

**Form I-526, Immigrant Petition by Alien Entrepreneur
Assisted Living, LP; Request for Evidence**

I. Procedural History and Commercial Enterprise Background

Mr. Shuyi He (Petitioner) filed an Immigrant Petition by Alien Entrepreneur (Form I-526), pursuant to section 203(b)(5) of the Immigration and Nationality Act (INA) on September 12, 2016.

The Form I-526 and the evidence presented assert that Petitioner invested \$500,000 into Assisted Living, LP, the new commercial enterprise (NCE), on July 22, 2016. The NCE plans to construct and operate, through AL, LLC d/b/a Assisted Living, LLC, a 190-unit assisted living and memory care facility in the city of Bayside, California. Petitioner asserts that the NCE is principally doing business within a targeted employment area (TEA).

Based upon a review of the initial record of evidence, U.S. Citizenship and Immigration Services (USCIS) concludes that Petitioner has not established eligibility for the benefit sought. To assist Petitioner in addressing the deficiencies in the existing record, USCIS is issuing this Request for Evidence. The deficiencies of the current record are outlined below.

II. Analysis of the Evidence

1. Capital At Risk

Applicable regulations provide that, in order “[t]o show that Petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that Petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that Petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital.” 8 C.F.R. § 204.6(j)(2). For the capital to be “at risk” there must be a risk of loss and a chance for gain.

To demonstrate that Petitioner has placed such capital at risk for the purpose of generating a return, Petitioner must first present evidence that he or she has made a qualifying investment of the minimum required amount of capital. The regulations define “invest” to mean a contribution of capital and state that 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, however, does not constitute a contribution of capital and, thus, does not constitute a qualifying investment. 8 C.F.R. § 204.6(e).

A. Qualifying Contribution of Capital

Moreover, *Matter of Izummi*, in the context of a sell option, held that entering into a redemption agreement is, in effect, entering into a debt arrangement and is prohibited by 8 C.F.R. § 204.6(e). 22 I&N Dec. at 188. “ 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” *Id.* at 186. Moreover, in no event may a petitioner enter into such an agreement prior to the end of the two-year period of conditional residence. *Id.* at 186. An investment assumes that risk exists; thus, the immigrant investor must go into the investment not knowing for sure if he or she will be able to sell his or her interest at all after he or she obtains his or her unconditional permanent resident status, and if he or she is successful in selling his or her interest, the sale price may be disappointingly low or surprisingly high. *Id.* at 186-187. This way, the immigrant investor risks both gain and loss. *Id.* at 187.

The evidence in the record fails to establish that the investor has made a qualifying contribution of the minimum required amount of capital. The existing record contains the following evidence:

- Limited Partnership Agreement
- Promissory Note
- Confidential Private Placement Memorandum
- Purchase Agreement
- Property Valuation Report
- Comprehensive Business Plan

Section 7.11 of the Limited Partnership Agreement (LPA) states “the Partnership will be obligated to pay the General Partner(s) a fee (Partnership Management Fee) for managing the business of the Partnership...” however the amount of this fee is not given. USCIS must be able to review the specific terms and cost of this fee in order to evaluate the overall financial suitability of the project.

The Confidential Private Placement Memorandum also references an Administration Fee under section 12(a) “Escrow of Subscription Funds” but never specifies the amount of the fees or the specific terms.

Further, the Promissory Note does not appear to contain any EB-5 prohibited provisions, however it is not executed by the Limited Partner.

The Purchase Agreement (Exhibit 18) with Development Partners, LLC as “Seller” and the JCE as “Buyer” shows the JCE purchased the project property for \$6 million (pg. 1). This is not an arms-length transaction. Development Partners, LLC is a Limited Partner in the JCE (Exhibit 19, Property Valuation Report, pg. 2) and is the operator of the project along with Development Partners Group, LLC (Comprehensive Business Plan, pg. 9).

While the Purchase Agreement has a sales price of \$6 million, the Project Valuation Report [PVR] by CBRE, a national commercial real estate firm, shows the land was being purchased, in escrow, by Development Partners for \$1.2 million (PVR, pgs. 1 & 2). The PVR values the land at \$2.47 million or \$7.99 per square foot (pgs. 3, vii of the cover letter and pg. 2 of the formal report). The 2012/2013 tax assessed value of the land is \$2.17 million (PVR, pg. 55). Sales prices for comparable land with a similar timeframe to this transaction support the CBRE PVR land value assessment of \$2.47 million (PVR, pg. 59).

