AN INDEPENDENT STUDY

# A Survey of the Immigrant Investor Visa: Regulations, Decisions, & Law

From 1966 through 2011

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**6/27/2011**

The former "Special Immigrant" Nonquota/Nonpreference Visa was issued pursuant to former INA § 101(a)(27) [8 USC § 1101(a)(27)] as a Regulatorily Defined Labor Certification Exemption for an "Investor" as an Interpretation of the "Other Qualified Immigrant" found in former INA § 203(a)(8) [8 USC § 1153(a)(8)]. Legacy INS promulgated 8 CFR § 212.8(b)(4) in the Federal Register in 1966. This immigration benefit first appeared in the Code of Federal Regulation in 1967. This visa was made statutory by Congress in 1990, at INA § 203(b)(5) as employment-based 5th preference: EB-5.

## I. Background of Immigrant Investor Visas[1] under 8 CFR § 212.8 (b)(4), former INA § 203 (a)(8) [8 USC § 1153 (a)(8)], and former INA § 101 (a)(27) [8 USC § 1101 (a)(27)] "not subject to" former INA § 212 (a)(14) [8 USC § 1182 (a)(14)].

### A. Former INA[2] § 212(a) [8 USC § 1182(a)] (1965) provided in pertinent part:

"Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission in the United States;....

(14) Aliens **seeking** to enter the United States, for the **purpose of** performing **skilled or unskilled labor**, *unless* the **Secretary of Labor has determined and certified** to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such **skill or unskilled labor**, and (B) the **employment of such aliens will not adversely affect** the wages and working conditions of the workers in the United States similarly employed." [Emphasis added.]

The purpose of this statute was to assure that immigrant aliens seeking to enter with a view to obtaining jobs will not displace American workers. Congress has sought to achieve this objective by denying entry unless the Secretary of Labor certifies that the labor force in which the alien proposes to work is inadequate and that employment of aliens will not adversely affect wages and working conditions. Labor certification inadmissibility is now covered under INA § 212 (a)(5) [8 USC § 1182 (a)(5)].

### B. Former INA §§ 203 (a)(3), (a)(6), (a)(8) [8 USC §§ 1153 (a)(3), (a)(6), (a)(8)] (1965) provided, in part:

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas *or their conditional entry authorized*, as the case may be, as follows:

. . . . .

(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(1) or (2) of this title, to qualified immigrants who are **members of the professions**, **or** who because of their **exceptional ability** in the sciences, or the arts will substantially benefit the national economy, cultural interests, or welfare of the United States.

. . . . .

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[1] It was originally **NOT** an investor visa classification **but rather** a labor certification exemption for a "special nonpreference immigrant visa or adjustment". A Form I-485, *Adjustment Application* could be filed concurrently with, and supported by, a completed **prior** version of Form I-526 then entitled: *Request for Determination that Prospective Immigrant is an Investor* or an application could be made to a Consular Officer abroad to facilitate their entry to pursue an investment. At that time, DOS and INS regulations *fixed or locked a priority date obtained by a Consular Officer* **even if the basis for the exemption later changed**.

[2] The 1965 Act: http://library.uwb.edu/guides/USimmigration/79%20stat%20911.pdf

(6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(1) or (2) of this title, to **qualified** immigrants who are capable of performing specified **skilled or unskilled labor**, not of a temporary or seasonable nature, for which a shortage of employable and willing persons exists in the United States.

. . . . .

(8) Visas authorized in any fiscal year, less those required for issuance to the classes specified in paragraphs (1) through (6) and less the number of conditional entries and visas made available pursuant to paragraph (7), shall be made available to **other qualified immigrants** strictly in the chronological order in which they qualify. Waiting lists of applicants shall be maintained in accordance with regulations prescribed by the Secretary of State. No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(14) of this title. **[Emphasis added.]**

**C.** The "*investor visa"* was created originally by regulations utilizing the Attorney General's broad authority under INA § 103 [8 USC § 1103] by construing and interpreting INA § 203 [8 USC § 1153] (a)(8)'s "**other qualified immigrants**" who can demonstrate that they do not require a labor certification from the Secretary of Labor. It was not exactly termed as a visa classification but rather as a "*labor certification exemption"*. It seems that everybody needed some guidance on who the phrase "other qualified immigrants" actually applied to. Who exactly were these "other qualified immigrants" that did not need a labor certification? These visas were allocated under INA § 203 (a)(8) but issued as a "special immigrant" class **defined** in INA § 101(a)(27) [8 USC § 1101 (a)(27)]. The Immigration and Nationality Act Amendments of 1965 (Public Law 89-236, Sec. 8 (a)) renamed nonquota immigrants as special immigrants in INA § 101(a)(27). These special immigrants were eligible for nonpreference visas and investors were among these immigrants but **defined** in the regulation, not the statute.

**D. The original version of 8 CFR § 212.8 stated, in pertinent part:**

(b) *Aliens not required to obtain labor certifications*. The following members are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: ..... (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

*[31 FR 10021, July 23, 1966; 31 FR 10355, Aug. 22, 1966, as amended at 34 FR 5326, Mar. 18, 1969]*

**E. Effective January 12, 1973**, the regulation was amended, see 38 Fed.Reg. 1380, to require that the alien invest capital totaling at least $10,000 in the commercial

enterprise and establish that he has at least one year's experience or training qualifying him to engage in it. **Effective October 7, 1976**, the regulation was further amended to require an investment of at least $40,000 in an enterprise in which "he will be a principal manager, and that the enterprise will employ persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children."

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### F. Struggling to understand what qualifies as a "substantial amount**" and the effect of the investor's skilled labor in competition with the American skilled and unskilled labor workforce.

***Matter of Finau*, 12 I&N Dec. 86 (BIA 1967)**, Decided by the Board February 10, 1967 [Approval by *Special Inquiry Officer*[3] AFFIRMED after Oral Argument by the Service but only submission on brief by Respondent.] The original version of 8 CFR § 212.8(b)(4) was promulgated at 31 FR 10021 on Aug. 4, 1966 (codified in 8 CFR as of 1967 version).

Finau, a Tongan, specialized in a "skilled" manual labor, i.e. authentic Polynesian construction including Hawaiian-style thatched roofing. This was in demand in Hawaii especially in tourist areas. The respondent had invested over $1,000.00** in equipment and employed one U.S. worker (an LPR).

This possibility of a "skilled laborer" being classified as an "investor" would be overruled in a later decision. The Board determined that the "substantial amount" must be substantial "only in relation to .... the particular enterprise." This concept of a "relative" amount of capital would also be overruled by that same decision.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol12/1700.pdf

** President Franklin D. Roosevelt signed the Fair Labor Standards Act (FLSA) into law in early 1938 (keeping a campaign promise made in 1936). The FLSA introduced sweeping regulations to protect American workers from being exploited and created a mandatory **federal minimum wage** of 25 cents an hour in order to maintain a "minimum standard of living necessary for health, efficiency and general well-being, without substantially curtailing employment". Considering that the federal minimum wage only came into being in 1938 and began at 25¢/hr, one needs to remember to keep the figures discussed in the past in the proper perspective.

In 1967, the year of this case, the minimum wage rose from $1.25/hr to $1.40/hr as of February 1, 1967. In 1968, the minimum wage was at its highest *relative to inflation* and *in purchasing power*. Although it was only $1.60/hr, adjusted to 2010 dollars it was *equivalent* to $10.04/hr.

[3] Former INS job title that later became known as an Immigration Judge.

which is more than the current 2011federal minimum wage of $7.25/hr (it is, however, higher in some states). Dealing in "relative" amounts of capital was and remains a very complex and undesirable context. It quickly fell out of favor in the investor visa context.

In 1967, Finaua's $1,000.00 investment at $1.25/hr represented 800 hours at minimum wage or 20 weeks or 5 months but only **before** taxes and paying for the basic necessities of life so, it would have taken much longer to save up that much in the early to mid-1960's.

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### G. Considering the *validity* and *longevity* of the investment; Liar, Liar, Pants-on-Fire! Also, the concept of a *current and on-going enterprise* and/or *prospective economic benefit* rather than past accomplishments and retirement.

