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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-98-075-51137 Office: Vermont Service Center Date: MAR 19 2003

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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 director determined that the petitioner had failed to demonstrate a qualifying investment, the source of the funds allegedly invested, or that the allegedly invested funds had been made available to the employment-generating enterprise. The director also found that the "sinking fund" described in the Partnership Agreement was disqualifying.

On appeal, counsel asserts that the petitioner provided sufficient evidence of the investment and the source of those funds. Counsel further claims that the terms of the Partnership Agreement were not disqualifying, especially after the agreement was amended. Finally, counsel argues that the director erred in relying on precedent decisions issued after the petition was filed.

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 record indicates that the petition is based on an investment in a business, Invest in America, L.P. The General Partner of Invest in America is InterBank Corporate Services, Inc. and the initial Limited Partner is InterBank Group, Inc. Invest in America was formed for the purpose of acquiring interests in "operating companies" that would agree to subcontract employees from Invest in America. The operating companies were purportedly based in either a targeted employment area or a rural area for which the required amount of capital invested may be adjusted downward. The director did not contest that the *proposed* employment would occur in a targeted employment area or a rural area. Thus, the required amount of capital in this case would be $500,000.

On appeal, counsel herself raises the issue of criminal allegations leveled against the founders of InterBank, James O'Connor and James Geisler, upon which the director did not rely. As counsel raised the issue on appeal, however, we will consider her arguments. Counsel attempts to characterize the investigation as improper, stating that it was "secretly initiated" and that the Service (now the Bureau of Citizenship and Immigration Services (Bureau) and the Bureau of Immigration

and Customs Enforcement) seized documents which "decapitated" the headquarters of the operation. Counsel further accuses the Service of raising "ungrounded suspicions" and providing misleading information to the operating companies that created an "adversarial" relationship which ultimately led to the "temporary" closure of the operating companies as of June 1999. [1]

The government's allegations against James O'Connor, president of InterBank, and James Geisler, a paid consultant of InterBank, were not "ungrounded." Rather, both individuals were tried on criminal charges relating to the Invest in America scheme in federal court. *United States v. James F. O'Connor and James A. Geisler*, 158 F.Supp.2d 697 (E.D. Va. 2001), [hereinafter *Decision*]. In a 49-page opinion, the judge made significant findings of fact regarding the Invest in America scheme and found the defendants guilty of all 61 counts of immigration fraud, tax fraud, wire fraud, and money laundering. On January 11, 2002, the judge sentenced Mr. O'Connor to 124 months and Mr. Geisler to 112 months in prison. They were also ordered to pay restitution of $17.6 million. The judge's findings of fact seriously undermine the credibility of the documentation submitted in support of this petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

SOURCE OF FUNDS

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

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or

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[1] Counsel makes other allegations about the Service's handling of the EB-5 program that are simply irrelevant to the adjudication of this petition. As the allegations are distorted, however, they reflect on counsel's credibility. For example, counsel asserts that no EB-5 petitions were approved in 1999. As evidence of this "fact," however, she relies on a survey performed by AILA in January of that year. In fact, the Service did approve approximately 140 EB-5 petitions that year. *See* Memorandum by Steve Yale-Loehr, Chair of the AILA Investors Committee, posted at www.usa-immigration.com/litigation/eb5stats.htm. AILA and the Service are identified as the source of these statistics.

INVESTMENT OF CAPITAL

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

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *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.

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:
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> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (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;
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> (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;
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> (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
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> (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.

On the Form I-526, the petitioner indicated a personal investment of $500,000 on an unspecified date. On Section 4 of the petition, the petitioner indicated the investment consisted of $500,000 in "property" transferred from abroad and no debt financing.

As discussed above, the petitioner submitted a screen print as evidence of an alleged $500,000 investment. Nowhere in the initial filing or the supplemental materials submitted prior to the director's decision did counsel or the petitioner indicate that the petitioner had borrowed the invested funds.

On appeal, counsel asserts for the first time that many of the Invest in America, L.P. investors actually borrowed their investment funds. She states:

> As an additional market attractor, InterBank promoted significant financing opportunities with independent lending institutions which were neither owned nor controlled by any InterBank entity or principal. The independent lending institutions provided up to U.S. $400,000 in cash financing to qualified individuals for the purchase of limited partnership units of the Invest in America Limited Partnerships. The lenders required each borrower to submit a loan application presenting a detailed individual financial profile.

