UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOES 1-53, **Plaintiffs,** **v.** **U.S. CITIZENSHIP & IMMIGRATION SERVICES, *et al.*,** **Defendants.**	**Civil Action No. 1:15-cv-00273-CKK**

MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE ADMINISTRATIVE RECORD AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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LEGAL BACKGROUND

I. The EB-5 Program

In 1990, Congress amended the Immigration and Nationality Act ("INA") to provide for classification of "employment creation immigrants who invest capital in new commercial enterprises in the United States that create full-time employment of United States workers" (colloquially referred to as the "EB-5 program"). *See* Immigration Act of 1990, Pub. L. No. 101-649, § 121(a) (Nov. 29, 1990) (8 U.S.C. § 1153(b)(5)). Congress set the qualifying capital investment level for aliens who participate in the EB-5 program at one million dollars, but aliens may qualify for classification by investing at least $500,000 in a "targeted employment area" or "TEA." 8 U.S.C. § 1153(b)(5)(B)(ii), (C); 8 C.F.R. § 204.6(f). The investment must "create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States . . . ." 8 U.S.C. § 1153(b)(5)(A)(ii). The purpose of this preference category is to create and sustain jobs for United States workers. S. Rep. No. 101-55, at 21 (June 19, 1989).

In 1991, the Immigration and Naturalization Service (INS)[1] published regulations through notice and comment rulemaking interpreting the EB-5 statute and establishing procedures for aliens to file petitions for classification as alien entrepreneurs (Form I-526 petitions). *See* 56 Fed. Reg. 60,897; 60,910-13 (INS) (Nov. 29, 1991) (codified at 8 C.F.R. § 204.6). In addition to USCIS's regulations, USCIS has designated four agency "EB-5 program precedential decisions," to provide alien investors with additional guidance on the rules and

[1] Under the Homeland Security Act of 2002, Congress abolished the INS. *See* Pub. Law No. 107-296, § 471 (Nov. 25, 2002). Congress transferred the authority to adjudicate immigrant visa petitions from the Commissioner of INS (and the Attorney General) to USCIS, an agency within the Department of Homeland Security. *Id*. at § 451(b)(1).

requirements of the EB-5 program.[2] *See Matter of Izummi*, 22 I. & N. Dec. 169 (Assoc. Comm. 1998); *Matter of Soffici*, 22 I. & N. Dec. 158 (Assoc. Comm. 1998); *Matter of Ho*, 22 I. & N. Dec. 206 (Assoc. Comm. 1998); *Matter of Hsiung*, 22 I. & N. Dec. 201 (Assoc. Comm. 1998). Courts have recognized these four agency-designated decisions as precedential in all proceedings involving the same issues. *See R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1018 (D. Haw. 2000) *aff'd* 273 F.3d 874 (9th Cir. 2001).

The implementing regulations require the alien investor to submit evidence that the alien "has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full time positions for not fewer than 10 qualifying employees." 8 C.F.R. § 204.6(j). To satisfy this requirement, the alien must submit evidence that the alien has "placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). Investing the requisite capital requires the entrepreneur to place funds or other capital assets at risk, which requires undertaking an actual business venture. *See Matter of Ho*, 22 I. & N. Dec. 206, 210 (AAO 1998); 56 Fed. Reg. at 60,902.

If the alien has not already satisfied the job creation requirement, the alien investor must provide with the Form I-526 petition a comprehensive business plan outlining how the new commercial enterprise will result in the employment of at least ten full-time employees. 8 C.F.R. § 204.6(j)(4)(i)(B). Importantly, USCIS has established that an alien cannot satisfy this "at risk" requirement by merely depositing funds into an account held by the new commercial enterprise. *Matter of Ho*, 22 I. & N. Dec. at 210. The alien must provide evidence demonstrating how the new commercial enterprise will use the deposited funds; otherwise USCIS has no assurance that

[2] Precedent decisions issued by the former INS or the AAU are binding on the Department of Homeland Security and its sub-agency, USCIS. *See* 8 C.F.R. § 103.3(c).

the new commercial enterprise will in fact use the alien's capital investment funds to finance its business operations. *See id*. at 210-211.

In adjudicating a Form I-526 petition, USCIS must determine whether the facts stated in the petition and supporting documents are true, *see* 8 U.S.C. § 1154(b), and it may reject statements that it finds unsubstantiated or without a factual basis, *see Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The burden of proof rests on the alien entrepreneur to establish by a preponderance of evidence that the petitioner is fully qualified for the benefit sought. *See* 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I. & N. Dec. 369, 374-76 (AAO 2010).

If USCIS determines that an alien's investment qualifies under the employment creation program, the agency may grant permanent resident status to the qualifying alien for a conditional two-year period. *See* 8 U.S.C. § 1186b(a)(1). During this conditional time frame, the alien entrepreneur must directly create "ten full-time jobs for qualifying employees," or show the ability to do so within "a reasonable time." 8 C.F.R. § 216.6(a)(4)(iv); S. Rep. 101-55 at 22 (the mandatory conditional residency period is meant "to encourage all aliens receiving visas . . . to continue their new commercial enterprises so that the creation of U.S. jobs and the infusion of capital into the U.S. economy is sustained").