***Matter of Talanoa*, 12 I&N Dec. 187 (BIA 1967)**, Decided by the Board April 17, 1967.

The respondent had sought an exemption from obtaining a labor certification as an "investor" by virtue of his "mobile nursery and gardening service". The trial attorney appealed the adjustment by the Special Inquiry Officer to the BIA. The BIA dismissed it and let the adjustment stand.

While the case was on appeal, weeks if not only days after the initial adjustment, the "investor" went out of business and sought outside employment. On the very day that counsel was pleading the case to the BIA the first time, the respondent accepted a job with Pan American Airways as a "fleet serviceman", i.e. could encompass maintenance worker, baggage handler, between-flight clean-up crew, or mechanic. These facts were withheld from the BIA in that first appeal proceeding. The BIA affirmed the adjustment after the respondent had already closed up shop and accepted employment. The second appeal resulted in a REMAND to the Special Inquiry Officer. [Most likely, the adjustment was *rescinded*, or in those days "withdrawn".]

Above found at: http://www.justice.gov/eoir/vll/intdec/vol12/1724.pdf

See also: ***Matter of Jo*, 15 I&N Dec. 401 (BIA 1975)** as to validity and longevity of investment is so fleeting and unsupported that a priority date was not obtained and could not be retained.

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**The U.S. investor visa is not a retiree visa (try Canada instead).**

***Matter of Caralekas*, 15 I&N Dec. 142 (BIA 1975)**, Decided by the Board February 25, 1975. The IJ GRANTED adjustment, INS appealed. The Board REMANDED for further fact-finding.

The alien did invest $80,000.00 in a restaurant BUT he sold it due to a falling out with his partners, and it was sitting idle. He claimed that he was living off the proceeds from the sale and would not enter the job market so should not need a labor cert. INS contended that the business was "not productive" as required by *Heitland* and therefore did not qualify.

The Board agreed that the investor visa was not available based on the past investment in the closed restaurant BUT remanded to allow Mr. Caralekas to seek other possible relief.

**NOTE**: Such *other possible relief* could be a new "investment" (a newly approved I-526) or some other visa classification (an approved and current I-130, I-140, some other petition) or even other forms of relief (cancellation, administrative withholding or suspension of deportation, or asylum).

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2333.pdf

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### H. Applicants didn't then and still don't understand what they qualify for—next is an example of an early very clear need for qualified immigration practitioners and another example over a decade later.

***Matter of Zang*, 13 I&N Dec. 290 (BIA 1969)**, Decided by the Board May 1, 1969.

The respondent, a native a citizen of Israel, filed a petition for classification as a 6th preference employment-based immigrant (former INA § 203(a)(6)) as a licensed contractor or construction superintendent. The beneficiary was a partner in a general-construction contracting firm. The Board found that he *might qualify as an investor*. This was crucial for him because the Department of Labor rejected his labor certification application as they considered him to be self-employed and ineligible for an alien labor certification. He could have been considered a 3rd preference "member of the professions" under former INA § 203(a)(3) also. However, he did not file the forms required to apply as an investor. The appeal was DISMISSED. [Probably with a wink and a nudge to just file the correct forms for the correct classification INA §§ 203(a)(8) & 101(a)(27).]

Above found at: http://www.justice.gov/eoir/vll/intdec/vol13/1980.pdf

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***Matter of Lett*, 17 I&N Dec. 312 (BIA 1980)**, Decided by the Board March 18, 1980.

- Managing one's own investment by a "qualified investor" ***will not*** be deemed "unauthorized employment" that would bar adjustment.
- Self-employment by an "unqualified investor" ***may*** be, and probably will be, construed as unauthorized employment barring adjustment.
- A Motion to Reopen deportation proceedings must be supported by *prima facie* evidence of eligibility for the relief sought.

In the instant case, the respondent was also excludable by virtue of a criminal record. He was required to submit a waiver application (I-601) but did not do so. He had a qualifying relative (a USC child) for whom he must demonstrate extreme hardship if he were to be deported. The appeal was DISMISSED, *without prejudice to re-filing a properly supported Motion*.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol17/2776.pdf

**I. The second version of 8 CFR § 212.8, effective as of February 12, 1973, stated:**

> (b) *Aliens not required to obtain labor certifications*. .... (4) An alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital consisting of at least $10,000, and who establishes that he has at least 1 year's experience or training qualifying him to engage in that enterprise.

In an earlier version that was put forth in the rulemaking process, INS had wanted to make the minimum capital investment $25,000.00 and include a job creation element termed as a *prospective economic benefit* requirement. These additions did not make it into the final version codified.

The 9th Circuit noted in 1980, in ***Patel*** *(see link below and full cite later)*, that...

> "[t]he INS introduced the idea that *an investment must expand job opportunities* in late 1972. It proposed an **investor-exemption regulation** which required a minimum investment of $25,000 in an enterprise "reasonably ... expected to be of prospective benefit to the economy of the United States and not intended solely to provide a livelihood for the investor and his family ...." 37 Fed.Reg. 23274 (1974). After public comment on this proposed regulation, however, the INS eliminated the requirement that the investment benefit the economy. 38 Fed.Reg. 1379 (1973). Instead, the INS promulgated the regulation applicable to Patel and quoted earlier in this opinion, which requires an investment of $10,000 and one year of experience in a similar enterprise. 8 C.F.R. § 212.8(b)(4) (1974)." *At ¶ 8* **[Emphasis added—it was NOT called a *visa classification* in its earlier incarnation, it was a *labor certification exemption*.]**

Above Decision found at:
http://law.justia.com/cases/federal/appellate-courts/F2/638/1199/211546/

**J. Which version of the regulation applies?**

***Matter of Ko*, 14 I&N Dec. 349 (Dep. Assoc Comm'r 1973)**, Decided May 9, 1973, the District Director CERTIFIED his DENIAL to the Regional Commissioner who AFFIRMED and CERTIFIED it further to the Deputy Associate Commissioner, Travel Control who REVERSED the decision and REMANDED the adjustment application for this Investor, to be reconsidered and decided "*in conformity with this opinion*" [in other words, approve it already!].

The *application was filed prior to a change in the regulation and remained pending* on the effective date of the revision. A newer version of 8 CFR 212.8(b)(4) was promulgated at 38 FR 1379 on January 12, 1973 and became effective on February 12, 1973. The new version made

the previously undefined "substantial amount of capital" that he "has invested" or is "actively in the process of investing" to be a minimum of $10,000.00 and added a requirement for the investor to have at least *one year of experience or training* in the commercial or agricultural "enterprise" in which he would "engage".

The Deputy Associate Commissioner held, and set the policy, that this case and any similarly situated (*pending on effective date*) could be **decided under either** the previous *or* current regulation, **whichever is more favorable** to the investor. The respondent had previously run a retail grocery store and opened a shoe store in the U.S. with the proceeds from the sale of that grocery store back in Argentina [$18,000.00]. The lower decisions disallowed the "experience" but the appellate decision said it was similar enough as an **"entrepreneur or manager"** *regardless of the lack of an exact match in the businesses*, i.e. it was still an owner-operated "retail store" with additional employees beyond the investor alone.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol14/2201.pdf

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***Matter of Raungswang*, 16 I&N Dec. 76 (BIA 1976)**, reversed by 9th Circuit in *Raungswang v. INS*, 591 F. 2d 39 (9th Cir. 1978). Initially decided by the Board December 27, 1976.

An IJ DENIED adjustment of status to the respondent and her husband. The husband had entered as a student and his wife was his dependent on that visa. *She* opened a dry cleaning business and they both **worked** there **in violation of their** student and spouse **visas** classifications. There were no other employees. 8 CFR § 212.8(b)(4) was amended, effective Oct. 7, 1976 but as the case was filed prior to that, the older version was utilized. *See 41 FR 37566, (9-7-1976)*. The investment amount of $13,000.00 *exceeded the minimum required* amount of $10,000.00 and the principal applicant *possessed a bachelor's degree and prior work experience*. *She was qualified* to run a small business and *prima facie eligible* for the investor labor certification exemption. *These issues, however, were not in contention*.

"The nature of the respondent's investment is such that her employment in the business appears likely to displace an American worker." *At p. 79* Under *Heitland*, the investment must be "substantial" enough to either 1.) *expand job opportunities* or 2.) be large enough and of the type such that the *investor will not be primarily engaged in skilled or unskilled labor*. This instant investment did not meet that test. The investor and her husband were the *only* employees and *they were **working illegally***. She was engaged in full-time work in an area in which it had not been shown that there was a shortage of workers who were able, willing, qualified and available to do that sort of work (dry-cleaner).