Counsel adds: "In addition, the lenders required borrowers to pledge their limited partnership interest as security for the loan." Counsel concludes:

> This type of capital investment complied with the regulatory definition of "capital" since it did not involve using assets of the enterprise as collateral security, the investors' own assets were the sole security for any loans comprising part of the original investment, and the investor was personally and primarily liable for repayment of the loan to the outside financial institution.

The investment of cash obtained as a loan from a third party is not simply an investment of cash that need not be examined further. In *Matter of Soffici*, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998), the new commercial enterprise itself was the borrower, not the petitioner. However, the decision states:

> Even if it were assumed, arguendo, that the petitioner and [the new commercial enterprise] were the same legal entity for purposes of this proceeding,

> indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital."

Thus, the precedent exists for examining third party loans as contributions of indebtedness, not cash.

If we were to accept all unsecured third-party loans as contributions of cash, and not indebtedness, a businessman who obtains a business loan secured by the assets of the business but funnels the funds through his own account first is contributing cash, and not indebtedness. Therefore, whether the loan was secured by the businessman's assets, the assets of the business, or completely unsecured would be irrelevant. The regulations, however, clearly preclude such financing.

Furthermore, if the term "indebtedness" in the definition of "capital" only referred to a promise by the petitioner to pay the new commercial enterprise, as was the case in *Matter of Izummi*, *supra*, and *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998), then the definition in its entirety would be absurd. The definition precludes "indebtedness" secured by the new commercial enterprise. Secured loans are secured by the assets of the promisor or a co-signer, and never the promisee. For example, if party A owes money to party B, it would make no sense for party B to risk his own assets as security. In the event of default by party A, party B would owe himself. As such an arrangement is utterly irrational, there would be no reason for the regulations to address it. Since the regulations *do* preclude indebtedness secured by the assets of the new commercial enterprise, it is clear that "indebtedness," as used in 8 C.F.R. § 204.6(e), is not limited to the petitioner's promise to pay the new commercial enterprise, but includes third party loans.

In summary, the regulations preclude the investment of unsecured indebtedness. Since the definition of "invest" would be meaningless otherwise, third party loans must be included as indebtedness. Therefore, the requirements for promissory notes set forth in *Matter of Izummi*[4] and *Matter of Hsiung*[5] must be met. This conclusion is supported by the language in *Matter of Soffici* quoted above.

8 C.F.R. § 204.6(j)(2)(v) requires the following evidence of investment:

> 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.

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[4] The promissory note must be substantially due in two years. *Matter of Izummi*, *supra*, at 193.

[5] The assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner 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*, *supra*, at 203-204.

As the record did not and does not contain the promissory note for the alleged financing of the investment, the petitioner has not established that the financing complies with requirements set forth in *Matter of Izummi* and *Matter of Hsiung*.[6] Moreover, assuming that the loans existed and that they were secured only by the petitioner's partnership interest as claimed by counsel, the petitioner bears no risk of losing any of his previously owned assets. Should the fair market value of the petitioner's interest decrease to less than the amount of the loan, the loan will no longer be adequately secured by the petitioner's assets.

RESERVE ACCOUNTS

The regulations provide that a 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. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. *Spencer Enterprises, Inc. v. United States*, *supra*, at 1042 (citing *Matter of Ho*, *supra*).

Section II of the operating agreement between Invest in America and the operating company Market Makers provides:

> Five years from the date hereof, and extending until the sixth anniversary of the date hereof, Market Makers, LLC will redeem its member shares from Invest in America, L.P. Such redemption will be made at par ($10,000 per share interest.) Market Makers, LLC will tender cash, and have no remaining obligation to Invest in America L.P. whatsoever.

In order to guarantee that Market Makers would have the funds to redeem its shares in five years, Mr. O'Connor and Mr. Geisler agreed upon the following resolution:

> The following plan to provide for the redemption of shares being proposed by James F. O'Connor, and seconded, by James A. Geisler, and unanimously carried, Market Makers, L.C. will proceed with the agreement with Invest in America, L.P., and using commercial paper, high-grade, high yield securities, and/or a mixture of investment grade instruments will create a sinking fund for the liquidation of the obligation to repurchase the shares. It is anticipated that 45-50% of the sum advanced by Invest in America, L.P., will be used to create the reserves. These funds may not be used for any other purpose, and may not be pledged as collateral by the company, or otherwise placed in jeopardy that would

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[6] In his decision convicting Mr. O'Connor and Mr. Geisler the judge found that a "loan book" contained 187 alien clients' names, but only 11 of those signed any loan documents. *Decision* at 705, note 9. The judge also found that the loans were shams, created by funneling the same funds through a Bahamian bank numerous times to create the appearance of several investments. *Decision* at 706-708.