The sales price of \$6 million from the Purchase Agreement between Development Partners, LLC and the JCE represents a value of \$19.40 per square foot, which is more than 2 times the value of the most expensive comparable property. A \$6 million sales price also represents nearly 3 times the assessed tax value, and 2.5 times the PVR appraised value by industry experts. It appears that Development Partners, LLC charged the JCE, 5 times what it paid for the land and made a \$4.8 million profit on the sale. This transaction appears to be one in which the partners have entered into a self-dealing contract without evidence that investors have been notified in violation of the EB-5 program.

To establish that Petitioner has made a qualifying contribution of capital, additional evidence is requested. Petitioner must submit, as applicable, the following:

- An explanation of why the provisions referenced above do not constitute a prohibited redemption agreement; Updated and/or revised organizational, transactional, and/or offering documents;

- Fully executed Promissory Note; or
- Any other evidence deemed appropriate by Petitioner to overcome the deficiencies noted above.

If Petitioner submits updated or revised documents, please note that “[a] petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after Petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [USCIS] requirements.” *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm’r 1998); *see also* 8 C.F.R. § 103.2(b)(1).

B. Guaranteed Return of Capital

Matter of Izummi held that guaranteed returns to an investor do not qualify for the purpose of being at risk under applicable regulations. 22 I&N Dec. at 180-184. Thus, if an immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then the amount of such guaranteed return is not at risk. Similarly, if the investor is individually guaranteed the right to eventual ownership or use of a particular asset in consideration of the investor’s contribution of capital into a new commercial enterprise, such as a home (or other real estate interest) or item of personal property, the expected present value of the guaranteed ownership or use of such asset does not count toward the total amount of the investor’s capital contribution in determining how much money was truly placed at risk.

The evidence in the record fails to establish that the investor has placed the required minimum amount of capital at risk for the purpose of generating a return in accordance with applicable law. The existing record contains the following evidence:

- Limited Partnership Agreement
- Management and Consulting Agreement

Section 8.1(c) of the Limited Partnership Agreement states “Upon receipt of the original capital contribution of \$500,000 to a Limited Partner, an option to purchase the interest for fair market value will vest. The option shall remain open for a period of one year from the date the original capital contribution was returned.” As currently written, it appears to allow a Limited Partner the ability to repurchase

their interest in the project after the expiration of the Promissory Note and have their original capital contribution returned. Please clarify the meaning and effect of this provision as it is not clear if this provision constitutes a redemption/guarantee agreement which is prohibited by the EB-5 program.

The Management Agreement (Exhibit 20) requires the JCE to pay Senior Home Management Inc. (the future Manager of Project Operations) a management fee of 7% of gross revenues each month, with a minimum payment of \$8,000 per month (Section 4). However, the Income Statement proforma does not accurately reflect this payment (see table showing discrepancy below).

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Gross Revenues	\$2,204,000	\$6,830,000	\$10,392,000	\$13,330,000	\$13,729,000	\$14,141,000
Management Fee in Income Statement	\$ 99,000	\$ 271,000	\$393,000	\$411,000	\$423,000	\$435,000
Management Fee at 7% of Gross Revenues	\$154,280	\$478,100	\$727,440	\$ 933,100	\$961,030	\$989,870
Discrepancy	\$(55,280)	\$(207,100)	\$(334,440)	\$(522,100)	\$(538,030)	\$(554,870)

Please submit an updated Income Statement, and other pro-formas, that accurately reflect the Management Fee.

To establish that Petitioner does not have a guaranteed return of capital that erodes Petitioner's capital contribution below the minimum required amount, additional evidence is requested. Petitioner must submit, as applicable, the following:

- An explanation of why the provisions referenced above do not constitute a prohibited guaranteed return;
- Updated and/or revised organizational, transactional, and/or offering documents; or
- Any other evidence deemed appropriate by Petitioner to overcome the deficiencies noted above.

If Petitioner submits updated or revised documents, please note that “[a] petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after Petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [USCIS] requirements.” *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm’r 1998); *see also* 8 C.F.R. § 103.2(b)(1).

2. Invested Capital was Obtained Through Lawful Means

Any assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital. 8 C.F.R. § 204.6(e). Petitioner must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. at 210.

