U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-L-

DATE: MAY 11, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

The Chief, Immigrant Investor Program Office (IPO), denied the petition. The Chief concluded that the Petitioner did not show he made an at-risk investment.

The matter is now before us on appeal. In his appeal, the Petitioner submits a brief and states that the Chief erred in finding he did not make an at-risk investment of cash.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. This job creation should generally occur within two years of the foreign national's admission to the United States as a Conditional Permanent Resident. Specifically, section 203(b)(5)(A) of the Act, as amended, provides that a foreign national may seek to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and 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 (other than the immigrant and the immigrant's spouse, sons, or daughters).

The implementing regulation at 8 C.F.R. § 204.6(e) defines "capital" and "investment" and states, in pertinent part:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.
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> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

II. ANALYSIS

The petition is based on an investment in the new commercial enterprise (NCE). According to the Petitioner's initial filing, the NCE intends to assemble up to $90,000,000 from 180 foreign national investors, each of whom, including the Petitioner, would invest $500,000, and become a limited partner holding a 0.444 percent interest in the NCE. the regional center affiliated with the project, is the NCE's general partner, holding a 20 percent interest in the NCE. The NCE plans to lend the entire investment amount to a wholly-owned subsidiary of to construct two power-generating facilities: in California, and in Nevada. The Chief concluded that funds the Petitioner wired to the NCE did not constitute "capital" under 8 C.F.R. § 204.6(e), because the loan proceeds, which were the source of the Petitioner's investment, qualified as "indebtedness" that was not secured or sufficiently secured by the Petitioner's assets. The Chief further noted that the Petitioner's contribution to the NCE did not meet the requirements for an investment of a "promissory note" under *Matter of Izummi*, 22 I&N Dec. 169, 192-94 (Assoc. Comm'r 1998).

On appeal, the Petitioner indicates that he invested cash, not indebtedness, in the NCE. In addition, he maintains that even if the loan proceeds he wired to the NCE constitute indebtedness, he has

sufficiently secured the funds with his assets, namely, his interest in the NCE's future distribution of profits, and a joint account he shares with [redacted] is the manager of the Petitioner's lender, [redacted] and the president and a managing member of the NCE's general partner, [redacted]

The record supports the Chief's findings that the Petitioner has not demonstrated his eligibility. The Petitioner borrowed $545,000 from [redacted] a USCIS-designated regional center that [redacted] manages. In his initial filing, the Petitioner affirmed that [redacted] is "an affiliate of [redacted] the regional center through which the Petitioner is investing. According to the "Security Agreement and Assignment of Cash Flow Distribution," the Petitioner's loan is secured with: (1) his interests in "any distributions from [the NCE], if any"; and (2) a savings account that he and [redacted] jointly own, which had a balance of $207.18 on June 30, 2014.[2] The Petitioner has not established that the funds he wired to the NCE, which derived from the referenced loan and constitute "indebtedness," meet the definition of capital under 8 C.F.R. § 204.5(e). For these reasons, we will dismiss the appeal.

A. USCIS Interpretation of "Indebtedness"

On appeal, the Petitioner maintains that USCIS announced its "new" interpretation of "indebtedness" in April 2015, and retroactively applied the "new rule" to this case. The Petitioner has not pointed to any evidence to show that the Chief's decision regarding what qualifies as an investment of indebtedness is a "new" interpretation of the regulation.

During an April 22, 2015, EB-5 Telephonic Stakeholder Engagement, IPO's Deputy Chief explained the requirements a petitioner must meet to establish that proceeds from a third-party loan qualify as his or her capital. *See* https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_IPO_Deputy_Chief_Julia_Harrisons_Remarks.pdf, accessed on May 3, 2016, and incorporated into the record of proceedings. This engagement, including the IPO Deputy Chief's remarks, aimed to assist stakeholders in understanding the relevant statutory and regulatory requirements of eligibility for the immigrant investor classification. Nothing in these remarks suggests this approach was new.