II. Expansion Through the Pilot Program

In 1993, Congress expanded the employment creation program through the "pilot program," which authorizes "regional investment center[s] in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." *See* Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-

395, § 610(a) (Oct. 6, 1992).[3] The pilot program allows economic units, whether public or private, engaged in the promotion of economic growth to seek regional center status with USCIS to allow alien investors to fund proposed economic development plans through pooled investments. *See* 58 Fed. Reg. 44,606, 44,608 (Aug. 24, 1993). An economic unit wishing to participate in the pilot program must submit a proposal that clearly describes, among other things, how the economic unit focuses on a geographic region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment. *Id.* at 44,609; 8 C.F.R. § 204.6(m)(3).[4]

Congress directed USCIS,[5] to "permit aliens admitted under the pilot program . . . 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." Pub. L. No. 106-396, § 402(b) (Oct. 30, 2000) (emphasis added). Thus, the statute permits a foreign investor participating in a regional center to satisfy the employment creation requirement by establishing that her investment will create jobs indirectly through revenues generated from increased

[3] The regional center program is no longer in a "pilot" form, although it is scheduled to sunset on September 30, 2016. *See* Consolidated Appropriations Act 2016, Pub. L. No. 114-113 (Dec. 18, 2015).

[4] In 2002, Congress clarified that "[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." 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11037(a)(3) (Nov. 2, 2002).

[5] Congress authorized the Secretary of Homeland Security to grant regional investment center status. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 4(a) (Dec. 3, 2003). The Secretary delegated this authority to USCIS. *See* 8 C.F.R. § 2.1; Secretary of Homeland Security's Delegation Order No. 0150.1 § 2(Y) (Mar. 1, 2003).

economic activity resulting from the new commercial enterprise. *See* 8 C.F.R. § 204.6(m)(7)(ii); USCIS Adjudicator's Field Manual § 22.4(a)(2)(A). The pilot program does not relieve alien investors from any other requirements under the statute or implementing regulations. *See* 58 Fed. Reg. at 44,607.

FACTUAL BACKGROUND[6]

Plaintiffs are fifty-seven foreign investor aliens seeking immigrant classification pursuant to 8 U.S.C. § 1153(b)(5). Plaintiffs claim eligibility for the EB-5 program based on their $500,000.00 investment in Quartzburg Gold LP, which, for purposes of the EB-5 program, is considered the new commercial enterprise or "NCE." Quartzberg proposed pooling $80 million from 160 investors for the purpose of loaning the capital (through the Regional Center, Idaho State Gold Company ("ISGC")) to mining companies to complete individual mining projects. The mining projects are, for purposes of the EB-5 program, the job creating entities or "JCEs." Plaintiffs received a Confidential Private Offering Memorandum ("PPM"), JD3 at 55-121, and eventually entered into a Subscription Agreement, JD3 at 186-98, and Limited Partnership Agreement.

In 2012, 156 investors in the partnership began filing Form I-526 petitions with USCIS. JD3 at 1-400. Plaintiffs claimed in their Form I-526 petition submissions that the NCE intended to loan money to four mining projects: Yellow Jacket Project (Boise, Idaho); Belshazzar Mine (Boise County, Idaho); South Mountain Mine, Thunder Mountain Project (Owyhee County, Idaho); and Monarch Mountain Mine, Monarch Gold Project (Elmore County, Idaho). Plaintiffs'

[6] The factual background set forth below largely tracks the background for the majority of the Plaintiffs, (whose administrative proceedings are represented by the administrative record for the third John Doe, which we cite to as "JD3"), but refers to differences in the administrative proceedings where necessary for the court's understanding and/or resolution of the case. *See also infra* note 8. Citations to the first and second John Doe administrative records will be styled as "JD1 at _" and "JD2 at _."

submissions claimed that three of the projects had been fully vetted and were "definite" projects (Yellowjacket Project, Belshazzar Project and the Thunder Mountain Project). JD3 at 9. Plaintiffs noted at the time that the fourth project (Monarch Gold) required additional due diligence and represented that "in the event that the Monarch Mountain Property does not pass the due diligence review, the Partnership will instead focus its investments into the . . . other three projects."[7] JD3 at 12. Plaintiffs' initial job creation estimates relied upon a study that "used data obtained from two of the definite large-scale investment Projects, the Yellowjacket Project and Thunder Mountain Project," as the basis for coming up with his job creation multiplier figures." JD3 at 18.

