

# In-Depth Lawful Source of Capital Issues

# In-Depth Capital Investment Issues

8 C.F.R. 204.6(j)(3):

- (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:
  - (i) Foreign business registration records;
  - (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.

- The types of evidence listed at 8 C.F.R. 204.6(j)(3) are of great assistance in determining whether the alien's capital was obtained lawfully, but you are not limited to asking for just those specific items.
- Foreign business registration records let you know about the business activities of the alien, but they do not prove that all of his capital was from those business activities.
- The paragraph which references tax returns stipulates all the different types of returns that might be available and which might assist you in making a determination. Note that personal and business returns are mentioned. Returns from the last five years should in most cases demonstrate the level of income of an individual, but there may be situations in which an alien obtained the capital in one transaction or earned adequate income in just one year.

- Evidence identifying any other source(s) of capital can refer to evidence of any other kind including documents showing capital accumulated over time in bank or investment accounts, documents showing the sale of assets, documents regarding inheritances or gifts, and many other sources of capital.
- Judgments or evidence of all pending civil or criminal actions are sometimes seen, but not often. This type of evidence is more likely to be provided if there are actions against the alien of which the Service is already aware and the Service specifically requests evidence about them.

❖ Be aware that you may see situations like these:

➤ An alien may claim that capital was earned in the stock market, but be unable to show where the initial funds came from (ie. earning \$300,000 from an initial investment of \$150,000 from unknown sources). *ASK WHERE THE INITIAL CAPITAL CAME FROM.*

➤ An alien may show a large amount of capital in an investment or bank account, but be unable to show where it was before the account was opened. *LOOK OUT FOR NEW ACCOUNTS AND ASK WHERE LARGE AMOUNTS OF UNEXPLAINED CAPITAL CAME FROM.*

- An alien may claim that the capital was given as a gift, but not demonstrate how the donor obtained the funds. *ASK FOR THE DONOR'S TAX RETURNS AND/OR OTHER EVIDENCE OF THE LAWFUL SOURCE.*
  
- An alien may claim that others loaned him/her the capital, but fail to show how the other people or entities earned the capital. *ASK FOR EVIDENCE OF HOW THE OTHER ENTITIES OBTAINED THE CAPITAL.*

➤ An alien may claim that certain assets were liquidated or sold, but fail to provide proof of how the assets were obtained in the first place. *IF THE ASSETS WERE ACQUIRED RECENTLY, ASK FOR EVIDENCE OF HOW AND WHEN THEY WERE OBTAINED.*

➤ An alien may claim that the capital was earned over many years, but be unable to show the presence and accumulation in accounts. *ASK FOR SAMPLE ACCOUNT STATEMENTS WHICH SHOW THE ACCRUAL OF CAPITAL.*

- An alien may show verifiable income over the years at or near the investment amount, but fail to account for the fact that personal living expenses were also incurred and must also have also been paid for (ie. earned \$550,000 from 1998 – 2008, but was \$50,000 enough to pay for 10 years of expenses?). *POINT OUT THE NEED TO DEMONSTRATE ADEQUATE EARNINGS TO ACCOUNT FOR THE CAPITAL.*
- An alien may use funds that come from offshore accounts in tax haven countries. *PUT THE ONUS ON THE ALIEN TO DEMONSTRATE THE FULL PATH OF THE CAPITAL.*



- ❖ Note that gifted funds sometimes require that a gift tax return be filed. In the US, any taxes due are paid by the donor. Some countries tax the recipient instead. Many countries do not have gift tax regulations at all. *Put the onus on the petitioner to prove that he/she has followed the law in any particular country.*
- ❖ In the US, it is rare that gifts actually trigger any tax; however, a gift tax return is required to be filed anyway if the amount is over \$12,000 to a non-spouse. Even nonresidents are usually required to file gift tax returns if the gifted assets are in the US.

# Money Laundering

- ❖ Money laundering is a serious threat to our national and economic security. Money laundering typically involves transferring money through several countries or entities in order to obscure its origins.
- ❖ Each year U.S. prosecutors obtain almost 900 money-laundering convictions with an average prison sentence of six years. The rise of global financial markets makes money laundering easier than ever, and countries with strong bank-secrecy laws make it more difficult to detect.

- ❖ To safeguard the banking system, the Financial Crimes Enforcement Network (FinCEN), the Federal banking regulators, and the Federal law enforcement community work closely with the banking industry to fight money laundering.
- ❖ If you encounter a case in which you suspect money laundering is involved, contact your supervisor who can provide guidance on how to proceed. The offices in your agency responsible for fraud detection may become involved and may seek assistance from FinCen.

## ❖ **Money Laundering Basics:**

- Money laundering, at its simplest, is the act of making money that comes from Source A look like it comes from Source B. In practice, criminals are trying to disguise the origins of money obtained through illegal activities so it looks like it was obtained from legal sources. Otherwise, they can't use the money because it would connect them to the criminal activity, and law-enforcement officials would seize it.
- The most common types of criminals who need to launder money are drug traffickers, embezzlers, corrupt public officials, mobsters, terrorists, and con artists.

❖ **The basic money laundering process has three steps:**

- 1) Placement - At this stage, the launderer inserts the dirty money into a legitimate financial institution. This is often in the form of cash bank deposits. This is the riskiest stage of the laundering process because large amounts of cash are conspicuous, and banks are required to report high-value transactions. Any deposit of cash over \$10,000 or any pattern of suspicious cash deposits can trigger a Cash Transaction Report (CTR) to be filed by a financial institution with the IRS.

- 2) Layering - Layering involves sending the money through various financial transactions to change its form and make it difficult to follow. Layering may consist of several bank-to-bank transfers, wire transfers between different accounts in different names in different countries, making deposits and withdrawals to continually vary the amount of money in the accounts, changing the money's currency, and purchasing high-value items (boats, houses, cars, diamonds) to change the form of the money. This is the most complex step in any laundering scheme, and it's all about making the original dirty money as hard to trace as possible.

- 3) Integration - At the integration stage, the money re-enters the mainstream economy in legitimate-looking form -- it appears to come from a legal transaction. This may involve a final bank transfer into the account of a local business in which the launderer is "investing" in exchange for a cut of the profits, the sale of a yacht bought during the layering stage or the purchase of a \$10 million screwdriver from a company owned by the launderer. At this point, the criminal can use the money without getting caught. It's very difficult to catch a launderer during the integration stage if there is no documentation during the previous stages.

- Money laundering is a crucial step in the success of drug trafficking and terrorist activities, not to mention white collar crime, and there are countless organizations trying to get a handle on the problem. In the United States, the Department of Justice, the State Department, the Federal Bureau of Investigation, the Internal Revenue Service and the Drug Enforcement Agency all have divisions investigating money laundering and the underlying financial structures that make it work.



## ❖ Overseas banks

Money launderers often send money through various "offshore accounts" in countries that have bank secrecy laws, meaning that for all intents and purposes, these countries allow anonymous banking. A complex scheme can involve hundreds of bank transfers to and from offshore banks. According to the International Monetary Fund, "major offshore centers" include the Bahamas, Bahrain, the Cayman Islands, Hong Kong, Antilles, Panama and Singapore.

❖ Investing in legitimate businesses

Launderers sometimes place dirty money in otherwise legitimate businesses to clean it. They may use large business like brokerage firms or casinos that deal in so much money it's easy for the dirty stuff to blend in, or they may use small, cash-intensive businesses like bars, car washes, strip clubs or check-cashing stores. These businesses may be "front companies" that actually do provide a good or service but whose real purpose is to clean the launderer's money. This method typically works in one of two ways: The launderer can combine his dirty money with the company's clean revenues -- in this case, the company reports higher revenues from its legitimate business than it's really earning; or the launderer can simply hide his dirty money in the company's legitimate bank accounts in the hopes that authorities won't compare the bank balance to the company's financial statements.

❖ Underground/alternative banking

Some countries in Asia have well-established, legal alternative banking systems that allow for undocumented deposits, withdrawals and transfers. These are trust-based systems, often with ancient roots, that leave no paper trail and operate outside of government control. This includes the *hawala* system in Pakistan and India and the *fié chen* system in China.

❖ Shell companies

These are fake companies that exist for no other reason than to launder money. They take in dirty money as "payment" for supposed goods or services but actually provide no goods or services; they simply create the appearance of legitimate transactions through fake invoices and balance sheets.

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- ❖ The Bank Secrecy Act (1970) basically eliminates all anonymous banking in the United States. It gives the Treasury Department the ability to force banks to keep records that make it easier to spot a laundering operation. This includes reporting all single transactions above \$10,000 and multiple transactions totaling more than \$10,000 to or from a single account in one day. A banker who consistently violates this rule can serve up to 10 years in prison.
- ❖ The 1986 Money Laundering Control Act makes money laundering a crime in itself instead of just an element of another crime, and the 1994 Money Laundering Suppression Act orders banks to establish their own money-laundering task forces to weed out suspicious activity in their institutions. The 2001 U.S. Patriot Act sets up mandatory identity checks for U.S. bank patrons and provides resources toward tracking transactions in the underground/alternative banking systems frequented by terrorist money handlers.

- Reminders:

- Although you are not performing an audit of every penny of the alien's capital, it is important that you satisfy yourself that all the capital was lawfully obtained.
- Each case is different, and may require a different approach and varying evidence.
- Rely on tax returns, account statements, business activity, and/or other probative evidence as opposed to self-serving statements.

THE END

# BASIC FORM I-526 ADJUDICATION ISSUES

## REVIEWING FORM I-526

- Review the form for the normal requirements (ie. name, fee, signature, etc.)
- Note the Current Nonimmigrant Status
  - If the alien is out of status, is he/she claiming that the funds were earned in the US?
- Note the box marked at Part 2
  - An investment in a targeted area lowers the threshold to \$500,000.
- Note the details about the business
  - What type of business is it?
  - Where is it?
  - How is it organized?
  - Was it established after Nov. 29, 1990?
  - Be on the lookout for conflicting information as you examine the file further.



## REVIEWING FORM I-526 (cont.)

- Note the information at Part 3, especially the total capital investment to date.
  - Has enough time passed since the investment for tax returns to be due?
  - Has less than the required amount of capital been invested?
  - If the alien owns less than 100%, are there other alien investors or perhaps other aspects that need to be examined further?
  - If the investment is in a targeted area, don't forget to verify.
- Note the type of enterprise at Part 4. How is it "new?" Does it conform to 8 CFR, 204.6(h)(1), (2), or (3)?
  - New commercial enterprise resulting from the creation of a new business. ("NEW" - See 204.6(h)(1))
  - New commercial enterprise resulting from the purchase of an existing business. ("REORGANIZATION/RESTRUCTURING" - See 204.6(h)(2))
  - New commercial enterprise resulting from a capital investment in an existing business. ("EXPANDED" - See 204.6(h)(3))
- Note the remaining financial information, but be aware that these figures may vary.

## REVIEWING FORM I-526 (cont.)

- **Note the number of full-time employees claimed at Part 5.**
- Were there employees before the investment was made? What will you need to see?
- If all the positions have been created, what will you look for?
- If there are still positions that must be created, what must they submit?
- Is the salary so high that it might constitute a return of the alien's capital?
- **Note at Part 6 whether the alien wishes to file an adjustment of status in the US or to adjust abroad if the case is approved.**
- Be aware of the additional attestations regarding whether the alien is in proceedings, etc.

## UPDATING

- Updating of the Form I-526 in CLAIMS LAN is similar to other updating.
- [F10] allows for entries regarding approvals, RFE's, denials, etc.
- Approvals will require entries regarding:
  - 1.) adjustment via an I-485 or through the consulate overseas (NVC).
  - 2.) status codes (**T51** - \$500,000 investment in targeted area; **C51** - \$1,000,000 investment in non-targeted area; **I51** - Regional Center investment.)
  - 3.) Priority date (filing date).

# EB5 Adjustment Codes

<b>C51</b>	<b>203(b)(5)(A) EMP NTA PRINCIPAL</b>
C52	203(b)(5)(A) SPOUSE OF C51
C53	203(b)(5)(A) CHILD OF C51
C56	203(b)(5)(A) EMP NTA PRINCIPAL
C57	203(b)(5)(A) SPOUSE OF C56
C58	203(b)(5)(A) CHILD OF C56
<b>T51</b>	<b>203(b)(5)(B) EMP CR TRGT AREA</b>
T52	203(b)(5)(B) SPOUSE OF T51
T53	203(b)(5)(B) CHILD OF T51
T56	203(b)(5)(B) EMP CR TRGT AREA
T57	203(b)(5)(B) SPOUSE OF T56
T58	203(b)(5)(B) CHILD OF T56
<b>I51</b>	<b>INV PILOT PRO PRIN ADM-TARGET</b>
I52	INV PILOT PRO SPOUS ADM-TARGET
I53	INV PILOT PRO CHILD ADM-TARGET
I56	INV PILOT PRO PRIN ADJ-TARGET
I57	INV PILOT PRO SPOUS ADJ-TARGET
I58	INV PILOT PRO CHILD ADJ-TARGET
<b>R51</b>	<b>INV PILOT PRO PRIN ADM-NON-T</b>
R52	INV PILOT PRO SPOUSE ADM-NON-T
R53	INV PILOT PRO CHILD ADM-NON-T
R56	INV PILOT PRO PRIN ADJ-NON-T
R57	INV PILOT PRO SPOUSE ADJ-NON-T
R58	INV PILOT PRO CHILD ADJ-NON-T
<b>E51</b>	<b>203(b)(5)(A) EMP CR NO TGT ARE</b>
E52	203(b)(5)(A) SPOUSE OF E51
E53	203(b)(5)(A) CHILD OF E51
E56	203(b)(5)(A) EMP CR NO TGT ARE
E57	203(b)(5)(A) SPOUSE OF E56
E58	203(b)(5)(A) CHILD OF E56

# BASIC FILE REVIEW TECHNIQUES

- Start with the basics:
  - Real Business?
  - Real Investment?
  - Real Job Creation?
- Follow the regs. Does the evidence demonstrate:
  - a "new" commercial enterprise?
  - the required amount of the alien's personal capital at risk?
  - the lawful source of the capital?
  - the job creation?
- Take notes while you review. Make flowcharts if it helps you follow the capital.
- Find out:
  - Who are the parties involved? (Alien, Partnership, Corporation, etc?)
  - What documents govern the relationships? (Partnership Agreements, loan documents, Subscription Agreements, etc?)
  - What evidence demonstrates eligibility of the major requirements?

## Requests for Additional Evidence (RFE)

- Due to the complex nature of EB5 cases and the potential for so many variations in financial arrangements, RFE's are commonly necessary.
- RFE's should normally adhere to local standards and practices in your office.
- EB5 RFE's should clearly and concisely ask for evidence which can demonstrate compliance with the statutory and regulatory requirements.
- Start with the basic requirements of the issue, and then add language to clarify the request if necessary.
- For example, don't simply ask for "tax returns." Specify which years and which entities are involved. Do you want personal returns or business returns? Which business? There may be several referenced in the evidence. Do you want foreign tax returns with translations? What if a tax return is not yet due? Is there other evidence that can be substituted?
- Think about why you are asking for specific evidence and don't assume the alien knows why you need it. Is the tax return needed to demonstrate lawful source of funds, the amount of wages paid, or that an investment was made?

Take a look at RFE Template #1. This RFE is useful when little evidence is presented. You may also use it as a basis for constructing a more detailed RFE.

Other tips:

- Divide the issues up separately and use headings to help clarify. Avoid tackling complex issues in the same paragraph.
- Sometimes it is useful to mention some of the documents submitted and explain why they are not sufficient. For example, if an investment was claimed to have been made in 2007 and 2008, yet the alien provides only bank statements from 2008, it might help to clarify your request.

- When appropriate suggest varying options. A certain year's tax return might not be due, thus requiring you to ask for some other relevant evidence such as an audited financial statement containing much the same information. A Form W-2 might contain an amount of wages which does not appear to be enough for a full-time employee if that employee was hired late in the year, thus requiring you to examine other evidence such as quarterly employment reports.
- The burden of proof is on the petitioner. If you don't understand something, don't pretend. Ask for written clarification or an explanation which you can understand. If you are still not satisfied after getting a response, consider denying the case.



Take a look at RFE Example #2.

- Note the clear separation of each issue into a separate discussion.
- Note that the request for specific evidence follows the outline of the regulations when possible (ie. 8 CFR 204.6(h)(1), (2), and (3) under "Establish New Commercial Enterprise").
- Note that this case involves several entities and claims of investment. Several key documents are mentioned in the RFE, and reasons are given as to why they are not sufficient by themselves.
- This RFE cites several court cases in an attempt to explain the evidence needed. You may cite court cases if doing so helps clarify the evidence needed, but such references are generally more important when writing denials.

Take a look at RFE Example #3.

