

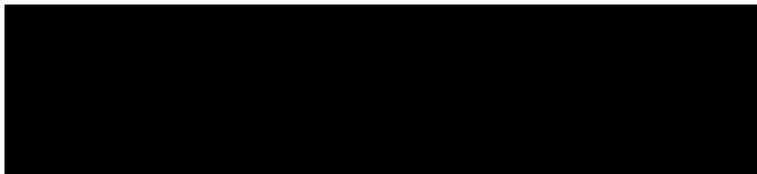
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



K1

DATE: **APR 26 2011** Office: CALIFORNIA SERVICE CENTER FILE: W09 000 980  
RCW 103 191 0000

IN RE: Applicant: 

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, Pub. L. No. 103-121, 106 Stat. 1874 (1992).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the proposal for designation as a regional center and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed.

The applicant 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. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002).

The director determined that the applicant had not demonstrated how the purchase of vacation suites in a resort community under construction could be considered an investment in the construction of that community. The director also determined that the petitioner had not demonstrated the economic impact of the community. The director certified the matter to the AAO pursuant to 8 C.F.R. § 103.4.

On certification, the applicant asserts that the director misunderstood the nature of the investment, which would all go towards construction, misquoted the total investment amount for the project and failed to consider the economic impact plans submitted.

For the reasons discussed below, the AAO finds that the applicant's proposal is a marketing strategy to attract buyers for vacation suites rather than investors of capital in a new commercial enterprise. Specifically, the evidence incontrovertibly establishes that the applicant proposes that "investors" would purchase a vacation suite as either a "primary residence," "second home" or "investment property." For the reasons discussed below, the AAO affirms the director's determination that such a real estate purchase of a private residence, even if still under construction, is not an at-risk investment of capital that can be credited with direct or indirect job creation under the employment creation program set forth at section 203(b)(5) of the Act and the implementing regulation at 8 C.F.R. § 204.6. The purchase of individual residential suites by alien "investors," even if concentrated in one resort complex, is also not the type of "pooled investment" concept Congress envisioned for the regional center program.

In addition, the offer in the record indicates an alien "investor's" funds would be returned should the residence not be completed on time, even if the alien has already adjusted to conditional permanent resident status. Thus, the alien's funds would not be at risk if the project failed or construction was delayed. Furthermore, the record does not identify a new commercial enterprise, such as a limited partnership, in which alien investors invest capital. Rather, their full involvement would be to purchase residential units from the regional center. Finally, the applicant asserts that membership in the resort's Homeowner's Association will constitute management in a new commercial enterprise. As the Homeowner's Association is not the new commercial enterprise in which the alien investors will invest, this assertion lacks credibility. As the described proposal does not contemplate an investment of capital in a new commercial enterprise, the job creation at a proposed resort is immaterial.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.

Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

#### I. Relevant Statute and Regulations

Section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5), as amended by 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).

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, as amended, 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, designated by the Attorney General on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

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(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)(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 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 regulation at 8 C.F.R. § 204.6(m)(3)(ii) requires the applicant to provide “verifiable” detail as to how the jobs will be created.

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.

Thus, aliens investing in a regional center must still make a capital investment into a new commercial enterprise as described in 8 C.F.R. § 204.6.

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

*Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. **This definition shall not include a noncommercial activity such as owning and operating a personal residence.**

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*Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

(Bold emphasis added.)

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

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

None of the above examples include purchasing developed property from a new commercial enterprise that intends to use the revenue for future development.

The regulation at 8 C.F.R. § 204.6(j)(5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

## II. Analysis

The applicant is [REDACTED] The applicant proposes constructing and managing the [REDACTED] [REDACTED] The resort will include a golf-course and clubhouse, a spa, conference centers, staff housing and additional residential additions. In the initial filing, the applicant indicated it had already spent \$17 million to purchase the land and conduct pre-development planning.

The initial proposal states:

If [REDACTED] is established as a Regional Center, the immigrant investor will purchase and receive titled ownership of residential vacation suite(s) from [REDACTED] which will generate revenue to continue to develop the new commercial activities/industries described above. Each immigrant investment will be directly tied to the new commercial industries/activities and not to sustaining Pleasant Harbor.

In response to the director's request for additional evidence, the applicant stated:

Direct investment by the Immigrant Investor through our proposed Regional Center revolves through the acquisition of prime resort condominium(s) constructed at Pleasant harbor, as a phased development. The Terrace Lofts, available for the USCIS Immigrant Investor Pilot Program, commence construction during Stage 1, Phases 1 & 2 where 48 Marina Terraces are planned for development. The Terrace Lofts continue within Stage II, Phase 1, with the construction of 154 Condominium Terraces of which an additional +/- 154 Immigrant Investors would qualify based on job creation program/analysis (10 jobs direct/indirect per foreign investor).

**Within 2127 Direct, Indirect or Induced Jobs created from the USCIS Program, a total of +/-213 Immigrant Investors would qualify for the regional economic model of Pleasant Harbor.** The resultant revenues of \$106,500,000 would complete Stage I – Phases 1 and 2, as well as Stage II – phase 1 and 28% of Phase 2. With [REDACTED] completed to this stage and phase, the momentum and revenues from operations would substantiate the formula for Tier 1 Bank Financing as well as revenue generated from sales of the 35 percent of the non-resort properties [REDACTED]. As such, the investment capital to be sought for [REDACTED] will be a combination of immigrant investor capital and domestic capital.