Beginning in 2013, Defendants then issued a Notice of Intent to Deny ("NOID") the petitions. JD3 at 402-11. The NOID focused on Plaintiffs' failure to demonstrate that the JCEs were located in a targeted employment area ("TEA"), whether the invested capital was at risk, and whether the NCE would create the requisite number of jobs. JD3 at 402-11. In response, Plaintiffs acknowledged that there may have been "technical impediments to claiming one or two of the locations as TEAs as of the time the[] I-526 was filed" but proceeded to identify a new list of possible JCEs all of which were apparently still subject of additional vetting and pending approval. JD3 at 433-34. Plaintiffs also submitted a "revised" business plan, which analyzed the new set of JCEs. JD3 at 565-629.

Defendants then issued two Requests for Evidence (RFEs) that further inquired into a number of issues raised by Plaintiffs' responses to the NOID including the investment structure, the business plan, and other issues associated with job creation. *See* JD3 at 1592-95; 1862-72.

[7] Plaintiffs identified nine additional possible projects in its attached Business Plan, JD3 at 317, and Confidential Private Offering, JD3 at 78-79, as potential additional projects or as a replacement for Monarch. None of those projects were included on Plaintiffs updated list of proposed JCEs.

Plaintiffs filed timely responses to the RFEs and one supplemental response. *See e.g.* JD3 at 2459-78. These responses continued to update the JCEs list. *Id.*

In early 2015, Defendants issued denials to approximately 30 of Quartzburg's 156 investors on the grounds that the investment was an impermissible debt arrangement and contrary to *Matter of Izummi*. JD2 at 3120-24. Without waiting for decisions on the remaining petitions (or requesting review of the decision by the AAO), Plaintiffs filed the instant case challenging the denials under the APA. In August 2015, Defendants began issuing denials to the remaining Quartzberg investors. Those denials offered further explanation of the debt arrangement ground for denial and identified three additional deficiencies in the petitions.[8] JD3 at 2481-93.

LEGAL STANDARD

"[I]n a case involving review of a final agency action under the [APA] . . . the standard set forth in Rule 56[a] does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006) (citations omitted). Merits brief may therefore serve as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *Id.* at 90 (discussing APA summary judgment briefing). In

[8] Although Plaintiffs suggest that the JD3 denials that post-dated the start of the litigation are somehow not legitimate because they happened after Plaintiffs "appealed" the first denials to this Court, Plaintiffs' assertion is legally incorrect. Plaintiffs' complaint is not an "appeal" of the agency, and therefore the agency does not lose jurisdiction over petitions that remain pending before it. Further, the only remedy the APA potentially available to Plaintiffs with pending petitions is an order requiring action on those petitions. Rather than move (for a second time) to dismiss the Plaintiffs who had not yet received a decision on their petitions, Defendants decided the best course was to issue decisions on all pending petitions by Quartzburg investors (including Plaintiffs as well as investors that did not join this litigation). Nothing in the APA permits Defendants to abdicate their responsibility to adjudicate pending cases simply because litigation has been initiated. Issuing the JD3 denial was, therefore, a permissible course of action.

adjudicating cases under the APA, a court may only set aside a final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this deferential standard, a court reviews the agency's decision to determine if it "articulated a rational connection between the factual findings and its decision." *See Fence Creek Cattle Co. v. Forest Serv*., 602 F.3d 1125, 1132 (9th Cir. 2010). Under the "arbitrary and capricious standard, the standard is narrow and the court should not substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT[9]

Where, as here, USCIS denies an application on multiple alternative grounds, the Court must affirm the agency's decision as long as any one of the grounds is valid. *Indiana Municipal Power Agency v. FERC,* 56 F.3d 247, 256 (D.C. Cir. 1995). Conversely, in order to prevail under the APA standard, Plaintiffs must demonstrate that *all* of the asserted grounds are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. Here, USCIS correctly identified four distinct grounds for denying Plaintiffs' I-526 petitions: (1) Plaintiffs' proposed investment in an ever-changing list of job creating entities is not sufficient to show at

[9] Because the shorter, one-issue denial that was issued to the second John Doe, *see* JD2 at 3120-24, has been subsumed by the denial issued to the majority of the Quartzburg investors, *see* JD3 at 2483-97, Defendants are not separately discussing the JD2 denial. In the event that the Court grants judgment to the Defendants as to the denial issued to the third John Doe, USCIS agrees that it will reopen the cases of the JD2 plaintiffs and follow proper procedure for issue a decision consistent with the one issued to the JD3 plaintiffs. Accordingly, there is no occasion for this Court to determine whether the denial issued to the second John Doe satisfies the APA standard.

