UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOES, **Plaintiffs,** **v.** **U.S. CITIZENSHIP & IMMIGRATION SERVICES, *et al.*,** **Defendants.**	**Civil Action No. 1:15-cv-00273-CKK**

DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT ON THE ADMINISTRATIVE RECORD

Plaintiffs' opposition relies on the application of a much higher standard of review than is permitted under the Administrative Procedure Act ("APA") and seeks an improper limit on agency authority to adjudicate pending petitions where no injunction had been entered. The administrative record in this case is comprised of three exemplar records (labeled John Doe 1 ("JD1"), John Doe 2 ("JD2"), and John Doe 3 ("JD3")) which represent the three general categories of denials issued to Plaintiffs. Defendants are entitled to judgment on Plaintiffs' claims challenging the JD3 and JD1 denials and seek remand on the JD2 denial so that the agency may reconsider those denials in a manner consistent with the Court's decision on the parties' cross-motions.

Defendants are entitled to summary judgment on the sufficiency of the JD3 denials. There, U.S. Citizenship and Immigration Services ("USCIS") correctly identified four independent grounds for denying Plaintiffs' petitions: (1) Plaintiffs' proposed investment in an ever-changing list of job creating entities is not sufficient to show at the time the petition was

filed that the investment is in a targeted employment area such that they were exempt from making the standard $1 million investment to qualify for the EB-5 program; (2) Plaintiffs' ad hoc investment scheme fails to provide the concrete plan for job creation necessary to demonstrate that each individual Plaintiffs' investment is likely result in the employment of ten qualified workers in the next two years, (3) Plaintiffs' invested capital is not sufficiently at risk because the investment was structured in such a way as to constitute a mere loan to the new commercial enterprise ("NCE"); and (4) Plaintiffs failed to satisfy their burden of showing that all of their investment is going to a job creating entity rather than to administrative fees and due diligence review of rejected projects. Defendants have offered a reasonable explanation of four grounds for denying the petitions and are entitled to summary judgment if any of those grounds satisfy the APA's highly deferential standard of review. *Indiana Municipal Power Agency v. FERC*, 56 F.3d 247, 256 (D.C. Cir. 1995). Because the denials readily satisfy the APA's highly deferential standard of review for agency determinations, Defendants are entitled to summary judgment on Plaintiffs' claims related to the JD3 denial.

Defendants also individually defend the one unique denial issued to JD1. JD1 filed his petition much later than other Plaintiffs and relied on a different factual record. As a result, the JD1 denial is a unique denial that rests on only one of the four bases identified in the JD3 denial—specifically, that JD1 failed to satisfy his burden of showing that all the investment is going to a job creating entity because the record demonstrated that a substantial portion of the funds were used to cover administrative fees and to conduct due diligence review of rejected projects. Plaintiffs' mere disagreement with USCIS's interpretation of the statute and efforts to operate the program in a manner consistent with Congressional intent is not sufficient to entitle them to relief under the APA. The APA's highly-deferential standard calls for a review of these

denials that is circumspect and accords considerable weight to the agency's legal judgments and factual determinations. Defendants are, therefore, entitled to judgment in their favor on the JD1 and JD3 denials.

I. The timing of the "JD3" denials is not a basis to strike them or otherwise refuse to apply the APA's deferential standard.

Plaintiffs argue that the JD3 denials should be vacated because they were issued after the start of litigation. ECF No. 69 at 1-2. Plaintiffs base their position on a series of cases discussing agency "appeals" and suggest that their APA claims are part of the agency appeals process. *Id*. The cases cited by Plaintiffs are unavailing. *See id*. (citing *Klein v. Peterson*, No. 87-2661, 1988 WL 36331 (D.D.C. 1988); *Prieto v. United States*, 655 F. Supp. 1187, 1191 (D.D.C. 1987)). In both cases a final agency decision had been issued and the agency attempted to undo the decision after an administrative appeal had been taken. Here, no decision had been issued on any of the JD3 Plaintiffs' petitions. As a result, there was no final decision for any of the JD3 Plaintiffs that could be frozen as a result of the filing of the complaint. Neither of these cases indicate that the filing of an APA claim, which sets forth an independent cause of action, would operate like an internal agency appeal and limit the agency's authority to act on pending agency matters. No injunction has been sought or entered in this case that would enforce such a prohibition. Therefore, USCIS's decision to enter a decision on the pending JD3 petitions was within its authority and not subject to *vacatur* under the APA based on its timing.