An "investor" may work in the business in order to manage the business and may even perform some skilled or unskilled labor (*Ko, id.*) but only if the business expands job opportunities to American workers also. This business and this investor did not *fit the concept of a true investor*

as envisioned by the regulation but rather was merely an attempt to circumvent the labor certification process.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2546.pdf

**See also**: *Ruangswang v. INS*, No. 77-2375 (9th Cir. Nov. 2, 1978). The 9th Circuit found there to have been a "lack of notice" regarding the requirements defined in *Heitland*. Later, the 9th Circuit completely invalidated *Heitland* in its decision in *Patel* (1980).

Notable excerpts from *Ruangswang*:

> "…. In NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), Justice Fortas, speaking for a plurality of four, stated that although the NLRB could not, in light of the Administrative Procedure Act, establish binding prospective rules by adjudication, it could establish a new standard of conduct that would be binding on the parties before it in any particular case, and that such **adjudications could have stare decisis effect**." *At ¶ 19*. **[Emphasis added.]**
>
> "In this case the "agency" is the Department of Justice, because both the Immigration and Naturalization Service and the Board of Immigration Appeals are arms of the Department. See 8 U.S.C. § 1101(a)(34) (1976) (Immigration and Naturalization Service); 8 C.F.R. § 3.1(a)(1) (1978) (Board of Immigration Appeals)." *Footnote 6*.

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***Matter of Wang* 16 I&N Dec. 711 (BIA 1979)**, Decided by the Board April 2, 1979. Wang opened a small import-export concern and bought a retail grocery store. Wang ran his business almost single handedly, employing one part-time employee. His investment was insufficient to qualify for an "investor" visa as conceptualized in the regulation. He performed skilled and unskilled labor and his "profits" were merely his own wages from his retail store. However, when a visa was available when the original adjustment application was filed the application remains validly filed when renewed before the IJ.

Lastly, counsel's ridiculous argument that only a native of the country of imported goods is qualified to conduct such a business is laughable, highly ethnocentric, and impermissible racial/ethnic profiling. (My paraphrasing of the Board's discussion on page 714.)

This decision discusses the 2nd Circuit case of *Mehta v. INS* and the 9th Circuit case of *Raungswang v. INS*. The 9th Circuit stated that there was inadequate "notice" of the interpretation of the job expansion requirement and the prohibition of the owner-operator performing the majority of the skilled or unskilled labor under *Heitland*. Later the 9th Circuit invalidated *Heitland* altogether in *Patel v. INS* (1980) [see below] as impermissibly adding requirements to the regulation.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2697.pdf

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### K. Further interpreting *what constitutes* an "*Investment*", and a more recent re-affirmance of the *uselessness of money in the bank* when calculating the amount of the qualifying investment.

***Matter of Heitland*, 14 I&N Dec. 563 (BIA 1974)**, *aff'd,* 551 F. 2d 495(2nd Cir. 1977[4]), *cert denied*, 434 U.S. 819 (1977). Initially decided by the Board January 25, 1974, the Service appealed the Immigration Judge's GRANT of adjustment of status as an investor. This decision overruled *Finau*.

The respondent bought a delivery truck and acted as a sub-contractor by accepting radio dispatched calls for services. He was likened to a "taxi driver" and found to be a "skilled or unskilled laborer" not exempt from the need for a labor certification from DOL. The adjustment of status was WITHDRAWN and the case REMANDED to the IJ for further action. Several other important factors were discussed and resulted in a multi-prong holding.

- The *enterprise must be productive* of some service or commodity.
- The **investor** should not be in competition for an outside skilled or unskilled job, i.e. not in competition with the American labor workforce. If he wants to just work, he needs a labor certification.
- Merely *owning property is **not** an investment* as contemplated for this visa.
- As for the prior regulation, the "substantial investment" must tend to expand job opportunities and not only for the alien. *Finau* overruled.
- A marginal business with an investment that merely places the alien in direct competition with American small businesses as a skilled or unskilled laborer is insufficient for this visa.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol14/2259.pdf

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See also: ***Matter of Liu*, 15 I&N Dec. 206 (BIA 1975)** as to the concept that idle funds do not equate to an investment.

See also: *Mehta v. INS*, 574 F. 2d 701 (2nd Cir 1978). Found at: http://174.123.24.242/leagle/xmlResult.aspx?xmldoc=19781275574F2d701_11151.xml&docbase=CSLWAR1-1950-1985

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Al-Humaid v. Roark et al
**Docket Number:** 3:2009cv00982
**State:** Texas

[4] http://openjurist.org/551/f2d/495

**Court:** Texas Northern District Court

**Date:** January 26, 2010

Memorandum Opinion and Order Denying *MOTION for Summary Judgment and Plaintiff's Request For Declaratory Relief* filed by Khalid Al-Humaid. The MOTION was DISMISSED *with prejudice*. (Ordered by Judge Sam A Lindsay on 1/26/2010)

Humaid filed as a "stand-alone" EB-5 investor and was required to invest $1,000,000.00 and create at least ten (10) direct full-time jobs for qualifying U.S. workers. However, he parked $800,000.00 of his money in a Certificate of Deposit and $140,000.00 in a money market account. He could only reasonably[5] be attributed with investing approximately $167,000.00 in his cleaning services business in Texas and some of that may have been reinvested profits (*non-qualifying retained earnings*). In addition, he merely just bought out existing contracts from another cleaning business and used many, if not all, of the same part-time workers for those jobs. In AAO's accounting the paperwork submitted and reviewed only supported a finding of one full-time employee and three salaried individuals. This was *far short of his overzealous projections* of creating over 40 full-time positions and short of even the required ten.

http://law.justia.com/cases/federal/district-courts/texas/txndce/3:2009cv00982/186710/19

The non-precedent AAO Dismissal of Humaid's Appeal is found at: Apr202009_02B7203.pdf

> "The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).
>
> The director determined that the petitioner had failed to demonstrate an at-risk investment as the new commercial enterprise's start-up costs had not amounted to a significant percentage of the $1,000,000 required investment."
>
> "On February 26, 2009, the AAO advised the petitioner that the new commercial enterprise, HAK Company, Inc., was listed as "not in good standing" on the website operated by the Texas Comptroller of Accounts, http://ecpa.cpa.state.tx.us (accessed December 22, 2008 and incorporated into the record of proceeding). The AAO also explained that the concerns regarding whether the petitioner's investment was sufficiently "at-risk" derived from the petitioner's financial projections, which included maintaining the bulk of the invested funds in reserve accounts rather than spending those funds on capital expenditures. The AAO also questioned whether the petitioner would be creating any "new" jobs by taking over cleaning contracts maintained by Elite Facility Systems (EFS). Finally, the AAO requested recent quarterly employer returns and the company tax returns for 2006 and 2007." [It goes on, with 8 pages of discussion and analysis.]

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[5] Humaid made the unsubstantiated assertion that he had actually invested $250,000.00 in the business and the rest was "reserve funds" for future expansion. The paper trail did not support his figure or his so-called expansion plan.

### L. Enter the "*Paper Tigers*[6]"; formulating documentary evidence requirements; Forget the money, just--"Show Me The Paperwork!"

***Matter of Ahmad*, 15 I&N Dec. 81 (BIA 1974)**, Decided by the Board August 23, 1974, the respondent had been ordered deported, filed a Motion to Reopen for the purpose of applying for Withholding. That Motion was denied, appealed, and the denial was sustained on appeal. Then, the respondent applied for adjustment as an "investor" based on his gas station. INS opposed the adjustment as an "investor".