> compromise the ability of the company to liquidate the redemption provisions of the above referenced agreement.

These reserve funds are, by resolution, not generally available to the job-creating entity. As stated in *Matter of Izummi*, *supra*, reserve funds that are set aside to redeem an interest cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk. Relying on *Matter of Izummi*, the director concluded the reserve funds were disqualifying.

On appeal, counsel argues:

> The assertion by the Service that reserves eliminate risk is fundamentally flawed and extremely naïve. The plan for creation of a reserve fund as the partnership raises additional capital, is clearly a conservative and prudent fundamental of sound business practices. The contemplation of a reserve fund should not be a reason for denying an immigrant investor application where the primary requirement is to show the likelihood of investing capital and creating jobs.

Finally, counsel quotes Senator Paul Simon from the legislative record of the EB-5 program:

> The million-dollar requirement or lesser amounts in rural and high unemployment areas should apply to the entire investment, including reserves, and need not be applied only to the operational costs of the enterprise.

We do not find that *Matter of Izummi* conflicts with Senator Simon's intent. *Matter of Izummi* does not preclude the use of any reserve funds. A company may have a legitimate business reason to create a reserve fund. For example, a company may need to prevent the distribution as dividends of funds needed to pay a tax liability or mortgage. Where, as in the instant case and in *Matter of Izummi*, the reserve fund is set up to guarantee the return of the alien's investment, we cannot conclude that the alien's investment is at risk. Counsel herself concedes that sinking funds are accounts set up for the redemption of a long-term *debt*. We concur. The sinking fund in this case was set up to redeem Invest in America's interest in Market Makers and, ultimately, the investor's interest. The investor's interest, therefore, is nothing more than a loan. Debt arrangements with the new commercial enterprise are specifically excluded from the definition of "invest" at 8 C.F.R. § 204.6(e).

Counsel further states, "if the capital is not somehow guaranteed by government backed securities then it is at risk and meets any definition of invested." As stated in *Matter of Izummi*, the "risk" that the Partnership might not have the resources to fulfill its obligation is not the type of investment risk contemplated by the regulations. *Id.* at 189-191. Regardless, counsel concedes that "sinking funds" are used to assure sufficient funds to satisfy a *debt*. The risks associated with loans are not the type of investment risks contemplated by the regulation. As stated above, the definition of invest at 8 C.F.R. § 204.6(e) specifically excludes debt arrangements as a qualifying investment.

CAPITAL AVAILABLE TO EMPLOYMENT-GENERATING ENTITY

Matter of Izummi, supra, found that cash reserves set aside to assure that money would be available to refund investors after two years were disqualifying as the funds were not being used for business purposes related to job-creation. *Id.* at 189-191.

The director noted that the only operating agreement in the record was the one between Invest in America and Market Makers. The director further noted that Market Makers had agreed to form a "sinking fund" with 45-50% of the funds. Thus, the director concluded that the petitioner had not demonstrated that all of his investment funds would be available to the employment-generating entity.

On appeal, counsel notes that a holding company with subsidiary operating companies is a structure expressly permitted in the regulations. The director, however, did not object to the structure of the business. Rather, the director stated that the evidence did not establish that the funds would be made fully available to the business creating the jobs. In light of the reserve fund, we concur with the director.

Nevertheless, the record does not reflect that Invest in America is structured in a way that complies with the regulations. 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. (Emphasis added.)

On appeal, however, the petitioner submitted the alleged 1997 tax return for Market Makers and purchase contracts for other operating companies. The 1997 tax return for Market Makers includes several Forms K-1, reflecting several partnerships had an ownership interest in that company. Thus, Market Makers is not a wholly-owned subsidiary of the partnership in which the petitioner purportedly invested. In addition, the purchase contracts reveal that InterBank Capital, Inc. only purchased a majority interest in Highland Framers of Northern California, Inc., North Valley Lumber and Truss, Inc., and Valley Construction, Inc. As such, those companies are not wholly-owned subsidiaries of the Partnership.

Finally, beyond the decision of the director, the record reflects that a significant amount of the $500,000 allegedly invested was for administrative and immigration legal costs. Page 6 of the Private Placement Memorandum permits a refund of the investment if the Service (now the Bureau) denies the Form I-485. The refund is the full purchase price less $30,000 for legal expenses, filing costs, and other expenses associated with the processing and filing of the Investor's application.