The denial issued to the first Joe Doe, JD1, was not issued to any other Plaintiff as result of JD1 being the only Plaintiff who waived the call option prior to filing his petition with USCIS. As a result, JD1's denial focuses exclusively on the issues discussed infra Section III. *See* JD1 at 2457-62. Accordingly, the Court's determination of the issues discussed in Section III will be determinative of JD1's APA claims.

the time the petition was filed that the investment is in a targeted employment area such that their $500,000.00 investment was sufficient to qualify for the EB-5 program; (2) Plaintiffs' ad hoc investment scheme fails to provide the concrete plan for job creation necessary to demonstrate that each individual Plaintiffs' $500,000.00 investment is likely result in the employment of ten qualified workers in the next two years, (3) Plaintiffs' invested capital is not sufficiently at risk because the investment was structured so as to constitute a mere loan to the new commercial enterprise; and (4) Plaintiffs failed to satisfy their burden of showing that all of their $500,000.00 investment is going to a job creating entity rather than to administrative fees and failed projects. JD3 at 2479-2497. Because Plaintiffs have not shown that all of these grounds for denial are so legally and factually deficient as to be arbitrary and capricious, the Court should find USCIS's decision comports with the APA standard. The Court should grant judgment in favor of Defendants.

I. Plaintiffs' shifting list of job creating entities constitutes reasonable grounds for denying the petitions

Plaintiffs' original submission to the agency identified four job creating entities—three of which Plaintiffs characterized as "definite" investments that had been fully approved by the Partnership—as supporting Plaintiffs' claims that Quartzburg is operating in a targeted employment area and that each $500,000.00 investment is likely to create ten new jobs through those four job creating entities. Plaintiffs, however, now rely on a wholly different list of job creating entities, which they continue to suggest are subject to additional due diligence review, to support their petitions. Plaintiffs' decision to abandon its original list of job creating entities supports USCIS's denial of the petitions for two independent reasons. First, Plaintiffs have conceded that its initial petition was defective because, at the time of filing, Quartzburg was not operating in a targeted employment area. Second, Plaintiffs attempt to offer new NCEs

demonstrates that Plaintiffs do not have a sufficiently definite investment plan as to satisfy the program's job creation requirements and constitute an impermissible material change to the originally-filed petitions. This is because a petitioner must establish eligibility for the benefit sought at the time of the filing. *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Comm. 1971). A petition cannot be approved based on later-occurring facts that correct defects in the initial filing. *Id*. The regulations prohibit petitioners from making a material change to the petition in an effort to cure a defect that existed at the time of filing. 8 C.F.R. § 103.2(b)(1). The revised list of job creating entities is a material change to the petitions and demonstrates that the petition was not approvable at the time of filing; USCIS was within its discretion to deny the petitions on that basis.

A. The NCE was not operating in a TEA at the time Plaintiffs' petitions were filed with USCIS.

Plaintiffs' Form I-526 relied exclusively on two "definite large-scale investment Projects, the Yellowjacket Project and Thunder Mountain Project," for its job creation calculations, plus two smaller investment projects, Belshazzar Mine and Monarch Gold Project, to show the NCE is operating in a targeted investment area. USCIS then issued a notice of intent to deny to Plaintiffs noting that the original four projects were not located in a targeted employment area and therefore Plaintiffs had not demonstrated that they were exempted from making the full $1,000,000.00 investment. In response, Plaintiffs acknowledged that some investors were not able to use the original projects as TEAs, but suggested the requirement was nonetheless satisfied because the NCE was principally doing business in a targeted employment area based on the new list of proposed investment projects.

Plaintiffs failed to show that the identified areas were TEAs at the time of Plaintiffs' investments or that the NCE was doing business in a TEA at the time of Plaintiffs filing. A

targeted employment area is an area that at the time of the investment is considered rural.[10] 8 U.S.C. § 1153(b)(5)(ii); 8 C.F.R. § 204.6(e). A "rural area" is defined as any area not within a metropolitan statistical area or the outer boundary of any city or town having a population of 20,000 or more. 8 U.S.C. § 1153(b)(5)(iii); 8 C.F.R. § 204.6(e). As USCIS pointed out in the Notice of Intent to Deny, the Bureau of Labor Statistics listed all of the original project locations as being within a metropolitan area. In addition, USCIS noted that the Monarch Gold Project is also located in an area that fails to qualify as rural for the additional reason that it has a population of over 20,000 according to the 2010 census.

Plaintiffs do not dispute that the four projects Quartzburg was involved in at the time of the filing of the petition are not located in a TEA, but instead appear to rely on three newly-offered JCEs to show Quartzburg is now "principally" operating in a targeted employment area. These new projects were not included anywhere in Plaintiffs' original submissions, either as one of the three "definite" investment projects, the one project awaiting "due diligence review," or one of the nine "additional projects" identified possible projects. As such, it is clear that at the time of the filing, Quartzburg was not principally operating in a TEA as none of the four identified projects were within a TEA. Plaintiffs later submission of a new business plan, which completely changed the primarily areas of investment (by replacing the two largest projects with previously undisclosed projects in new areas) represent a material change in the circumstances of the petition and therefore cannot be a basis for approval. 8 C.F.R. § 103.2(b)(1). Plaintiffs have the burden of affirmatively demonstrating program eligibility, including the burden of proving they are exempt from the required $1,000,000.00. Plaintiffs cannot (and did not) satisfy this

[10] An area may also qualify as a TEA if it has experienced unemployment of at least 150% of the national average rate, but that is not the basis for Plaintiffs' claim that their investment is in a TEA. *See* 8 C.F.R. § 204.6(e).