Defendant previously noted that the odd posture of this case (with decisions occurring after filing) was the result of Plaintiffs prematurely filing APA claims before they had a final agency action to challenge. Plaintiffs counter by citing an example of a case where a plaintiff was permitted to file an APA clam before receiving a denial under the new policy. *See* ECF 69 at 1-2 n. 2. (citing *Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003). In addition to the

case being distinguishable (the challenge being to the retroactive application of a policy, not an individual denial) and from another circuit, it does not indicate that (1) pre-decision filing is generally permissible under the APA and (2) that upon Plaintiffs filing a questionably ripe APA claim that the agency no longer had jurisdiction to act on the pending petitions. It therefore does very little to suggest that Plaintiffs' challenge was timely or to undermine Defendants' decision to issue denials while litigation was pending. As Defendants noted previously, Defendants elected this course rather than move to dismiss the unripe claims for a second time, wait for a decision on the motion, and issue the denials, only to have the litigation restart on the merits of those denials. Defendants' decision to take the more expedient course under the circumstances was not improper and is not a basis to strike the denial under the APA.

II. Defendants' conclusion that Plaintiffs' capital was not at-risk satisfies the APA standards for review of the law applied and facts found.

Although Plaintiffs attempt to blend the question of proper legal standard with the question of whether there was sufficient evidence in the record to support Defendants' application of this standard, this inquiry is more properly broken down into two parts.

A. USCIS did not act arbitrarily in scrutinizing the structure of the purposed investment to determine if it is an investment in substance.

Defendants properly applied 8 C.F.R. § 204.6(e) and the foundational principles of *Matter of Izummi,* 22 I. & N. Dec. 169 (AAU 1998), to Plaintiffs' petitions to require an inquiry into whether the arrangement qualifies as an investment. *Matter of Izummi* is a precedential decision and adjudicators are required to comply with it in adjudicating individual petitions. 8 C.F.R. § 103.3(c). Therefore, absent an extraordinarily clear reason for disregarding USCIS's interpretation of the regulation and *Matter of Izummi*, Plaintiffs cannot show that Defendants' legal position is arbitrary or capricious. Plaintiffs have made no such showing.

Plaintiffs appear to make three arguments for why Defendants should have disregarded *Matter of Izummi*, but largely ignore USCIS's reliance on the noticed-and-commented regulation, 8 C.F.R. § 204.6(e), which defines investments to exclude "any other debt arrangement between the alien entrepreneur and the new commercial enterprise." USCIS reasonably applied this regulation, as well as *Matter of Izummi*, to require an inquiry into whether the arrangement shares a sufficient number of debt-like features so as to qualify as "any other debt arrangement" precluded by regulation. Because the decision (as well as *Matter of Izummi*) is based on the broader federal regulation, Plaintiffs' complaints about *Izummi* are insufficient to demonstrate arbitrariness and cannot show a violation of notice and comment procedures.

