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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B7

FILE: SRC 08 135 50129 Office: TEXAS SERVICE CENTER Date: MAR 06 2009

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petitioner claims eligibility based on an investment in a regional center pursuant to Section 610 of the Judiciary Appropriations Act, 1993, Pub. L. 102-395 (1993) as amended by section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

Before addressing the merits of the director's decision, we will review the procedural history of this matter as it relates to the legal representation of the petitioner. The record of proceeding contains three different Forms G-28, Notice of Entry of Appearance as Attorney or Representative, executed by three different individuals: [redacted] as legal representative of the petitioner; [redacted], as legal representative of the regional center; and [redacted] in his capacity as the Managing Principal of the regional center investment fund.

The director certified the notice of denial to the AAO pursuant to 8 C.F.R. § 103.4. In compliance with the regulation at 8 C.F.R. § 103.4(a)(2), the director provided notice to the petitioner, through counsel, and advised that a brief could be submitted directly to the AAO within 30 days.

In response, [redacted] submits a brief prepared by [redacted] and additional evidence. The submission included [redacted] Form G-28. The Form G-28, however, is signed by [redacted] not the petitioner. Moreover, on the Form G-28, [redacted] indicates that he represents the regional center in which the petitioner claims to have invested, not the petitioner. The self-petitioning alien is the only affected party in this matter. 8 C.F.R. § 103.3(a)(iii)(B). We acknowledge that [redacted] also submits a Form G-28 listing himself as the petitioner's representative, signed by the petitioner. While this new Form G-28 signed by the petitioner is dated October 14, 2008, it was submitted for the first time on certification. On this Form G-28, however, [redacted] did not identify himself as an attorney or an accredited representative. The regulation at 8 C.F.R. § 103.2(a)(3) provides that an applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

There is no statutory or regulatory authority of which we are aware that would allow a third party, [redacted]r, to sign a Form G-28 on behalf of the petitioner. While [redacted] may be an official of the regional center in which the petitioner claims to be investing, the regional center is not an affected party in this matter in accordance with 8 C.F.R. § 103.3(a)(1)(iii)(B). If we were to accept a Form G-28 from a third party, that third party would have access to the record of proceeding pursuant to the Freedom of Information Act (FOIA) and, thus, the petitioner's personal and sensitive financial information. *See* Pub. L. 89-487 (July 4, 1966), codified at 5 U.S.C. § 552. For the above reasons, the Form G-28 from [redacted] cannot be viewed as documenting his representation of the petitioner. And without evidence that [redacted] is an attorney in good

standing or an accredited representative as defined at 8 C.F.R. § 292.1(a)(4), we cannot accept the Form G-28 purporting to provide notice of his representation of the petitioner.

On February 18, 2009, the AAO advised [redacted] and [redacted] of these issues and specifically requested an explanation of how either [redacted] or [redacted] properly represent the petitioner. In response, [redacted] resubmits the certification response and requests that all other Forms G-28 be disregarded. Thus, the original response will be considered and this decision will be issued only to [redacted] and the petitioner. However, where appropriate, this decision will refer to [redacted] and [redacted] as the authors of the submitted evidence, in an effort to clearly identify the documents.

Having addressed the issue of the petitioner's representation, we can now turn to the merits of the director's decision. The director determined that the petitioner had failed to demonstrate a qualifying at-risk investment based on several identified deficiencies, enumerated below, in the organizational documents for the new commercial enterprise. For the reasons discussed below, the AAO will uphold the director's decision on certification; the petitioner has not demonstrated that his contribution of capital is fully at risk as an investment.

In reaching this decision, the AAO has carefully considered [redacted] assertions on certification that the regional center made "a good faith effort to avoid" the kinds of concerns raised in the director's decision when it provided USCIS with "substantially final forms of its key documents, including the Operating Agreement" on May 21, 2007. [redacted] implies that the Operating Agreement provided to U.S. Citizenship and Immigration Service (USCIS) on May 21, 2007 is the same as the November 27, 2007 version provided in support of the instant petition. Mr. [redacted] does not suggest, and the record contains no evidence to establish, that the regional center designation was ever amended after the November 25, 2005 approval, a copy of which was submitted in support of the petition.