- You may encounter complex arrangements which involve a parent or holding company owning varying assets or other entities. If so, it may be necessary to address the role of each entity or property and to track the capital going into each one.
- In this example, the RFE notes the petitioner's claims and points out some of the deficiencies.
- Note that each claim of investment might be plagued by a different problem. In this example, the first claim of a \$180,000 investment in the store was not corroborated by the evidence; the second claim of a capital investment was reduced by a loan secured by the property; the third claim was not supported by any evidence; and the other claims also had similar problems which required additional evidence.
- The burden of proof is on the petitioner, but we need to help them by providing clarity in our Requests for Evidence.

THE END

# Federal EB-5 Cases

September 2008

# Upholding the AAO Precedent Decisions

- In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court distinguished Ruangswang and concluded that the AAO precedent decisions did not involve rule making. “The provision at issue in Ruangswang contained ‘objective criteria (a \$10,000 investment, and one year's experience or qualified training), which the petitioner had clearly met. . . .”

## R.L.I.P. cont.

- There ‘simply [was] no room for the agency to interpret the regulation so as to add another requirement.’ [Citation omitted.] By contrast, in applying the precedent decisions here, the INS did not add any requirement.”

# Golden Rainbow

- Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000).
- 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 Izumi,

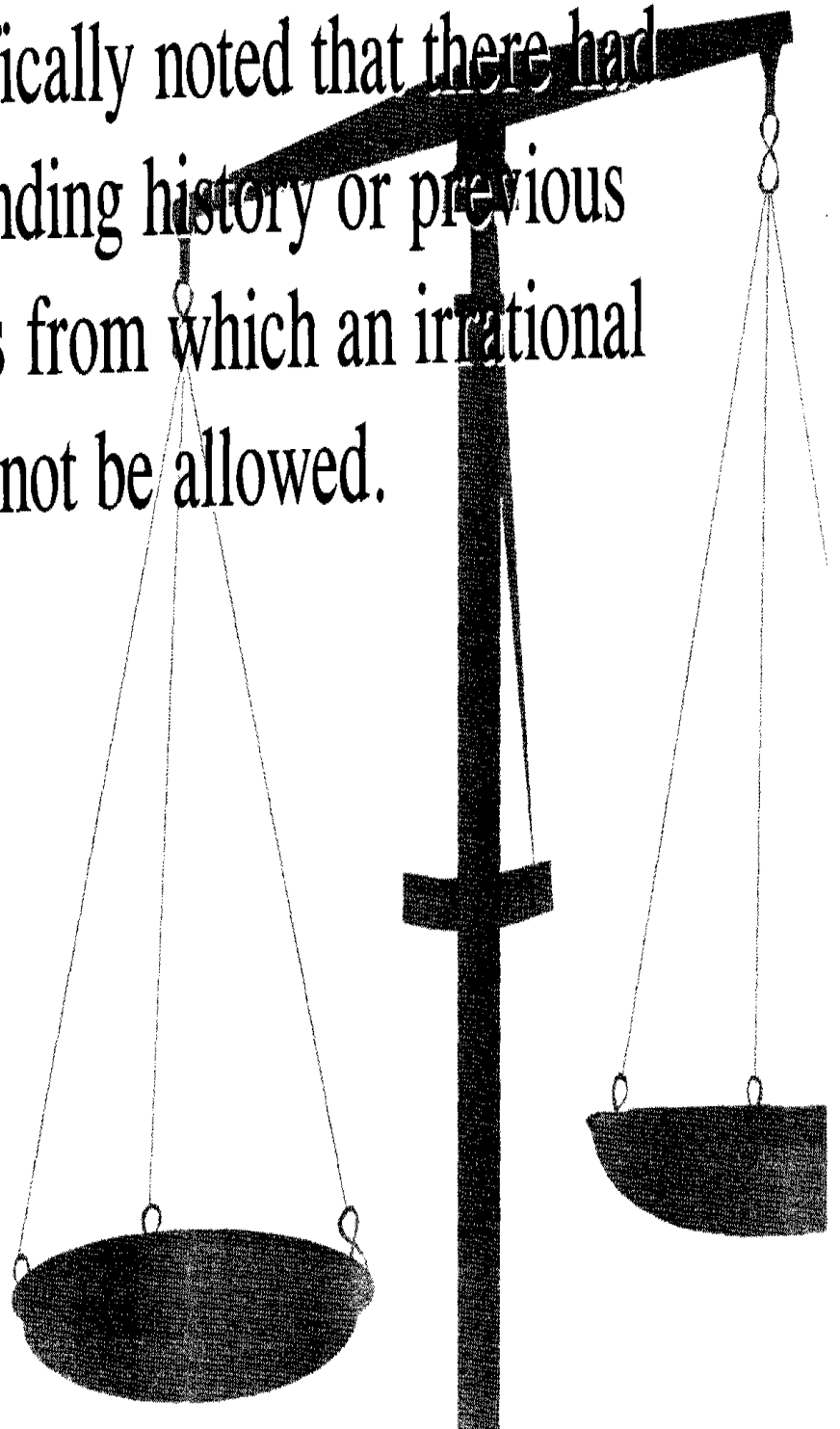
# Golden Rainbow cont.

- . . . 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 . . . [which] [t]he Agency was free to change.” Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.)



# Golden Rainbow cont.

- That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

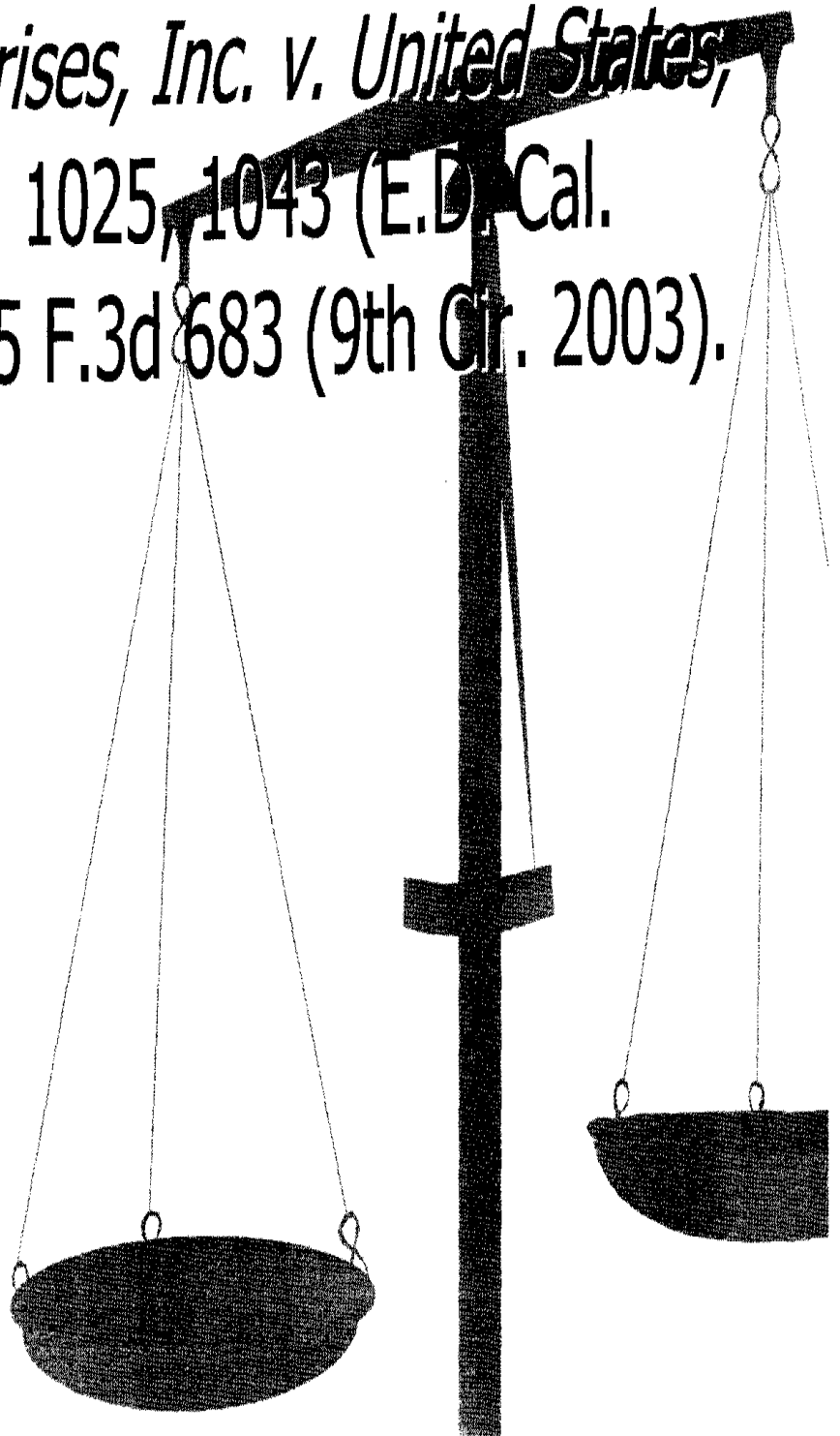


# Golden Rainbow II

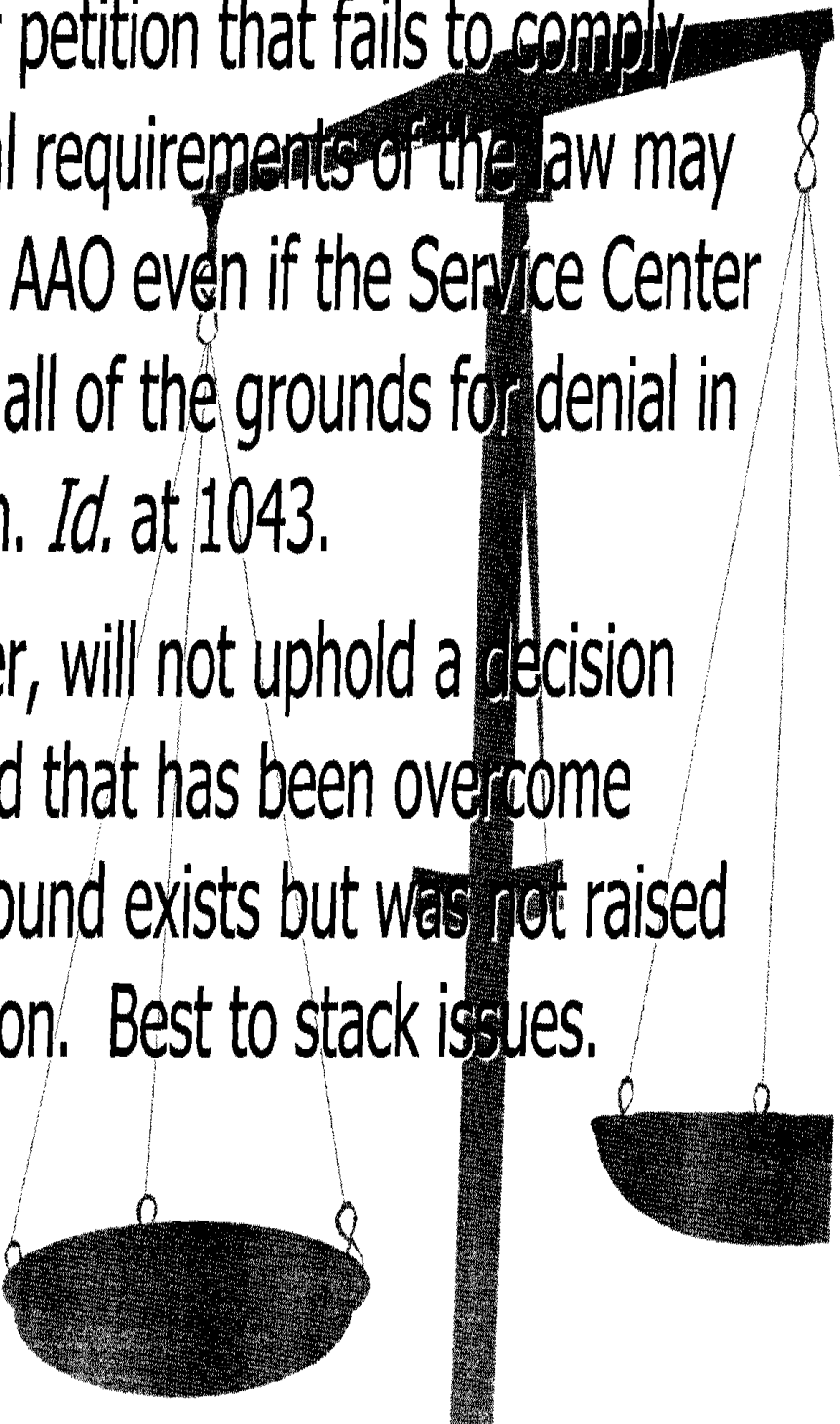
- Golden Rainbow Freedom Fund v. John Ashcroft, No. 00-36020 (9<sup>th</sup> Cir. Nov. 26, 2001).
- “No doubt, Golden Rainbow and the alien investors did rely on the non- precedential position of the INS, and may suffer on that account. But there had been no formal determination at the time, and they 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). . . .

# Specific EB-5 Requirements

- *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).



# Spencer (cont.)

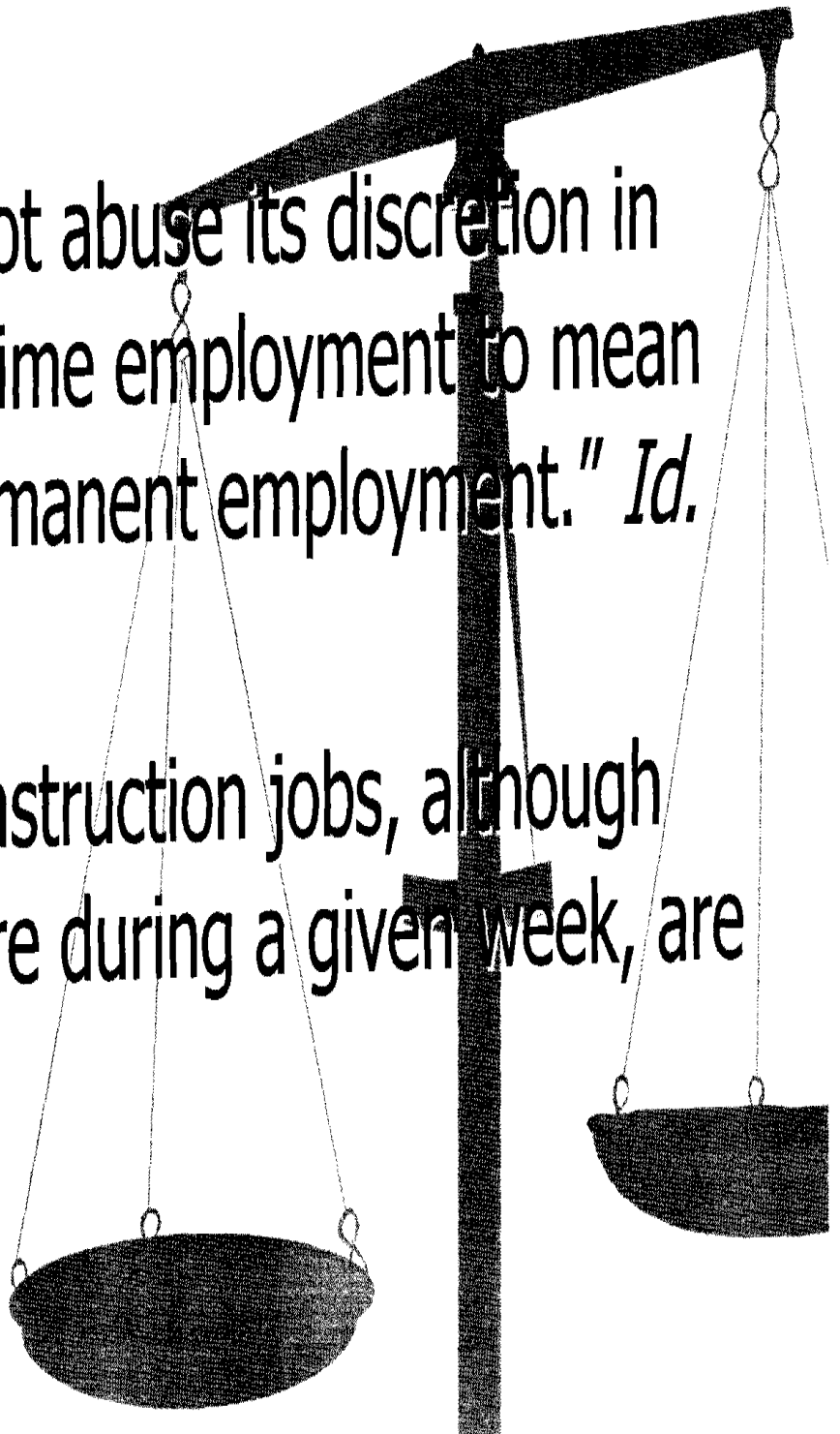
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- An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *Id.* at 1043.
  - The AAO, however, will not uphold a decision based on a ground that has been overcome where another ground exists but was not raised in the initial decision. Best to stack issues.