- Of note is the deferred discussion on the priority date being the date of filing the concurrent petition and adjustment application.
- Adjustment of status under INA § 245 is a form of discretionary relief.
- An application as an "investor" may not be used merely to circumvent a need for a labor certification.
- The burden of proof is clearly *and heavily* on the alien.
- Then alien made unsupported assertions of his "business experience" with absolutely no documentation to back up anything and INS was not required to just take his word for it.
- *Documentary evidence* is discussed at length and **includes, but is not limited to**: *written agreements, tax forms, bank statements, and accounting reports relating to the alien's investment*.
- The amount of investment in this sort of *revolving payment for, and sale of, inventory* does not total more than the inventory on hand. [The alien leased the gas station for $600.00/month, and buys gas, sells it, and uses the proceeds from one month to buy more gas for sale the next month. No documentation concerning the start up or inventory costs involved was submitted.]
- **Funds sitting idly in a personal savings account are not being put to use in the entrepreneurial undertaking**, *Cf*. *Matter of Heitland*.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2316.pdf

[6] Some people define a paper tiger as something that only appears threatening but is in fact harmless. Among the INS and now USCIS adjudicators, **they** *are* the **"Paper Tigers"** that demand sufficient documentary evidence that must comply with ALL statutory, regulatory, and "hypertechnical" requirements for the benefit sought.

**Building on Documentary Evidence Requirements in Light of the Documentation *Normally* Found in *Any* Business and What Must be Maintained for Tax and Compliance Purposes *And* Nobody Will Just Take the Word of Someone Who Has Already Been Caught Lying**

***Matter of Shaw*, 15 I&N Dec. 794 (BIA 1976)**, Decided by the Board July 2, 1976. Most recent APPEAL DISMISSED.

The respondents (husband and wife) sought adjustment based on the husband's investment in a restaurant. The restaurant's books were exceedingly poorly kept and a *financial statement* from a public accountant was *based solely on the word of the respondent*, without an audit of the business. That "statement" yielded unsatisfactory findings based on scant, suspect and uncorroborated documentary evidence. The documentation from Shaw's restaurant came nowhere meeting the requirements outlined in *Ahmad*.

Expanding on and clarifying the documentary requirements from *Ahmad*: monthly (or even annual) operating expenses such as lease or rental payments on property and equipment as well as other revolving expense such as inventory (food in the restaurant is like gas in the gas station) do not equate to an aggregate capital investment. Current (or average) inventory on hand is all that will be considered in the calculation of the amount of investment. Revolving inventory continually bought, sold, and replenished for sale again is not a cumulative investment. In addition, as pointed out in *Ahmad*, if documentation is not available then its absence must be satisfactorily explained.

Mr. Shaw had **previously been caught giving false testimony in prior immigration proceedings** and therefore, was not afforded any break on the documentary evidence that he failed to provide and could not satisfactorily explain away. This was, and remains, the same type of documentary evidence that is normally available from any actual legitimate business in the U.S. such as invoices, receipts, contracts, leases, *and documentation required to be kept for tax purposes*. The documentary evidence is of the type that should be readily available in any legitimate business operating in the United States then and now.

***Neither*** respondent was deemed **worthy** *of an exercise* ***of discretion*** as to withholding of deportation based on hardship. They had a USC child, they own some property, they made an **unsubstantiated claim** that they would be forced to live apart (he was from Taiwan and she was from Japan). **On a prior remand, they were afforded an opportunity to substantiate that claim of forced separation but offered no evidence**. [It is noted that Formosa (Taiwan) was recognized as the only legitimate government for China until President Carter issued Executive

Order 12167[7] - United States-People's Republic of China Trade Relations, on October 23, 1979. Their assertion of forced separation by Taiwan and Japan seems unfounded in fact or reality.]

In addition to his false testimony, the *substance* of that false testimony was a negative factor. He had falsely claimed **not** to have worked illegally but **actually was employed** in another restaurant as a cook, busboy, waiter, and sometimes cashier, **without INS authorization**. She eventually admitted that she entered the U.S. as a nonimmigrant (tourist) with a **preconceived intention** not to depart (an immigrant without an immigrant visa). Even after all this, they were afforded a renewed grant of voluntary departure.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2525.pdf

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**A further word on the *exercise of discretion* in light of adverse, disqualifying, or non-qualifying facts or factors, or improper basis for an application or petition.**

***Matter of Yarden*[8], 15 I&N Dec. 729 (Regional Commissioner 1976)**, Decided August 6, 1976, held:

> *In the **absence** of **unusual or outstanding equities**, an application for **adjustment** of status under section 245 of the Immigration and Nationality Act will be **denied as a matter of discretion where** the labor certification supporting the application, or eligibility for exemption therefrom, was **predicated on experience and/or income derived from employment held by applicant in violation of immigration laws**.*
>
> "Exception is taken to the statement that the applicant has failed to establish he posses the one year of experience in a managerial capacity as required by the regulation. We agree with counsel that the record establishes the applicant's employment in this capacity over the last five to six years. We do not believe, however, that it is proper in this case to grant an exemption from the requirements of section 212(a)(14) [labor certification process through DOL] by virtue of the applicant's experience gained or funds derived from employment while unlawfully in the United States." *At p. 731*

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2513.pdf

See also: ***Matter of Lett*, 17 I&N Dec. 312 (BIA 1980)** and ***Matter of Kumar*, 17 I&N Dec. 315 (BIA 1980)** for when it is considered *unauthorized* employment and when it is OK.

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[7] See the Executive Order at: http://www.presidency.ucsb.edu/ws/index.php?pid=31576#ixzz1QQSPqKAn

[8] A complete *non sequitur*, as in off-topic, but...The holding in *Yarden* could be quite useful to defend the Religious Worker regulations for both immigrant and non-immigrant visas as to the exclusion of work experience gained while unlawfully in the United States. It is clearly not a new concept as evidenced by that Precedent which preceded the 2008 Religious Worker regulations by 32 years. The old "*special immigrant*" investor exemption and the "*special immigrant*" religious worker category both derive from INA § 101(a)(27) [8 USC § 1101(a)(27)].

### M. Investments cannot be "in name only" or "obviously bogus" or "not in the control of the purported investor" or "too vague and undefined" *as a means* for the "investor" *to circumvent the requirement to obtain a labor certification*.

***Matter of Yang*, 15 I&N Dec. 147 (Regional Commissioner 1974)**, Decided on December 4, 1974.

Yang had twice been denied labor certification as an electronics technician, at least one of those denials was again dismissed on appeal by DOL. After his student visa and practical training ended and his period of voluntary departure expired, he got a job (*without proper authorization*) and purchased $10,000.00 worth of common stock of his employer "Transitron Electronics Corporation". This represented less than 1/10 of 1% of the company. He then filed as an "investor". The Regional Commissioner found in response to the notion that *his* investment had any bearing on the success or failure of *that* enterprise i.e. *Transitron* was "pure fantasy". As to the assertion that *his investment* would have the effect of expanding job opportunities for American workers; it was rejected as "erroneous on its face and factually indefensible." *At p. 149*

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2335.pdf

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***Matter of Takayanagi,* 15 I&N Dec. 585 (BIA 1976)**, Decided by the Board February 12, 1976.

The respondent bought shares in the corporation that owns the hair salon where he had been illegally working for months as a hairdresser. The purported "investment" only came after a labor certification application was denied. He had **no control** *over the business or* even his own purported *investment* as **the stock had to be sold back upon termination of employment**. His was an obvious and blatant attempt at fraud.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2472.pdf

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***Matter of Chiang*, 15 I&N Dec. 656 (BIA 1975)**, Decided by the Board July 30, 1975.

Chiang made an application as an investor based on a **vague enterprise** known as the "California Herb Tonic Company". The only documentation submitted was a self-prepared unaudited balance sheet and a visibly altered "City of Los Angeles Business Tax Statement" (the respondent's name was written in over the crossed-out name of his "partner's" former spouse). [Looks like it was a bogus investment supported by fraudulent documents.]

> "To grant "investor" status to an alien who holds an unrelated full time job in competition with American labor would be to countenance the very type of evasion of the labor certification procedures that we were concerned with in *Matter of Ahmad*." *At p. 657*

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2488.pdf

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**N. "Actively in the process of investing"; no *conditions* allowed; *asserting* that one is "looking for an investment" is not the same as "actively in the process of investing"; birth of the bogus "*Promissory Note*" and its uselessness, again "No Conditions Allowed". Promissory notes were disfavored long before 1998.**

***Matter of Liu*, 15 I&N Dec. 206 (BIA 1975)**, Decided by the Board March 13, 1975.

The IJ DENIED adjustment for an insufficient amount of investment in his landscaping and yard service business in Hawaii and for not being actively investing. The alien claimed to be "*actively in the process of investing*" however, he had held back investing *until and unless* he was *granted adjustment of status*. He put forth a bank statement indicating that he has enough to invest in additional equipment that would bring his full amount over $10,000.00.