Because the petitioner failed to provide a copy of the Operating Agreement that served as the basis for the 2005 regional center designation (submitted on August 12, 2005, hereinafter the August 12, 2005 Operating Agreement) or of the May 21, 2007 Operating Agreement, the AAO has reviewed the original regional center proposal, the supporting documents, and all of the documents submitted after the November 25, 2005 approval to ensure that the AAO's decision is in accord with the 2005 USCIS regional center approval. In summary, the instant record of proceeding contains four different operating agreements: (1) the August 12, 2005 Operating Agreement that served as the basis for the regional center designation; (2) the May 21, 2007 Operating Agreement that was submitted for incorporation into the regional center record of proceeding but did not result in an amendment of the designation; (3) the November 27, 2007 Operating Agreement that was initially submitted in support of the instant petition; and (4) the January 22, 2009 Amended Operating Agreement submitted in response to the notice of certification. (Copies of the August 12, 2005 Operating Agreement and the May 21, 2007 Operating Agreement have been incorporated into the instant record of proceeding.)

A review of all four Operating Agreements revealed that the regional center has significantly and materially altered the investment fund's Operating Agreement, departing from the August 12, 2005 Operating Agreement that served as the basis for the November 25, 2005 approval. As will be discussed, the original August 12, 2005 Operating Agreement had no provision for reserve funds, side agreements, or investment redemption if no investment vehicle was found for an alien within two years. There are even minor differences between the May 21, 2007 version and the November 27, 2007 version.

In addition, the AAO has identified deficiencies that were not raised by the director in his certified decision. First, the AAO concludes that the petitioner has not established that the investment will be in a targeted employment area. Finally, the record lacks evidence tracing the invested funds directly from the petitioner in Shanghai to the escrow account. Moreover, the apparent existence of at least two accounts at the escrow institution and the transfer of funds between them raises a serious concern that the regional center will be unable to demonstrate that *each* investor has invested the requisite amount. USCIS has an interest in being able to trace every investor's funds back to the individual investor. *See United States v. James F. O'Connor and James A. Geisler*, 158 F.Supp.2d 697 (E.D. Va. 2001) (involving a regional center scheme in which some of the invested funds were recycled for new investors). These issues will be addressed in more detail below.

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). Moreover, this matter was certified to us pursuant to 8 C.F.R. § 103.4 for our review of the unusually complex or novel issues. Thus, our decision need not be limited to the deficiencies raised by the director.

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, CARc JOB Fund-I, LLC, which proposes to invest in a project located in the Capital Area Regional Center Job Fund (CARc), a

designated regional center pursuant to Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993 as amended by section 402 of the Visa Waiver Permanent Program Act, 2000. The regulation at 8 C.F.R. § 204.6(m)(1) provides, in pertinent part: "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." The regulation at 8 C.F.R. § 204.6(m)(7) allows an alien to demonstrate job creation indirectly. The petitioner asserts that the new commercial enterprise will invest in the renovation of the [redacted]

MINIMUM INVESTMENT AMOUNT

The petition was supported by the November 25, 2005 letter from [redacted] of the USCIS Office of Program and Regulations Development, designating CARc as a regional center. The petitioner provided no evidence of any correspondence from USCIS approving any amendments to this original designation. The letter provides:

> Because some of the geographic areas within the defined boundaries of the CARc JOB Fund Regional Center are neither Targeted Employment Areas (TEAs) nor small urban or rural areas of less than 20,000 in population, the minimum capital investment threshold for any individual alien foreign investor into a new commercial enterprise through the CARc JOB Fund Regional Center shall be not less than one-million dollars in those areas, while the minimum capital investment threshold for investment in job creating enterprises located within geographic areas that have been designated as a TEA by the appropriate State or DC authorities, or are located within small urban areas of less than 20,000 in population, as defined in regulations at 8 CFR 204.6(e) shall be not less than $500,000.