Significantly, a federal court decision on a criminal matter, dated 2001, addressed investments of proceeds from third-party loans affiliated with the NCE, and found that such arrangements constituted contributions of indebtedness. In *United States v. O'Connor*, the court noted that if a petitioner invested loan proceeds, he or she must show "that the debt is secured by the assets of the [petitioner], not of the commercial enterprise in which he or she is investing," and "that [he or she] is personally and primarily liable for the debt." 158 F. Supp. 2d 697, 704-05 (E.D. Va. 2001) (citing 8 C.F.R. § 204.6(e)). Like the matter before us, the *O'Connor* case involved third-party loans from a company that was related to the NCE, and the investors' personal assets did not secure the loans. *See id.* at 705-06. In short, the Petitioner has not established that the Chief retroactively applied a

[1] Since 2013, the Petitioner has been working as [redacted] senior financial advisor.
[2] The record includes one bank statement for this joint account, which covered March 31, 2014, through June 30, 2014.

"new rule" in this case. In addition, as discussed below, the Petitioner has not shown he has made an at-risk investment.

B. Capital Placed at Risk

As quoted above, the regulatory definitions of "capital" and "invest" preclude an investment of unsecured indebtedness. Moreover, the investment of cash obtained through a third-party loan, as is the case here, is not simply an investment of cash that needs no further examination. Instructive on this question is *Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998). On appeal, the Petitioner focuses on the discussion in that decision about a loan to the NCE. The decision, however, also addresses a bank loan with the NCE as the borrower. *Soffici* first noted that the NCE, a corporation, was a separate legal entity from the Petitioner, but then states:

> Even if it were assumed, arguendo, that the petitioner and [the new commercial enterprise] were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital."

Id. Thus, the precedent exists for examining third-party loans as contributions of indebtedness, not as cash. Furthermore, the Act and relevant regulation do not support the position that an investment of proceeds of a third-party loan in a new commercial enterprise constitutes a contribution of cash, rather than indebtedness. Specifically, to classify an investment of loan proceeds as a contribution of cash would permit third-party loans that are secured by the assets of the NCE. The regulation and precedent decisions, however, specifically preclude such financing arrangement.

In addition, the definition of indebtedness is not limited to a petitioner's promises to pay a new commercial enterprise. The regulatory definition of "capital" precludes any indebtedness secured in whole or in part by the assets of the new commercial enterprise. As the new commercial enterprise would be unlikely to accept the assets it already owns as security for a promise to pay itself, the definition must include third-party loans as indebtedness. Therefore, the requirements for promissory notes set forth in *Izummi*, 22 I&N Dec. at 193, and *Matter of Hsiung*, 22 I&N Dec. 201, 203-04 (Assoc. Comm'r 1998), must be met.

In this case, as the Petitioner has wired proceeds from a third-party loan to the NCE, he has invested indebtedness, not cash. The Petitioner has not demonstrated that the indebtedness is sufficiently secured by his assets. As such, the indebtedness does not constitute capital under 8 C.F.R. § 204.6(e). It is difficult to see how the Petitioner has contributed capital by placing any assets of his own at risk in this case in particular, where the lender is affiliated with the NCE, is itself a USCIS-designated regional center, and the loan is secured by the Petitioner's interest in future distributions of profit.[3]

[3] The facts of this case also call into question the source of the funds loaned to the Petitioner. While we do not allege that the NCE's general partner is engaged in the types of activities discussed in *O'Connor*, 158 F. Supp. 2d at 704-06, it

C. Security

The record shows that on May 8, 2014, the Petitioner wired $545,000 to the NCE. Pages 6 and 7 of the Limited Partnership Agreement indicated that the Petitioner's $545,000 wire consisted of a $500,000 initial capital contribution to the NCE, and a $45,000 syndicated fee payable to the NCE's general partner. According to the Security Agreement, the loan's collateral includes his share of the NCE's potential distributions and a savings account he jointly owns with The agreement further provides: "Lender cannot look to any assets of Debtor as security for the payment of the amounts due under the Note" other than the items mentioned above.

While the Petitioner may have a "cognizable present property interest in any future distributions of the NCE," as he states on appeal, he has not demonstrated that this interest constitutes sufficient risk. As the Chief noted, the Petitioner provided in his response to the notice of intent to deny that "there is no 'right' in any limited partner to any distribution of profit" and that he "has no interest in any distribution unless and until such time as a distribution is actually declared and made payable to [him]." In other words, while the Petitioner may be entitled to a potential distribution of the NCE's profits, this unspecific amount does not constitute his assets, until actual distribution. On appeal, the Petitioner acknowledges that "unless and until such time as a distribution is actually declared and made payable to [him, his] proportional share of the distributable assets does not belong to him." Accordingly, in this case, the Petitioner has not shown that unrealized, unspecific future profits constitute his assets, such that they could be used to secure a third-party loan.