In addition, since he filed early enough, he could be considered under the prior regulation that did not specify any minimum amount. The prior regulation also allowed for one to be "actively in the process of investing" but he was *affirmatively* withholding *further* investment **impermissibly conditioned** on attaining adjustment of status. This decision made clear that that type of arrangement would not be honored under *Heitland* and *Ahmad* as idle funds do not equate to an investment. The case however, was remanded for further fact-finding [probably accompanied by a wink and a nudge to "put up or shut up".]

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2354.pdf

See also: ***Matter of Lee*, 15 I&N Dec. 408 (BIA 1975)** for more on another early determination on the unacceptability of a *promissory note that was conditioned* on attaining resident status first.

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**"Yeah, sure, we really believe you, NOT!....*at least not yet*"**
***Perhaps if* she had a business plan and/or contracts...*15 years later and who knows*?**
**A real life Looky-loo or is that "Looky-Lee"**

***Matter of Shon Ning Lee*, 15 I&N Dec. 439 (BIA 1975),** Decided by the Board August 26, 1975, *aff'd, Shon Ning Lee v. INS*, 576 F.2d 1380 (9th Cir. 1978) *or* No. 77-2681 (June 13, 1978).

From the Ninth Circuit:

> "The major issue is whether the motion to reopen is a new application or a renewal of a previously denied application. If it is a renewal, as Lee argues, a visa could be available to Lee. If the former, the BIA was correct in finding Lee ineligible for resident status. We have concluded that Lee's motion to reopen was a new application." *At ¶ 2*
>
> "On April 3, 1973, Lee filed with the District Director an application for permanent resident status. A previous application, not relevant here, had already been denied. In **this** application, Lee sought **admission as a nonpreference immigrant who was exempted**

> **from the labor certification requirements** of 8 U.S.C. § 1182(a)(14) on the ground that she was an alien investor within the purview of 8 C.F.R. § 212.8(b)(4). The District Director found that Lee was not entitled to the claimed exemption because she had not invested in and was not actively in the process of investing in a commercial or agricultural enterprise. 8 C.F.R. § 212.8(b)(4). He denied the application." *At ¶ 6* **[Emphasis added.]**
>
> "At oral argument before the BIA in December 1974, Lee's counsel stated that Lee owned no business at the time of argument and that no business relating to Lee was identifiable. Nine months after argument, in August 1975, the BIA affirmed the denial. During this nine-month period, visas for Chinese nonpreference immigrants apparently became available on three occasions." At ¶ 8

Lee claimed that she was **"looking for a suitable investment"** and by that mere assertion she should be viewed as "actively in the process of investing". She claimed that on the advice of her attorney she should *only commit* to an investment *after obtaining her LPR status*. Neither the INS, BIA, nor 9th Circuit agreed with her "attorney's advice" or that interpretation of the investor visa eligibility requirements.

Her later allegation that she had actually invested *in November*, a month prior to the last BIA hearing (which heard oral argument from her *so-called* attorney *in December*) and was therefore **entitled** to recapture an earlier priority date was found unacceptable (*and dubious*). The Court (and everyone with half a brain) questioned **why** that information, *if it was true*, would *conceivably* have *been withheld* from the last BIA hearing *in December 1974*.

> "On February 25, 1976, the BIA received the motion to reopen in question here. The motion attempts to demonstrate once more Lee's entitlement to permanent resident status as an alien investor and shows that Lee had actually purchased a business in November, 1974, one month before the oral argument mentioned above. The BIA treated the motion as a new application for permanent resident status with a filing date of February 25, 1976. Under the terms of 8 U.S.C. § 1255, the BIA found that Lee was not eligible for permanent resident status because a visa was not available to her on this filing date." *At ¶ 9* [Emphasis added.]

BIA Decision at: http://www.justice.gov/eoir/vll/intdec/vol15/2424.pdf
9th Circuit Decision at: http://openjurist.org/576/f2d/1380

***Matter of Khan*, 16 I&N Dec. 138 (BIA 1977)**, Decided by the Board March 15, 1977. The respondent moved to reopen his deportation order in order to apply for adjustment as an investor.

At that time, he had demonstrated that he had invested $8,600.00 which was less than the required minimum of $10,000.00. He argued that he was *"actively in the process of investing"* additional funds and "should be given a reasonable period of time to complete the investment" *at p. 140.*

He could not show any evidence of any future commitment in connection with that claim. He presented no "copies of contracts showing a legal commitment to make certain expenditures, or similar items" *at p. 141.* The burden of proof rests on the alien and the evidence must be unambiguous, any doubts will be resolved against the "investor", *Cf. Shaw* and *Ahmand*.

The IJ's DENIAL was upheld and the Appeal was DISMISSED.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2565.pdf

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***Matter of Lee*, 15 I&N Dec. 408 (BIA 1975)**, Decided by the Board July 28, 1975.

Assuming *arguendo* that a promissory note could be counted, this one failed miserably due to its conditional basis. Lee only invested $5,000.00 in a restaurant and put up a "**promissory note**" for an additional $5,000.00 but only payable *under the condition* that he gains adjustment of status first. In addition, he was employed there as a cook. His employment placed him in direct competition with American labor and is disqualifying for any "investor". This was an obvious attempt to circumvent the labor certification process and use the "investment" as a conduit for his own entrance into the job market improperly and without an unattainable labor certification..

The IJ's DENIAL was upheld and the Appeal was DISMISSED.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2415.pdf

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***Matter of Konishi*, 16 I&N Dec. 549 (BIA 1978)**, Decided by the Board July 5, 1978. The respondent was ordered deported. The IJ had DENIED the investor classification and adjustment of status. The Appeal was DISMISSED.

The respondent was a self-employed *artist* who operated a *single-artist gallery* with no employees other than himself. The respondent's gallery was viewed as merely a conduit to sell a product produced by his own labor. *Speculation* as to the possibility of needing an employee at sometime in the future *was unpersuasive*.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2658.pdf

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**O. A new investment calls for a new application when the prior investment exemption application was denied as inadequate. No priority date retention in such a case.**

***Matter of Jo*, 15 I&N Dec. 401 (BIA 1975),** Decided by the Board July 22, 1975.

A *renewed* application for adjustment as an "investor" made in deportation proceedings must be *considered* as a completely *new* application **when**:

1.) the prior *investor adjustment application*[9] was denied AND,
2.) the new request is based on a new business enterprise altogether.

The crux of this case is that there was no visa "currently available" on the Visa Bulletin which prevented filing for adjustment. The earlier priority date could not be retained because the basis for that filing was found to be non-qualifying. The alien had formed a partnership to import foodstuffs. Based on that he filed an I-526 and I-485 on October 17, 1972. The partnership was dissolved in December 1972, and the District Director denied the applications on August 30, 1973. There was *nothing to renew* when he submitted a second I-526 on November 1, 1973, **and** no visas were then available.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol15/2412.pdf

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**NOTE**: The immigrant investor law landscape has changed greatly since 1975, certain considerations discussed might apply in 2011 but it is complex. The underlying processes have shifted from *seeking suspension of deportation before an IJ* to *seeking advance visa petition approval from USCIS*. While a current EB-5 alien can seek to obtain a new I-526 approval from USCIS (s)he cannot do so before an IJ. Although an I-829 can legally be renewed before an IJ, the IJ cannot decide on a new investment as an IJ *lacks jurisdiction* to decide any visa petition *in the first instance*.

See also: ***Matter of Shon Ning Lee*, 15 I&N Dec. 439 (BIA 1975),** Decided by the Board August 26, 1975, *aff'd, Shon Ning Lee v. INS*, 576 F.2d 1380 (9th Cir. 1978) *or* No. 77-2681 (June 13, 1978). This case discusses treating a renewal or a motion as a brand new application.

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[9] The possibility of adjustment was available *as a means to suspend deportation* but hinged on qualifying for an exemption from obtaining a labor certification and current visa availability. This was in contrast to specifically seeking entry as an investor by asserting that prospect to a Consular Officer abroad before entry into the United States. This fact distinguishes *Matter of Jo* (new application, visa unavailable) from *Matter of Ro* (priority date retention).

