MONEY MAKES THE EB-5 WORLD GO ROUND!

By Joseph P. Whalen (Thursday, October 27, 2016)

The earliest substantive[1] I-526 AAO Decision posted is dated January 18, 2005,[2] and the most recent, as of this writing, is dated September 20, 2016.[3] Both decisions are Appeal Dismissals. The first decision dealt with an immigrant petition *Revocation* initiated during the I-485 adjustment of status adjudication, a most unfortunate situation. The underlying reason for revocation concerned a failure to demonstrate a *qualifying investment* of lawfully obtained funds. In the most recent case, the petitioner did not show that he invested, or was actively in the process of investing, his own capital and, thus, a *qualifying investment*. There was more than a decade between these decisions but they both address the real estate which is the source of the alien's money, albeit, from slightly different angles.

In the 2005 decision, AAO found that the petitioner had not overcome the Director's[4] concern whether the petitioner's $500,000, was a *qualifying investment*. Initially, the petitioner submitted no evidence of the lawful source of his funds. In the notice of intent to revoke, the director concluded that the record did not establish *how much* the petitioner actually *received from the sale of his house*-after taxes. The tax returns submitted in rebuttal reflecting the petitioner's income **after** the date of investment could not, and did not, demonstrate the lawful source of the funds invested before then. The Director thus concluded, that even *after rebuttal* the petitioner had still not demonstrated how much income the sale of his house had generated after taxes, *or* that he had legitimate business interests back in Ireland to make up any difference.

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1 There are two summary dismissals and two untimely rejects dated earlier.
2 JAN182005_01B7203.pdf
3 *Matter of V-S-*, ID# 18086 (AAO Sept. 20, 2016) SEP202016_01B7203.pdf
4 In 2005, EB-5 visa petitions were adjudicated at either the Texas or California Service Center, this one was denied at the California Service Center.

In the 2016 decision, the Chief of the Immigrant Investor Program Office (IPO) denied the petition, concluding that the petitioner had not shown that he had invested, or was actively in the process of investing, his own capital in the new commercial enterprise (NCE). AAO agreed that the petitioner did not document his *ownership of the real estate property* he used to secure a $500,000 loan, the proceeds of which he stated that he invested in the NCE. Even though this case involved the proceeds of a loan rather than from a sale, both cases involved real estate which the petitioner could not, or at least did not, demonstrate was his own. A failure to prove ownership of property used as collateral for a loan, or as the object of a sale, is a failure to prove that the funds invested were the petitioner's own lawful funds, and thereby a *qualifying investment*. *See Matter of Soffici*, 22 I&N Dec.158 (AAO 1998) (*A petitioner must present clear documentary evidence of the source of the funds that he invests. He must show that the funds are his own and that they were obtained through lawful means*). Even when it has been established that the property is owned by the petitioner, it is also necessary to demonstrate how that property was acquired by the petitioner.

Matter of Hsiung, 22 I&N Dec. 201 (AAO 1998), held, *in pertinent part*:

> (1) A promissory note secured by assets owned by a petitioner can constitute capital under 8 C.F.R. § 204.6(e) if: the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; and the assets are fully amenable to seizure by a U.S. note holder.
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> (2) When determining the fair market value of a promissory note being used as capital under 8 C.F.R. § 204.6(e), factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered.
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Matter of Ho, 22 I&N Dec.206 (AAO 1998), held, *in pertinent part*:

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> (2) The petitioner must establish that he has placed his own capital at risk, that is to say, he must show that he was the legal owner of the invested capital. Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital.
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> (3) The petitioner must also establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement. ...

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Although *Hsiung* and *Ho* (1998) were addressing promissory notes, AAO has since continually applied the same principles to loans and loan proceeds used as EB-5 investments. In addition, by requiring proof of ownership of real estate that was sold or mortgaged to raise funds for the investment, as well as proof of how that property was acquired by the petitioner, Congressional intent to exclude unlawful funds is served. These "*hypertechnical*" requirements serve a valid government interest, specifically, by confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003) (*affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns*).

In that 2005 case, counsel argued that the regulation requiring that a petitioner affirmatively demonstrate the lawful source of the invested funds exceeded the requirements of the EB-5 statute. AAO easily shot that down because counsel could not point to any precedent striking down the relevant

regulations. To the contrary, AAO pointed out that a federal court had, in fact, already upheld the source of funds requirement at issue. *See Spencer, supra*. Thus, AAO found that the regulations at 8 CFR § 204.6(e)&(j)(3) are lawful and binding on the agency.

In the 2016 case, the petitioner offered conflicting ownership information and inconsistent documentation concerning who or how many people, own(s) the property, as well as when and how he acquired the property. Apparently, the real estate was passed down from generation to generation from the father, and shared among petitioner and his siblings. As such, he has not established by a preponderance of the evidence that he owned the real estate property that secured the loan. In *Matter of V-S-*, ID# 18086 (AAO Sept. 20, 2016), the petitioner presented insufficient evidence to explain or reconcile the inconsistent documentation concerning ownership. "[I]t is incumbent upon [the Petitioner] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, even if the petitioner proved that he did lawfully share clean ownership and owned a large enough portion to cover the full amount of his investment loan; it would still need to be proven that the property were amenable to seizure by the loan provider. With the increased number of "what…if" scenarios and complicated details, it becomes more difficult to satisfy the EB-5 evidentiary requirements. Oh, what a tangled web we weave, even when we are **NOT** trying to deceive!

That's My Two-Cents, For Now!