## Spencer (cont.)

- Lawful source of funds.
- The regulatory requirements to demonstrate the path of the funds and provide tax returns for five years "are hypertechnical requirements to serve a valid government interest; i.e. to confirm that the funds utilized in the program are not of suspect origin." *Id.* at 1040.

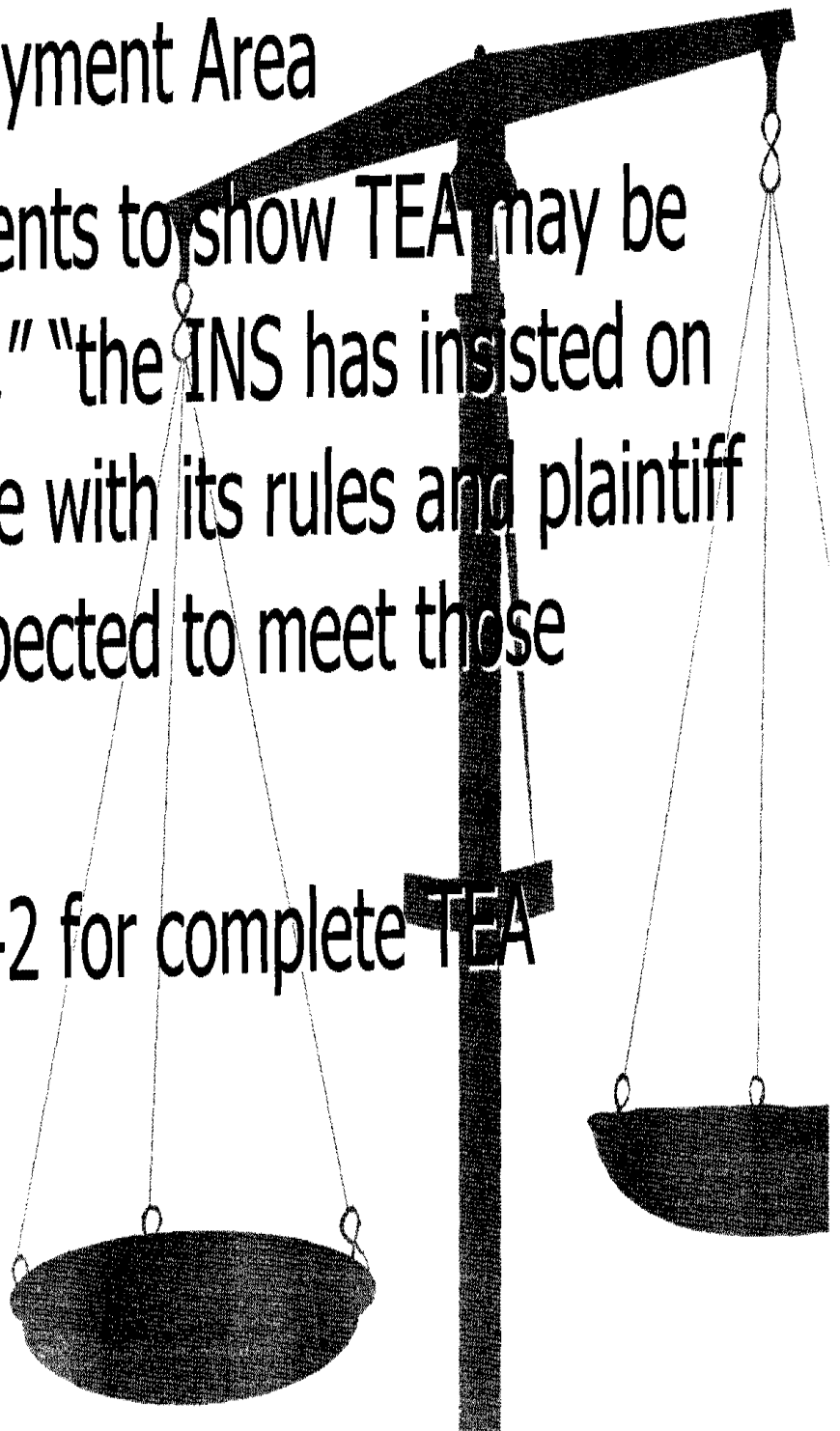
## Spencer (cont.)

- Employment
- "The AAO did not abuse its discretion in construing full-time employment to mean continuous, permanent employment." *Id.* at 1039.
- Intermittent construction jobs, although 35 hours or more during a given week, are not qualifying.



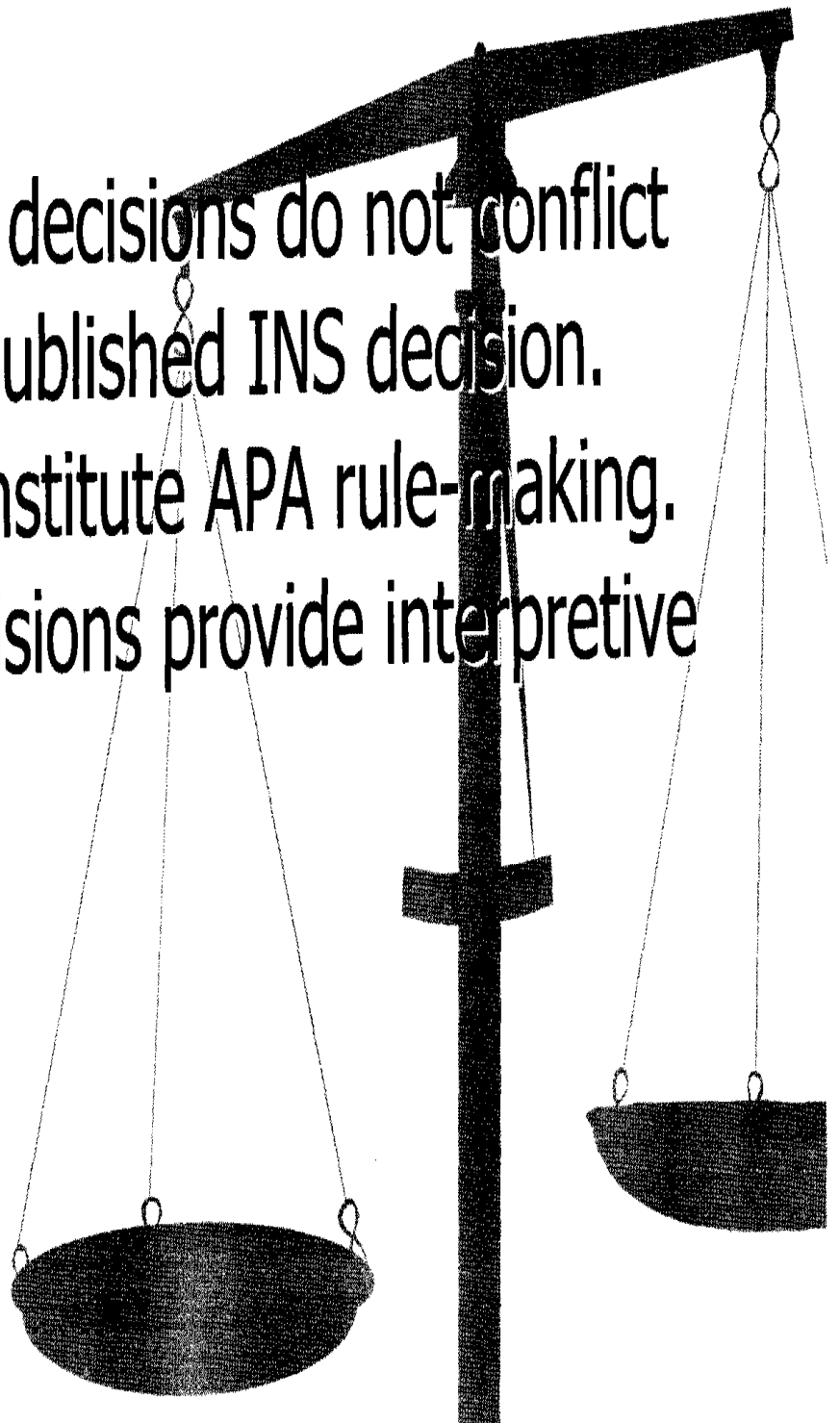
# Spencer (cont.)

- Targeted Employment Area
- While requirements to show TEA may be "hypertechnical," "the INS has insisted on strict compliance with its rules and plaintiff should have expected to meet those requirements."
- Pages 1041-1042 for complete TEA discussion.



# Spencer (cont.)

- APA issues:
- "The precedent decisions do not conflict with any prior published INS decision. They do not constitute APA rule-making. Rather, the decisions provide interpretive guidance."
- *Id.* at 1044.



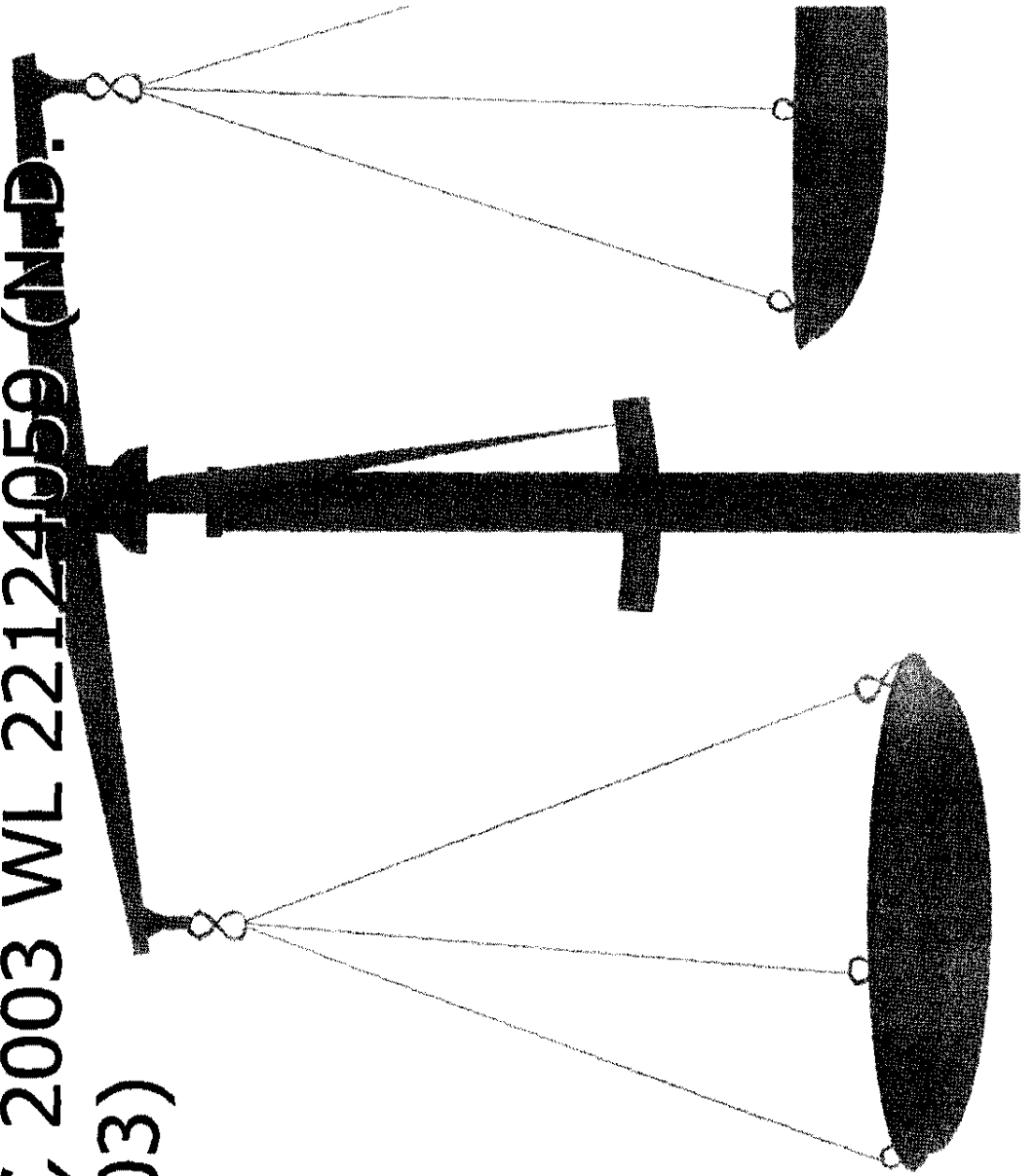


# Use of Proceeds

- De Jong v. INS, 6:94 CV 850 (E.D. Texas 1997). INS - a corporation was a separate legal entity, thus, the reinvestment of proceeds from the corporation, w/out removal and taxation, was not an investment for which the petitioner was personally and primarily liable. Court found no abuse of discr.

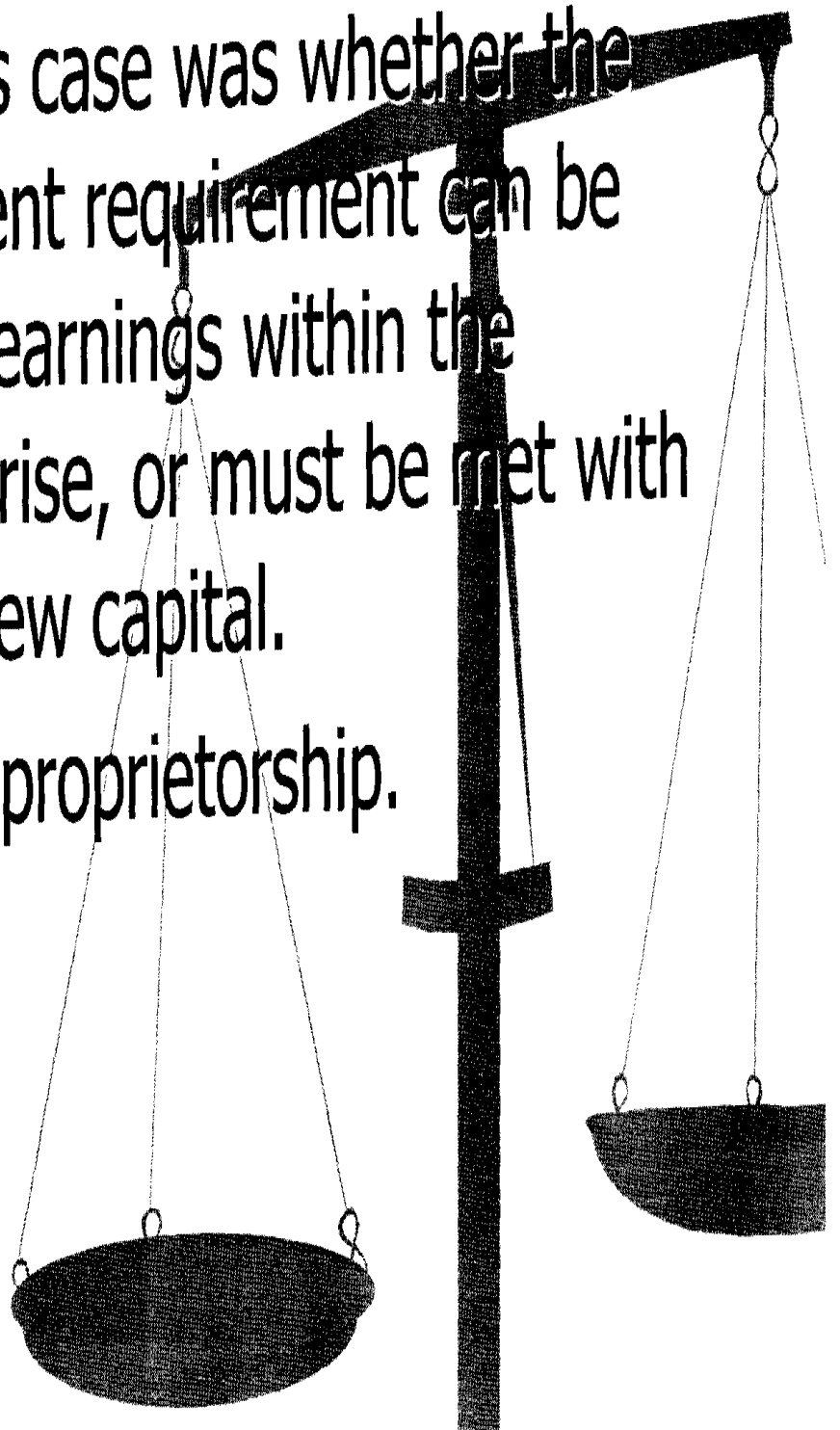
# Kenkhuis

- *Kenkhuis v. INS*, 2003 WL 22124059 (N.D. Tex. Mar. 7, 2003)



## Kenkhuis (cont.)

- The issue in this case was whether the capital investment requirement can be met by leaving earnings within the business enterprise, or must be met with an infusion of new capital.
- Involved a sole proprietorship.