Thus, the regional center determination did not resolve which areas in the regional center are TEAs or which proposed investment projects would qualify for the reduced investment amount of $500,000. Rather, each petition must establish whether the alien is investing in a TEA.

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[1] The investment would support the renovation efforts of [redacted] The renovation was a joint venture between [redacted] *See* [redacted] (accessed February 18, 2009 and incorporated into the record of proceedings). [redacted] put the hotel up for sale in August 2008. *Id.* With the bankruptcy of [redacted] it is not clear whether [redacted] still intends to continue with the planned renovation or whether it will attempt to sell the hotel. *See* [redacted] (accessed February 18, 2009 and incorporated into the record of proceedings). Any new petition based on the new operating agreement and other amendments would need to resolve whether the renovations are still a viable investment opportunity. While the petitioner has submitted a business plan for the renovations, it must be presumed that this plan is out of date as it calls for substantial completion by February 16, 2009.

The petitioner in this matter indicates that the petition is based on an investment in a business located in a TEA.

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

> *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:
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> (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).

The petitioner does not claim that he will be investing in a metropolitan statistical area or a county with an unemployment rate of at least 150 percent of the national average rate. Rather, the petitioner claims that Washington, D.C. authorities have designated the area in which the investment will occur as a TEA. Thus, the petitioner must comply with the regulation at 8 C.F.R. § 204.6(i).

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

> *State designation of a high unemployment area.* The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526. Before any such designation is made, an official of the state must notify the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.

Initially, the petitioner submitted a July 30, 2007 letter from [redacted] of the Washington, D.C. Office of the Chief Financial Officer. [redacted] asserts that he had reviewed data considered by the manager of the regional center and concurred that "the average unemployment rate in the combined area encompassing Wards 2, 5, 6, 7 and 8 exceed 150% of the national unemployment rate" over both a one-year period and a five-year period.[2] [redacted] does not indicate that he is the delegated Washington, D.C. authority to certify subdivisions as TEAs or that the area has been officially designated. Rather, he merely confirms the petitioner's own analysis of a "combined" area. Significantly, the proposed investment project is well within Ward 2. Thus, the other wards are not implicated. Nothing in the record suggests that Ward 2 has ever qualified on its own as a TEA. In fact, the petitioner provides evidence that Ward 2 has enjoyed an unemployment rate below the national average over the same one-year and five-year periods.

In response to the director's request for additional evidence, the petitioner submits an October 3, 2008 letter from [redacted] for Planning and Economic Development, Washington, D.C. The letter is "in response to a request by CARc to designate Wards and census tracts in the District of Columbia ('District') as a 'targeted employment area' under section 203(b)(5)" of the Act. [redacted] notes that Wards 1, 4, 5, 6, 7 and 8 plus several "adjacent and contiguous" census tracts in Ward 2 "are geographic areas with the District." [redacted] states the "combined unemployment rates of the designated Wards and selected census tracts in Ward 2 listed above yield an unemployment rate in excess of 150% of the national average." then concludes that

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[2] Washington, D.C. is divided into eight wards. *See* http://www.dccouncil.washington.dc.us/wardoverview (accessed March 2, 2009 and incorporated into the record of proceedings). Each ward is a political subdivision that elects a member of the Washington, D.C. Council, which also has five at-large members. *See* http://www.dccouncil.washington.dc.us/councilorganization (accessed March 2, 2009 and incorporated into the record of proceedings). Washington, D.C.'s unemployment rate was 6.2 percent at the time the petition was filed in March 2008. *See* http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LASST11000003 (accessed February 27, 2009 and incorporated into the record of proceeding). The national unemployment rate for the same month was 5.1 percent. http://data.bls.gov/cgi-bin/surveymost (accessed February 27, 2009 and incorporated into the record of proceeding. One hundred fifty percent of 5.1 is 7.65, more than Washington, D.C.'s unemployment rate in March 2008. Thus, the city of Washington, D.C. was not a TEA at the time the petition was filed.

this analysis yields "a proper TEA for the designated Wards and tracts." Mr. [redacted] does not indicate that he is the delegated Washington, D.C. authority to certify subdivisions as TEAs or explicitly state that Washington, D.C. has officially designated the combination of six wards and 18 tracts as a TEA.