**P.** 8 CFR § 212.8, Certification requirement of section 212(a)(14). The "investor" exemption regulation was amended effective October 7, 1976. Under the version of the regulation, found in the 1980 edition,

(b) *Aliens not required to obtain labor certifications*. The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: ...

(4) an alien who establishes on Form I-526 that he has invested, or is actively in the process of investing, capital totalling at least $40,000 in an enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States who **[*]** are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children. **[*]**

**[*]** Denotes where additional text was later inserted, as shown in **bold text** in the version shown in **Q.** that follows.

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**Q.** This is the text as of at least January 1, 1997, through the present e-cfr version of June 23, 2011, and it includes the provisions discussed in the earlier decisions but does vary somewhat with added text.

(b) *Aliens not required to obtain labor certifications*. The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: ....

(4) an alien who establishes on Form I–526 that he has invested, or is actively in the process of investing, capital totaling at least $40,000 in an enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States **of which he will be a principal manager and that the enterprise will employ a person or persons in the United States** who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children. **A copy of a document submitted in support of Form I–526 may be accepted though unaccompanied by the original, if the copy bears a certification by an attorney, typed or rubber-stamped in the language set forth in §204.2(j)[10] of this chapter. However, the original document shall be submitted, if submittal is requested by the Service.**

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[10] *Note: The cross-referenced 8 CFR § 204.2(j) did not match up with the 1997 version which addressed consular notification of changes to orphan petitions. 8 CFR 204.2(j) disappeared altogether after this version.*

**R. A <u>new</u> <u>investment</u> <u>did not require a new application</u> when the prior investment was tried and failed or even switched for another <u>AFTER</u> making a case to a <u>Consular Officer</u> to secure that chance <u>in the first place</u>. *There could be priority date retention in such a case*. This is instructive in 2011, but might not be OK under EB-5 because the laws and regulations have significantly changed since 1977. Unless, the possibility had been put forth and vetted by USCIS through the successful use of *transparent complexity*[11] *in order to preserve flexibility*.**

***Matter of Ro*, 16 I&N Dec. 93 (BIA 1977)**, Decided by the Board January 25, 1977. The IJ DENIED the adjustment of status applications. The Appeal was DISMISSED. Adjustment was denied as a matter of discretion only.

An earlier priority date was retained even though the investment had changed. In this case, unlike another case that the IJ relied upon, *Matter of Jo*, 15 I&N Dec. 401 (BIA 1975, *distinguished*, this respondent **did** have a prior classification approved by a Consular Officer[12] abroad which did establish a priority date. **The Board allowed this respondent to keep the same priority date even though the current adjustment application is based on an investment in a completely new and different business than what had supported the original application.**

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2551.pdf

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**See also***: Ka Fung Chan v. INS*, 634 F.2d 248 (5th Cir. 1981) found at: http://openjurist.org/634/f2d/248/ka-fung-chan-v-immigration-and-naturalization-service

> "In summary, we hold that the BIA acted properly in ruling that Chan's motion to reopen constituted a new rather than a renewed application for adjustment of status, based on the valid principle announced in *Matter of Jo*. We hold that Chan failed to raise his claims of estoppel before the BIA, precluding review in this court. Finally, we hold that Chan failed to show the substantial prejudice necessary to establish a due process violation." *At ¶ 44 [Emphasis added.]*

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**S. *Material Change* was disallowed long before *Izummi* in 1998.**

***Matter of Heidari*, 16 I&N Dec. 203 (BIA 1977)**, Decided by the Board May 4, 1977. The Board DISMISSED this Motion to Reconsider a dismissal of a prior Motion to Reconsider an even earlier dismissal of a Motion to Reopen a deportation proceeding in order to allow filing for adjustment of status as an investor.

[11] See article at: http://www.slideshare.net/BigJoe5/transparent-complexity-to-achieve-flexibility-in-eb-5-plans-and-proposals-05242011

[12] *Supra*, see footnote 9.

The respondent attempted to submit "newly created" evidence that only came into being after he had already been ordered deported and long after the original application was filed and the prior denials and dismissals. **The Board refused to consider the brand new evidence under the prior regulation when a previous case was already denied under the prior regulation.**

The revised immigrant investor classification under 8 CFR § 212.8(b)(4) "now" required an alien to invest $40,000 and be the principal manager of the business and employ at least one USC or LPR employee (excluding self, spouse, and children). The latest revision had become effective on Oct. 7, 1976, pursuant to its having been published in final form at 41 FR 37566, Sept. 7, 1976. The older version was "superseded" and applicable prospectively. The investment which was the underlying basis of the new investor application commenced after the effective date of the new regulation and was therefore subject to it.

Since, in this case, the **evidence came into being after the effective date** and is considered under the newer regulation. The Board found that the respondent had failed to make a *prima facie* showing of eligibility based on the operative regulation at the time that the evidence came into being.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/2581.pdf

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### T. *Stare Decisis* in action: Appellate Bodies are not stuck[13] with their mistakes, just like the inspectors at JFK—they can admit their mistakes! Unlike the inspectors, Appellate Bodies can *reconsider a decision and announce it as a new Precedent*.

***Matter of Huang*, 16 I. & N. Dec. 358 (BIA 1977), and Dec. 362.1 (BIA 1978)** Decided by the Board originally on September 27, 1977, *that* decision was overruled & reversed April 10, 1978, upon reconsideration of a Motion to Reconsider filed by the Service and joined by Huang.

The main point of these decisions was determining when an application for adjustment is "properly filed" and when it is properly considered to be *renewed* before the Immigration Judge. As long as a visa was available at the time of the original filing of the application, the adjustment application remains valid throughout the entirety of the proceedings until conclusion of the case. This case is distinguishable from *Matter of Jo* because Jo's prior investment went bust while Huang maintained the same investment. The approvable investment petition/application set the visa availability making Huang's visa classification request approvable when filed as required by *Matter of Katigbak*. It should be remembered that if the original basis for an adjustment application is no longer valid, other avenues for relief can be sought.

**NOTE**: Such *other avenues* could be a new "investment" (a newly approved I-526) or some other visa classification (an approved and current I-130, I-140, some other petition) or even other forms of relief (cancellation, administrative withholding or suspension of deportation, or asylum).

Above found at: http://www.justice.gov/eoir/vll/intdec/vol16/Matter_of_Huang.pdf (Updated) (Original decision): http://www.justice.gov/eoir/vll/intdec/vol16/2616.pdf

[13] See also Matter of Arai, 13 I&N Dec. 494 (BIA 1970) at: http://www.justice.gov/eoir/vll/intdec/vol13/2027.pdf

***Matter of Kumar*, 17 I&N Dec. 315 (BIA 1980)**, Decided by the Board February 20, 1980. The investor first filed under an older version of the regulations. That business failed to meet the requirements. A *subsequent* application based on a *new business* that **came into being after a regulatory change** is *not entitled to be reviewed under the prior standards*. "One cannot claim a lingering entitlement to have an investment made after the regulatory change reviewed under the pre-regulatory change standards when the initial application never satisfied those earlier standards." *At p. 317* In addition, this respondent was deemed not entitled to an exercise of discretion due to an obvious preconceived immigrant intent upon entry on a tourist visa.

He entered as a tourist on March 15, 1976. He got money transferred from his father on March 30, 1976. He leased a store on that same day and began ordering inventory (clothing to be sold in that store) by April 15, 1976, and filed the paperwork for adjustment four days later.

After the clothing store failed and he liquidated the investment, he bought a motel for $20,000.00 down and a 25-year note for $100,000.00. However, he had no employees.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol17/2777.pdf

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***Matter of Patel*, 17 I&N Dec. 597 (BIA 1980)**, Decided by the Board December 11, 1980. *Patel v. INS*, 638 F. 2d 1199 (9th Cir. 1980), followed in the 9th Circuit. *Heitland* not applicable in the 9th Circuit.

Patel, in the instant administrative appeal, was found to meet the lower requirements for classification as an "investor". However, "[t]he grant of an application for adjustment of status under section 245 is a matter of administrative grace. An applicant has the burden of showing that discretion should be exercised in his favor." *At p. 601* Based on the facts of this case, a favorable exercise of discretion is not warranted.