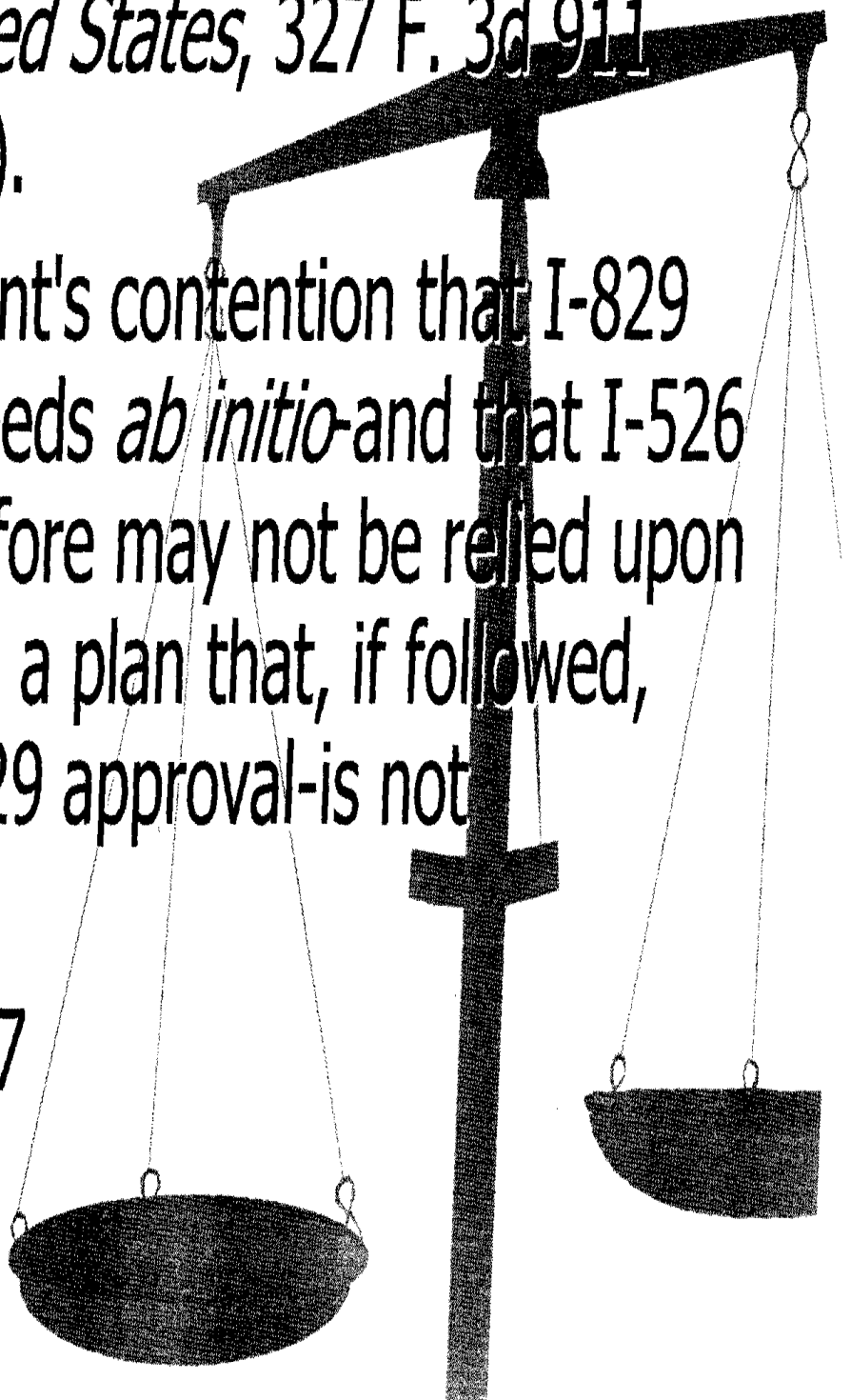


# Kenkhuis (cont.)

- "The AAO's construction is consistent with an everyday usage of 'invest,' meaning to put money or capital into a venture, [Footnote citing Merriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months."
- *Id.* at \*3.

# I-829s

- *Chang v. United States*, 327 F. 3d 911 (9th Cir. 2003).
- The government's contention that I-829 approval proceeds *ab initio*-and that I-526 approval therefore may not be relied upon as setting forth a plan that, if followed, will lead to I-829 approval-is not sustainable.
- 327 F. 3d at 927



## Chang (cont.)

- "The government provides no reason to believe that the combination of I-526 approval, successful execution of the approved plan, and absence of material misrepresentation in the I-526 petition-*all characteristics that Appellants claim apply to them*-was not an excellent predictor of I-829 approval up until the precedent decisions appeared." *Id.* (Emphasis added.)

## Chang (cont.)

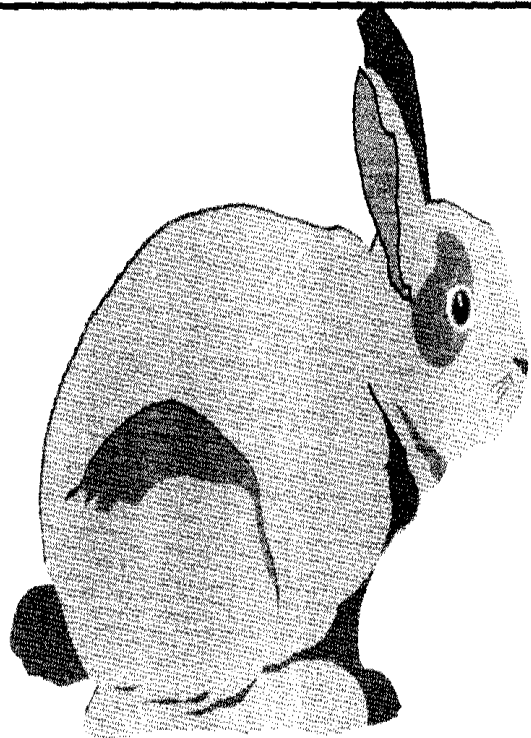
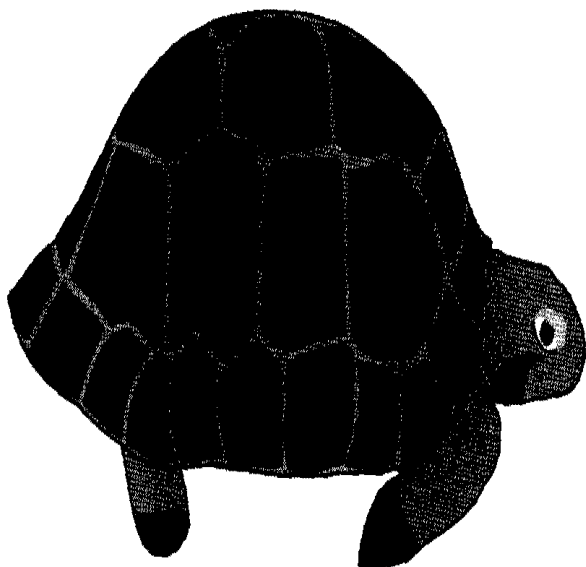
- Circuit Court did not “fault the INS for determining that its earlier approvals of I-526 petitions interpreted the EB-5 program in ways that arguably contravened Congressional intent.” Assumed “arguendo” that precedents were justified. Did not reach APA notice and comment claims. *Id.* at 929.

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# AAO PRECEDENTS

September 2008

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# The Decisions

- *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998)
- *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998)
- *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998)
- *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998)

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# Matter of Soffici

## FACT PATTERN

### **Petitioner**

\$25,000 in earnest money deposits  
\$1.7 mil. borrowed from 1st United Bank  
\$705,298 cash at settlement

### **Ames**

Inc. 1997  
\$2.4 mil.

### **Howard Johnson's**

In business since 1950's

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# Holdings

- Targeted Employment Area (TEA)
  - 150% of the national unemployment rate
  - Or rural . . .
  - **At the time of filing.**
- Remember, 8 C.F.R. § 204.6(e) requires the area be a TEA at the time of investment, so if years apart, check both.

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## Soffici Holdings (cont.)

- Balance sheet for hotel reflected \$922,136 as “shareholder loans.” Thus, \$705,298 cash at settlement and \$25,000 earnest money merely loaned to company. Definition of “invest,” 8 C.F.R. § 204.6(e) precludes debt arrangements. Thus, the \$922,136 cannot be considered part of the petitioner’s investment.

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## Soffici Holdings (cont.)

- Balance of hotel purchase price, \$1.7 mil.  
financed by Ames through Bank, secured by  
the hotel.
  - Loan by corp. is not loan by individual.
  - Loans secured by assets of NCE specifically  
precluded in 8 C.F.R. § 204.6(e).
  - Personal guarantee doesn't help, not *primarily*  
liable.

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## Where relevant:

- Loans from third parties used to finance cash investment or capital expenses.
- Promises to pay BY the investor TO the business at a later date as an alleged investment are discussed in *Izummi* and *Hsiung*.

---

## Resources to Invest

- Net worth statement from unknown source includes hotel as an asset of the petitioner and its mortgage as his liability. Own net worth only \$61,747.02.
- Unknown proportion of joint accounts with father.
- Funds of the company for whom he serves as secretary are not his.

---

## Soffici Holdings (cont.)

### ■ Source of Funds

#### □ Claimed:

- \$450,000 from personal savings and sale of house
- \$500,000 from sale of "our business."

#### □ No sales contract or deed submitted.

- #### □ "Simply going on record without supporting documentary evidence is not sufficient . . ." Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).



---

## Soffici Holdings (cont.)

- Establish a New Comm. Enterp. (NCE)
  - “It is the job-creating business that must be examined in determining whether a new commercial enterprise has been created.”
  - HoJo’s motor lodge was an ongoing business at the time of purchase - 24 years. Ames merely replaced the former owner.
  - No claim of 40% expansion.
- NEW LAW OVERRULES THIS HOLDING!

---

## Soffici Holdings (cont.)

### ■ Reorganization -

- A hotel prior to purchase, still being operated as a hotel.
- "A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership."

---

## Soffici Holdings (cont.)

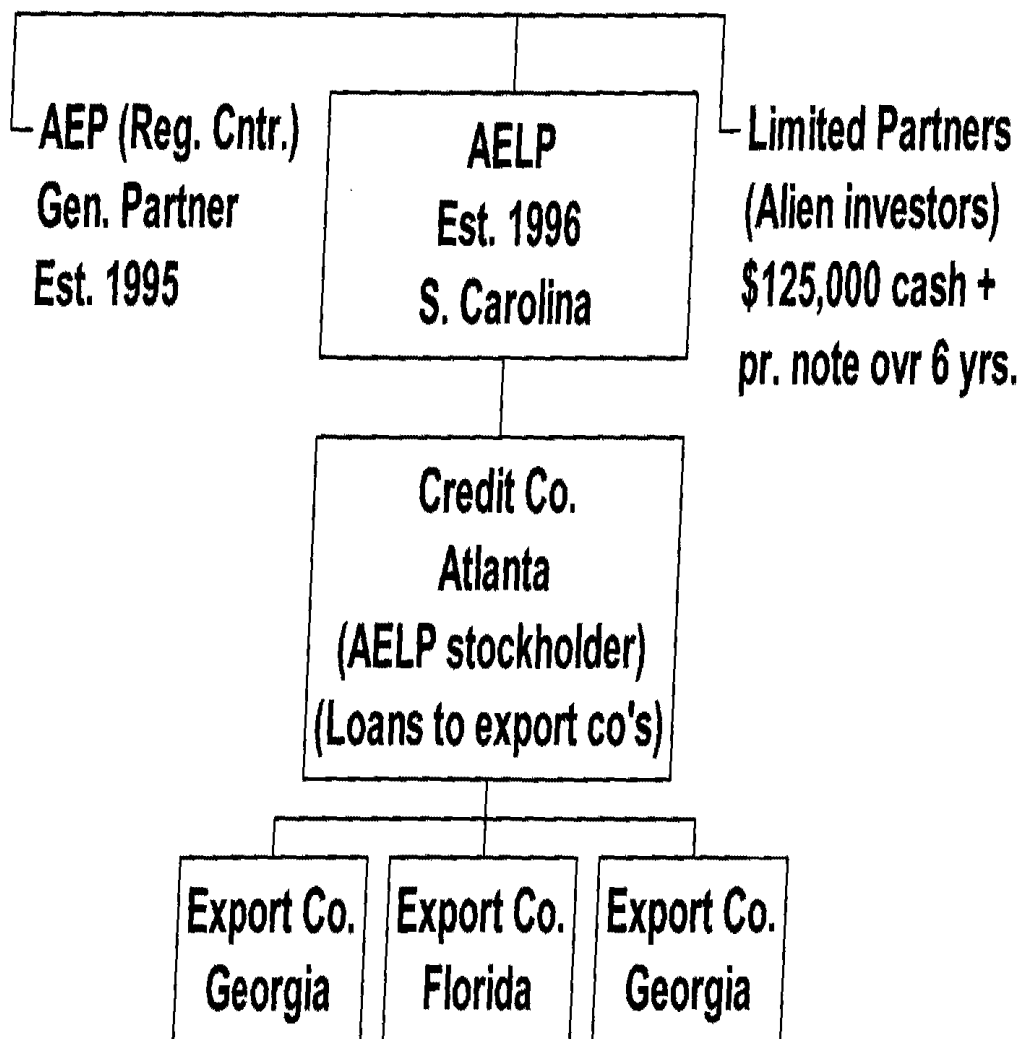
- Employment creation:

- Payroll journal did not establish all employees worked at least 35 hours.
- At most, 20 full-time employees. Hotel previously employed 29 full and part-time employees.
- No evidence 10 new jobs created, "marketing plan" does not address hiring.

- NOT OVERTURNED BY NEW LAW!

# Matter of Izummi [Izumii]

## FACT PATTERN



---

# Holdings

## ■ Regional Center:

- Letter designating AEP a regional center indicated status applied to 8 coastal areas of S. Carolina, expanded to include 22 other counties in S. Carolina.
  - Loans from credit company in Atlanta to companies in GA and FL.
  - As neither credit co. nor export co. in reg. cntr, can't rely on ind. employment. No "improved regional productivity." 204.6(m)(3(i).
-

---

## Izummi Holdings (cont.)

- Footnote 4, related business (manuf.) need not be in regional center.
- Targeted Employment Area (TEA)
  - Employment benefits must take place in a TEA to qualify for reduced investment amount.
  - Export companies will create employment. Not all in TEAs. Thus, minimum investment amount is \$1,000,000.

---

# Changes to petition

- Amendments to Partnership agreement rejected on appeal pursuant to Katigbak.
- Acknowledged unpublished decision which accepted revised business plan (from troubled business to non-troubled business) was in error.

---

# Qualifying Investment

- Promissory Note:
  - Initial deposit of \$120,000 into escrow
  - Five annual payments of \$18,000
  - Final “balloon” payment of \$290,000
- \$30,000 of dep. for partnership expenses
- Reserve accounts required by L.P. agreement



---

# Partnership Expenses

- \$30,000 from \$120,000 in escrow to be immediately released from escrow for partnership expenses.
- “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.”

---

# Annual Payments

- Five annual payments of \$18,000, totaling \$90,000.
- 12% per annum return guaranteed on amount contributed IN ADDITION to share of profits.

## Money to AELP Over 5 Years

<u>Owed (Net)</u>	<u>Return</u>	<u>Calculation</u>
\$18k (\$3,600)	\$14,400	12% of \$120k
\$18k (\$1,440)	\$16,560	12% of \$138k
\$18,000	\$18,720	12% of \$156k
\$18,000	\$20,880	12% of \$174K
\$18,000	\$23,040	12% of \$192k

---

## Annual Payments (cont.)

- Obligation to pay AELP is conditioned on payment of guaranteed returns.
- Problem is that annual returns are guaranteed, might be paid out of capital.
- No infusion of \$\$ (\$93,600 in returns, only owe \$90,000)
- Not at risk.

---

# Redemption Agreements

- After 6th year, limited partner has the “right to require” AELP to purchase his/her interest.
- Price = total capital - first six payments + pro rate share of profits or \$290,000 plus profits.
- In essence, \$290,000 is a loan payable to the investor in six years.

---

# Redemption Agreements

- “For the alien’s money truly to be at risk, the 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. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one.”
  - Risk that partnership will default is no greater than risk for any loan.
-

---

# Redemption Agreements

- Can sell interest eventually, just can't have agreement ahead of time.
- Even if sale price is "fair market value" - fmv not applicable, no market for these alien investor interests.
- No risk of profit or loss, if profit, AELP can force sale, if loss, alien investor can force sale.

---

# Cash Reserves

- Partnership agreement requires AELP to place sufficient funds in reserve to meet its obligations under the sell-back provisions.
- Funds not available to employment-generating entity.