To show that Petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of Petitioner;

(iii) Evidence identifying any other source(s) of capital; or

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

8 CFR 204.6(j)(3).

The evidence in the record fails to establish that the capital which has been invested by Petitioner or which Petitioner is actively in the process of investing is capital that

has been obtained through lawful means. The existing record contains the following evidence:

- Investment Flow Chart [Exhibit 4]
- Source of Funds documents [Exhibit 5 (a)-(v)]
- Transfer documents [Exhibit 5 (a)-(r)]
- Bank Card Statement [Exhibit 7]

Petitioner states the source of his investment funds is derived from a loan using property as collateral. While petitioner states he has more than twenty-three years of experience and has operated and managed four companies, his submission of registration cancellations does not evidence the amount of income received over the years or his accumulated savings in order to make his capital investment.

USCIS must be able to determine that it is more likely than not that the capital which has been invested by Petitioner or which Petitioner is actively in the process of investing is capital obtained through lawful means. Additionally, USCIS must be able to track the lawful path of those investment funds. Accordingly, USCIS requests additional evidence to establish the lawful source of the EB-5 investment.

To determine the lawful source of Petitioner's investment funds, additional evidence is requested. Petitioner must submit, as applicable, the following:

- Evidence identifying any other source(s) of capital;
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by Petitioner's own assets, other than those of the NCE, and for which Petitioner is personally and primarily liable;
- Evidence of income such as earnings statements or official correspondence from current or prior employer(s) stating when Petitioner worked for the company and how much income Petitioner received during employment;
- Gift instrument(s) documenting gifts to Petitioner;
- Evidence of payment of individual income tax, such as an individual income tax report or payment certificate, on the following:
 - Wages and salaries;

- Interest, dividends and bonuses;
 - Any incidental income; and/or
 - Other taxable income determined by the relevant financial department.
- Bank statements evidencing an accumulation of funds; or
 - Any other evidence deemed appropriate by Petitioner to overcome the deficiencies noted above.

3. Creation of at Least 10 Full-time Positions for Qualifying Employees

As required by 8 C.F.R. § 204.6(j)(4)(i), the petition must establish that the investment of the required amount of capital in a new commercial enterprise will create full-time positions for at least ten qualifying employees within 2 years. *See also* 8 U.S.C. § 1153(b)(5)(A)(ii). For purposes of the Form I-526 adjudication and the job creation requirements, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526.

The regulation requires initial evidence to show that a new commercial enterprise will create full-time positions for at least ten qualifying employees within two years. The petition must be accompanied by:

- Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for 10 qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
- A copy of a comprehensive business plan showing that, due to the nature and projected size of the NCE, the need for at least 10 qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. §§ 204.6(j), (j)(4)(i).

For a new commercial enterprise that is not associated with a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted. This means that the new commercial enterprise (or its wholly-owned subsidiaries) must itself be the employer of the qualifying employees who fill the new full-time positions. 8 C.F.R. § 204.6(e).

The evidence in the record fails to establish that the NCE will create at least 10 full-time positions for qualifying employees. The existing record contains the following evidence:

- Business Plan
- Subscription Escrow Agreement
- Confidential PPM
- Construction Contract
- Purchase Agreement

To establish that the NCE will create at least 10 full-time positions for qualifying employees, additional evidence is requested. Petitioner must submit, as applicable, the following:

- Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for 10 qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
- A copy of a comprehensive business plan showing that, due to the nature and projected size of the NCE, the need for at least 10 qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

Comprehensive Business Plan

Matter of Ho held that a “comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives.” 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, the decision states:

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 therefore. Most importantly, the business plan must be credible. *Id.*

Upon reviewing the business plan, USCIS finds that it is not *Matter of Ho* compliant because it contains a number of deficiencies that affect its credibility. The business plan was found to be deficient in the following areas:

The Comprehensive Business Plan (CBP) is inconsistent with other documents submitted regarding the cost of construction and purchase of property. The CBP Source and Use of Funds shows a "New Construction" cost of \$21.91 million, however the General Contractor's construction contract shows a total price of \$28.96 million (Exhibit 20, pg. 1, Section 2). This represents a discrepancy of approximately \$7 million. Additionally, the CBP Source and Use of Funds shows a "Real Estate" cost of \$8 million, but the Purchase Agreement for the Project property shows a sales price of \$6 million (Exhibit 18, pg. 1). This represents a discrepancy of \$2 million.

The CBP Source and Use of Funds (pg. 11) cites a \$27.75 million commercial/construction bank loan, however petitioner has not submitted any documentation showing the NCE's ability to obtain this loan or any of its terms.