burden by simply proposing in their petition submissions that Quartzburg will invest in mining projects to be named at a later date that may or may not be in a TEA. Indeed, the fact that Plaintiffs admit that even under their revised plan only 57% of their estimated job creation will occur in a TEA, demonstrates why their business plans (old and new) fail to carry their burden. ECF 61 at 40. If all of the proposed projects remain subject to ongoing due diligence review and not all of the proposed projects are in TEAs, Plaintiffs cannot show with certainty that the Quartzburg is at any given time (now or in the future) "principally" invested in a targeted employment area. Ultimately, here, Plaintiffs substantially altered their business plan after filing, and as a result, were required by regulation to submit a new Form I-526 to reflect their eligibility at the time of filing (either by investing exclusively in TEAs or contributing the required $1,000,00.00 capital). Plaintiffs did not comply with this regulatory requirement and, therefore, USCIS did not act arbitrarily or capriciously in denying Plaintiffs' petitions for failure to show that they met their burden of demonstrating entitlement to the benefit sought.

B. Plaintiffs have not satisfied their burden of proving they are likely to create the required number of new jobs.

A petitioner must establish that the investment of the required amount of capital in the new commercial enterprise will create full-time positions for at least ten qualifying employees within two years. *See* also 8 U.S.C. § 1153(b)(5)(A)(ii); 8 C.F.R. § 204.6(j)(4)(i). Every individual investor (here, 160 in total) must also demonstrate that their investment will create at least ten full-time jobs for qualifying employees. The statute requires employment creation for a "United States citizen, a lawfully admitted permanent resident or other immigrant lawfully authorized to be employed in the United States," which does not include the alien investor, his dependents, or any other nonimmigrant alien. 8 U.S.C. § 1153(b)(5)(A)(ii); 8 C.F.R. § 204.6(e). To satisfy this burden, the alien must provide USCIS with either tax records, Forms I-9, or other

similar documents for workers already hired, or a comprehensive business plan indicating that the business will hire at least ten qualifying employees within the next two years. 8 C.F.R. §§ 204.6(j)(4)(i)(A), (B). For regional centers, a petition may rely on reasonable methodologies to show indirect job creation. 8 C.F.R. § 204.6(j)(4)(iii). Any business plan that the alien uses to show a projection of likely job creation under 8 C.F.R. § 204.6(j)(4)(i)(B) must be sufficiently detailed to permit USCIS to draw reasonable inferences about the business's job-creation potential. *See Matter of Ho*, 22 I. & N. Dec. 206, 213 (Assoc. Comm. 1998); see also 8 C.F.R. § 204.6(m)(3). USCIS has specific requirements for the business plan:

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

Id. Plaintiffs have failed to meet their burden for two reasons.

First, Plaintiffs' now base their claimed job creation on a completely different business plan than the one submitted with the petition. As noted above, Plaintiffs new business plan bears little resemblance to the plan originally submitted with Plaintiffs' petitions. Plaintiffs' selection of new JCEs and submission of a completely different business plan (which relied on different projects to satisfy the job creation requirement) constitutes a material change in circumstances. 8

C.F.R. § 103.2(b)(1). The regulations do not permit Plaintiffs to materially change circumstances after the filing of the petition. Accordingly, USCIS denial was reasonable on this basis.

Second, even if (contrary to the regulations) Plaintiffs were given the benefit of their post-filing change in JCEs and business plan, Plaintiffs cannot satisfy their burden of showing they will create the requisite number of jobs because they have acknowledge (and the past demonstrates) that their business plan is wholly speculative because the projects themselves are subject to change. In response to the NOID, Plaintiffs acknowledged that its proposed investment projects—even those previously identified as "definite" projects that had been fully approved by the Partnership—were subject to change based on previously undisclosed additional due diligence required before the project is deemed viable. Plaintiffs then offered a revised list of seven projects as job creating entities and a revised business plan. Of the seven projects on the new list, two were the smaller projects included in submissions with the initial petitions (but not analyzed as part of the job creation statistics based on them making little difference in the total job creation estimates). JD3 at 18 ("[T]here was no need to add in data from other [two] smaller projects, since it would only produce a highly similar result."). The remaining five were completely new projects that were not previously disclosed anywhere in the original submission. Even these seven projects, however, have not been "finally identified" and are apparently still subject to change based on further due diligence. *See, e.g.*, JD3 at 2459-78 (updating the JCE list in interfiling). Therefore, if Plaintiffs' first submission is any indication—in which three of the four projects were abandoned and none of the additional nine "additional" projects were included in subsequent lists—there is little reason to believe that the newly-proposed list of projects is likely to fare any better. As such, it was not arbitrary and capricious for USCIS to conclude that a

business plan analyzing a tentative list of possible projects is insufficient to show likelihood that 160 investors are likely to show their investments are each likely to create ten new jobs.

II. USCIS reasonably denied the petitions on the ground that Plaintiffs' low-risk investments do not satisfy the purpose of the EB-5 program.

