U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Z-X-

DATE: NOV. 29, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) 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.

The Chief, Immigrant Investor Program Office, denied the petition. The Chief concluded that the Petitioner did not establish he placed at least $500,000 of his own capital at risk.[1] Specifically, the Chief found that the Petitioner invested indebtedness, not cash, and did not adequately secure the indebtedness with his own assets.

The matter is now before us on appeal. The Petitioner submits no additional evidence in support of the appeal, but argues that the Chief erred in concluding he invested indebtedness. Instead, he maintains that he invested cash, and made an at-risk investment of at least $500,000.

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. 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:

[1] In this case, the required amount of capital is $500,000 because the investment is in a targeted employment area (TEA). The regulation at 8 C.F.R. § 204.6(f) explains that the minimum investment amount is generally $1,000,000, but may be adjusted down to $500,000 if the investment is in a TEA.

> (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).

An immigrant investor may invest the required funds directly in a new commercial enterprise, or invest through a "regional center."[2] Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with new commercial enterprises, which in turn are associated with a specific project, known as the "job creating entity." Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The implementing regulation at 8 C.F.R. § 204.6(e) defines "capital" and "invest" 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.
>
> . . . .
>
> 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.

Moreover, the regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document he or she 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 demonstrate that the petitioner is actively in the process of

[2] A regional center is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (defining "regional center").

investing. The petitioner must show actual commitment of the required amount of capital. In addition, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The Petitioner filed his Form I-526, Immigrant Petition by Alien Entrepreneur, based on an investment through a designated regional center, (the Regional Center). The petition identified an investment in a new commercial enterprise, (the NCE), associated with the Regional Center. The business plan explained that the NCE would raise up to $16,000,000 from foreign investors to loan to (the JCE) that planned to redevelop, renovate and operate

The Chief denied the petition, finding that the Petitioner did not place at least $500,000 of his own funds at risk in the NCE. Specifically, the Petitioner's investment capital derived from a personal loan secured with two real estate properties. The Petitioner and his wife owned one of the properties, while his wife's parents owned the other. The Chief determined that the Petitioner's investment of loan proceeds constituted an investment of indebtedness, not cash. The Chief further found that as the Petitioner invested indebtedness, but did not own one of the properties that served as collateral, he therefore did not demonstrate that his assets adequately secured the indebtedness. Consequently, he did not place at least $500,000 of his own capital at risk in the NCE. The Chief subsequently denied the Petitioner's motion to reconsider, again concluding that he did not place at least $500,000 of his own assets at risk.

On appeal, the Petitioner argues that his investment of proceeds derived from a bank loan constituted an investment of cash, not indebtedness. He further maintains, "[w]hen [the] bank issued the money to [him] according to the loan agreement, the USD 500,000 became [his] personal property, although [he] still has the legal liability to repay the money to the bank according to the loan agreement." We have reviewed all the evidence in the record and found that the Petitioner has not shown he placed at least $500,000 of his own assets at risk in the NCE. We will therefore dismiss the appeal.

III. ANALYSIS

The Petitioner obtained a 3,500,000 renminbi (RMB) loan from the The Individual Loan Contract listed two properties as collateral. The Petitioner and his wife owned the first property, which had an appraised value of 2,890,000 RMB. His wife's parents owned the second property, which had an appraised value of 2,900,000 RMB. Through an intermediary, the Petitioner exchanged the loan proceeds for U.S. dollars, and remitted $550,035 to the NCE. The remittance included a $500,000 investment and a $50,000 administrative fee. As noted, the Chief concluded that the Petitioner's personal assets, i.e., the property that he and his wife owned, did not adequately secure the 3,500,000 RMB bank loan, proceeds of which he sent to the NCE. Consequently, the

Chief determined that the Petitioner did not establish that he made an at-risk investment of at least $500,000 in the NCE.

On appeal, the Petitioner maintains that the Chief erred in requiring him to show his personal assets secured the 3,500,000 RMB bank loan. He indicates that while his capital derived from a third-party loan, he invested cash, not indebtedness, in the NCE. He states that once the "bank issued the money to [him] . . . , the USD 500,000 became [his] personal property . . . ." The Petitioner argues that an investment of indebtedness, as contemplated in the regulation, is limited to an investment of a promissory note, i.e., a petitioner's promise to pay a new commercial enterprise. He reasons that as he has invested proceeds of a loan, not a promissory note, he need not show that his assets sufficiently secured the 3,500,000 RMB bank loan. The relevant regulation, however, does not support his position.

The regulatory definition of "capital" includes indebtedness, as well as cash. In addition, the regulation precludes any indebtedness secured in whole or in part by the assets of a new commercial enterprise. If indebtedness were limited to the Petitioner's promise to pay the NCE, as the Petitioner suggests, then the definition of "capital" would, in effect, mean the NCE's assets may not be used to secure the Petitioner's promise to pay the NCE. From a business standpoint, a contrary position would be illogical and untenable. A business would be unlikely to accept assets it already owns as security for an investor's promise to pay the business. For the regulation to be interpreted reasonably, the definition of "capital" cannot be limited to only prohibiting an illogical and untenable business arrangement. Consequently, the regulatory definition of "capital" must include situations other than those involving the Petitioner's promise to pay the NCE. *See* 8 C.F.R. § 204.6(e).