As quoted above, the regulation at 8 C.F.R. § 204.6(i) requires that, *prior to a TEA designation*, a state official advise the Associate Commissioner for Examinations of the "agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area." Assuming that Washington, D.C. is included within the "state" authorities permitted to designate TEAs, Washington, D.C. has never notified USCIS of its designated authority to certify TEA designations.

Moreover, the regulation at 8 C.F.R. § 204.6(i) allows a state to designate "a" geographic or political subdivision as a TEA. The plain language of the regulation indicates that a TEA must be a single geographical or political subdivision. As stated above, the record contains no evidence that Ward 2 or even the census tract that contains the site of the proposed investment project is a TEA. Only by combining several subdivisions can the petitioner demonstrate the necessary high unemployment rate. Nothing in the regulation suggests that a petitioner may qualify for the reduced investment amount by seeking government confirmation of the fact that adding several high unemployment wards to a low unemployment ward produces a higher average unemployment rate. Such an analysis renders the reduced investment amount meaningless as any alien could qualify for the reduced amount simply by "gerrymandering" or by adding high unemployment subdivisions to a subdivision that is otherwise not a TEA. Rather, the investment must be in "a" geographic or political subdivision officially designated as a TEA.

In addition, a petitioner must demonstrate that the location of the investment was "considered" a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm'r. 1998), (cited with approval in *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001)). Thus, even if we accepted the second letter as an official designation, and, for the reasons stated above we do not, the designation was not made prior to the date of filing and, thus, is not evidence of eligibility as of that date. *See also* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

Finally, the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement allows the new commercial enterprise to invest in "series funds" that may or may not invest in the multiple subdivisions that purportedly make up a designated TEA. The full investment must benefit a TEA if the petitioner is to qualify for the reduced investment amount. *See generally Matter of Izummi,* 22 I&N Dec. 169, 173 (Comm'r. 1998).

In light of the above, the minimum investment amount is $1,000,000. The petitioner does not claim to have invested more than $500,000 or to be actively in the process of investing $1,000,000. On this basis alone, the petition must be denied. For purposes of analysis, however, the remainder of this decision will consider the petitioner's investment plan as if the minimum investment amount had been met.

AT RISK INVESTMENT OF CAPITAL

The regulation at 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.
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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.

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:
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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;
> >
> > (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
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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.

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. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. *Matter of Ho*, 22 I&N Dec. 206, 209 (Comm'r. 1998). 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*, 229 F. Supp. 2d at 1042, *aff'd* 345 F.3d 683 (9th Cir. 2003) (citing *Matter of Ho*, 22 I&N Dec. at 209).

On September 2, 2008, the director issued a request for additional evidence advising that the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement and Private Placement Memorandum contain provisions that are "not acceptable." Specifically, the director noted that the Operating Agreement allowed for reserve accounts and management fees that could exceed the $35,000 fee required in addition to the $500,000 investment amount, fees that could be, and in this case were, waived. Thus, payment of those fees might be deducted from the investment amount. Such a scheme was found disqualifying in *Matter of Izummi*, 22 I&N Dec. at 179. The director also noted that shares could be issued for services rendered, in exchange for investments in other companies and incrementally due to the reinvestment of proceeds. The contribution of services or the reinvestment of proceeds are not included in the definition of capital at 8 C.F.R. § 204.6(e), quoted above. The director also expressed concern that the invested capital could be diverted to interim investments and series funds and could even be redeemed by the alien if no investment vehicle was found in two years. Finally, the director noted that the Letter of Intent to invest in the Watergate Hotel renovations was not signed by a representative of [redacted]

