in the regional center would "range from commercial real estate development to infrastructure/development financing for local utilities . . . from regional transportation to retail shops." (Ellipses in original.)

The business plan further states that the limited partnerships may be a holding company for financing facilities and/or direct investments and may focus on troubled businesses, but none are identified or documented as meeting the regulatory definition of troubled business at 8 C.F.R. § 204.6(e). The plan proposes to use Washington's Community Economic Revitalization Board (CERB) loans as a model, but asserts that the limited partnerships' financing will be superior because they will provide larger loans and the loans will not be limited to public entities. The plan proposes four types of investments: (1) direct loans to midsized technology manufacturers, (2) loans and financing for infrastructures (such as a crane for Port Grays Harbor), (3) direct investment in residential or commercial real estate and (4) loans or direct investment in retail businesses, including seasonal resort communities. The plan estimates that the total investment would result in 40 percent of the investment in type 1, 30 percent in type 2, 20 percent in type 3 and 10 percent in type 4. Each limited partnership would choose whether it wanted to loan or make a direct investment in the public or private sector. The plan also estimates that there would be a three to one ratio of investment between the two counties, with more investment going to Grays Harbor as the most populous of the two counties. The plan states that the investors will try to avoid indirect job creation, but where indirect job creation is used, the regional center "will require as part of its financing agreement that the borrower complete an affidavit estimating the number of jobs created by the loan or credit facility and provide reports of job creation linked to the loan."

The plan does not identify midsized technology companies that have expressed an interest in working with regional center limited partnerships or provide draft contracts with those businesses. The plan does not identify public or private entities that have expressed an interest in receiving a crane at Port Grays Harbor port. The record includes no evidence as to how much such a crane costs. Significantly, while the plan asserts that the port lacks the necessary infrastructure to operate as a full-service deep water port, the Grays Harbor Economic Development Council Internet materials submitted on appeal, page 4, reveal that Grays Harbor has a "Deep water, full-service port with U.S. Foreign Trade Zone." The plan does not explain the type of residential or commercial real estate investments in which the limited partnerships would engage. Significantly, simply funding construction projects that do not provide permanent (continuous) jobs cannot form the basis of a qualifying investment. Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) (finding this construction not to be an abuse of discretion). Further, while the plan discusses the need for more retail businesses within the regional center, it does not identify any retail business that has expressed an interest in working with the regional center investors and does not contain any potential contracts. The plan did not estimate the number of partners or costs of the projects. Finally, the plan was not supported by "economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables" as required under 8 C.F.R. § 204.6(m)(3)(v), quoted above.

Service Center Operations acknowledged that the plan would offer alien investors options from which to choose but noted that "representative business, industry or commercial enterprises are not identified in either proposal or supporting evidence." Service Center Operations was further concerned about the lack of "documentary evidence in the proposal which shows that established public-private agencies, entities, real estate developers, or consulting companies intend to participate in conjunction with the proposed regional center's partnerships in order to invest in any defined 'portfolio of direct investment.'" Service Center Operations also noted the lack of economic analysis of the proposal supported by economically or statistically valid forecasting tools.

On appeal, the appellant asserts that the four types of investments identified are sufficiently specific and acknowledges that no economic analysis was submitted. The appellant asserts that it is now submitting "a formal econometric survey of direct and indirect job creation in our proposed region." Appendix 6 to the appeal includes: "The Economic Impact of a Steel Mill on a Distressed County" prepared for the Grays Harbor Economic Development Council by [redacted] and "The Washington State Aluminum Industry Economic Impact Study," also prepared by [redacted] The first report was prepared in 1998 and the second report was prepared in 2000. [redacted] who prepared the initial regional center business plan, asserts that he spoke with [redacted], who advised that very little has changed in the area since he prepared his report. 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. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not include a statement from [redacted] himself.

The appellant also submitted a new business plan, but it provides no more specific information regarding the actual private or public sector recipients than the original plan. Rather the new plan

merely repeats, with regard to loans and direct investment in midsized technology manufacturers, that "informal contacts with several [small employers] indicate that well-defined credit facilities could be used to expand their operations in ways that can clearly create the necessary jobs to meet EB-5 guidelines."

We concur with Service Center Operations that the business plan is too vague. Simply limiting investments to four broad investment categories does not allow for an evaluation of the investment strategy. Clearly, an influx of "liquidity" can benefit a region, as the plan consistently asserts. Any influx of capital, however, adds "liquidity." The regulation at 8 C.F.R. § 204.6(m)(3) requires more evidence than merely an increase in liquidity aimed at one of four broad investment types. Service Center Operations was unable to evaluate whether the proposed benefits were realistic without more information specifically identifying the private and public sector entities that would be receiving and utilizing the investment funds and the specific loan or direct investment contract proposals. The petitioner has not provided such information on appeal. It appears that the plan was filed prematurely, before the regional center came into existence and began negotiating with local entities for potential projects. For example, the plan more than once references the possibility of acquiring and leasing a crane to the Port Grays Harbor. The record, however, lacks evidence of negotiations and the resulting draft lease agreement with a port authority demonstrating an interest in renting a crane such that the plan can be deemed credible.

On appeal, the appellant also submits, as Appendix 5, public utility bonds and projects funded by CERB. This information may demonstrate that the potential exists for these types of projects in Grays Harbor and Pacific Counties, but does not provide any additional details as to what the regional center plan will actually entail beyond the broad investment types identified in the business plan. For example, in 1999, CERB funded the rehabilitation of the Telecom Building and in 2007 CERB funded the construction of a general purpose building. The record contains no evidence that either project requires additional funding or that the regional center has negotiated an agreement to provide additional funding for these projects. Similarly, the news report about funding for a pontoon bridge and the document regarding forestry grants merely demonstrate the potential for projects in this area without shedding light on what specific projects the regional center will fund.