Precedent also exists to examine an investment of third-party loan proceeds as a contribution of indebtedness. Instructive on this issue is *Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998). While the Petitioner focuses on *Soffici*'s discussion regarding a loan to a new commercial enterprise, the decision also addresses a third-party bank loan. *Soffici* states: "indebtedness," namely proceeds from a third-party bank loan, "that is secured by assets of the enterprise is specifically precluded from the definition of 'capital.'" *Soffici* illustrates that when a petitioner's capital is derived from proceeds of a third-party loan, his contribution of the funds constitutes an investment of indebtedness, not cash, and he must therefore show that his personal assets sufficiently secure the loan. *Id.*; *see also* 8 C.F.R. § 204.6(e).

Furthermore, the Petitioner has not presented legal authority in support of his interpretation that an investment of proceeds obtained through a third-party loan, as is the case here, is an investment of cash that needs no further examination. Under the Petitioner's rationale, it would be permissible to obtain a third-party loan, secure the loan with assets of the new commercial enterprise, and invest the proceeds of the loan in the new commercial enterprise. If we accept his position, in this scenario, we would conclude that the Petitioner has invested cash and met the regulatory definition of "capital." The regulation and precedent decisions, however, specifically preclude such a financing arrangement. *See* 8 C.F.R. § 204.6(e); *see also Soffici*, 22 I&N Dec. at 162.

Similarly, the Petitioner has not offered legal authority in support of his position that the 3,500,000 RMB loan proceeds became his own assets once the bank released the funds to him. To the contrary, loan proceeds, unlike gifts, are generally not a receiver's assets, because of the receiver's obligation to repay the lender.[3] We briefly addressed this issue in *Soffici*, where a portion of the petitioner's investment funds came from a loan. We stated that "[a] petitioner must also establish, pursuant to 8 CFR § 204.6(e), that funds invested are his own. The petitioner has already conceded that the funds lent to [the new commercial enterprise] are not his; the funds belong to his father and must be repaid." 22 I&N Dec. at 165 n.3. Thus, we noted in *Soffici* that proceeds of a third-party loan that includes a corresponding obligation to repay do not constitute a petitioner's "own" capital.

In this case, the Petitioner borrowed 3,500,000 RMB from a bank, and remitted the loan proceeds to the NCE as investment capital. As the Petitioner transferred proceeds of a third-party loan to the NCE, he invested indebtedness, not cash. To show that the loan proceeds constitute capital under 8 C.F.R. § 204.6(e), he must establish that his personal assets adequately secured the indebtedness. *See* 8 C.F.R. § 204.6(e). The Petitioner has not made this showing.

Specifically, while he owned one of the properties that secured the loan, he did not own the second one.[4] As the Petitioner had no ownership of the second property, he had no equitable interest to be placed at risk. The property that he did own had an appraised value of 2,890,000 RMB, which did not sufficiently secure the 3,500,000 RMB bank loan. In addition, the appraisal report specifically noted that the appraised value was "based on the assumptions that there is no mortgage, security and other matters limiting its rights placed on the subject property." According to a mortgage document, the Petitioner had obtained a 740,000 RMB mortgage on the property for a 20-year period, beginning in 2007 and ending in 2027. He has not presented an evaluation of his ownership interest of the property in light of the mortgage. Accordingly, the Chief correctly concluded that because the value of the Petitioner's property was less than the 3,500,000 RMB loan proceeds, he did not demonstrate that his assets fully secured the bank loan. Consequently, the Petitioner has not shown that he placed at least $500,000 of his own assets at risk in the NCE.

IV. CONCLUSION

For the reasons discussed above, the Petitioner has not established that he has invested or is in the process of investing at least $500,000 of his own assets in the NCE. Specifically, he has not shown that his personal assets sufficiently secured the 3,500,000 RMB bank loan. Accordingly, he has not established eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

---

[3] On appeal, the Petitioner offers an example involving someone who invested funds he received as a gift. This case, however, does not deal with gifted funds, an investment of which could meet the regulatory definitions of "capital" and "invest." *See* 8 C.F.R. § 204.6(e).

[4] While the Petitioner did not present this argument on appeal, before the Chief, he claimed that he had paid 3,430,000 RMB to her wife's parents with the intent to purchase their property. The Chief correctly noted in his denial of the petition that the record lacked documentation showing that the Petitioner's wife's parents had actually sold their property to the Petitioner.

ORDER: The appeal is dismissed.

Cite as Matter of Z-X-, ID# 12075 (AAO Nov. 29, 2016)