In response, [redacted], asserts that it is "the intent of the Fund Manager generally to utilize income generated by the Fund [(CARc)] to both create reasonable reserves and to pay the expenses of the Fund." Mr. [redacted] further asserts that CARc will "amend the definition of Capital Account" to exclude loans by the members and require a contribution of cash. Mr. [redacted] also states that upon "concurrence by USCIS," he will amend the CARc JOB Fund-I, LLC Operating Agreement to prohibit the use of the $500,000 investments to create reserves or pay management fees. Mr. [redacted] opines that the invested funds may be invested in the interim until such time as they can be invested in the [redacted] renovations, including in a mutual fund and, thus, that no amendment of these provisions is required. Mr. [redacted] explains that aliens are

able to request the return of funds that CARc JOB Fund-I, LLC was unable to invest within two years so that they can attempt to reinvest those funds in a manner acceptable to USCIS for the removal of conditions.

The petitioner submitted a June 1, 2008 Commitment Letter from CARc, addressed to Michael [redacted] While this letter is signed by [redacted] it states, on page 6:

> Development and Manager agree that neither Developer nor Manager shall be obligated to proceed with the transaction contemplated by this letter, and no contract or binding agreement would arise until such time as the Investment Documentation, including such terms of this letter and such other terms of the transaction, as Developer and Manager mutually agree upon, has been executed and delivered by appropriate representatives of Developer and Manager.

Moreover, this letter postdates the filing of the petition. The director concluded that any amendments postdating the filing of the petition could not be considered and that the Fund's intention to invest was insufficient.

On certification, [redacted] asserts that the deficiencies noted in the director's request for additional evidence merely "solicited clarification" and did not find any violations of law, regulation or other standards. [redacted] asserts that the "clarifications" have mostly been addressed in the amended operating agreement and private placement memorandum being submitted on appeal. Thus, [redacted] concludes that the "only issue on appeal" is whether the director erred in finding the interim investment problematic. The remainder of [redacted] brief addresses this issue.

[redacted] also submits a letter from [redacted] asserting that he met with USCIS officials after approval of the regional center proposal and that the concerns now raised by the director were not raised during meetings. The record of proceeding for the regional center proposal does not contain any transcripts or notes relating to these meetings. According to section 551(14) of the Administrative Procedure Act (APA), an "*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 including those relating to Forms I-526 filed based on the approved regional center. Finally, the opinion of a single USCIS official is not binding and no USCIS officer has the authority to pre-adjudicate an immigrant-investor petition. *Matter of Izummi,* 22 I&N Dec. at 196. It remains, the only notice designating CARc as a regional center predates the May 21, 2007 Operating Agreement.

As stated above, the director's request for additional evidence explicitly stated that certain terms in the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement and Private Placement Memorandum were "not acceptable." Thus, rather than merely requesting "clarification," the director found specific deficiencies with this Operating Agreement and corresponding Private Placement Memorandum as constructed. The amendments to this Operating Agreement and Private Placement Memorandum proposed in response to that notice and now submitted on certification cannot be considered. The petitioner must establish eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. 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 USCIS requirements. *Matter of Izummi,* 22 I&N Dec. at 175. The changes proposed and now submitted are material; they go to the issue of whether the petitioner's investment is at risk and, thus, qualifying under the pertinent regulations. Thus, the director did not err in refusing to consider the proposed amendments.

Further, regarding the ability of CARc JOB Fund-I, LLC to make interim and series investments prior to or instead of investing in the [redacted] renovations is problematic. [redacted] asserts that the regulations do not prohibit, limit or condition the use of interim investments and that the Fund's interim investments will be "at risk" because the Fund has undertaken meaningful concrete action to enact the investment plan. Finally, [redacted] asserts that the full amount of these funds will eventually be made available to the employment-generating entity. [redacted] discusses the importance of confirming that the developer will fulfill its obligations and asserts that other regional centers store funds in bank accounts prior to investing in the regional center project.

First, we concur with the director that the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement and Private Placement Memorandum had deficiencies and that amendments after the date of filing cannot cure those deficiencies. Second, we concur with the director that the interim investments are problematic.