---

# Promissory Notes

- As Capital - must determine Fair Market Value of promissory note.
  - Look at future value, \$500,000 today is not \$500,000 in six years.
  - Take into account costs of seizing collateral.
  - Bank accounts securing note - easily dissipated.
  - FMV far short of face value.
  - If last payment optional, decreases FMV

---

# Promissory Notes

- As evidence of intent to invest.
  - Must “substantially complete his payments on the note prior to the end of the two-year conditional period.”
  - See 8 C.F.R. § 216.6(c)(1)(ii).
  - If approved, petitioner would only have paid \$123,600 of own funds at end of two years. Not a good faith commitment of funds.

---

## Where relevant:

- Promise BY Investor TO Business to pay cash at a later date.
- Third party loans to obtain investment funds or to pay capital expenses are discussed in Soffici.

---

## Source of Funds

- Submitted evidence of bank accounts with large balances and foreign company's earnings.
- No evidence of source of funds in accounts.
- Insufficient to demonstrate company's earnings, must demonstrate personal earnings.

---

# New Commercial Enterprise

- AELP established March 25, 1996.
- Petitioner executed the partnership documents October 14, 1997.
- AELP is “new,” however, “the petitioner had no hand in its creation and was not present at its inception.”
- May pool investors, but must gather ahead of time.

---

## NCE (cont.)

- Must be there at the beginning.
- Should be established prior to filing.
  - Footnote 29 rejects argument that “establishment” is a process which is not complete until all investors obtained.
    - If that interpretation were adopted, petition filed prematurely as all investors not yet obtained.
    - Would be too speculative.

---

## NCE (cont.)

### ■ Expansion:

- Claimed 95 investors previously approved. If true, and all invested \$500,000, one investment of \$500,000 cannot increase net worth 40%.
- Not in case, but net worth is a defined accounting term: assets - liabilities. Other measures of a business' worth - such as appraised value are no good. Two balance sheets are required (before and after inv).

---

## NCE (cont.)

- Reorganization:

- Doing same business prior to investment. No reorganization.



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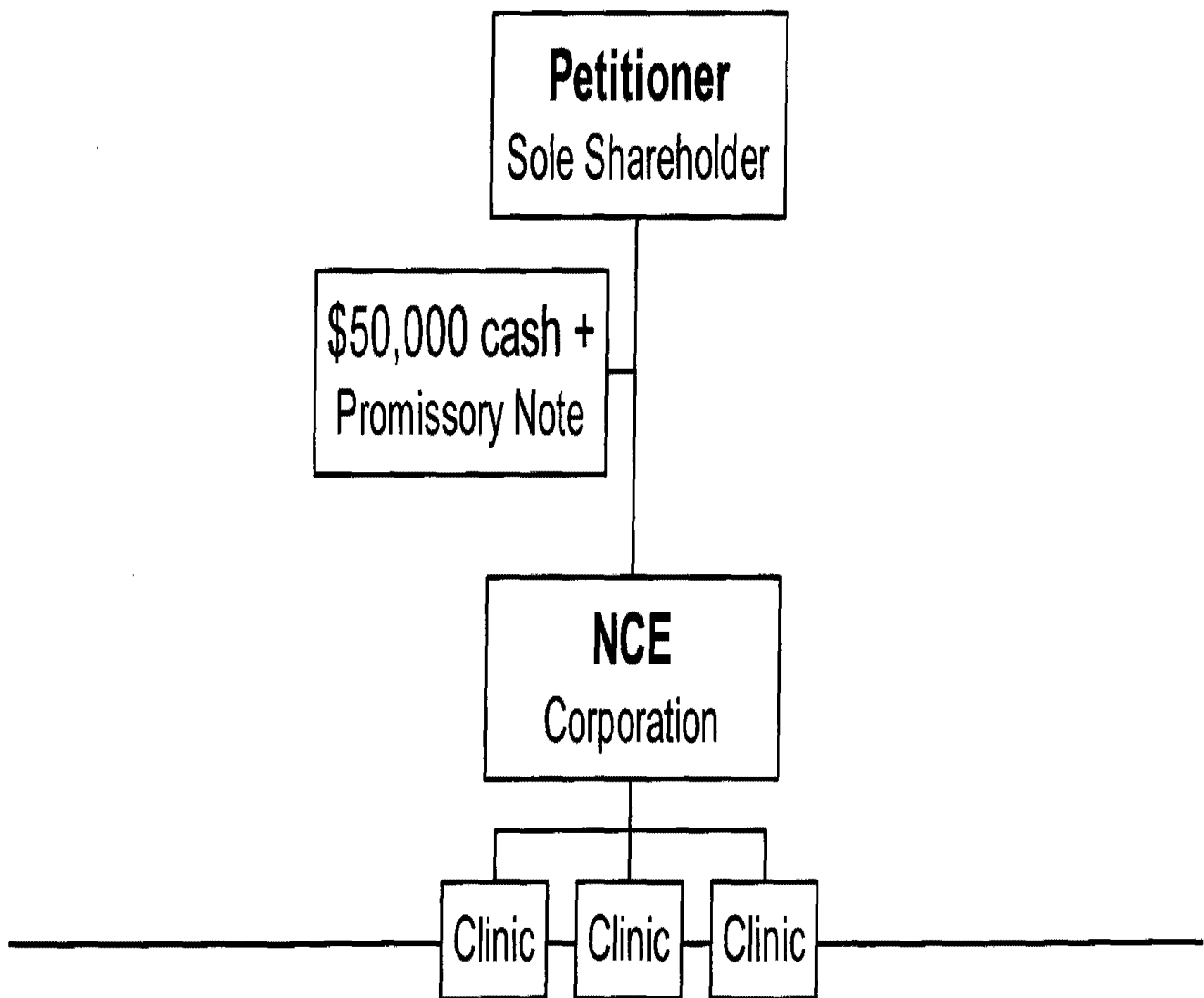
# THAT'S ALL FOR IZUMMI!



- (Two short precedents to go!)

# Matter of Hsiung

## Fact Pattern



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# Matter of Hsiung

## ■ Payment Plan:

- \$50,000 initially.
- \$50,000 within 30 days of I-526 approval.
- \$200,000 one year after entry.
- \$200,000 prior to removal of conditions.

- Promise to pay secured by property with FMV of \$500,000. Property was not in petitioner's name.
-

---

## Hsiung (cont.)

- Assets securing note must be
    - Owned by petitioner (not his business).
    - Specifically identified.
      - Not “my assets everywhere.”
    - Must be perfected.
      - Interest is recorded
      - Petitioner's burden
    - Fully amenable to seizure
      - Foreign entities can't seize assets in China.
-

---

## Hsiung (cont.)

### ■ Assets (cont.)

- Worth \$\$ in note. (Mortgage on property made property worth less than note.)
- Cover costs of seizing assets overseas.

### ■ Who are parties to note?

- Solely owned shareholder loaning money to corporation, funds not really at risk.

---

## Where relevant:

- Promise BY investor TO business to pay capital investment at a later date.
- Soffici covers loans by business or investor to pay a cash investment or capital expenses.

---

## Hsiung (cont.)

### ■ Employment Creation.

- NCE planned to purchase preexisting clinics.
- “A petitioner cannot directly cause a net loss of employment.”
- In other words, must create 10 new job opportunities. Look at Part 5 of I-526 - how many jobs prior to investment? Need wage and withholding reports of previous business.

---

# Matter of Ho

## Fact Pattern

**Petitioner**  
Sole Shareholder  
500,000 shares

**NCE**  
\$500,000

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# Matter of Ho

## ■ Facts:

- ❑ \$500,000 placed into a corporate account (King's Wheel Corporation).
- ❑ Petitioner was the sole owner of the corporation, issued 500,000 shares.
- ❑ Business plan indicated sales would commence in 3-6 months.
- ❑ Office/warehouse lease, but no purchase of equip., negotiations with suppliers/buyers.

---

## Ho (cont.)

- “ 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. Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient. . . . ”

---

## Ho (cont.)

- Must commence operations, the petitioner must present evidence of the “actual undertaking of business activity.”
- If only activity prior to investment - original business issue.
- Not discussed in Ho, but simply showing a deposit is also insufficient because the money might not constituted “capital.”

---

## Other places to get “capital” numbers from:

- Corp. tax return, schedule L
  - Partnership tax return (also used for LLC)
    - Schedule L, line 21
    - Schedule M-2, Analysis of Partners' Capital Accounts
    - Schedule K-1 for individual partners, members, shareholders of S-Corps - see section J.
-

---

## Ho (cont.)

- Source of Funds:

- No evidence of marital relationship, medical practice, or income over 5 years.

---

## Ho (cont.) - Employment

- Evidence presented:
  - Two I-9s for jobs allegedly created, business plan calling for 8 new employees within 1 yr.
- I-9s insufficient evidence of full-time employment. Need payroll records.
- Business plans:
  - Must make sense.
  - Have a time table for hiring

---

# Ho (cont.)

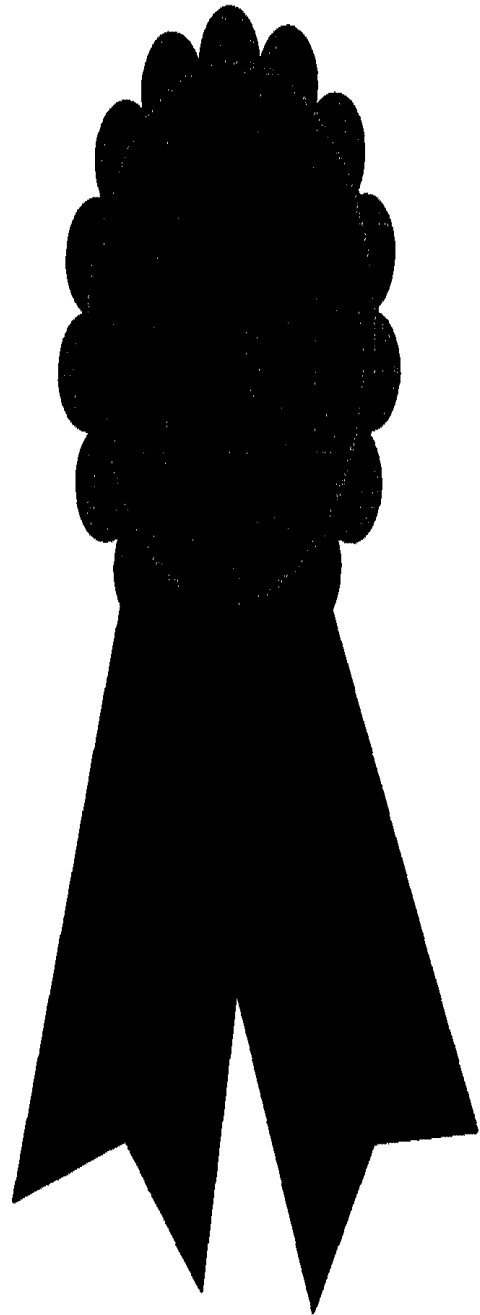
## ■ Business Plans (cont.)

- Job descriptions
- Explain why the employees are needed
- Include market analysis
  - competition
  - process
  - sources of suppliers
  - marketing structure
  - projections (credible!)

---

# THAT'S ALL FOLKS!

■ GOOD LUCK!





# In-Depth Capital Investment Issues

# In-Depth Capital Investment Issues

- 8 C.F.R. 204.6(e):

*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. . .

- You may see many different forms of capital being used. Aliens have established eligibility in the past through direct cash infusions in a business, incurring debt on behalf of a business, securing loans for a business by risking their personal assets, buying inventory for a business with their personal capital, paying the bills of a business with their personal capital, and many other arrangements. The key is to look for evidence that the alien's personal capital is at risk.

➤ You may see aliens attempting to shield their capital from risk. However, capital that is not fully at risk is therefore not fully available for job creation.

➤ Sometimes a faulty financial arrangement will be made obvious, but other times you may see petitioners concealing arrangements.

➤ Cases have been seen with some of the following deficiencies:

➤ Aliens loaning funds to the enterprise

➤ Aliens setting aside funds

➤ Aliens placing funds in passive investments

➤ Aliens using other people's or entity's funds

➤ Aliens using faulty promissory notes as capital

➤ Aliens not naming which assets secured indebtedness

- Aliens claiming that their overseas assets could secure debt in the US without proving that US courts would honor the debt as well as the cost
- Aliens claiming that debt owed to the business they owned would automatically trigger foreclosure on their assets (not an arms-length transaction)
- Aliens routing capital back to themselves, others, or other businesses not responsible for employment creation. (*Hint: Just because it was deposited one day does not mean it was not removed another day – Look for corroborative evidence that it was invested*)
- Aliens claiming the normal operating expenses a business paid as contributed capital

- Aliens claiming to be “in the process of investing” while capital is not actually at risk
- Aliens claiming an unproven fair market value of software, patents, or other assets.
- Aliens arranging to have their capital returned to them via a guarantee (before or after conditions are removed)
- Aliens claiming their capital is at risk via a personal loan guarantee when any part of the indebtedness is secured by the assets of the business

# In-Depth Capital Investment Issues

- 8 C.F.R. 204.6(e):

*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. . .

- You may see many different forms of a commercial enterprise being used. Aliens have established eligibility in the past through all of the entities listed above. The key is to look for evidence that the alien's personal capital is at risk.

- Cases have been seen with some of the following deficiencies:
  - Businesses that were single transaction entities (ie. one loan, one investment, etc) while the regulations require an investment in an “ongoing” business
  - Multiple businesses not united by a holding company or parent entity (often capital flows to entities which do not create jobs)
  - Aliens placing funds in non-profit entities



# In-Depth Capital Investment Issues

- 8 C.F.R. 204.6(e):

*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.

- You may see many different types of financial arrangements, some of which can be very complex involving multiple entities and varying levels of ownership. Therefore, it is important to focus on the basics: real capital being contributed to a real business. Capital cannot be provided by the alien in return for any kind of debt. However, you should note that an alien can contribute capital to a new commercial enterprise which then in turn loans out money.

➤ Cases have been seen with some of the following deficiencies:

- Aliens submitting bank statements showing deposits of the claimed capital while tax returns show the funds were loans from shareholders
- Worthless promissory notes in favor of the business claimed as capital
- Aliens claiming nontangible assets as capital
- Aliens claiming to have provided funds or indirect benefits through other businesses or individuals
- Capital siphoned off to pay for immigration attorneys, marketing expenses of promoters, escrow fees, etc.

## Business Plans

- Business plans are often submitted not only to show the need for employment as mentioned in the regulations, but also as blueprints for how the capital will be spent.
- This is important since you must ensure that all the capital will be available for job creation.
- Some will be many pages long and prepared by professionals in the industry, while others may be a brief written statement prepared by the petitioner.

## Business Plans

- An EB5 comprehensive business plan is something between a prediction and a promise.
- The predictions should be made based on reasonable methodologies, and we need to hold the entities responsible for their promises to ensure all the capital is placed at risk and all the requisite employment is created.

## Business Plans

- In Matter of Ho, the Administrative Appeals Office held that 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."

- “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.”

# Evidence

- What can I expect to see?
- Everything from well-organized submissions of several key documents to ...

...buckets of company invoices, unrelated bank statements, newspaper clippings, website printouts, videos, samples of products, 100 page long partnership agreements, and almost anything else you can imagine.

- 8 CFR, 204.6(j) contains a list of evidence, but be aware that due to the nature of the cases and the wide possibilities for varying financial arrangements, you may need to review documents that are not on the list.

- 8 C.F.R. 204.6(j) :
- (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
  - (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;



- 8 C.F.R. 204.6(j) (cont):
- (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;

- 8 C.F.R. 204.6(j) (cont):
- (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

# Escrow Agreements

- **Funds Held in Escrow**
- Title 8, Code of Federal Regulations, Section 204.6(j)(2) states:
- 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:

. . . .