First, Plaintiffs suggest that, because *Izummi*'s facts are not precisely on point, it was arbitrary for Defendants to apply *Izummi*'s underlying principles.[1] ECF No. 69 at 3-4. On reply, Plaintiffs acknowledge that *Izummi* is not necessarily limited to its facts, but claim Defendants failed to list *Izummi*'s guiding principles. This is both incorrect and misunderstands *Matter of Izummi. Matter of Izummi* provides only one example of a debt arrangement that fails to satisfy the 8 C.F.R. § 204.6(e) definition of "invest." Plaintiffs' dogged focus on specific differences in what was permitted in *Izummi* versus in their own arrangement ignores the larger point that the *regulation* directs an inquiry into whether a given arrangement is more debt-like or equity-like in

[1] Plaintiffs try to distinguish *Izummi* based on the issue of control by arguing that the sell option in *Izummi* gives the investor control over the option and thus it is a guarantee. But repayment doesn't have to be guaranteed to be a debt arrangement. *Matter of Izummi* places the focus on the appearance of a preconceived intent, rather than how much control the immigrant has over the exit strategy. *Matter of Izummi*, 22 I. & N. Dec. at 189.

[2] USCIS also found Plaintiffs' attempt to offer new JCEs were not effective because (1) they failed to show that the petition was approvable at the time of filing, *see Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Comm'r 1971); and (2) the attempt to alter the JCEs constituted a material change in the petition such that it would have to be refiled to account for the change. *See* 8

substance, even if as a technical matter it takes the form of an equity investment. Thus, it was not arbitrary for Defendants to engage in this inquiry in compliance with the regulations and *Matter of Izummi*.

Second, Plaintiffs rely on extra-record evidence to suggest that Defendants have in the past not applied *Matter of Izummi* to bar all investments with low rates of return, making it arbitrary to do so now. As Defendants previously noted, Plaintiffs have not shown that any of the exceptions to the general rule against supplementation of the administrative record applies here. *See, e.g., Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). Further, the cited information does not provide sufficient detail to conclude that there is no meaningful difference between this arrangement and the ones alleged by Plaintiffs. Indeed, USCIS concluded that this arrangement is especially unique in that it does exactly what *Izummi* instructs against: it allows the alien to "enter into a partnership knowing that he already has a willing buyer in a certain number of years" and that "he will receive a certain price." *Id*. at 186. Having a likely low rate of return is not the same as having a pre-ordained cap on the return, coupled with a set date by which the NCE is obligated to strive to maintain cash reserves to allow them to purchase the option. Even if a hearsay suggestion that similar petitions have been approved could effectively show that USCIS has deviated from the required inquiry (in non-precedential decisions no less), it would not be enough to undermine Defendants obligation to follow and apply binding precedent here.

Finally, Plaintiffs repeat their argument that Defendants' reference to a "surprisingly-high return standard" is a substantive rule and cannot be applied without notice and comment rulemaking. ECF No. 69 at 4-5. Plaintiffs again misunderstand both the substance of the denial and *Matter of Izummi*. The "surprisingly-high return" reference in the denial comes directly from

Matter of Izummi (and, therefore, cannot be, as Plaintiffs suggest, contrary to *Matter of Izummi*) and is not suggesting any absolute standard for riskiness. Defendants merely determined that the call-option, especially when set at a very low rate of return, not only makes it *unlikely* that there will be a surprising rate of return, but essentially *guarantees* that return cannot exceed a set rate. *Matter of Izummi* notes that investments are structured such that the risk of gain is commensurate with the risk of loss. Therefore, Defendants were not applying a substantive standard for requisite riskiness, but merely applying relevant factors in interpreting the term "invest." *American Mining Congress v. MSHA,* 995 F.2d 1106, 1112 (D.C. Cir. 1993). Accordingly, notice and comment rulemaking is not required.

B. Substantial evidence support USCIS's conclusion that the investment is debt-like in its operation.

Under the substantial evidence standard, an agency's fact-based conclusion must be sustained unless no reasonable factfinder could have reached that conclusion based on the administrative record. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In applying the facts, Plaintiffs ignore the important distinction between arrangements that are equity investments in *form* but s*ubstantively* operate as debt arrangements. Plaintiffs instead focus on the facts that show that the arrangement has the *form* of an equity investment but made no effort to address USCIS's lengthy explanation of how structurally the arrangement operates as a lower risk loan to the NCE. *See* JD3 at 2486-89. Taken in combination, the unique features of Plaintiff's "investment" operate like an unsecured loan with a set date for pay-off.