As noted by the director, the definition of "Capital Contribution" in the Operating Agreement includes the fair market value of services. The regulatory definition of "capital" at 8 C.F.R. § 204.6(e), however, does not include the fair market value of services.

The petitioner may also not rely on the reinvestment of proceeds. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations quoted above does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS*, 1997 WL 33765206 (E.D. Tex. Jan. 17, 1997); *Kenkhuis v. INS*, 2003 WL 22124059 (N.D. Tex. Mar. 7, 2003) (finding that a contribution of capital as defined at 8 C.F.R. § 204.6(e) cannot include the reinvestment of proceeds).

The November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement also references reserve accounts in several locations. For example, they are referenced in the definitions of Available Capital and Fund Expenses. Nothing in the agreement precludes management from diverting invested funds into those accounts. Cash reserves using the minimum investment funds contributed by the aliens prevents those funds from being available for job creation and cannot be considered at risk. *Matter of Izummi,* 22 I&N Dec. at 189.

The insinuation that the USCIS regional center approval implicitly accepted the November 27, 2007 Operating Agreement submitted in support of this petition is contradicted by the regional center record of proceeding. Specifically, [redacted] asserts on certification that the managing principals of the regional center were "concerned . . . that the novelty of the Fund's structure and documents" might result in "confusion and I-526 petition processing delays" at the service center. Accordingly, "a substantially final" version of the CARc JOB Fund-I, LLC Operating Agreement was provided to USCIS on May 21, 2007 "[i]n a good faith effort to avoid . . . problems." Mr. [redacted]r does not assert that he filed a formal amended regional center proposal or that USCIS formally adjudicated and approved an amended regional center proposal. Instead, he points to an off-the-record meeting with a single USCIS official and claims that the official did not "advise" him that the terms of the new Operating Agreement "were contrary to the governing EB-5 Program rules and regulations or policies."

The May 21, 2007 Operating Agreement postdates the 2005 designation of CARc as a regional center and the record contains no evidence that USCIS formally approved an amended proposal by issuing a new designation letter encompassing those amendments. The suggestion that the silence of a single official on an issue, or even the *ex parte* opinion of that official, must be equated with the tacit approval of an informally-submitted Operating Agreement is simply unreasonable. Again, the opinions of a single USCIS official do not serve to bind the agency. *Matter of Izummi*, 22 I&N Dec. at 196.

As stated above, the AAO has acquired the original regional center proposal. Upon review, the August 12, 2005 sample Operating Agreement included with the proposal is significantly and materially different from the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement submitted in support of this petition. Specifically, the August 12, 2005 Operating Agreement does not reference reserve accounts. As will be discussed below, other problematic provisions identified

by the director and in this decision also do not appear in the August 12, 2005 Operating Agreement provided in support of the regional center proposal.[3] Even the May 21, 2007 Operating Agreement is not identical to the November 27, 2007 Operating Agreement.

The November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement, Section 3.5(b), provides that in determining members' equity, the manager "shall have the right to apportion the Organizational Costs among the Class A Units." Thus, the members' accounts will be reduced in value for the organizational costs incurred by the Fund. In addition, Section 6.4(a) provides that a $35,000 expense fee is due from members. The same paragraph provides that in addition to these fees, "the Fund shall reimburse the Manager and its Affiliates for all direct, out-of-pocket costs incurred by the Manager, its Affiliates, members, employees or agents in connection with the sale of Units and the receipt of Capital Contributions." Moreover, as is the case with the instant petitioner, the $35,000 fee charged to the petitioner can be waived. The agreement does not explain how Management will be reimbursed where the fees charged to the alien are waived. Subparagraph (b) further discusses a quarterly portfolio management fee and reimbursement costs to be paid to management. Subparagraph (c) discusses the payment of transaction fees to the managers. The full amount of money must be made available to the business most closely responsible for creating the employment on which the petition is based. *Id.* at 179. The potential payment of fees to the manager of the Fund out of the minimum investment amount is disqualifying.