The petitioner does not claim to have paid more than $500,000 to Invest in America. As such, according to the agreement, the Partnership would use $30,000 of the $500,000 to pay the petitioner's immigration legal costs. *Matter of Izummi, supra*, provides that the Bureau has an interest in examining, to a degree, the manner in which funds are being applied. *Id.* at 177-180. The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. Thus, even if the petitioner had established a personal contribution of $500,000, that amount would need to be reduced by $30,000. While a petitioner need only be "in the process" of investing, the full investment amount must be fully committed. The record does not reflect that the petitioner had placed an extra $30,000 in escrow to be released to the Partnership in the next two years or otherwise irrevocably committed those funds to the Partnership.

REDEMPTION AGREEMENT

As stated in *Matter of Izummi, supra*, an alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. *Id.* at 183-188. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. As stated above, counsel concedes that "sinking funds" are used to assure sufficient funds to pay long-term *debts,* reinforcing the Bureau's conclusion that the terms of the Partnership Agreement required no more risk than a loan.

The AAO further stated that the alien must go into the investment not knowing for sure if he will be able to sell his interest at all after he obtains his unconditional permanent resident status; and if he is successful in selling his interest, the sale price may be disappointingly low or surprisingly high and more than what he paid. This way, the alien risks both gain and loss. To allow otherwise transforms the arrangement into a loan. *Id.*

The Private Placement Memorandum provides:

> Unless otherwise agreed, approximately five (5) years after the closing of the Offering, an affiliate of the General Partner will repurchase its member interest of the Venture Business(es) from the Partnership. Repurchase will be for the price paid for the member interest. Limited Partners will tender their respective Limited Partnership interest to an affiliate of the General Partner, and withdraw from the Partnership in the order they were admitted into the Partnership. All distributions upon a sale of the Business(es) are intended to be made under the Partnership Agreement within ninety (90) days after the sale, as part of the dissolution and liquidation of the Partnership.
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> * * *
>
> Following Liquidation, each Limited Partner is entitled to a *pro rata* distribution up to repayment of the Purchase Price of his Unit(s) (less reimbursements for legal

> expenses, offering expenses, and any other out of pocket expenses paid on behalf of the investor) through liquidation of the Partnership's assets.

Section 8.02 of the Partnership Agreement states:

> Special Information and Voting Rights. Five (5) years after the closing of the Offering, on the anniversary date of the investment, each Venture Business will repurchase its member interests from the Partnership. Said repurchase must be for the par value of the member interest. Upon the redemption of the Venture Business(es)'s member interest, any of the Limited Partners may, at their option, elect to tender their respective Limited Partnership interest to the Partnership, and withdraw from the Partnership. However, neither the General Partner nor the Limited Partner will be obligated to repurchase Unit(s) from any person. All distributions upon a sale of the Business will be made under the Partnership Agreement within ninety (90) days after the sale, as part of the dissolution and liquidation of the Partnership, unless otherwise provided for hereinabove. All distributions upon a sale will be made pursuant to Article XIV hereof within sixty (60) days after the sale, as part of the dissolution and liquidation of Partnership interests.

The director concluded that the redemption provisions were disqualifying. The petitioner was assured a willing buyer after five years and his interest was limited to the purchase price, precluding any chance of profit. The director acknowledged that these agreements had been amended, but concluded they did not affect the petitioner's eligibility as of the date of filing since the amendments occurred after the date of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Bureau requirements. *See Matter of Izummi*, *supra*, at 175.

On appeal, counsel claims that the original Partnership Agreement only contemplated the repurchase of the limited partner interests, but that no such repurchase was required. Counsel further argues that the director should have considered the new policy that was issued in response to a Service hold on the petition. Finally, counsel challenges the determination in *Matter of Izummi* that redemption agreements reduce the risk of an investment. Counsel states: "The Service is incorrect in concluding that redemption of member interests or buy backs are impermissible because they limit or reduce risk. Any agreement to repurchase is only as valuable as the ability of the purchaser to perform."

This argument was addressed above in response to counsel's arguments that the reserve accounts did not reduce the petitioner's risk since they did not constitute a "government-backed security." Furthermore, it is acknowledged that the original Partnership Agreement provides that the General Partner and the initial Limited Partner are not obligated to repurchase the investors' interests. Notwithstanding the "Partnership Law Opinion" in the record to the contrary, however, this

provision on its face only relieves the General Partner and Limited Partner *individually* from repurchasing the investors' interests. Moreover, it is not sufficient to demonstrate that the Partnership could have purchased the investors' interests for less than the initial purchase price. The petitioner must also "risk" gain. Nothing in the original Partnership Agreement reflects that the Partnership was obligated to purchase the interest for more than the purchase price if it increased in value.