USCIS properly denied the petitions on the basis that Plaintiffs' investment was not a true equity investment, with genuine growth potential, but structured in such a way made it more like a prohibited debt arrangement. USCIS's legal inquiry into the investment structure was not arbitrary or capricious, but is consistent with its obligations under *Matter of Izummi*, 22 I. & N. Dec. 169 (AAU 1998), to ensure that the statutory purpose of the program is satisfied by the particular investment on which an individual petitioner relies as a basis for its request for admission into the United States through the EB-5 program. USCIS's factual conclusion, that Plaintiffs' investment is more debt-like than equity-like, is likewise consistent with the record. Accordingly, Plaintiffs' challenge to the agency's denial on this basis is simply an improper attempt to second-guess the agency's considered judgment regarding the purpose of the EB-5 program and USCIS's broad discretion to administer the program it in a manner consistent with Congress's goals. Therefore, the denials may be sustained on this basis.

A. USCIS was not arbitrary in its reading of *Matter of Izummi* and 8 C.F.R. 204.6(e) as requiring an inquiry into to the investment structure to ensure it is not a prohibited debt-arrangement.

USCIS was not arbitrary or capricious in interpreting its precedential decisions to require an inquiry into the investment structure to ensure that it is a true equity investment that satisfies the purpose of the statute. Under the agency's regulations, prospective immigrant investors are required to show that they have invested or are actively in the process of investing the required amount of capital, the latter of which requires an "actual commitment" of the such capital. *See* 8 C.F.R. § 204.6(j)(2). In addition, the regulations expressly disqualify any contribution of capital

in exchange for a debt arrangement. *See* 8 C.F.R. § 204.6(e) (definition of "Invest"). Consequently, a contribution of capital will only count as part of the prospective immigrant's statutorily required capital contribution amount if it is a true equity investment. As a result, any contribution of capital in exchange for a debt arrangement fails to satisfy the requirement that the prospective immigrant invest the required amount of capital in the new commercial enterprise.

In *Matter of Izummi*, 22 I. & N. Dec. at 186, the Administrative Appeals Unit noted the important purpose behind the statute and interpreted the statute to require the agency to conduct an inquiry into terms of the investment to "ascertain the true substance of the transaction." The purpose of this inquiry, according to the AAU, is to ensure that the "investment" is not a loan or other debt arrangement masquerading as an otherwise permissible investment. The AAU noted the following features of a debt-arrangement and discussed why they are inconsistent with the program's statutory purpose:

> To enter into a redemption agreement at the time of making an "investment" evidences a preconceived intent to unburden oneself of the investment as soon as possible after unconditional permanent resident status is attained. This is conceptually no different from a situation in which an alien marries a U.S. citizen and states, in writing, that he will divorce her in two years. The focus here is on the green card and not on the business. Despite counsel's repeated claims that the Service's current position is hurting U.S. workers and U.S. businesses, and despite counsel's accusations regarding the Service's allegedly cavalier attitude toward them, one could argue that an alien who enters into a redemption agreement considers the continued success of the U.S. workers and U.S. businesses secondary. His primary concern is obtaining permanent resident status for as little money as possible.
>
> For the alien's money truly to be at risk, the alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one.

Id. at 186.

Plaintiffs arguments regarding *Matter of Izummi* amount to little more than the legally unsupportable claim that USCIS may not deny any petitions on the basis of the reasoning in *Matter of Izummi* unless (1) the facts of the investment are an exact match to the facts in *Matter of Izummi*, or (2) the agency engages in notice and comment rulemaking. Plaintiffs' reasoning reflects a fundamental misunderstanding of the discretion accorded to USCIS and its expertise in managing the EB-5 program and the precedential value of AAU decisions beyond the particular facts of a case. Here, the AAU has elucidated a number of important guideposts for determining what types of investments satisfy Congress's standards for the EB- 5 program. USCIS was well within its authority to apply those concepts beyond the facts presented by *Matter of Izummi*.

Similarly, there is no requirement that USCIS engage in notice and comment rulemaking before being permitted to inquire into the structure of the investment. By conducting such an analysis here, USCIS is not implementing any new procedural rules; it is simply complying with the AAU's binding precedential decision interpreting the term "investment." As such, the denials merely follow an interpretive rule that is not subject to notice and comment rulemaking. *See Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005); *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759-60 (D.C. Cir. 1992) ("[T]he clarification of ambiguous terms . . . is precisely the type of agency action that the 'interpretive rule' exception [to notice and comment rulemaking] was designed to accommodate."). Accordingly, Plaintiffs' challenge, whether to *Matter of Izummi* or USCIS's application of it here, fails both substantively and procedurally.