In addition, the appellant has not overcome the concerns regarding the lack of an economic analysis. First, it is unclear that such an analysis is possible at this time. We are not persuaded that forecasting tools would provide meaningful data at this stage, where no specific projects have been identified and the plan merely contemplates loans or direct investment in four broad areas. Certainly the analyses provided are not helpful. While [redacted] asserts, according to the appellant, that conditions remain the same in Grays Harbor and Pacific Counties, the appellant does not propose to fund a steel mill or fund the aluminum industry. In at least two places in the steel mill report, pages 13 and A-5, [redacted] specifically asserts that employment multipliers for a steel mill are higher than most other industries. [redacted] makes a similar assertion about the aluminum industry in the aluminum report. **Thus, these reports do not provide a reasonable forecasting tool for analyzing** investments in midsized technology manufacturers, infrastructure, real estate or retail establishments.

Moreover, additional information is needed to explain how a limited partnership formed to fund a limited number of infrastructure projects or real estate deals constitutes an enterprise formed for the "ongoing" conduct of lawful business pursuant to 8 C.F.R. § 204.6(e) (definition of "*commercial enterprise*"). Rather, these would appear to be one-time investments that, while benefiting the region, would not constitute ongoing activities.

Finally, without an estimate of the number of limited partners per partnership and the investment needs of specific projects, we cannot determine whether the partnerships will be overcapitalized or undercapitalized. An overcapitalized partnership will not place all of the invested funds at risk for job creation. An undercapitalized partnership will not be able to meet its obligations and create the proposed benefits.

In light of the above, we concur with Service Center Operations that the proposal lacks evidence of negotiated contracts, identified investment partners that will utilize the invested funds and an economic analysis of the specific projects that the regional center will commit itself to funding.

D. ***Partnership Agreement***

Service Center Operations concluded that the draft partnership agreement was insufficient to establish how the limited partnerships would qualify the participating aliens for classification pursuant to section 203(b)(5) of the Act. Specifically, Service Center Operations noted the lack of escrow agreements, by-laws, operating agreements, offering memoranda and a break down of how the $18,500 administrative fee would be spent. On appeal, the appellant provides CWIIC, LLC's operating agreement. Without the escrow agreement, offering memoranda and a break down of how the $18,500 administrative fee would be spent, the appellant cannot overcome the concerns of Service Center Operations.

Beyond the concerns raised by Service Center Operations, the draft limited partnership agreement uses definitions that do not conform to normal accounting definitions. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 3.05(a) of the agreement defines net operating profits as "the excess of the aggregate revenue, cash-flow, income and capital gain realized during the fiscal period by the partnership from all sources whatever over all expenses incurred during the fiscal period by the partnership." Subparagraph (b), defining net operating losses, also includes the phrase "aggregate revenue, cash-flow, income and gain received and realized." This definition appears to duplicate certain amounts by adding revenue, cash-flow, income and capital gain together. For example, "revenue" is normally defined as an "increase in the assets of an organization or the decrease in liabilities during an accounting period, primarily from the organization's operating activities. This may include sales of products (SALES), rendering of services (*revenues*), and earnings from interest, dividends, lease income, and royalties." Dictionary of Accounting Terms 380 (3rd ed. 2000). "Cash flow" is defined

as "cash receipts minus cash disbursements from a given operation or asset for a given period" or "*cash basis* net income." *Id.* at 68. Finally, "income" is defined as "money earned during an accounting period that results in an increase in total assets." *Id.* at 219. Thus, it would appear that some incoming funds would be considered under at least two of the identified categories: revenue, cash-flow, income and/or capital gain. Any such funds would be considered more than once if these three figures were considered in the aggregate as the definition states. At a minimum, the terms of the agreement are confusing and limit CIS' ability to analyze the prospective financial arrangements of the regional center.

E. ***Use of Promissory Notes***

While the appellant asserts that it disfavors promissory notes, we cannot ignore that it will accept them. We acknowledge that the draft promissory note requires that the note must be paid in full within two years in eight quarterly installments. The note does not, however, indicate the amount of the installments or percentage of the total amount owed. We further acknowledge that outstanding funds are considered "suspended" capital in the partnership agreement and that any distributions based on suspended capital cannot be withdrawn until the promissory note is fully redeemed. Article III of the draft limited partnership agreement provides that each partner must make a contribution with a "minimum present value" of $518,500. The agreement does not, however, indicate how present value will be calculated.

As stated in *Matter of Izummi*, 22 I&N Dec. at 191-194, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the evidence must show that the alien has placed his assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the alien personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. *Matter of Hsiung*, 22 I&N Dec. 201, 203-204 (Comm. 1998). Otherwise, the note is meaningless.

In the draft promissory note, the borrower must identify the assets securing the note and pay any seizure costs. Assets outside the United States may secure the note. Should the alien default on the note, however, it is not clear that he would be in a position to pay the seizure costs, which could be significant if the asset is overseas. It would seem, then, that seizure costs should be taken into account in setting the amount of the note.

Finally, as stated above, the record does not identify specific projects or entities that will be the ultimate recipient of the invested funds either through direct investment or by loan. Thus, the appellant has not demonstrated that the limited partnerships will be able to fulfill their investment or loan obligations if they will not have access to all of the invested funds for two years. Certainly the two-year period in which an alien may contribute capital delays the extra "liquidity" that the appellant asserts is so important to the region.

For the above stated reasons, considered both in sum and as separate grounds for denial, the proposal may not be approved.

ORDER: The appeal is dismissed.