This respondent entered the U.S. on a student visa and immediately went to work without authorization and to compound that transgression affirmatively made false statements in order to conceal that fact in three subsequent extension applications for the student visa. Confronted with his false statements he admitted them and asked for mercy. He got none. "[W]here adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities." *Id*. While the IJ had even denied voluntary departure, the BIA granted 30 days voluntary departure, subject to any extension granted by the District Director.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol17/2842.pdf

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***Matter of Amornvootiskul*, 19 I&N Dec. 366 (BIA 1986),** Decided by the Board April 1, 1986.

An IJ granted adjustment but an overzealous INS trial attorney with an inconsistent and contrary interpretation of the Service's own interpretations and regulations sought an appeal. The appeal was DISMISSED.

(1) Under the pertinent provisions of section 19 of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 [codified at 8 U.S.C. § 1151 (1982)], an alien is not subject to the numerical limitations of the Act if he was present in the United States on or before June 1, 1978, and was qualified as a nonpreference immigrant under section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8) (1982); was exempt from the labor certification requirement of section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (1982), as a qualified investor; and properly filed an application for adjustment of status to that of an alien lawfully admitted for permanent residence, which is still pending.

(2) Section 19 of the 1981 Amendments to the Act has been interpreted by the Immigration and Naturalization Service in its regulations to mean that an application for adjustment of status may be approved after June 1, 1978, provided that the applicant has a priority date on or before June 1, 1978, and meets the other requirements of section 19.

"The question of the respondents' eligibility for adjustment of status as investors turns on the interpretation of section 19 of the 1981 Amendments to the Act, which reads as follows:

> Sec. 19. The numerical limitations contained in sections 201 and 202 of the Immigration and Nationality Act shall not apply to any alien who is present in the United States and who, on or before June 1, 1978 --
>
> (1) qualified as a nonpreference immigrant under section 203(a) (8) of such Act (as in effect on June 1, 1978);
>
> (2) was determined to be exempt from the labor certification requirement of section 212(a)(14) of such Act because the alien had actually invested, before such date, capital in an enterprise in the United States of which the alien became a principal manager and which employed a person or persons (other than the spouse or children of the alien) who are citizens of the United States or aliens lawfully admitted for permanent residence; and
>
> (3) applied for adjustment of status to that of an alien lawfully admitted for permanent residence.

The relevant segment of section 19 of the 1981 Amendments has been interpreted by the Service in its regulations at 8 C.F.R. § 245.1(c)(2) (iv) (1986). See 47 Fed. Reg. 12129, 12133, 44233, 44237 (1982). It states:

> Any applicant will have qualified as a nonpreference immigrant on or before June 1, 1978 for purposes of this section, if the application for investor status was actually approved on or before that date, *or the application was subsequently approved with a priority date on or before June 1, 1978. (Emphasis added.)"*

The earlier incarnation of the immigrant investor visa was a *nonpreference immigrant visa*** as these visa became unavailable for a long time the "investor immigrant visa" nearly passed into complete obscurity. This ameliorative provision was enacted to provide relief to those who had already actually made investments and sought to apply for benefits prior to the date.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol19/3009.pdf

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**Nonpreference Category**

Nonpreference visas were available to qualified applicants not entitled to a visa under the preferences until the category was eliminated by the Immigration Act of 1990. Nonpreference visas for persons not entitled to the other preferences had not been available since September 1978 because of high demand in the preference categories. An additional 5,000 nonpreference visas were available in each of fiscal years 1987 and 1988 under a provision of the Immigration Reform and Control Act of 1986. This program was extended into 1989, 1990, and 1991 with 15,000 visas issued each year. Aliens born in countries from which immigration was adversely affected by the Immigration and Nationality Act Amendments of 1965 (Public Law 89-236... [Sec. 8 (a) renamed nonquota immigrants as special immigrants in INA § 101(a)(27)]...) were eligible for the special nonpreference visas.

Above from: USCIS Website in Nonpreference Category [Contains embedded link]

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## II. The "Statutory" Investor Visa: INA § 203(b)(5) [8 USC § 1153(b)(5)] (1990):

The immigrant investor visa classification was created by regulation rather than statute. It was first promulgated in a rulemaking in 1966 by INS under the delegated authority from the Attorney General. It evolved for a while, began its first round of administrative and judicial challenges and decisions. After about a decade of vague results and plenty of fraud, it got affirmatively more concrete as to eligibility. After the **quadrupling** of required capital, a minimal job creation requirement, and the effective removal of "mom and pop" ventures, interest dropped sharply and then the whole concept sort of went on hiatus until it was revived by Congress in 1990. Congress made the investor category statutory as the "employment creation" visa and then later expanded the program through the creation of the "regional centers" under the "immigrant investor pilot program".

In 1990, the immigrant investor visa was brought back to life via Pub. L. 101-649: the Immigration Act of 1990 (IMMACT 90), Title I, Subtitle B, Part 2, Sec. 121 which created INA § 203(b)(5) "employment creation" preference category visa and INA § 216A "Conditional permanent resident status for certain alien entrepreneurs, spouses, and children."

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## III. The "Immigrant Investor Pilot Program" and "Regional Center" under § 610 is *codified* as 8 USC § 1153 Note and *not within the INA*:

The Immigrant Investor Pilot Program in which the Regional Centers reside finds its origin in § 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, [also known as Pub. L. 102-395: The Judiciary Appropriations Act,

1993], as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, etc… These provisions of § 610 have not been made part of or enacted as a section of the Immigration and Nationality Act (INA). These provisions are set out as a note within 8 USC § 1153.

In § 610 entitled: "Pilot Immigration Program", paragraph (a) is the statutory source of the undefined "pilot program" and "regional center" while (c) is the source of the inclusion of "indirect jobs" as determined by "reasonable methodologies". The statute directs the Attorney General [subsequently replaced by the Secretary of Homeland Security] to "implement the provisions" [which translates to: write implementing regulations] which was initially delegated to INS [subsequently replaced by USCIS].

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**8 USC § 1153 Note: Pilot Immigration Program**

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

[(b) includes spouses and children who accompany or follow to join.]

(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the pilot program described in this section. Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence.

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Legacy INS promulgated regulations at 8 CFR § 204.6 to implement the revived investor visa and later amended to incorporate the pilot program and its regional centers. INS forgot to get rid of 8 CFR § 212.8(b)(4) [it's still there in June 2011].

After a shaky start, INS sort of put a halt on investors and regional centers and fought court battles. Then came the 1998 AAO EB-5 Precedent Decisions and of course, the court battles continue.

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***Matter of Ho*, 22 I&N Dec. 206 (BIA 1998)**

> (1) Merely establishing 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, INS 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.
>
> (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.

One of the more frequently quoted parts of *Matter of Ho* is that concerning the business plan:

> "...To be "comprehensive," a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.
>
> 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.4 Most importantly, the business plan must be credible." *At p. 213*

Above found at: http://www.justice.gov/eoir/vll/intdec/vol22/3362.pdf

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***Matter of Hsiung*, 22 I&N Dec. 201 (AAO 1998)**

(1) A promissory note secured by assets owned by a petitioner can constitute capital under 8 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 pre-existing business may not cause a net loss of employment.

Above found at: http://www.justice.gov/eoir/vll/intdec/vol22/3361.pdf

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***Matter of Izummi*, 22 I&N Dec. 169 (AAO 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.

(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 C.F.R. § 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 C.F.R. § 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.

(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.

(13) In order for a petitioner to be considered to have established an original business, he must have had a hand in its actual creation. **[Overruled by subsequent legislation.]**

Above found at: http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf

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***Matter of Soffici*, 22 I&N Dec. 158 (AAO 1998)**

> (1) A petitioner under § 203(b)(5) of the Immigration and Nationality 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 C.F.R. § 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."

Above found at: http://www.justice.gov/eoir/vll/intdec/vol22/3359.pdf

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***The Failed South Dakota Dairy Farm Case* (AAO 2011).** This most recent *non-precedent* AAO Decision concerning a Form I-829: Petition by Entrepreneur to Remove Conditions Pursuant to Section 216A of the Immigration and Nationality Act, 8 U.S.C. § 1186(b) AFFIRMED the Director's DENIAL on CERTIFICATION on April 14, 2011.

The underlying elements of the business plan and economic model and methodologies disclosed and approved in the I-526 stage cannot be re-adjudicated in the absence of the discovery of previously undisclosed or misrepresented information, or a substantive and material change.