B. USCIS's conclusion that the investment is more debt-like than equity-like is supported by the record.

USCIS's factual conclusion that the structure of the investment is more debt-like than equity-like is entitled to deference. Here, the agency points to the existence of a "call option" in

the NCE's Limited Partnership Agreement that would allow the NCE to repurchase the investors individual equity in the NCE for $550,000 or its equivalent in gold. Upon exercise of the option, the investor's equity in the NCE would be redeemed for a set price much the same as a debt would be repaid for a set price. In addition to the existence of the option, USCIS looked to language in NCE's offering documents (specifically, the Private Placement Memorandum) that amounted to a promise to exercise the option. For example, the PPM stated that the General Partner of the NCE would "strive to be in a position" to exercise the option by a proposed date, and the PPM stated the General Partner's intention to retain "all cash flow" resulting from repayment of the loans to the NCE "so that such money is available to fund the exercise of the [call option]." Taken together, the existence of the call option and the promises made to exercise it led to USCIS's reasonable determination that the facts support a finding that the investors had, in fact, not made a qualifying contribution of capital, because they appeared to have entered into the partnership intending to contribute capital in exchange for a debt arrangement versus a true equity investment.

Plaintiffs argue that USCIS's application of *Matter of Izummi* to the facts of this case exceeds its authority, and attempts to distinguish the "put" or "sell" option used as an example in the *Izummi* case from the "call" or "buy" option in this case based on who has control over the option. Although *Matter of Izummi*'s discussion of redemption provisions focuses primarily on the example of a sell option, it does not define the outer limits of what constitutes an impermissible debt arrangement. The plain language of the regulations controls: under 8 C.F.R. § 204.6(e), a contribution of capital in exchange for a note, bond, convertible debt, obligation, or "any other debt arrangement between the alien entrepreneur and the new commercial enterprise," does not constitute a qualifying contribution of capital. In *Matter of Izummi*, the AAU illustrates

how an arrangement may appear to be an equity investment in form, but an adjudicator could analyze the actual substance of the arrangement and determine that it is in fact debt-like, rather than equity-like, in nature.[11]

C. Plaintiffs' waiver of the call option was not timely and therefore cannot salvage Plaintiffs' petitions.

USCIS acted within its discretion to decline to consider Plaintiffs' post-filing waiver of the call-option to correct deficiencies in their initial filing or in the structure of the investment. Longstanding agency regulations prohibit petitioners from relying on material changes in their petitions to correct substantive deficiencies. 8 C.F.R. § 103.2(b)(1). There is no basis for finding the agency's decision to apply that regulation here is arbitrary or capricious as the waiver represents a fundamental change in a key term of the investment that serves as the foundation for the petition. As such, USCIS was well within its authority to rely on that petition and decline to figure out whether a post-filing waiver can undo a fundamental structural problem with the investment's framework.

III. USCIS was not arbitrary or capricious in concluding that Plaintiffs failed to demonstrate that they will make the full amount of required capitol available to the job creating entity.

In order for a petitioner to meet the burden of showing that the investment capital has been placed at risk for the purpose of creating growth, the full amount of the required investment "must be made available to the businesses most closely responsible for creating the employment

[11] Plaintiffs cite a number of extra-record materials in their opposition. This Court has already determined that the case should be limited to the administrative record. ECF No. 46. Therefore, the Court should decline to consider any such evidence. Further, the articles cited by Plaintiffs suggesting that other EB-5 investments have very little risk are not relevant here as the agency expressed special concern based on the call option and promotional documents give Plaintiffs reason to believe that they will have a willing buyer of their interest within a set period. *Matter of Izummi* is unequivocal that such an arrangement undermines the purpose of the statute and should be viewed as an impermissible debt arrangement.

upon which the petition is based. *Matter of Izummi*, 22 I. & N. at 179. Plaintiffs have acknowledged that the business plan is to be funded exclusively by the contributions of the 160 foreign investors, each of whom has made the minimum $500,000.00 investment. Despite the fact that there is no other source of capital (besides future profits from the JCEs), USCIS has identified three major expenditures that cannot appropriately be paid from the Plaintiffs' capital contributions because it would prevent those funds from being made available to the projects Plaintiffs now claim will be responsible for job creation. Those expenditures include (1) the start-up expenses for the abandoned Belshazzar Mines project; (2) Loan Fees paid by JCEs to the Regional Center; and (3) Licensing Fees paid by NCE to the Regional Center. Plaintiffs do not dispute that they have not made any profits to date and, therefore, the only presently available funds are the Plaintiffs' investments.