III. Plaintiffs failed to show by preponderance of the evidence that all of the invested capital will go to the job creating entity.

Defendants have identified two categories of expenses that cannot be properly paid from EB-5 investment capital: (1) due diligence into mine projects that fail to qualify as job creating entities, and (2) fees owed to the Regional Center by the NCE and JCE. The record supports

Defendants conclusion that these expenses demonstrate that Plaintiffs have not carried their burden of showing all invested funds will go to a JCE.

A. Funds used for a pre-operational mine feasibility analysis are not funds paid to the JCE for the purpose of job creation.

Plaintiffs do not dispute that the NCE used $1.5 million in investor funds on a "due diligence" review of Belshazzar Mine, a mine that was on the list of potential JCEs, but was rejected as a JCE during the review stage. Plaintiffs' only argument in opposition is that the money spent on feasibility review of a potential JCE should be considered an investment in a JCE. The problem, however, is that the money was not made available to a JCE that simply failed to create jobs. It was instead spent on a preliminary investigation to determine whether to move forward with the JCE. Thus, unlike the "portfolio of businesses" example Plaintiffs rely upon, Belshazzar Mines never made it into the business portfolio; the investment was in the compilation of the portfolio and not in the businesses contained in the portfolio.

Although Plaintiffs complain that this represents a rigid application of the investment requirement, it is consistent with the requirement that the funds be made available to the job creating entity for the purpose of job creation. *Matter of Izummi*, 22 I. & N. Dec. at 179 ("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."); *see* also S. Rep. No. 101-55 at 21 (June 19, 1989) (purpose of program is to promote U.S. job creation). In this case, however, the job creating entity was never provided with the investors' capital; the capital was merely used to vet the job creating entity. As discussed in Defendants' cross-motion, this does not arbitrarily exclude mining projects from being EB-5 funded. Rather, it means that other capital must be used to conduct the initial vetting of the projects. *Cf. Matter of Izummi*, 22 I. & N. Dec. at 179 (non-JCE expenses must be covered from alien funds above the minimum contribution). The

requirement is clearly derived from *Matter of Izummi*, consistent with statutory purpose, and, therefore, not arbitrary or capricious.

B. Substantial evidence supports USCIS's adverse credibility determination regarding payment of fees to the Regional Center.

Plaintiffs likewise do not dispute that annual fees owed to the Regional Center are continuing to accrue and that the sole source of funds to pay those fees is EB-5 investor capital. The only dispute between the parties is whether USCIS's conclusion that Plaintiffs failed to credibly establish that the fees will be paid from cash flow was supported by substantial evidence. Plaintiffs now suggest for the first time that the fees "might never be" paid to bolster its claim the fees will never be paid out of investor capital. ECF No. 69 at 7.

USCIS's decision to discount this explanation is supported by substantial evidence. Substantial evidence is a deferential standard one step removed from clear-error review. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). Plaintiffs claim that these fees would never be due if the NCE never returns a profit is not supported by the evidence in the record. Although Plaintiffs later submitted evidence suggesting that these fees must be paid from profit, the evidence on the issue was inconsistent, with Plaintiffs' evidence coming, not with the initial filing, but after being questioned about it. *See* JD3 at 2492 (chart showing fees payable from partnership contributions).

Additionally, Plaintiffs' evidence does not address the situation where the NCE is never profitable. If the fees were in fact contingent on the turning of a profit, or if the fees were indeed cancelled in the event that no profit was ever realized, that is a term one would expect to be contained in the very detailed investment documents, or otherwise reflected in the letters submitted by Regional Center's CEO. The absence of this term in the record, coupled with the

timing of the CEO's explanation, and the explanation's self-serving purpose, is enough to support USCIS's conclusion.