A review of the Confidential Private Placement Memorandum reveals references to an "Escrow Agreement" (pg. 8 "Subscription Payments and Escrow Arrangement" section) between the Escrow Agent and the Partnership; however this agreement has not been submitted with petitioner's filing. Submission of this agreement is requested as it may contain information material to the filing.

USCIS must be able to determine that it is more likely than not that the business plan is comprehensive and credible. Accordingly, USCIS requests additional evidence to establish the business plan is both comprehensive and credible. Such evidence may include, but is not limited to:

Market Analysis

- Competing Businesses: Provide the names of competing businesses and their relative strengths and weaknesses.
- Products and Pricing Structure: Provide a comparison of the competition's products and pricing structures.
- Target: Provide a description of the target market/prospective customers of the new commercial enterprise.

Permits and Licenses

- Provide evidence that the appropriate permits and licenses have been obtained in order to begin work on the project.
 - Building projects – provide evidence that all necessary building permits have been obtained including any Environmental Protection Agency permits necessary to immediately begin construction.

(more examples: Water, sewage, wastewater, and Health Department permits.)
- Provide evidence of agreements entered into with other companies to provide marketing, goods, or services for the job creating entity.

NOTE: If providing the permits would require the submission of scores, hundreds, or thousands of pages of documents, then just provide a letter from the appropriate city, county, state, or federal agency that confirms the permits have been issued.

Contracts

- Supply: Provide evidence of any contracts executed for the supply of materials or services.

- Distribution: Provide evidence of any contracts for the distribution of products or services.

Marketing and Strategy of the Business

- Pricing: Provide additional discussion of the pricing strategy for the products to be sold by the proposed project.
- Advertising: Provide an explanation of the new commercial enterprise's advertising strategy.
- Servicing: Explain the new commercial enterprise's servicing strategy.

Business Organization

- Location: Indicate the exact location of the job creating entity. Evidence to establish the location of the job creating enterprise may include but is not limited to: corporate documents, leases, power and water bills, etc.
- Structure: Describe the new commercial enterprise's business organizational structure.
- Personnel's Experience: Describe the new commercial enterprise's personnel's experience.

Staffing

- Requirements: Explain the job creating business's staffing requirements.
- Timetable: Provide a timetable for the hiring of the job creating entity's staff.
- Descriptions: Provide job descriptions for all positions with the job creating entity. Be sure to indicate the management structure of the job creating enterprise.

Projections

- Total Project Cost: List the total costs for the project. Indicate the following:
 - Projected EB-5 Funds
 - Projected Non-EB-5 funds and their source if applicable (e.g., developers, municipal bonds, loans, etc.)
 - Secure commitment from Non-EB-5 investors if applicable (contracts, bonds, loans, letter of confirmation from the lender, other sources, etc.)
- Expenditures: Provide clear and verifiable projections for expenditures to be applied to the new job creating entity.
- Infusion of EB-5 Capital: Indicate the following:
 - Provide actual dates or a detailed explanation of the infusion of EB5 capital into the job creating enterprise in relation to expected job creation within 2 years of the start of the project.
 - Indicate if there are EB5 groups assigned to phases of the project.
 - Indicate if any of these funds are used as a bridge loan.
 - If yes, indicate the total number of employees prior to the infusion of the EB-5 funds.
- Goals: Provide a timetable of actual dates or projected milestones and the ultimate completion of the project for implementation of project goals, (e.g., acquisition of permits, buildings, etc.)
- Sales: Provide sales projections for the new job creating enterprise.
 - Submit details regarding the sources and /or derivation of the input data being used and the methodological steps taken so that USCIS can be confident that they are derived from reliable sources using reasonable assumptions.
- Costs: Provide cost projections for the new job creating enterprise:

- Include costs of permits, reports and design fees, developer fees, finance fees, construction loan interest fees, and any other costs or fees for each project;
- Indicate the source of money for these fees.
- Income: Provide income projections for the new job creating enterprise.

III. Conclusion

USCIS has determined that the record does not establish eligibility for the benefit sought. Accordingly, USCIS has requested evidence to address the issues outlined above. Petitioner is not precluded, however, from submitting evidence in addition to the evidence requested by USCIS that Petitioner deems relevant to address such issues. Petitioner must prove by a preponderance of the evidence – in other words, that it is more likely than not – that Petitioner is fully qualified for the benefit sought.

NOTES:

Any document submitted to USCIS containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Submit clear and legible copies of all requested evidence. If clear and legible copies are not possible, submit the original documents. These originals will be returned, if requested.

Please provide an index of any submitted evidence and include corresponding tabs for each section of evidence.