A. Start-up Fees for Belshazzar Mines

Plaintiffs admit that the NCE paid $1,548,657.00 of the EB-5 investors' capital to a JCE that has now been abandoned as not feasible. As a result this money has not gone to an entity that is responsible for job creation (as it will now create no sustainable employment in the area) and is therefore not available for investment in a JCE that Plaintiffs contend will be responsible for job creation. Plaintiffs' objection to this conclusion is not based in any legal disagreement, but based on Plaintiffs' incorrect assertion that the USCIS would prohibit the use of EB-5 capital for mining projects which are "inherently risky" and "involve ever-changing variables." ECF No. 61 at 33. Here, the problem is that Plaintiffs' business plan (and ability to satisfy its job creation obligations) is not tied to engaging in due diligence or in exploration of *possible* mine site, but in the operation of feasible sites. Thus, one appropriate means of using EB-5 capital for mining projects is to finance projects that have already been determined to be feasible, rather than for

mine exploration. Also, there is, of course, no requirement that EB-5 ventures be funded exclusively by EB-5 investors or, if funded exclusively by EB-5 investors, that prohibits the EB-5 investors from investing above the minimum amount to cover expenses that are not going to the JCE. Plaintiffs' complaints about the feasibility of this policy is therefore unpersuasive because *Matter of Izummi*, plainly sets out a solution: if part of the investment is not going to the job creating entity or is not for the purpose of job creation, then that money must come from another source or (if from an alien investor) must be from an investment above the minimum required amount. *Matter of Izummi*, 22 I. & N. at 179 (noting that if investors are covering additional expenses, those expenses "must be paid in addition to the $500,000."). Plaintiffs' failure to maintain or solicit additional non-investor capital to cover ventures that will not result in job creation is therefore a sufficient ground to deny the petitions.

B. Loan and Licensing Fees Payable to the Regional Center

Plaintiffs make several concessions that are alone sufficient to support USCIS's denial on the grounds that Plaintiffs failed to present credible evidence that the loan and licensing fees due to the regional center would be paid from a source other than the investor's funds. First, Plaintiffs do not dispute that these fees must be paid (regardless of whether the JCEs are presently profitable), are presently due for payment, and are accruing late fees. Second, Plaintiffs have not suggested any presently-available alternative source of funds from which to make these payments. Third, Plaintiffs acknowledge that the JCEs are not making any profit at this time and are not projected to turn a profit in the near future. Taken together, these facts are sufficient to support USCIS's reasonable conclusion that the Regional Center's has failed to satisfy its burden of proving that the full amount of required capitol will be made available to the job creating entity (and not used to pay fees to the Regional Center).

Any funds used to pay these fees are decidedly not being paid to the entity responsible for job creation; indeed both fees are being diverted from the job creating entities to the Regional Center, which has no direct involvement in job creation. Plaintiffs do not appear to contest, then but instead rely principally on their guarantee that funds will not be so used. USCIS reasonably determined that Plaintiffs' guarantee was not credible in light of Plaintiffs' above-mentioned concessions, or, at the very least, was insufficient to carry their burden of proof in light of contrary evidence that such fees must be paid from investor funds based on a lack of alternative source. This weighing of the factual evidence in the record is reviewed under the substantial evidence standard, under which an agency's fact-based conclusion must be sustained unless no reasonable factfinder could have reached that conclusion based on the administrative record. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, the evidence in the administrative record that supports the agency's factual conclusion is sufficient if it would justify, in a jury trial, a refusal to take a factual decision away from the jury. *See Ill. Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 66 (1966). The conflicting evidence on this issue is sufficient to raise a reasonable question of fact that would require a determination by a factfinder. The agency's determination of that fact, therefore, should be honored here. *Id*.

Plaintiffs' only other argument is a footnote suggesting that USCIS has misread *Matter of Izummi* in finding that no fees can be financed through the required minimum investment. ECF No. 61 at25-26 n.11. *Matter of Izummi* compels this conclusion and is a reasonable interpretation of the Congress's intent that the full investment be used to promote economic growth in the area of investment. There, the AAU soundly rejected an argument similar to the one advanced by Plaintiffs (that fees attendant to a loan are often financed in other contexts and should be considered part of the investment) here:

> While points and processing fees are often financed, they are considered an amount over and above the original loan amount. To illustrate, when a person intends to obtain a mortgage for $200,000, he can choose to pay the points and fees separately or he can choose to finance them. If he chooses to finance the fees, the principal on his mortgage is no longer just $200,000 but something more. In the investor context, the Service is not prohibiting the payment of Partnership expenses; rather, the Service is finding that if [NCE] wishes to have the limited partners pay these expenses, these expenses must be paid in addition to the $500,000.

Matter of Izummi, 22 I. & N. at 179. The AAU explained the reasoning for its requirement that the entirety of the investment must be made available to the businesses most closely responsible for job creation as being particularly necessary in the context of an investment through a regional center and NCE, which will not be directly responsible for job creation.

> Especially where indirect employment creation is being claimed, and the nexus between the money and the jobs is already tenuous, the Service has an interest in examining, to a degree, the manner in which funds are being applied. . . . The Service does not wish to encourage the creation of layer upon layer of "holding companies" or "parent companies," with each business taking its cut and the ultimate employer seeing very little of the aliens' money.

Id. This worthwhile goal is reasonable and consistent with the purpose of the EB-5 program.

CONCLUSION

For the forgoing reasons, Plaintiffs' motion for summary judgment should be denied and Defendants' cross-motion should be granted.

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CERTIFICATE OF SERVICE

I certify that on April 15, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will deliver a copy to all counsel of record.

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