Moreover, even assuming that unrealized future profits constitute the Petitioner's assets, the Petitioner has not shown that the NCE's potential earnings are sufficient to secure a $545,000 loan. According to page 8 of the NCE's business plan, the NCE "is expected to – but not guaranteed – to earn approximately 1% annual return on its investment." If the same rate of return applies to the $500,000 the Petitioner wired to the NCE as a capital contribution, it would mean that the Petitioner will earn approximately $5,000 annually. The Petitioner has not explained how this annual rate of return of one percent is sufficient to secure a $545,000 loan.

Furthermore, the Petitioner has not demonstrated that the funds in the joint account he shares with adequately secure the $545,000 loan he received from The Petitioner submitted one bank document for the joint account, which covered transactions from March 31, 2014, through June 30, 2014. The bank record showed that the $545,000 loan proceeds were first deposited into the account, then transferred out to the NCE a few days later. The account had an ending balance of $207.18. The Petitioner has not established that $207.18 sufficiently secures the $545,000 loan. In addition, as this account is a joint one, either the Petitioner or could withdraw funds, thus, depleting the account. As discussed in *Izummi*, "funds in bank accounts can easily be dissipated." 22 I&N Dec. at 192. As the joint account is not an escrow account or trust account in favor of the NCE, there is no guarantee that the funds in the account would remain during

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remains that the NCE has not explained where the entity related to the regional center, itself a regional center that should be promoting economic growth through its own projects, acquired the funds.

the duration of the loan. *See id.* On appeal, the Petitioner maintains in a footnote that the joint account would "be created for the benefit of the lender for the purpose of facilitating repayment of the loan." The record does not support this statement. In the same footnote, the Petitioner acknowledges that the joint account "is owned solely by [him] and " not for the benefit of the lender.

Finally, in his initial filing, the Petitioner maintained that he "anticipated [that he] will repay the [$545,000] loan with profit or other distributions he may receive as a limited partner of [the NCE], as well as with other employment income and personal assets." How the Petitioner intends to repay a third-party loan is not relevant to whether the loan is secured with his assets. As discussed, to demonstrate that the funds the Petitioner wired to the NCE qualify as his capital investment in the NCE, the Petitioner must establish that his assets have secured the $545,000 loan, which the Petitioner has not done.

D. Summary

For the reasons discussed above, the Petitioner's contribution of loan proceeds is an investment of "indebtedness," not cash. Pursuant to 8 C.F.R. § 204.6(e), the loan proceeds must be secured by the Petitioner's assets, and are subject to the evidentiary requirements described in *Hsiung*, 22 I&N Dec. at 203-04 and the regulation at 8 C.F.R. § 204.6(j)(2)(v). The Petitioner's assets have not secured or sufficiently secured the $545,000 loan he obtained from Without adequately securing the loan with his own assets, the Petitioner has not shown that he has placed a sufficient amount of his capital at risk.[4] Rather, he has shifted his risk to his lender. Accordingly, the Petitioner has not established that the proceeds derived from the loan qualify as his capital investment in the NCE.

III. CONCLUSION

The Petitioner has not demonstrated by a preponderance of the evidence that he is eligible for the immigrant investor classification. He has not submitted sufficient material establishing that he has placed the requisite amount of capital at risk for the purpose of generating a return, or that he meets the employment creation requirements. The Petitioner, therefore, has not shown his eligibility pursuant to section 203(b)(5) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. The burden is on the Petitioner to show eligibility for the

[4] On appeal, the Petitioner cites the U.S. State Department Foreign Affairs Manual, indicating that the State Department accepts a nonimmigrant treaty investor's investment of unsecured loan proceeds as capital that has been placed at risk. The petitioner, however, has offered no authority showing that the nonimmigrant treaty investor classification, under 8 C.F.R. 214.2(e)(12), is relevant in our adjudication of a petition for immigrant investor classification under 8 C.F.R. § 204.6.

immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-L-*, ID# 16376 (AAO May 11, 2016)