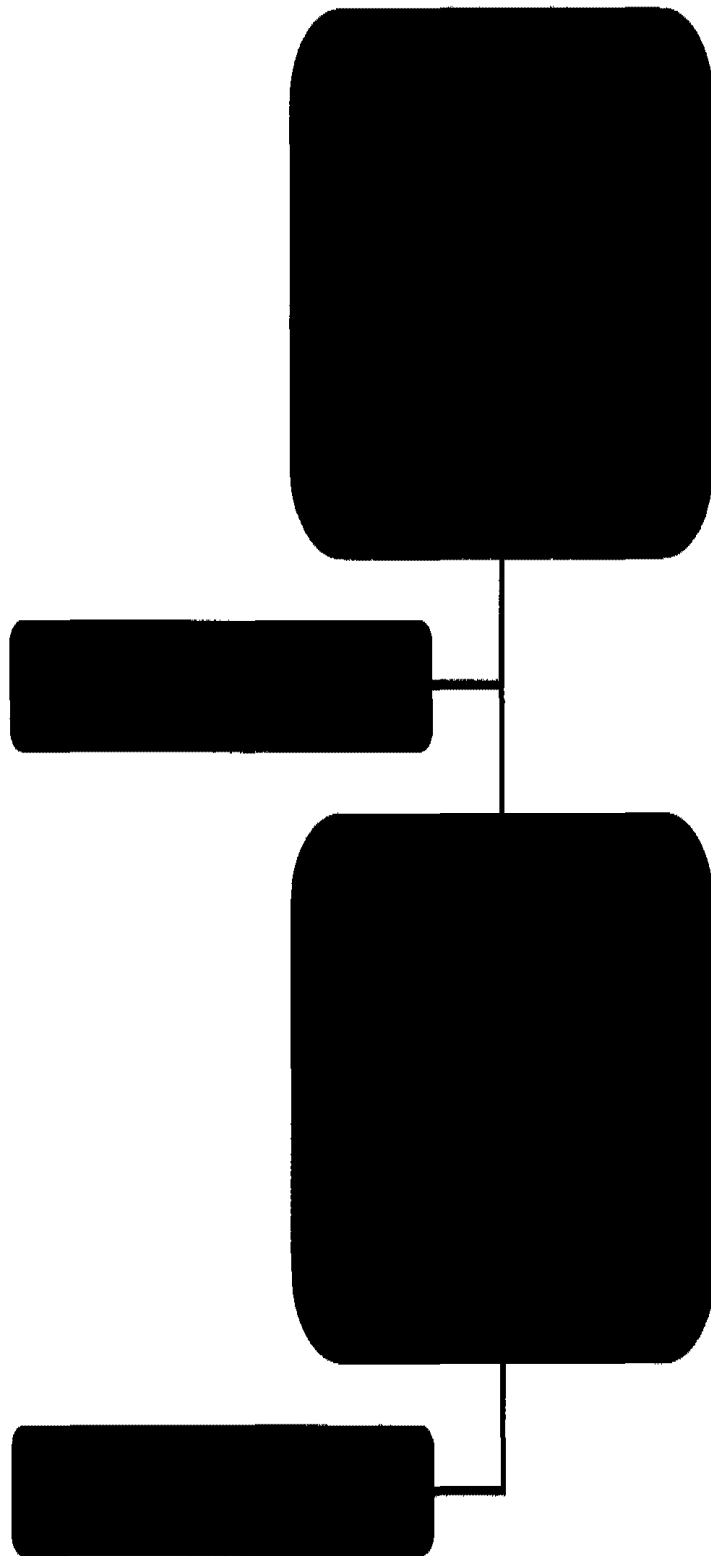
- (iv) Evidence of monies transferred or *committed to be transferred* to the new commercial enterprise. . . .  
(Emphasis added.)

# Escrow Agreements

- Title 8 of the Code of Federal Regulations, section 204.6, does not directly address the use of an escrow prior to issuance of a visa. An escrow is a legal instrument that places the funds of one person (called the grantor, promisor, or obligor) in the hands of a third person (called the escrow holder) to be delivered to another party (called the grantee, promisee, or obligee) upon the occurrence of some event or meeting of some condition.
- For the purposes of the instant petition, an escrow must state that the required initial capital contribution is actually committed to the new commercial enterprise and made available for the purpose of job creation immediately and irrevocably upon approval of the petition and visa issuance, or adjustment. A mere statement that the funds are available from the escrow agent is not acceptable evidence of commitment.

- In order to decipher all this evidence, you don't need a degree in accounting – just some basic knowledge.
  
- Follow the money:
  - Where did it come from?
  - Where did it go?
  - What documents govern its use?
  - Is it being used for the benefit of the enterprise?
  - How are profits earned?

- Understand the underlying arrangement – make a diagram or flowchart.



1) Diagram this exercise for practice:

- An alien invests \$500,000 in a targeted area with International Money Technologies, Inc. (IMT) which has 2 employees.
- IMT is owned 40% by the alien and 60% by Competing Resource Network, Inc (CRN) which also leases the building which IMT owns and has 14 employees.
- The alien also owns 10% of CRN.
- IMT owns 100% of Big Retail Stores, Inc. (BRS) and 40% of Takedown Wrestling Studios, LLC (TWS). Both have business plans which predict 11 new jobs each within two years.
- IMT deposits \$500,000 in a CD which National State Bank uses as collateral for a \$500,000 revolving credit loan for BRS. IMT also deposits \$750,000 with TWS.
- Compare your diagram with those of your classmates. What concerns if any do you have about the investment?

## 2) Diagram this exercise for practice:

- In 2005 an alien invests \$1,000,000 in International Fracture Technologies, LLC. (IFT) which has had 4 employees since 1989.
- IFT owns 100% of Tripe North America, Ltd. Partnership (TNA); 100% of Borgman Flash Digttools, Inc. (BFD); and 50% of Green Card America, LLC (GCA). Each had 12 employees before the investment and has added one full-time employee since, except for TNA which now has 21.
- BFD owns 60% of Adventure Gear Plus, Inc. (AGP) which has six retail stores and 300 employees.
- IFT purchased \$3,500,000 in inventory for AGP.
- Compare your diagram with those of your classmates.  
What concerns if any do you have about the investment?



### 3) Diagram this exercise for practice:

- An alien along with 29 other alien investors places \$500,000 with an escrow company for later release to Happy Elegance, Ltd. Partnership (HELP) upon approval of the I-526 petition.
- HELP has 2 employees and loans the capital to Cheney Biofuel, LLC, which owns 100% of Cheney Biofuels, Inc.
- According to the business plan, \$14 million is to be used for constructing new facilities in a targeted area, while \$1,000,000 is to be placed in a securities account owned by HELP.
- Cheney Biofuels, LLC will lease the facility to Cheney Biofuels, Inc., which will relocate 300 jobs there.
- Cheney Biofuel, LLC, is owned 50% by one individual and 50% by another unnamed limited liability company.
- Compare your diagram with those of your classmates.  
What concerns if any do you have about the investment?

# Typical Documents

- Some of the typical controlling documents you might encounter with many current Regional Center cases:
  - Escrow Agreement – Allows alien to place funds at risk in the hands of a third party who will deliver the capital to the enterprise.
  - Subscription Agreement – Alien agrees to partake in investment.
  - Loan Agreement – Enterprise agrees to loan alien capital to job creating entity.
  - Partnership Agreement – Sets forth terms of all transactions between General Partner, Limited Partners (aliens), and partnership.

# Tracking Capital

- You might be required to track the path of capital through multiple countries.
- Be aware that some countries' financial documents and procedures are similar to those of the US, while others are not.
- The path will likely start with documents showing the source of capital such as foreign tax returns, bank accounts, business registration documents, or documents for the sales of assets. Certified translations should accompany all foreign language documents.

- You may be required to review wire transfer statements. *Note that there is a difference in some cases between a request for a wire filled out by the alien and an actual wire statement.*
- There is an example of a wire statement in your course material. For your purposes, you will want to note the date as well as who sent the funds (usually listed as ORG or Originator) and who received them (usually listed as BNF or Beneficiary). *Sometimes an alien will claim that the capital belongs to him/her when it was actually sent by someone else.*

- It may also be necessary to calculate the exchange rates between countries. Many websites contain currency exchange calculators, but the one at [www.oanda.com](http://www.oanda.com) is very helpful as it can retrieve historical data.
- You may be given an exchange rate and have to calculate the currency. For example, how would you calculate the value of \$10,000 USD in Euros if the rate is \$1 USD to .64 Euros?
  - ✓ Multiply  $10,000 \times .64$  to get 6,400 Euros.
- How would you calculate the amount of US dollars equal to 3,440,360 Chinese Renminbi (yuan) if the rate is \$1 USD to 6.88 Renminbi?
  - ✓ Divide 3,440,360 by 6.88 to get \$500,052 USD.

# Tracking Capital

- You might be required to track the path of capital through multiple people or business entities.
- Some transactions will be clear-cut, while others will require you to review many bank statements and checks.
- Currently in China, currency restrictions limit the amount of funds one person may remove from the mainland, so some alien investors may either: 1) transfer their capital to someone in Hong Kong who then transfers the funds out, or 2) give the funds to several other people who transfer out smaller increments. This type of transaction is not illegal, but it produces a more difficult trail to follow.

# Tracking Capital

- Sometimes an alien will receive capital through a gift. Note that gifted funds sometimes require that a gift tax return be filed. In the US, any taxes due are paid by the donor. Some countries tax the recipient instead. Many countries do not have gift tax regulations at all. Put the onus on the petitioner to prove that he/she has followed the law in any particular country.
- In the US, it is rare that gifts actually trigger any tax; however, a gift tax return is required to be filed anyway if the amount is over \$12,000 to a non-spouse. Even nonresidents are usually required to file gift tax returns if the gifted assets are in the US.

# Bankruptcy & Ceasing Operations

- Bankruptcy law provides for the development of a plan that allows a debtor, who is unable to pay his creditors, to resolve his debts through the division of his assets among his creditors. This supervised division also allows the interests of all creditors to be treated with some measure of equality. Certain bankruptcy proceedings allow a debtor to stay in business and use revenue generated to resolve his or her debts. An additional purpose of bankruptcy law is to allow certain debtors to free themselves (to be discharged) of the financial obligations they have accumulated, after their assets are distributed, even if their debts have not been paid in full.
- Bankruptcy law is federal statutory law contained in Title 11 of the United States Code.
- Bankruptcy proceedings are supervised by and litigated in the United States Bankruptcy Courts. These courts are a part of the District Courts of The United States.



- There are two basic types of Bankruptcy proceedings. A filing under Chapter 7 is called liquidation. It is the most common type of bankruptcy proceeding. Liquidation involves the appointment of a trustee who collects the non-exempt property of the debtor, sells it and distributes the proceeds to the creditors.
- Bankruptcy proceedings under Chapters 11, 12, and 13 involve the rehabilitation of the debtor to allow him or her to use future earnings to pay off creditors. Under Chapter 7, 12, 13, and some 11 proceedings, a trustee is appointed to supervise the assets of the debtor.

- A bankruptcy proceeding can either be entered into voluntarily by a debtor or initiated by creditors. After a bankruptcy proceeding is filed, creditors, for the most part, may not seek to collect their debts outside of the proceeding. The debtor is not allowed to transfer property that has been declared part of the estate subject to proceedings. Furthermore, certain pre-proceeding transfers of property, secured interests, and liens may be delayed or invalidated. Various provisions of the Bankruptcy Code also establish the priority of creditors' interests.

# Trusts

- A **trust** is an arrangement whereby property is managed by one person (or persons, or organizations) for the benefit of another.
- A trust is created by a **settlor**, who entrusts some or all of his or her property to people of his choice (the **trustees**). The trustees hold legal title to the *trust property*, but they are obliged to hold the property for the benefit of one or more individuals or organizations (the **beneficiary**).

- The trust is governed by the terms of the trust document, which is usually written and in deed form. It is also governed by local law. The **settlor** is also called the **trustor**, **grantor**, **donor**, or **creator**.
- The beneficiaries are beneficial (or **equitable**) owners of the trust property. Either immediately or eventually, they will receive income from the trust property or they will receive the property itself. The extent of an individual beneficiary's interest depends on the wording of the trust document. One beneficiary may be entitled to income (*for example, interest from a bank account*), whereas another may be entitled to *the entirety of the trust property when he turns 25*).

- *Common purposes for trusts include:*
- **Privacy**
- **Spendthrift Protection**
- **Wills and Estate Planning**
- **Charities**
- **Unit Trusts (an investment vehicle)**
- **Pension Plans**
- **Corporate Structures**
- **Asset Protection**
- **Tax Planning**
- **Co-ownership**
- **Tax Evasion**
- **Money Laundering**

## Discussion Questions

- *Are there problems or concerns with the following scenarios in regards to EB5?*
  1. An alien places capital in a charitable trust which creates 10 new jobs.
  2. An alien's grandparents place \$5,000,000 in a trust for him. The trust invests \$1,000,000 in a legitimate investment.
  3. An alien claims that his father gave him a gift of \$1,000,000 which was obtained from the sale of real property in Colorado worth \$3,500,000 that the father paid for from his \$19,000 per year salary.
  4. An alien claims his capital was obtained through his mother's café business in the UK which owns a 50% interest in a Cayman Island Ltd. Partnership. The partnership wired \$500,000 to his uncle's fish market in Florida which in turn wired the funds to a legitimate EB5 business.

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- Helpful Reminders:

- Diagram complex arrangements.
- Ask for written explanations to accompany documents you don't understand.
- Ask for written explanations and evidence to clear up contradictions.
- Follow monetary funds through each transaction.
- We are not performing IRS audits of the capital, but we do need to track the path of the capital to make sure that it belongs to the petitioner.

THE END





# ESTABLISHING A NEW COMMERCIAL ENTERPRISE

## NEW COMMERCIAL ENTERPRISE

- Although the 2002 Amendments to the INA removed the requirement that an alien personally establish the new commercial enterprise, it is still required that a “new” commercial enterprise be established.
- According to 8 CFR, 204.6(e), “*New* means established after November 29, 1990.”

- **Title 8 Code of Federal Regulations Section 204.6(h) states:**
- The establishment of a new commercial enterprise may consist of:
  - (1) The creation of an original business;
  - (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
  - (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.

## ■(1) The creation of an original business

➤ This part of the regulations allows for the new commercial enterprise to be an original entity formed after November 29, 1990, as opposed to a pre-existing business.

- For example, if an alien purchases an interest in a car dealership that has been in operation since 1955, he would not qualify under this paragraph of the regulations. However, he might be able to demonstrate eligibility under 8 CFR, 204.6(h)(2) or (3).
- Note that there are many sources of information which can establish when the business was started such as: the first page of the tax return, incorporation papers, various business registration documents, partnership and other agreements, etc.
- However, also be aware that just because a company files these documents, that doesn't mean that the business did not exist before. Sometimes businesses merge, get bought out, change names, or take other actions which could make them appear to be newly created. Be on the lookout for conflicting information on company websites, tax returns, and other documents.

- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results

➤ This part of the regulations allows for the alien to purchase a business that was already in operation as long as it was changed to such a degree that one could consider the resulting business as completely new and different from the one that existed previously.

- For example, if an alien purchases a budget hotel and continues to operate it under a different business name, we would require more evidence of reorganization and restructuring.
- Look for real changes in modes of operation, products and services offered, business structure, organization of personnel, and other aspects which would indicate that a new business has resulted.
- Note that it is not enough that an entity merely be reorganized or restructured. It must be reorganized or restructured to such an extent that a new business has resulted.

- What are some examples of changes which would indicate that a new business has resulted?
  
- If a dairy reorganized from a corporation to a partnership, but kept the same employees, equipment, and cows, would such a change meet the standard?
  
- If an alien bought a cafe and then restructured and reorganized it to also provide catering and banquet services in a new 5,000 square foot facility, would it appear that a new business resulted?
  
- If a taxi service added a new limousine to its fleet and changed its name, would such a change meet the standard?
  
- If an alien bought a Motel 6 business and then through improvements and a new franchise began operating a Marriott hotel, would such a change meet the standard?



- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.

➤ This part of the regulations allows for the alien to purchase a business that was already in operation and expand it.

- Note that the regulations draw a nexus between the investment of the required amount and the expansion of the business with a resulting change in net worth or number of employees of 40%.
- Also note that you will need evidence of the net worth or number of employees both prior to and after the investment. Sources of this information would likely be: 1) tax returns or audited financial statements for the net worth; and 2) state quarterly wage reports, Forms W-2, or employment records for the number of employees.
- Remember that the assertions of the petitioner or Counsel are not substitutes for probative evidence. A list of employees or a letter from an accountant do not carry the same weight as tax returns and other forms filed under penalty of perjury.

- *Net Worth = Assets minus Liabilities.* Find these figures on Schedule L of the corporate or partnership tax return.
- Now take a look at these examples and determine if a substantial expansion has taken place.
  - At the end of 2005 the assets are \$550,000 and the liabilities are \$600,000. The alien invests in 2006. At the end of 2007 the assets are \$2,700,000 and liabilities are \$2,800,000.
  - ✓ No, in this case the net worth has decreased from -\$50,000 to -\$100,000 (\$550,000 assets - \$600,000 liabilities = -\$50,000 net worth ; \$2,700,000 assets - \$2,800,000 liabilities = -\$100,000 net worth).

- At the end of 2006 the assets are \$1,500,000 and the liabilities are \$900,000. The alien invests in 2007. At the end of 2007 the assets are \$2,850,000 and liabilities are \$2,000,000.
- ✓ Yes, in this case the net worth has increased over 40% from \$600,000 in 2006 to \$850,000 in 2007 – an increase of \$250,000. ( $\$1,500,000 - \$900,000 = \$600,000$  net worth;  $\$2,850,000 - \$2,000,000 = \$850,000$  net worth; Note that  $\$600,000 \times 40\% = \$240,000$  minimum increase in net worth;  $\$850,000 - \$600,000 = \$250,000$  increase in net worth in this case).