(Emphasis in original.)

The petitioner also submitted the proposed offer for alien investors. The offer states:

In addition to receiving titled ownership to a [REDACTED] at [REDACTED] in the most picturesque area of Washington

State, approved investors and dependents will qualify for a VISA as a result of their investment and job creation.

\* \* \*

Your investment is limited to only \$500,000 USD, which includes the ownership of the [REDACTED] and 40% of the net Rental Revenue realized per annum.

The "Summary of Purchase" section requires the "investor" to indicate whether he is purchasing the suite as a "primary residence," "second home," or "investment property."

Significantly, the section titled "Completion of Construction" states:

If the [REDACTED] is not ready for legal occupancy on that Closing Date and the Investor's EB-5 Application has been approved, either Investor (as Investor's sole remedy) or Seller pursuant to this Agreement may rescind this Agreement and, upon return of the investment funds, all parties shall be discharged from all obligations and liabilities hereunder.

Thus, should the project fail after the alien investor obtains conditional permanent resident status, the regional center is obligated to return the alien's "investment."

In response to the director's April 16, 2010 request for additional evidence, the applicant provided the following breakdown of the sales price for each suite:

a) sales price (land/structure)	\$400,000.00
b) marketing/materials/advertising)	\$16,500.00
c) commission	\$23,000.00
d) legal/fund validations	\$7,800.00
e) site review costs/expenses	\$24,500.00
f) accounting (7 years)	\$24,500.00
g) management/administration	<u>\$18,200.00</u>
	\$500,000.00

On certification, the applicant asserts that the regional center will not itself use alien investor funds to "purchase, own and rent resort property" and that the "bulk" of the funds will be used for construction. At issue is not whether the regional center will use the funds to purchase property but whether the alien is simply purchasing a resort home rather than making an investment in a developer. An addendum to the offer provides:

Investor acknowledges that the Project is in the planning and development stage and that the investment funds received for [REDACTED] under the EB-5 Program, once qualified by USCIS, will be utilized by Seller to develop the

various commercial industries within the Regional Center aimed at creating direct/indirect jobs.

Nevertheless, the applicant has never explained how an agreement to use the proceeds of a property sale for future development constitutes an investment in a new commercial enterprise. Every retail establishment uses at least some of its sales proceeds to purchase additional inventory. Such an arrangement does not make every customer an investor. Similarly, developers typically use the profits from one phase to fund the next phase. Once again, that does not transform every real estate purchase of new construction into an equity investment into the developer company.

Ultimately, whether the alien “investor” chooses to purchase the suite as a “primary residence,” “second home” or “investment property,” the transaction is that of a real property sale rather than a capital investment in a new commercial enterprise.

Throughout the proceeding, the applicant has asserted that the purchase of a vacation suite is a “risky investment, with no guarantee of return in today’s volatile real estate market.” In response to the director’s April 16, 2010 request for additional evidence, the applicant explained the rental income as follows:

First and foremost, The Statesman Group does not guarantee any rental revenue at all or a return on investment. In fact, real estate is an incredibly risky investment in today’s world with no guarantees or promises of retained values. As such, each individual investor must weigh the risks associated with purchasing and owning real estate, including the inability to rent his/her unit after purchase even if placed in the program.

Thus, it is clear that the 40 percent rental revenue would be from the alien “investor’s” own suite, not from the new commercial enterprise as a whole. It is clear that the “investment” strategy the applicant contemplates would leave the alien “investor” with no equity ownership in a commercial enterprise. Rather, the alien “investor” would acquire nothing more than a vacation suite with the option of using the regional center as a rental manager should the alien choose to rent out the property. The regulatory definition of “commercial enterprise” at 8 C.F.R. § 204.6(e) excludes the ownership and operation of a personal residence.

While [REDACTED] may meet the definition of a new commercial enterprise as defined at 8 C.F.R. § 204.6(e), the alien “investors” would not be making capital investments into [REDACTED]. Specifically, their purchase of a suite would not make them partners in [REDACTED]. Accepting that the purchase of real estate is a personal investment, it is not a capital investment into a new commercial enterprise.

Moreover, while the purchase of a suite entitles the owner to voting membership in the Homeowner’s Association, the Homeowner’s Association does not meet the definition of a new commercial enterprise at 8 C.F.R. § 204.6(e). Specifically, a Homeowner’s Association may be organized as a nonprofit corporation. Ariz. Rev. Stat. §33-1241. Even if organized for profit, it conducts non-commercial activities, which exclude it from the definition of commercial enterprise at

8 C.F.R. § 204.6(e). The applicant has not persuasively explained how the aliens would have even the rights of a limited partner in [REDACTED] or any other new commercial enterprise that is pooling investments into the proposed regional center pursuant to 8 C.F.R. § 204.6(j)(5).

In summary, the applicant has proposed an investment plan whereby alien investors would make independent, passive, personal real estate investments that garner them no equity ownership in a new commercial enterprise. Instead of presenting a plan for a pooled equity investment of capital into a new commercial enterprise, the applicant has merely put forth a marketing strategy to attract sufficient buyers to fund later phases of development. This plan does not meet the letter or spirit of section 203(b)(5) or the regional center pilot program designed to encourage pooled investments in a new commercial enterprise benefitting a geographic region.

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

**ORDER:** The director's decision dated February 9, 2011 is affirmed. The application is denied.