IV. Defendants' denial for failure to satisfy the job creation requirements is not arbitrary and is supported by Plaintiffs' speculative business plan.

Defendants identified two independent reasons why Plaintiffs' business plans failed to satisfy the job creation requirement. The first is that the business plan submitted with the petitions is completely obsolete. USCIS concluded that the petition materially changed after filing and, therefore, determined that it was not approvable under 8 C.F.R. § 103.2(b)(1). Second, Defendants noted that the changes in the revised business plan reflect a fundamental problem with the Plaintiffs' business plans with regard to their ability to satisfy the specific requirements set out in *Matter of Ho*, 22 I. & N. Dec. 206, 213 (AAU 1998). Because approval of these petitions is dependent on the petitioner demonstrating the future likelihood of job creation, the regulations require a "comprehensive business plan" from which USCIS can conclude that the JCE is likely to create a sufficient number of jobs. *Matter of Ho* further clarified that requirement by elaborating on the types of things that should be in a comprehensive business plan, including specific information related to the operation of the JCE. Plaintiffs, however, in submitting their new business plan, which eliminated all but two of the JCEs analyzed in its original business plan, acknowledged that the JCEs were tentative and that the JCEs will be identified pursuant to a due diligence process. Thus, USCIS concluded, because the NCE was not able to specifically identify the JCEs, there was no way for USCIS to determine whether the business plan is credible and will result in the requisite job creation. Plaintiffs therefore failed to satisfy their burden of showing job creation.

Plaintiffs first argue that they can meet the job creation requirement "across a portfolio of businesses or projects" so long as "one or more of the portfolio of businesses or projects can

create the required number of jobs." ECF No. 69 at 9. But the problem is that Plaintiffs have not submitted a credible business plan that would support such a finding because Plaintiffs themselves have acknowledged that it is unclear which (if any) of the JCEs analyzed in the business plan will ultimately be selected following due diligence. Because we can't know which of the projects will ultimately be invested in, USCIS is not able to use the business plan to support a claim that, even if some of the businesses are ultimately not invested in, there will still be sufficient job creation. Thus, their support for the alleged job creation appears to be "trust us; if these don't work out, we will find something." This is not a credible business plan and fails to meet the specific standards set forth in the regulations and *Matter of Ho*.

Plaintiffs next argue that USCIS should not apply the *Matter of Ho* requirements to this and other similar industries because "during the course of a multi-year adjudication period, business conditions are bound to change and require adjustment." ECF No. 69 at 10. This, however, is markedly different from the situation here. Plaintiffs are not suggesting that small adjustments to the business plan may not occur during the adjudication period; rather the problem here is that Plaintiffs have not demonstrated with certainty that *any* of the identified projects will even go forward. Contrary to Plaintiffs' claim, Defendants are not requiring the initial business plan to remain entirely static throughout adjudication. But, at a minimum, the petitioner must submit a business plan that is based on JCEs that are more than just possible projects. Whether the plan for one particular JCE may adapt over time is one matter; the complete overhaul of the entire business plan is another.

Finally, Plaintiffs argue that changes in the business plans are not "material changes." Although the materiality of a change may be different depending on the facts of each case, it is hard to imagine a more material change than a change in every proposed investment project. In

any event, this point is largely immaterial because it fails to address USCIS's broader concern that Plaintiffs have, even to date, failed to submit a credible business plan that demonstrates with any certainty which job-creating entities will receive the EB-5 capital. The petitions, therefore, were properly denied.

V. Defendants were not arbitrary in finding Plaintiffs failed to demonstrate at the time of filing that they invested in JCEs that would principally operate in a TEA.