Counsel's arguments regarding the amendments are not persuasive. Counsel argues that *Matter of Katigbak* can be distinguished and that in this case the petitioner had to demonstrate only that capital "was likely to be invested." Neither the law nor the regulations use the standard "likely to be invested." On the contrary, 8 C.F.R. § 204.6(j)(2), as quoted above, 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. 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.

The Bureau must evaluate the terms of the Partnership Agreement as they existed at the time of filing to determine whether the petitioner had placed the required amount of capital at risk as of the date of filing. The amendments all occurred in May 1998, several months after the petitioner filed the instant petition.

In addition, the amendments do not resolve the issue. The amendment to the Partnership Agreement provides, "the second sentence of Section 8.02 of the Original Agreement is hereby amended by deleting the words 'par value' and substituting the words "fair market value." The amendments also add the following sentence, "any repurchase of Limited Partnership interests or Units by the General Partner or the Partnership pursuant to this Section 8.02 shall be at fair market value."

The Private Placement Memorandum was amended as follows:

> LIMITED PARTNER EXIT STRATEGY The second sentence of the paragraph labeled "Limited Partner Exit Strategy" of the PPM is hereby amended by deleting the words "the price paid" and substituting therefore the words "fair market value." In addition, a new sentence reading as follows is hereby added to the paragraph labeled "Limited Partner Exit Strategy" of the PPM immediately following the last sentence:
>
> > Any repurchase of Limited Partnership interests or Units by the General Partner or the Partnership shall be at fair market value.

Market Makers and the Partnership entered into a new agreement in May 1998 which included the following terms. The limited partner could only sell shares or interests it owns in Market Makers for "fair market value." Market Makers could only repurchase its shares or interests from the limited partners for "fair market value." Finally, fair market value would be determined by Price Waterhouse.

Matter of Izummi, *supra*, states:

> Fair market value assumes the existence of a market. In this case, no public market exists for the AELP partnership interest. The sale of the partnership interest would not be an arms-length transaction, and the valuation of the parties would not reflect a true fair market value.

Id. at 186. We find the reasoning applicable to this case as well. Counsel asserts:

> InterBank intended to repurchase the interests of each of the individual partners, after at least five (5) years, in order to regain 100% ownership of the newly created venture business operating companies. In this manner, InterBank hoped to attract initial venture capital for its new operating companies, establish profitability, then buy-out the initial investors so that InterBank could make a public offering of shares in the new operating companies as the sole owner-offeror.

First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, if true, the investors' "investment" was simply a loan of initial venture capital. Regardless, counsel's assertion is directly contradicted by the evidence, which reveals that InterBank had agreed to sell back its interest to Market Makers. Thus, unlike *Matter of Izummi*, in this case the Partnership will have completely divested itself of its investments in the operating companies when it buys out the limited partners. Thus, it does not appear that at the time of redemption any market for the Partnership interests would exist for the general public or even aliens seeking to adjust status under the entrepreneur program.

Regardless of counsel's objections, *Matter of Izummi* is binding. For the reasons discussed at the end of this decision, the director correctly relied upon *Matter of Izummi*. Therefore, the director properly concluded that the redemption agreements were disqualifying.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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

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

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

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

Finally, 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Bureau to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213. In a 1997 unpublished decision, the AAO reversed a Service Center's decision that found that the InterBank business plan was insufficient. Counsel quotes that decision at length. While the plan, as written, may have appeared credible when reviewed, counsel states on appeal that the operating companies were temporarily closed due to the Service's investigation. Thus, it is not now reasonable to conclude that the petitioner will create any employment.