➤ The Forms W-2 for 2005 indicate 25 employees earning wages reflective of full-time employment (35 hours per week x minimum wage). After the alien invests in 2006, she is able to provide 45 Forms I-9. Are you satisfied that an increase in 40% in the number of employees has taken place?

✓ No, in this case the evidence of Forms I-9 does not demonstrate the number of employees actually being paid and currently employed by the business.

➤ The Forms W-2 for 2006 indicate 250 employees worked for an I.T. firm. After the alien invests in 2008, he is able to provide state quarterly employment reports for two quarters which demonstrate that the company now employs 350 employees. Does it appear that an increase in 40% in the number of employees has taken place?

✓ Yes, in this case the evidence of state quarterly employment reports and Forms W-2 provide good evidence of a 40% increase ( $250 \times 40\% = 100$ ;  $250 + 100 = 350$ ).

■ Consider the totality of the evidence presented and make sure you are satisfied that the requirements in the regulations are met.

# ESTABLISHING A NEW COMMERCIAL ENTERPRISE

THE END



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

## Interoffice Memorandum

To: Regional Directors  
Service Center Directors  
Field Office Directors  
National Benefits Center Director  
Overseas District Directors

From: William R. Yates /S/  
Associate Director  
Operations

Joseph Cuddihy /S/  
Director  
Office of Refugee, Asylum and International Operations

Date: January 18, 2005

Re: Extension of Status for Conditional Residents with Pending or Denied Form I-829  
Petitions Subject to Public Law 107-273

### 1. Purpose

This memorandum supplements previously issued interim guidance regarding statutory changes made by Public Law 107-273. Pub. L. 107-273 affects adjudication of Forms I-526, Immigrant Petition by Alien Entrepreneur, and Forms I-829, Petition by Entrepreneur to Remove Conditions. See June 10, 2003 policy memorandum, issued by Janis A. Sposato, entitled Amendments Affecting Petitions for Alien Entrepreneur (EB-5) Adjudication. This supplemental memorandum provides guidance on the extension of status for certain conditional residents with a pending or denied Form I-829 petitions that are subject to Pub. L. 107-273, and incorporates by reference certain provisions in the March 3, 2000, policy memorandum issued by Michael A. Pearson, entitled AFM Update: Immigrant Investor Petitioner – Form I-829 Adjudication (EB-5 Memo # 9). This supplemental guidance is effective immediately.



To: Regional Directors, Service Center Directors, Field Office Directors, National Benefits  
Center Director, Overseas District Directors  
Re: Extension of Status for Conditional Residents with Pending or Denied Form I-829 Petitions Subject  
to Public Law 107-273

## **2. Background**

On November 2, 2002, the President signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, which provides for the special treatment of certain pending EB-5 petitions. Pub. L. 107-273 mandated a review of Form I-526 petitions filed by eligible aliens who: (1) had their petitions approved between January 1, 1995 and August 31, 1998, and (2) timely filed a subsequent Form I-829 prior to the November 2, 2002, the date of enactment of this law. In addition, if a timely filed Form I-829 was denied prior to November 2, 2002, Pub. L. 107-273 mandates that the alien must have filed a motion to reopen prior to January 2, 2003 in order to be deemed an eligible alien.

Pub. L. 107-273 also mandates that an eligible alien, who is no longer physically present in the United States, be paroled into the United States when such action is necessary to obtain final determinations on their Form I-526 or Form I-829 petitions. However, Pub. L. 107-273 specifies that legacy INS and today, the Secretary of Homeland Security, shall not parole any alien into the United States (1) who is inadmissible or deportable on any grounds or (2) whose Form I-829 was denied due to a material misrepresentation of fact or information contained in the petition or made by the alien during any interview with the DHS in connection with the adjudication of his or her Form I-829. Under these circumstances, such aliens are not eligible for parole.

Pub. L. 107-273 also requires that, for those cases where the Form I-829 has not already been adjudicated, an initial determination be made on an eligible alien's petition. If the Secretary of Homeland Security determines that the alien has met the job creation and capital investment requirements outlined by this law, and that there is no material misrepresentation with respect to the Form I-829, the Secretary must notify the alien and remove the conditional basis of the alien's status, as well as that of the alien's spouse and children if their status was obtained under section 216A of the Act.

## **3. Extension of Conditional Resident Status**

Pub. L. 107-273 mandates up to two additional reviews of covered EB-5 cases. As a result, USCIS must continue to document the conditional resident status of eligible aliens with pending or denied Form I-829s until the conditional status has been removed or a final order of removal has been issued under section 242(a)(1) of the Act. The following information provided in section (g) and (h) of the EB-5 Memo # 9, pages 13 and 15, respectively, should be considered when adjudicating the extension of conditional resident status for eligible aliens under Pub. L. 107-273.

### **Page 13:**

If the Form I-829 is pending or it has been denied but no final order of removal has been entered, the district immigration information officer (IIO) must collect the expired conditional Permanent Resident Card and issue either:

- a temporary I-551 stamp with a 12-month expiration date in the petitioner's unexpired, foreign passport (if the expiration date of the passport is one year or more), or
- if the petitioner is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the petitioner. **[NOTE: IIO may require petitioner to obtain unexpired passport, if available, prior to issuing temporary I-551 stamp.]**

The IIO must use the same conditional resident status code initially issued to the petitioner and grant the status for an additional 12 months. Documentation of conditional resident status must be issued until a final order of removal is issued. An order of removal is final if a decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals (BIA).

\* \* \* \* \*

**Page 15:**

**Will entrepreneurs/investors remain in status after they file Form I-829?**

Under 8 CFR § 216.6(a), upon receipt of a properly filed Form I-829, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition....

**Can entrepreneurs/investors travel after filing Form I-829?**

Under 8 CFR § 216.6(a)(3), an alien entrepreneur who has filed Form I-829 is authorized to travel outside the United States and return if in possession of appropriate documentation. The regulation at 8 CFR § 211.1(a)(5) authorizes admission if an alien presents an expired Form I-551, Permanent Resident Card, accompanied by a filing receipt issued within the previous 6 months for a Form I-829, if seeking admission or readmission after a temporary absence of less than 1 year. (Some filing receipts may authorize travel for up to 1 year.) **[NOTE: Service Centers may issue a duplicate Form I-829 receipt to facilitate extension of employment and travel authorization for pending cases.]** Waivers from visa requirements may be obtained under 8 CFR § 211.1(b). District offices are authorized to issue:

- (a) a temporary I-551 stamp with a 12-month expiration date in the petitioner's unexpired, foreign passport (if the expiration date of the passport is one year or more), or
- (b) if the petitioner is not in possession of an unexpired foreign passport, a form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of

the petitioner. **[NOTE: IIO may require petitioner to obtain unexpired passport, if available, prior to issuing temporary I-551 stamp.]**

An alien entrepreneur may wish to contact his or her local USCIS district office to discuss the travel planned and to determine the routine procedures of that office for obtaining such necessary travel documentation. If necessary, thirty (30) days before the expiration of the Form I-829 **[NOTE: Also I-551 temporary stamp or card]**, the conditional resident should contact the district office nearest to where he or she is living for such documentation for purposes of travel outside of the United States.

#### **4. Transportation Letters**

District Field Offices should coordinate with HQ Field Operations when determining whether eligible aliens (or their dependents) who are currently overseas need to be paroled into the United States as provided under Pub. L. 107-273. HQ Field Operations will coordinate with the Office of International Operations (and associated overseas USCIS Offices) to ensure consistent application of parole decisions and to facilitate the issuance of transportation letters to eligible aliens or their dependents for re-entry into the United States. Once re-admitted, eligible aliens or their dependents will need to contact the District Field Office for temporary evidence of conditional permanent resident status.

Questions regarding this memorandum may be directed through appropriate channels to Service Center Operations or District Field Operations.

#### **Notice**

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Attachments



# *EB-5 Business Structures*

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- *General Partnership*
- *Limited Partnership*
- *Limited Liability Company*
- *Corporation*

# *General Partnership 1*

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- *Shared (unequal) ownership of business*
- *Each general partner's liability may exceed ownership share*
- *Not taxed separately*
- *Net income/loss reported on Form 1065; data is transferred to personal Schedule E*



## *General Partnership 2*

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- *Data is then included on line 18 of partner's personal Form 1040*
- *Form 1065 includes a balance sheet (on page 4) which may be reviewed for net assets and liabilities*



# *Limited Partnership*

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- *Must be created by formal written contract*
- *Limited partner's liability cannot exceed his/her investment in partnership*

# *Limited Liability Company (LLC)*

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*An LLC is:*

- *a type of business ownership combining several features of corporation and partnership structures*
- *not a corporation or a partnership*
- *may be called a limited liability corporation, the correct terminology is limited liability company*
- *owners are called members not partners or shareholders*
- *The number of members are unlimited and may be individuals, corporations, or other LLC's*



# *Limited Liability Company (LLC), Cont'd*

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## ***LLC Advantages:***

- ***Limited Liability:*** Owners of a LLC have the liability protection of a corporation.
- ***Flexible Profit Distribution:*** Limited liability companies can select varying forms of distribution of profits. Unlike a common partnership where the split is 50-50, LLC have much more flexibility.
- ***No Minutes:*** Corporations are required to keep formal minutes, have meetings, and record resolutions. The LLC business structure requires no corporate minutes or resolutions and is easier to operate.
- ***Flow Through Taxation:*** All your business losses, profits, and expenses flow through the company to the individual members. (IRS Form 1065 is used by LLCs)

## *Limited Liability Company (LLC), Cont'd*

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### ***LLC Disadvantages:***

- ***Limited Life:*** Corporations can live forever, whereas a LLC may have to dissolve when a member dies or undergoes bankruptcy depending on the Articles of Organization.
- ***Going Public:*** Business owners with plans to take their company public, or issuing employee shares in the future, may be best served by choosing a corporate business structure.
- ***Added Complexity:*** Running a corporation or partnership will have less paperwork and complexity. A LLC may federally be classified as a sole-proprietorship, partnership, or corporation for tax purposes. Classification can be selected or a default may apply. EB-5 LLCs typically opt for classification as a partnership.

# *Corporation*

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- *Separate legal entity from owners*
- *Incorporated under state law*
- *Taxed separately from owners, using Form 1120 (U.S. Corporation Income Tax Return)*

# *Corporation 2*

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- *Subchapter S, or S corporation*
- *Major difference is that taxes are not levied at corporate level*
- *Net income/loss reported on Form 1120S, then transferred to individual's Form 1040*

# SUMMARY OF EB5 PRECEDENT DECISIONS AND RESULTING ISSUES

## EB 5 PRECEDENT DECISIONS

- Matter of Soffici, 22 I&N Dec. 158 (Comm. 1998)
- Matter of Izumii, 22 I&N Dec. 169 (Comm. 1998)
- Matter of Hsiung, 22 I&N Dec. 201 (Comm. 1998)
- Matter of Ho, 22 I&N Dec. 206 (Comm. 1998)

## Matter of Soffici, 22 I&N Dec. 158 (Comm. 1998)

- (1) A petitioner under section 203(b)(5) of the Act cannot establish the requisite investment of capital if he lends the money to his new commercial enterprise.
- (2) Loans obtained by a corporation, secured by assets of the corporation, do not constitute capital invested by a petitioner. Not only is such a loan prohibited by 8 CFR 204.6(e), but the petitioner and the corporation are not the same legal entity.
- (3) A petitioner's personal guarantee on a business's debt does not transform the business's debt into the petitioner's personal debt.
- (4) A petitioner must present clear documentary evidence of the source of the funds that he invests. He must show that the funds are his own and that they were obtained through lawful means.
- (5) A petitioner who acquires a pre-existing business must show that the investment has created, or at least has a reasonable prospect of creating, 10 full-time positions, in addition to those existing before acquisition. The petitioner must, therefore, present evidence concerning the pre-acquisition level of employment. Simply maintaining the pre-acquisition level of employment is not sufficient, unless the petitioner shows that the pre-existing business qualifies as a "troubled business."

## Matter of Izumii, 22 I&N Dec. 169 (Comm. 1998)

- (1) Regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement.
- (2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.
- (3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.
- (4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.
- (5) An alien may not receive guaranteed payments from a new commercial enterprise while he owes money to the new commercial enterprise.



## Matter of Izumii (cont.)

- (6) An alien may not enter into a redemption agreement with the new commercial enterprise at any time prior to completing all of his cash payments under a promissory note. In no event may the alien enter into a redemption agreement prior to the end of the two-year period of conditional residence.
- (7) A redemption agreement between an alien investor and the new commercial enterprise constitutes a debt arrangement and is prohibited under 8 CFR 204.6(e).
- (8) Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.
- (9) The Service does not pre-adjudicate immigrant investor petitions; each petition must be adjudicated on its own merits.
- (10) Under 8 CFR 204.6(e), all capital must be valued at fair market value in United States dollars, including promissory notes used as capital. In determining the fair market value of a promissory note, it is necessary to consider, among other things, present value.

## Matter of Izumii (cont.)

- (11) Under certain circumstances, a promissory note that does not itself constitute capital may constitute evidence that the alien is "in the process of investing" other capital, such as cash. In such a case, the petitioner must substantially complete payments on the promissory note prior to the end of the two-year conditional period.
- (12) Whether the promissory note constitutes capital or is simply evidence that the alien is in the process of investing other capital, nearly all of the money due under the promissory note must be payable within two years, without provisions for extensions.
- **NOTE: In the 2002 EB-5 amendments, Congress eliminated the requirement in Izumii that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations. However the business still must fit the definition of "new" as specified under existing regulations.**

## Matter of Hsiung, 22 I&N Dec. 201 (Comm. 1998)

- (1) A promissory note secured by assets owned by a petitioner can constitute capital under 8 CFR 204.6(e) if: the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; and the assets are fully amenable to seizure by a U.S. note holder.
- (2) When determining the fair market value of a promissory note being used as capital under 8 CFR 204.6(e), factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered.
- (3) Whether a petitioner uses a promissory note as capital under 8 CFR 204.6(e) or as evidence of a commitment to invest cash, he must show that he has placed his assets at risk. In establishing that a sufficient amount of his assets are at risk, a petitioner must demonstrate, among other things, that the assets securing the note are his, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value.
- (4) A petitioner engaging in the reorganization or restructuring of a preexisting business may not cause a net loss of employment.

## Matter of Ho, 22 I&N Dec. 206 (Comm. 1998)

- (1) Merely creating and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant investor petitioner has placed his capital at risk. The petitioner must present, instead, evidence that he has actually undertaken meaningful concrete business activity.
- (2) The petitioner must establish that he has placed his own capital at risk; that is to say, he must show that he was the legal owner of the invested capital. Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital.
- (3) The petitioner must also establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement.
- (4) To establish that qualifying employment positions have been created, Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities and have been hired in permanent, full-time positions.

## Matter of Ho (cont.)

- (5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.
- **Note: There are also a number of precedent decisions that pertain to old (pre-1978) immigrant investor provisions under the former non-preference immigrant visa category. While some of these decisions may be interesting from a historical perspective, they have little or no relevance to the "employment creation" investor category created by IMMACT 90 and should not be relied upon when adjudicating post IMMACT 90 cases.**

# EB5 PRECEDENT DECISIONS AND RESULTING ISSUES

THE END



U.S. Citizenship  
and Immigration  
Services

# UNDERSTANDING TAX RETURNS

# TAX RETURNS

- One of the best sources of information about a business is the tax return.
- Note the different types of business tax reporting:
  1. Schedule C attached to the Form 1040 (sole proprietorship).
  2. Form 1120 or 1120S (corporation or S corporation).
  3. Form 1065 with K-1 (partnership).



- One of the best sources of information about a business is the tax return.
- 8 CFR 204.6(j) specifically mentions tax returns as evidence of lawful source of income, but tax returns also reveal information about capital investments, stock, assets, liabilities, net worth, wages, and other factors that can affect EB5 adjudication.
- How is a tax return different from a financial statement? Is a tax return more reliable than an audited financial statement? What about an unaudited one?

- Examine the Form 1040 in your course material. What do you notice about the taxpayer? Also note where the business income from Schedule C is reported.
  
- Examine the Schedule C. What do you notice about this business? Does it spend more on employee wages or on subcontractors who receive non-employee compensation? Make a short list of your observations.

➤ Note that this business has Cost of Goods Sold (COGS). Cost of Goods Sold are the direct costs attributable to the production of the goods sold by a company. This amount includes the cost of the materials used in creating the good along with the direct labor costs used to produce the good. (It excludes indirect expenses such as distribution costs and sales force costs.) If you don't see wages as an expense, sometimes they are included in the cost of labor here.

➤ As an example, the COGS for an automaker would include the material costs for the parts that go into making the car along with the labor costs used to put the car together. The cost of sending the cars to dealerships and the cost of the labor used to sell the car would be excluded.