As stated above, the AAO has reviewed the August 12, 2005 Operating Agreement submitted in support of the regional center proposal. No discussion of fees or fee waivers are included and, in fact, Section 5.5(c) of the sample agreement provides that "in no event shall the capital contributions of Investor Members be used for the payment of guaranteed payments" to the manager. The May 21, 2007 Operating Agreement requires a $75,000 fee above the $500,000 investment.

According to Section 8.10(c) of the November 27, 2007 Operating Agreement, a member is permitted to request a redemption of his uninvested Capital Contribution where the full investment has not been made by the Fund in two years. Once again, this provision does not appear in the August 12, 2005 Operating Agreement. [redacted] in his response to the director's request for additional evidence, asserts that this provision allows the alien to switch investment schemes but he does not point to any provision that allows an alien to change investment schemes during his conditional residence period.[4] Significantly, upon approval, an investor can apply for conditional permanent resident status and must apply to remove the conditions on residence in two years. Section 216A of the Act.

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[3] The regulation at 8 C.F.R. § 204.6(m)(3) states that a regional center proposal must explain how jobs will be created indirectly and provide a detailed statement regarding the amount and source of capital. The regulation at 8 C.F.R. § 204.6(m)(6) further states that USCIS may terminate a regional center designation if the regional center no longer serves the purpose of promoting economic growth.

[4] The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) does contain such a provision but it applies only to those aliens whose Forms I-526 petitions were approved prior to August 31, 1998.

The removal of conditions adjudication, however, is not an *ab initio* review of the petitioner's investment activities in the past two years. 8 C.F.R. § 216.6(a)(4)(iii); *Chang v. U.S.,* 327 F. 3d 911 at 926-27 (9th Cir. 2003). Rather, the removal of conditions procedure is intended to confirm that the petitioner fulfilled the plan set out in the I-526 petition. *Id.* As such, an alien's switch to a new investment scheme during the two-year conditional period is disqualifying. Significantly, an ability to redeem uninvested capital after 24 months would suggest no incentive for CARc to invest these funds in the approved regional center project, as there is no risk to the alien if the funds remain in interim investments.

The ability of CARc's manager to divert invested funds into series funds is also problematic. The record does not establish that these series funds would be engaging in qualifying regional center activities. We note that the Private Placement Memorandum states that CARc "will target a range of investments in single and multi-use real estate assets, joint ventures and operating companies within the Capital Area Regional Center, investment type, asset class, development lifecycle and risk return profile." The memorandum concludes that such diversification reduces risk. If the diversified investments, however, include passive investments that do not fall under the approved regional center proposal, such investments cannot be considered as contributing to indirect job creation.

In addition, we concur with the director that the interim investment provisions as currently constructed are problematic. On certification, the petitioner submits evidence that the petitioner's funds have been transferred to the Fund's HSBC Bank investment account. Unlike placing invested funds in an interest bearing account while the funds are accumulated for investment, the petitioner's funds have been invested and could lose principal. Lost principal would not be available for job creation. While the CARc manager should have some flexibility in structuring the accumulation of funds for a pooled investment into the development project identified, in this case it would appear that the Fund has begun passively investing the petitioner's funds in a manner that could prove adverse to the development project that is part of the regional center plan. Significantly, the sample operating agreement submitted with the regional center proposal provides, at Section 5.2, that the "capital contribution of each Investor Member will be directed only into *job-creating businesses* located within the geographical area of the Regional Center." (Emphasis added.)

The November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement, Section 8.10, allows an alien to redeem his interest after five years. CARc JOB Fund-I, LLC may purchase this interest, with the price being the "proposed" price offered by the alien to a third party. While this is not a guaranteed return on the alien's investment, its construction is troublesome. Specifically, it suggests that the alien, not the market, sets the redemption price by stating that the price is that offered by the alien, not what an independent third party agreed to pay.