We reject counsel's argument that the investigation itself led to the firing of workers or the closure of legitimate businesses. In his decision, the judge stated:

> After they had created false evidence, through the use of the sham loan transactions and misleading print screens, that each alien client had invested the requisite $500,000 into the EB-5 program, O'Connor and Geisler next devised a scheme to create false evidence that such investment had generated, or would generate within two years, at least ten new American jobs. Thus, at some point in the scheme, O'Connor and Geisler directed that certain InterBank employees be paid, at least on the business records, by Market Makers. In furtherance of the scheme, from January 1996 until August or September 1998, Market Makers leased a small office in Winchester, Virginia from Richard Hardison, on the second floor of a trucking terminal. Also, in April 1997, InterBank leased a small office in Avon Park, Highlands County, Florida from Robert Young. O'Connor and Geisler intended both of these sites to serve as phantom operational centers of Market Maker's purported new commercial enterprise, a telemarketing business in which the alien clients were allegedly investing their funds for the purpose of creating ten jobs. Indeed, InterBank, through O'Connor and Geisler, falsely reported to the INS in the EB-5 applications that each alien client had invested the requisite $500,000 in

> Market Maker's new telemarketing business. The INS was further falsely advised that this new telemarketing business was to have multiple employee operational centers in both Winchester, Virginia and Highlands County, Florida. In fact, however, just one employee - an InterBank employee - worked at the Winchester location, and one employee -- [sic] Geisler's brother - worked at the Highlands County location.

Decision at 708. In light of the above and the lack of IRS certified wage and withholding reports, the employment payroll report for June 29, 1999 submitted on appeal is not credible. Similarly, the 1997 tax returns and financial statements for 1998 prepared by David Samson, which reflect substantial wages, are also not credible. In the cover letter to the financial statements, Mr. Samson acknowledges that the statements are based on "the representation of management" and not on an independent audit.[7]

RELIANCE ON AAO PRECEDENT DECISIONS

Counsel argues that the precedent decisions upon which the director relied represented new rules improperly implemented in violation of the Administrative Procedure Act. Counsel cites several federal cases in support of her argument. She asserts that the precedent decisions depart from long established practice and cites additional case law. Thus, she concludes that the "retroactive application" of these decisions, which were issued after the instant petition was filed, was improper. Counsel argues that the petitioners invested "substantial sums of money – indeed, sometimes their life savings."[8]

Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

> Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by [*Izummi*,] and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [that] [t]he Agency was free to change." *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1334 (9th Cir. 1997.)

Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous

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[7] Given the convictions of upper management discussed above, the representations of management are not credible.

[8] In his decision finding Mr. O'Connor and Mr. Geisler guilty of immigration fraud, among other charges, the judge stated, "not a single alien client invested the requisite $500,000 in a new commercial enterprise." *Decision* at 710. The judge noted that most clients provided only between $100,000 and $150,000, but some invested as little as $50,000 or none at all.

binding decisions from which an irrational departure would not be allowed. *See also Spencer Enterprises, Inc. v. United States, supra*, at 1045.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. *See R.L. Investment Limited Partners*, 86 F.Supp.2d 1014 (D. Hawaii 2000) *affirmed on appeal, R.L. Investment Limited Partners v. INS,* No. 00-15627, slip op. 15813 (9th Cir. Nov. 20, 2001); *Golden Rainbow Freedom Fund v. Janet Reno, supra, affirmed on appeal, Golden Rainbow Freedom Fund v. John Ashcroft*, No. 00-36020 (9th Cir. Nov. 26, 2001); *Spencer Enterprises, Inc. v. United States, supra.*[9]

Regarding the "retroactive" application of the precedent decisions, the Ninth Circuit, in affirming the lower court decision in *Golden Rainbow Freedom Fund* provides:

> No doubt, Golden Rainbow and the alien investors did rely on the non-precedential position of the INS, and may suffer on that account. But there had been no formal determination at the time, and they had to know that any initial approval was conditional. There could be no closure until there had been a second petition for removal of the condition, and a showing of compliance was required at that time. *See* 8 U.S.C. § 1186b(c)(1) & (d)(1). The long and short of it is that they lost their gamble that Golden Rainbow's creative financing approach would manage to get through the whole process. The INS finally acted to prevent a perversion of the program contemplated in the statutes and the regulations. The mischief that was avoided far outweighed any detriment to Golden Rainbow or anyone else. In other words, retroactivity was not inappropriate.

Golden Rainbow Freedom Fund v. John Ashcroft, supra. Given the consistent view of the federal courts that the precedent decisions at issue did not involve rule-making and did not violate the Administrative Procedure Act, we do not find counsel's arguments in this area to be persuasive.

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.

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[9] It is acknowledged that *Chang v. United States*, Case No. CV-99-10518 (C.D. Calif. 2001), found that while the precedent decisions did not constitute legislative rule making the Service should consider hardship claims at the removal of conditions stage. The reasoning of the Ninth Circuit in *Golden Rainbow Freedom Fund, supra*, however, quoted in the body of this decision supercedes this lower court decision in the same circuit.