Plaintiffs' premature filing of their petitions—before the proposed projects had been subject to proper vetting and officially approved as JCEs—also prevents Plaintiffs from demonstrating that the JCE will operate in a targeted employment area ("TEA"). Plaintiffs' eligibility is dependent on satisfying the TEA requirement because, otherwise, Plaintiffs' $500,000.00 investment is not sufficient. *See* 8 U.S.C. § 1153(b)(5)(B)(ii), (C) (requiring a $1 million investment unless the investment is in a TEA). USCIS denied the petition on this basis for two primary reasons (1) Plaintiffs failed to show that the four original projects would principally operate in a TEA; and (2) Plaintiffs "admission [that] the JCEs responsible for creating the requisite jobs had not yet been identified" demonstrates that it would not have been possible for USCIS to determine at the time of filing whether the investment was in a TEA because it had not yet been determined which proposed projects would survive the due diligence process to become an approved JCE.[2] JD3 at 2484-85.

Plaintiffs ignore the second ground entirely and instead submit new evidence to show that three of the four original mine projects were located in TEAs. Plaintiffs' arguments are both

[2] USCIS also found Plaintiffs' attempt to offer new JCEs were not effective because (1) they failed to show that the petition was approvable at the time of filing, *see Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Comm'r 1971); and (2) the attempt to alter the JCEs constituted a material change in the petition such that it would have to be refiled to account for the change. *See* 8 C.F.R. 103.2(b)(1).

improper and fail to show at the petitions were approvable at the time of filing. *See Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Comm'r 1971). First, the fact that additional evidence not previously contained in the administrative record was necessary to demonstrate eligibility demonstrates that Plaintiffs failed to carry their burden of proof in the administrative proceedings. Accordingly, the new evidence cannot retroactively make the agency's finding erroneous. Rather, it merely confirms that the record submitted to the agency was insufficient to demonstrate eligibility.

Second, Plaintiffs have not offered a sufficient basis for supplementing the record with this new information. *See CTS Corp. v. Envtl. Prot. Agency*, 759 F.2d 52, 64 (D.C. Cir. 2014) (noting just two exceptions to no supplementation rule that "are quite narrow and rarely invoked": (1) where agency action's procedural validity "remains in serious question;" or (2) where agency "affirmatively excluded relevant evidence . . . ."). Plaintiffs suggest new evidence is permissible "because the issue was not resolved at the agency level." ECF No. 69 at 12 n.6. It was, however, Plaintiffs' responsibility to present a sufficient record to "resolve the issue at the agency level." Plaintiffs' failure to do so cannot justify the presentation of extra-record evidence.

Finally, this evidence, even if true, fails to establish eligibility. As Plaintiffs acknowledge that no investment funds actually went to any of these projects; thus, their location is of little value to show that Plaintiffs invested in a TEA. Nor does this new evidence address the concern that due to Plaintiffs premature filing there was simply no way to determine at filing whether the Plaintiffs were investing in a JCE that will principally operate in a TEA because the JCEs had

not been determined. Plaintiffs, therefore, could not show by a preponderance of the evidence that they would be investing in a TEA.[3]

[3] Plaintiffs repeatedly indicate that it is sufficient for the NCE to principally do business in a TEA. This is incorrect. For investments made through regional centers, the term "principally doing business" applies to the job-creating entity, not the NCE. *See* 8 C.F.R. § 204.6(j)(6); *Matter of Izummi*, 22 I&N Dec. at 171-73. Plaintiffs claim that it is sufficient if more than half of the identified projects are located in a TEA is similarly incorrect and not supported by regulation or other agency guidance. The true test calls for an examination of each JCE to determine whether the JCE is principally operating in the TEA. Therefore, it remains problematic that even under the current business plan, some of the JCEs are not in a TEA.

Conclusion

Defendants, therefore, request that the Court grant the cross-motion for summary judgement. Respectfully submitted this 27th day of May, 2016:

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CERTIFICATE OF SERVICE

I certify that on May 27, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will deliver a copy to all counsel of record.

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