- Examine the Form 1120 in your course material.  
What do you notice about the business?

➤ When was it created? Is it after November 29, 1990? Was it incorporated before the alien made his claimed investment? Do we need to consider whether or not there was a pre-existing business?

➤ Where is it located? Does that information conflict with the petition or other documents?

➤ Note that some aliens or their counsel might try to emphasize the amount of assets and equate that to their investment. However, we are looking for an investment by the petitioner, not the amount of assets the business has accumulated.

- Are wages reflected and do they corroborate the claims of the petitioner or the other documents submitted? Are there labor costs in C.O.G.S.?
- Does the information concerning the compensation of officers or their ownership percentages reflect the other evidence in the file? If you find conflicting assertions, you will need to clarify them.
- Look at the Schedule L? Note that there is a section for both the beginning and ending figures for the tax year.
- Look for information which corroborates the petitioner's assertions about amounts of stock purchased or capital contributed.

➤ Look for “loans from stockholders.” Many people in business prefer to make a loan to the business rather than a true investment. That way, when the amounts are paid back, there are no additional taxes due. However, capital contributed in exchange for a debt arrangement is not qualifying for EB5 purposes.

➤ Look for increases in “capital stock” and/or “additional paid in capital” to help demonstrate the investment. However, note that if the alien has obtained a loan for the business by risking his personal assets as collateral, this might not be readily apparent.

- In addition, you might see a withdrawal of cash or other assets on the part of the alien which reduced the amount of investment he or she is supposed to make.
  
- If you are trying to calculate net worth (assets – liabilities = net worth), you will also need to review this page of the return.

- Note that Form 1120S is very similar to Form 1120.
- However, S Corporations do not pay any income taxes. Instead, the corporation's income or losses are divided among and passed through to its shareholders. The shareholders must then report the income or loss on their own individual income tax returns.
- Most of the same principals of financial reporting apply to both so your review of pertinent 1120S information is basically the same as on the 1120.



- Examine the Form 1065 in your course material.

What do you notice about the business?

➤ When was it created? Do we need to consider whether or not there was a pre-existing business? How many partners are there?

➤ Where is it located? Does that information conflict with the petition or other documents?

➤ Note that some aliens or their counsel might try to emphasize the amount of assets and equate that to their investment. However, we are looking for an investment by the petitioner, not the amount of assets the business has accumulated.

- Are wages reflected and do they corroborate the claims of the petitioner or the other documents submitted? Are there labor costs in C.O.G.S.?
  
- Does the information concerning the compensation of officers or their ownership percentages reflect the other evidence in the file? If you find conflicting assertions, you will need to clarify them.
  
- Look at the Schedule L? Note that there is a section for both the beginning and ending figures for the tax year.
  
- Look for information which corroborates the petitioner's assertions about amounts of stock purchased or capital contributed during the year.

- Note that Partnership Returns (1065) should be accompanied by Forms K-1, which reflect each partner's share of income, credits, and deductions.
  
- Note the change in the capital account during the year and remember that it can be affected by increases in contributions, gains, losses, and distributions.
  
- Look for information which corroborates the petitioner's assertions about amounts of capital contributed during the year as well as information which might conflict with the alien's claims.

■ *PRACTICAL EXERCISES:*

- Is it possible for an alien to have made a qualifying investment of \$1,000,000 if the assets on the tax return total only \$50,000?

✓Yes.

- It is possible that \$1,000,000 was invested several years in the past, but that financial losses reduced the assets. It is also possible that an alien could have secured \$1,000,000 in financing secured by \$1,000,000 of his personal assets for the benefit of the enterprise.

- If an alien claims that the enterprise paid 10 employees \$40,000 each and shows 10 Forms W-2 with \$40,000 paid on each, but the wages on the 1120 reflect substantially less, should an RFE be issued to clear up the contradiction?

✓ It depends.

- If the COGS reflect labor costs which corroborate the Forms W-2, it may not be necessary. However, if there is no other apparent explanation for the lack of wages on the return, it would appear that an RFE is needed.

- If an alien claims to own 100% of the corporation's common stock, but is not listed on Schedule E, is that a problem?

✓No.

- It is possible that an alien own shares without receiving a wage or other compensation, but it should be a concern if the alien is listed as owning a different percentage of stock or if the amount of compensation is so great as to be a *de facto* return of capital.

- A Form 1120 reflects: 1) loans from shareholders of \$500,000; 2) common stock of \$500,000; and additional paid in capital of \$500,000. Is there a problem if the required capital is \$1,000,000?

✓ It depends.

- We must know how many stockholders there are and how much of the stock and contributed capital belong to the petitioner. It is possible that the combination of stock and contributed capital came from the petitioner and that the loans are immaterial; however, loans from shareholders are often a red flag and it is possible that other investors are responsible for the capital.

- An alien claims a \$500,000 investment which you later show to be a loan from shareholders. The Schedule L reflected \$500,000 in loans at the beginning of the year and \$250,000 at the end of the year. In an RFE response, Counsel argues that the alien did not intend to make a loan, but was just following normal business practices. He also shows amended tax returns have been filed changing the remaining balance of the shareholder loan to a purchase of additional stock. Is there a problem?

✓Yes.

- The fact that the loan balance was paid indicates that it was intended as a loan to be repaid. In addition, the remaining \$250,000 balance is far less than the required amount of capital.



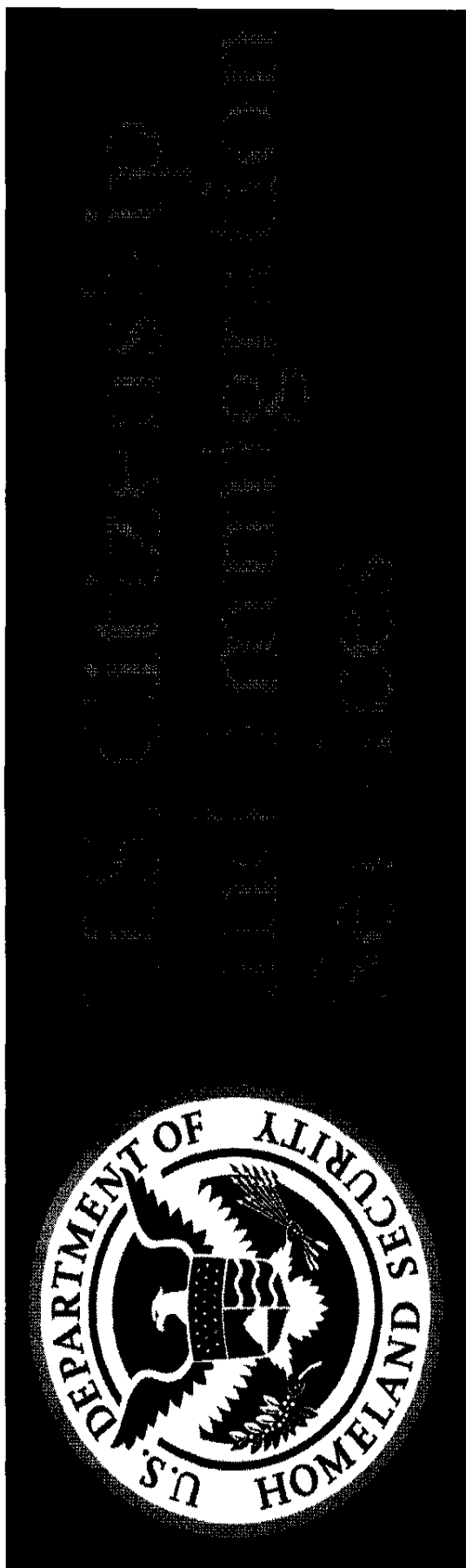
- A tax return shows that the sole partner of a partnership made a capital contribution of \$800,000 in 2006 and another \$300,000 in 2007. She also took a distribution of \$150,000 in 2007. The partnership incurred large losses in each year. Is there a problem?

✓Yes.

- The alien withdrew some of her investment capital, thus removing it from risk and employment creation. Subtracting the \$150,000 distribution from the \$1,100,000 she contributed leaves the investment amount at less than the required \$1,000,000. Also, since the entity incurred losses, it cannot be asserted that she merely took out some of the profits and left the investment capital intact.

- The USCIS accepts copies of tax returns and assumes that they have been filed and are thus, accurate representations of the financial situation of a business and/or an individual. However, if you suspect or have evidence that a U.S. tax return was not filed, you may request that the alien provide an Internal Revenue Service (IRS) transcript. An IRS transcript may be obtained by the taxpayer or his/her authorized representative from the Internal Revenue Service.
- Also remember, that the Service may examine many other types of valuable probative evidence including bank statements, wire transfers, checks, contracts, and audited financial statements. Each type of evidence serves as a piece of an overall financial puzzle that you must solve to make an accurate determination.

THE END



## ADDITIONAL COURT DECISIONS RELEVANT TO EB5

# ADDITIONAL COURT DECISIONS RELEVANT TO EB5

- In addition to the AAO precedent decisions, there are several other court decisions which impact the adjudications of Forms I-526 and I-829.

The following decisions are organized by a topic relevant to EB5, and an excerpt is given of each which may be utilized when constructing RFE's and denials.

## Additional Court Decisions

### ■ GENERAL EVIDENTIARY ISSUES:

- 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).
- Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

➤ *Note that these decisions address the need for probative evidence. Written statements from Counsel or the alien may be helpful, but they are not substitutes for evidence. Such statements are self-serving and do not carry the weight of objective proof which demonstrates the actual transactions and arrangements.*

# Additional Court Decisions

- A petitioner must establish eligibility at the time of filing. The petition may not 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 a material change to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.

➤ *Note that the facts in place at the time of filing are important. In other words, the financial arrangements and other related factors which make a petition approvable need to be in effect when the petition is filed. It is common for the alien to be alerted to deficiencies in the petition through an RFE and to attempt to correct them. If such changes are material, the petition may need to be denied. The judgment of whether the change is material is up to the adjudicating officer. However, a material change is usually one which reflects a substantial alteration in circumstances on which the Service is relying in making its decision.*

▪ *EXAMPLES:*

- An alien files a Form I-526 on June 1, 2008, based on a \$400,000 investment. In response to an RFE, the alien provides proof of the remaining required amount being invested on July 15, 2008. Is this a material change?

✓ Yes, this is a material change.

- Why?

- An alien files a Form I-526 with an arrangement for half of the capital to be paid back to him as a guaranteed return. In response to an RFE, he declares the arrangement null and void. Is this a material change?

✓ Yes, this is a material change.

- Why?

- An alien files a Form I-526 and invests \$1,000,000 in a business that is planning to operate a Chinese restaurant. In the RFE, it is revealed that the business has decided to operate a Peruvian restaurant instead. Is this a material change?

✓ No, this is not a material change.

- Why not?



# Additional Court Decisions

- CAPITAL INVESTMENT ISSUES:

- It has been established in a federal district court in De Jong v. INS, Civ. No. 6:94cv 850, that an alien cannot be deemed to have complied with the capital investment requirement if any portion of the alien's capital contribution derives from dividends or other funds received through operations of the new commercial enterprise.

➤ *Note that this decision although not binding, is a federal decision which may be used as guidance. It is not uncommon for an alien to start a business in the US with a small investment and grow the business into a larger entity. However, the alien should not try to establish eligibility by using the capital of the new commercial enterprise as the qualifying investment since the EB statute and regulations contemplate an investment of the alien's personal capital.*

## Additional Court Decisions

- CAPITAL INVESTMENT ISSUES (cont.):

➤ *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 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.*

■ *EXAMPLES:*

- An alien files a Form I-526 in 2008 based on a gas station business she acquired through a bank loan and a personal investment of \$100,000 in 2002. Counsel points out that the business is now worth well over \$5,000,000. The tax returns reflect owner equity of over \$1,000,000. A letter from the alien's CPA states that the alien's investment is over \$1,000,000.

➤ Should you be concerned that some portion of the alien's claimed capital contribution derives from dividends or other funds received through operations of the new commercial enterprise?

✓ Yes.

- What if the alien withdrew \$1,000,000 from the business as a salary, paid personal income taxes on the money, and then invested \$1,000,000?

- An alien is an E2 investor who files a Form I-526 in 2008 based on his car dealership business that he started with \$500 and a used Dodge Charger. The business now has assets of over \$2,000,000 and retained earnings of \$1,750,000.

➤ Should you be concerned that some portion of the alien's claimed capital contribution derives from dividends or other funds received through operations of the new commercial enterprise?

✓ Yes.

## Additional Court Decisions

- CAPITAL INVESTMENT ISSUES (cont.):
  - A federal court, in an unpublished decision, has upheld the AAO's interpretation of "invest" as applied to a sole proprietorship. See Kenkhuis v. INS, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).

➤ *Note that the court stated:*

*The AAO's construction is consistent with an everyday usage of "invest," meaning to put money or capital into a venture. [Footnote citing Mirriam-Webster Online omitted.] It is also consistent with the legislative history indicating the purpose of the EB-5 program is to encourage infusions of new capital in order to create jobs. The Senate Report on the legislation twice refers to investments of "new capital" that will promote job growth. S. Rep. 55, 101st Cong. 1st Sess. 5, 21 (1989). [Footnote providing some of that report omitted.] The AAO's construction is also consistent with the remarks of Sen. Simon in the floor debate on the statute. [Footnote quoting those remarks omitted.] Finally, as the AAO noted, Kenkhuis' contrary construction would permit the accretion of capital over years; that would be contrary to the legislative intent that the job creation resulting from the infusion of capital take place within a reasonable time, in most cases not longer than six months.*

*Id.* at 4-6.

## Additional Court Decisions

### ■ CAPITAL INVESTMENT ISSUES:

- According to Matter of M-, 8 I&N Dec. 24 (BIA 1958; AG 1958), "It is an elementary rule that a corporation is a legal entity entirely separate and distinct from its stockholders, and this is true even though one person may own all or nearly all of the capital stock." See also Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980).

➤ *It is fairly common in the business world for individuals to invest in corporations which in turn make other investments in additional entities. However, the EB5 regulations require that an alien investor make an investment of capital in a new commercial enterprise. Arrangements in which the investment is made by a separate corporation may not necessarily qualify.*

▪ **EXAMPLES:**

- An alien is a 50% owner of a corporation. He invested \$1,000,000 in that corporation, and two others invested \$200,000 each. That corporation in turn owns a hotel business which is listed on the Form I-526 as the new commercial enterprise. The bank statements submitted indicate that the corporation deposited \$1,000,000 in the new commercial enterprise's account.

➤ Does Matter of M apply? Is there a qualifying investment?

- ✓ Yes, Matter of M applies. No, there is not a qualifying investment since the capital invested belongs to the corporation, a separate entity from the alien. We need to see the alien's capital invested.

- An alien owns 100% of a holding company which in turn owns 100% of several different retail shops in rural areas. He deposits \$500,000 of his own capital with the holding company.

➤ Does Matter of M apply?

- ✓ No, we would not apply Matter of M in this instance. Although a corporation is always a separate entity from the alien, the definition of a new commercial enterprise in the regulations includes a holding company and its 100% owned subsidiaries.

❖ *The key is to trace the alien's personal capital and determine if it has been placed at risk with the new commercial enterprise. Funds earned by a corporation are not the personal capital of an alien, even if he owns all the stock. However, there are situations in which an intervening entity such as a corporation stands between the alien and the job creating enterprise, but the all the capital must belong to the petitioner and all of it should flow to the new commercial enterprise.*

# Additional Court Cases

- EMPLOYMENT ISSUES:

- Spencer Enterprises, Inc., Chang, et. al. v. United States of America, U.S. District Court, Eastern District California (March 28, 2001), it is reasonable for this Service to construe full-time employment to mean continuous, permanent employment.

➤ *Seasonal jobs and other intermittent employment does not qualify.*

# Additional Court Cases

THE END



# MFAS

MFAS, also known as the Marriage Fraud Amendment System or the Marriage Fraud Assurance System, is the system in which I-829 petitions are entered and updated.

This course is not meant to be a substitute for official MFAS training, but rather is a summary of some MFAS functions as they relate to alien entrepreneur investor cases.

In addition, some offices utilize CIS Assistants or other personnel to update MFAS rather than having officers perform the updates. However, it is essential to be familiar with the basic screens and functions as they relate to EB5 cases so that EB5 officers will be able to properly research alien investor cases.

- For access to MFAS, see your supervisor and/or follow established local procedures.

# MFAS

(b)(2)



MFAS

(b)(2)



# MFAS

(b)(2)



## MFAS REMINDERS

- DO NOT MAKE UNAUTHORIZED INQUIRIES OR ENTRIES IN MFAS.
- IF IN DOUBT, CHECK WITH YOUR SUPERVISOR.
- FOLLOW LOCAL PROCEDURES AND GUIDELINES FOR MFAS ACCESS.

THE END