Finally, while not raised by the director, it is extremely problematic that Section 3.7 of the November 27, 2007 CARc JOB Fund-I, LLC Operating Agreement and the January 22, 2009 Amended Operating Agreement allows the manager and members to enter separate agreements setting forth additional rights and obligations. Thus, the terms appear to be amenable to change at the discretion of the parties, without review by USCIS. As we are not seeing the final and complete agreement, we cannot determine whether the terms are acceptable. Significantly, the sample

operating agreement submitted with the regional center proposal, Section 8.9, provides that the agreement "sets forth the entire understanding of the parties hereto with respect to the matters covered herein."

In light of the above, we concur with the director that the $500,000 purportedly invested is not at risk.

SOURCE OF FUNDS

The regulation at 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
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns). Tracing each investment back to the individual alien in a pooled investment also serves a valid government interest in establishing that each alien has conributed the necessary funds. *See United States v. James F. O'Connor and James A. Geisler*, 158 F.Supp.2d at 697.

The subscription agreement, page C-8, identifies the escrow agent as HSBC Bank USA in New York. The trust account number is listed as [redacted] The record also contains the escrow agreement with HSBC Bank. On January 25, 2008, the petitioner's wife signed a resolution of their Shanghai Corporation agreeing to pay the petitioner a dividend of $500,000. The petitioner submitted Chinese language documents with an uncertified summary translation indicating that they represented the transfer of RMB3,900,010 into the petitioner's China Construction Bank Account, account number [redacted] This uncertified summary translation does not comply with the regulation at 8 C.F.R. § 103.2(b)(3).

On February 8, 2008, the petitioner signed the subscription agreement, agreeing to wire the investment funds to HSBC Bank, escrow account number [redacted] On February 23, 2008, the petitioner's wife signed a transfer application to transfer $500,000 from her joint account with the petitioner, account number [redacted] (an account with HSBC Bank in Hong Kong), to the escrow account number [redacted]. A statement for account number [redacted] for February 26, 2008, including the transaction history for the last 10 days, reflects a withdrawal of $500,000 on February 26, 2008. It also reflects a credit of $500,000 on February 18, 2008 with a prior balance of only $4,955.04. The statement does not reflect the identity of the account holder. Assuming this account is the petitioner's account, the petitioner must establish the source of the $500,000 transferred into HSBC Bank account number [redacted]

The record contains a transfer application signed by [redacted] on January 22, 2008, requesting the transfer of $530,000 to account number [redacted] from HSBC account number [redacted] The January 24, 2008 statement for account number [redacted] showing a transaction history for only that date and which does not identify the account holder, reflects an opening balance of $530,009.89 and a withdrawal of $530,000 on that date. The January 22, 2008 through January 30, 2008 statement for account number [redacted] reflects an opening balance of $1.27 and a deposit of $530,000 on January 24, 2008. According to the February 26, 2008 statement for the same account, however, those funds were gone by February 18, 2008 and a new $500,000 was deposited as a "refund" on February 26, 2008. Thus, the $530,000 deposited by [redacted] on January 24, 2008 were gone before the petitioner transferred $500,000 to the escrow account on February 26, 2008 and the source of the February 26, 2008 $500,000 "refund" deposit is not documented in the record.

Given the minimal transactions and funds other than the approximately $500,000 investment amount, it appears that all of the HSBC accounts were set up primarily to move alien investment funds. The petitioner's primary account is at China Construction Bank and the record does not document any transfer from this account to any HSBC account. The petitioner has never explained who [redacted] is, his relationship to this proceeding, or why any funds would pass through his account. These multiple HSBC Bank accounts make it impossible to confirm that the petitioner in this matter is the source of the $500,000 placed in escrow on February 26, 2008. We note that the Private Placement Memorandum references "off-shore feeder funds formed for the purpose of investing in the Fund." It is not clear whether the Hong Kong HSBC Bank account was one of these

off-shore feeder funds. Regardless, we cannot trace these funds back to the petitioner's Shanghai account.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The director's decision is affirmed; the petition is denied.