> "The Director, California Service Center, denied the petition to remove conditions. The matter is now before the Administrative Appeals Office (AAO) on certification pursuant to the regulation at 8 C.F.R. §103.4. The director's decision will be affirmed in part and withdrawn in part. The petition will be denied.
>
> *****
>
> .... The director denied the petition and certified the matter to the AAO. There is no appeal available for a denied Form 1-829. The regulation at 8 C.F.R. § 103.4(a)(5), however, allows the director to certify any decision to this office whether or not the case is appealable. The petitioner has submitted a brief on certification." *At p. 2*

"The two statutory requirements at section 203(b)(5) of the Act are exceedingly simple, mandating the provision of a visa to any investor who: (1) makes an investment of the requisite capital, and **(2) creates jobs for at least 10 "U.S. citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States" other than the investor or the investor's spouse, sons or daughters.** In this case, the petitioner has made the requisite investment, albeit into an enterprise that failed after the petitioner filed the Form 1-829. However, **the investor appears never to have employed the requisite number of qualifying workers.** On that basis alone, the petition may not be approved. **[Emphasis added.]** *At p. 2*

The heart of the petitioner's request is that USCIS should remove conditions on his lawful permanent resident status on the basis of a failed enterprise with a workforce that is staffed almost entirely with aliens who are not " lawfully authorized to be employed in the United States." 8 C.F.R. § 204.6(e). According to the AAO's review, approximately 82 percent of the petitioner's workforce are not employment authorized. While the failure of the enterprise does not necessarily prohibit removal of conditions on the petitioner's lawful permanent resident status, USCIS is precluded by statute and regulation from removing conditions if the enterprise failed to create the requisite number of jobs for qualifying employees *(i.e.,* U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States). *At p. 2-3*

For the reasons discussed below, the AAO will uphold the director's determination regarding who may be considered direct and qualifying employees of the new commercial enterprise. USCIS is statutorily precluded from approving the petition in this case because the petitioner has failed to employ the requisite number of qualifying employees during the conditional period or within a reasonable time thereafter. The AAO will withdraw the director's concerns regarding the use of multipliers that were disclosed in support of the approved Form 1-526 petition. Nevertheless, the AAO concurs that allowing the application of a multiplier to non-qualifying jobs would likely produce an outcome that is inconsistent with Congressional intent. Finally, the AAO will make a separate finding of willful material misrepresentation because the petitioner submitted: (1) unsupported Internal Revenue Service (IRS) Forms W-2 that are contradicted by other IRS tax reports as evidence for two of the claimed qualifying direct employees, and (2) Forms I -9 and payroll records from an unrelated entity, [redacted] as evidence of his own investment enterprise's compliance with section 203(b)(5)(A)(ii) of the Act." *At p. 3*

"***C. The Multiplier***

The regulation at 8 C.F.R. § 204.6(m)(3)(v) provides that a regional center proposal must be supported by "economically or statistically valid forecasting tools, including, but not limited to. feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier table

As stated above, in support of the original Form 1-526, counsel asserted that the petitioner would use a 2.66 multiplier to calculate total job creation. The director approved the petition without further inquiry, apparently considering the economic formula to be a "reasonable methodology" as discussed at 8 C.F.R. §§ 204.6(j)(4)(iii) and

(m)(3)(v). In the matter before us, the director now questions whether the multiplier is appropriate for the dairy's location.

The Ninth Circuit, in *Chang v. United States of America,* 327 F. 3d 911 (9th Cir. 2003), held that, during the adjudication of a Form 1-829, USCIS could not review whether the initial plan submitted with the Form 1-526 was qualifying, only whether the alien sustained that plan. Specifically, the court stated that the Form 1-526 approval may not be "decoupled from [Form] 1-829 approval." *Id*. The court further stated that Form 1-829 approval is predicted by Form 1-526 approval and "successful execution of the approved plan." *Id*. As noted by the court in *Chang,* 327 F. 3d at 927, far more evidence is required in support of the Form 1-526 petition. In fact, as stated above, the regulation at 8 C.F.R. § 204.6(j)(4)(iii) expressly requires the submission of reasonable methodologies for determining indirect job creation at the Form 1-526 stage. At the Form 1-829 stage, the petitioner is not required to submit such evidence, although the petitioner must use the methodologies approved at the Form 1-526 stage to demonstrate that his investment has created the requisite employment.

Under the reasoning of *Chang*, the director erred in revisiting the appropriateness of the multiplier. The director approved the Form 1-526, which disclosed that the petitioner would be using the 2.66 multiplier for the location of the dairy. The petitioner did not materially change the location of the proposed employment creation and the director does not identify information that was misrepresented or not disclosed at the Form 1-526 stage that would warrant a new evaluation of the multipliers used. Thus, the petitioner should be able to rely on the 2.66 multiplier as an acceptable means of demonstrating total job creation, including indirect jobs. The AAO withdraws the director's concern that the 2.66 multiplier is not appropriate.

We will discuss below how the multiplier should be applied in this matter given that the majority of the direct jobs are for non-qualifying employees." *At p.15*

"***D. Application of the Multiplier to Non-Qualifying Direct Jobs***

The final issue that the director certified to the AAO is whether the petitioner may rely on the indirect jobs even though the calculation of indirect jobs applies a multiplier to non-qualifying direct jobs.

We reiterate that Congress intended section 203(b)(5) of the Act as an "employment creation" classification that would create jobs for qualifying employees. The AAO acknowledges that the regional center pilot program allows investors to rely on indirect job creation and USCIS has no means to verify whether indirect employees meet the regulatory definition of "qualifying" at 8 C.F.R. § 204.6(e). **Nevertheless, the AAO must address the fact that the petitioner's investment plan called for the creation of qualifying direct jobs and the calculation of indirect jobs by applying a multiplier to those direct jobs.**

The petitioner's evidence regarding its direct qualifying employees is not relevant, probative or credible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Mutter of Ho, 19 I&N Dec. at 591. The submitted evidence

in this matter is so flawed, that there is no established number of direct jobs that can be used for the multiplier.

Even if we were to consider the claims in a light most favorable to the petitioner, and apply the 2.66 multiplier to the non-qualifying direct jobs, the resulting number would not satisfy the statutory minimum. ...." *At p. 16*

Above found at: Apr142011_01B7203.pdf

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**See also**: *Chang v. United States of America*, 327 F. 3d 911 (9th Cir. 2003) found at: http://law.justia.com/cases/federal/appellate-courts/F3/327/911/625674/

United States' Reply Brief in the 9th Circuit *Chang* case found at: http://www.clearinghouse.net/chDocs/public/IM-CA-0052-0003.pdf

**See also**: *Spencer Enterprises Inc v. United States*, 345 F.3d 683 (9th Cir., 2003) *or* No. 01-16391 (September 17, 2003). Found at: http://caselaw.findlaw.com/us-9th-circuit/1330636.html

The above is an affirmance of: *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025 (E.D. Calif. 2001) *or* CIV-F-99-6117 OWW LJO (March 28, 2001).
Found at: http://www.slideshare.net/BigJoe5/spencer-enterprises-eb5decision-district-court-2001

| **For additional reading on immigrant investor regulations see:** |
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| **Immigrant Investor Visa/Adjustment Regulations** |

| **8 CFR § 212.8 (b)(4)** |
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| 31 FR 10021, July 23, 1966; |
| 31 FR 10355, Aug. 22, 1966, as amended at |
| 34 FR 5326, Mar. 18, 1969; |
| 38 FR 31166, Nov. 12, 1973; |
| 41 FR 37566, Sept. 7, 1976; |
| 41 FR 55850, Dec. 23, 1976; |
| 47 FR 12129, 12133 (1982) |
| 47 FR 44233, 44237 (1982) |
| 47 FR 44990, Oct. 13, 1982; |
| 48 FR 19157, Apr. 28, 1983 |
| **8 CFR 204.6** |
| 56 FR 60910, Nov. 29, 1991, as amended at |
| 57 FR 1860, Jan. 16, 1992; |
| 58 FR 44608, 44609, Aug. 24, 1993; |
| 74 FR 26937, June 5, 2009; |
| 75 FR 58990, Sept. 24, 2010 |
| **8 CFR 216.6** |
| 59 FR 26591, May 23, 1994, as amended at |
| 63 FR 70315, Dec. 21, 1998; |
| 74 FR 26939, June 5, 2009 |