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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-N-

DATE: NOV. 9, 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 based on her financing of renovations of two business properties in Ohio through a U.S. Citizenship and Immigrations Services (USCIS) designated regional center, [redacted] (the Regional Center).[1] *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) employment based 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 of the Immigrant Investor Program Office (IPO) denied the petition, concluding that the Petitioner had not demonstrated that she placed her own assets at risk with her investment.

The matter is now before us on appeal. In her appeal, the Petitioner submits additional evidence and maintains that the Chief erred by applying a definition of indebtedness that is not supported by statute, regulations, precedent decisions, policy, or the plain meaning of the word.

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. 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] The authority to designate regional centers is based on section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended. The purpose of the regional center framework is to encourage pooled immigrant investment in a range of business and economic development prospects within designated regional centers. This regional center model offers an immigrant investor already-defined investment opportunities.

(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).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The Form I-526, Immigrant Petition by Alien Entrepreneur, is based on a $500,000[2] investment in the new commercial enterprise (the NCE), which is affiliated with the Regional Center. According to the business plan, the NCE will finance the construction and redevelopment of two properties: the headquarters located in Ohio; and a former located in Ohio. The business plan states on pages 4, 13, and 14 that the NCE proposes to help finance the projects through three loans derived from up to $104 million in capital from no more than 208 investors.

The Chief initially denied the petition without a written decision on the merits. The Petitioner appealed. Upon review of the record, we refunded the appellate fee and returned the matter to the Chief for a written decision. The Chief subsequently issued a denial based on his finding that the Petitioner, by executing an unsecured loan to obtain her investment funds, had not placed her own assets at risk. The Petitioner filed the instant appeal.

III. ANALYSIS

The funds the Petitioner invested in the NCE derive from the proceeds of a $1,001,000 loan from her parents, and Specifically, advised that he and his spouse loaned the funds to the Petitioner from a joint Hawaii account. He later confirmed that the transfer was a loan, not a gift. In a personal declaration accompanying the appeal, the Petitioner affirms that the loan "is not secured" by her personal assets. At issue is whether the Petitioner has placed her own assets at risk. We find that she has not. In addition to the Chief's basis for denial, we further conclude that there is a break in the path of funds such that the Petitioner has not traced them back to a lawful source.

A. At-Risk Capital

The implementing regulation at 8 C.F.R. § 204.6(e) includes the following definitions:

[2] The minimum investment amount is $500,000 as the Petitioner has documented that the NCE is principally doing business in a targeted employment area. 8 C.F.R. § 204.6(f).

> *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.
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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.

Also, the regulation at 8 C.F.R. § 204.6(j)(2) states, in pertinent part:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the 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 the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital.

On appeal, the Petitioner contends that it is factually and legally incorrect to characterize her investment as indebtedness, noting that neither she nor the NCE is indebted to the other. In support of this position, the Petitioner cites precedent decisions, a policy memorandum, and the Foreign Affairs Manual (FAM). We will address each of these authorities below. Further, the Petitioner argues that the Chief erroneously retroactively applied the interpretation of "capital" and "indebtedness," as expressed in a stakeholder engagement, and that this teleconference constituted unauthorized rulemaking.

During an April 22, 2015, EB-5 Telephonic Stakeholder Engagement, IPO's Deputy Chief explained that proceeds from a third-party loan must meet the requirements placed upon indebtedness by 8 C.F.R. § 204.6(e) to qualify as a petitioner's capital.[3] These remarks did not announce a new rule; rather, they aimed to assist stakeholders in understanding the relevant statutory and regulatory requirements of eligibility for the immigrant investor classification. We agree that this reading is correct. Moreover, as the Chief did not apply a "new" rule as the Petitioner maintains, we need not consider whether the Chief erred in applying such a rule retroactively.

[3] *See* https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_IPO_Deputy_Chief_Julia_Harrisons_Remarks.pdf.

As quoted above, the regulatory definitions of "capital" and "invest" preclude an investment of unsecured indebtedness. The Petitioner cites *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998) and *Matter of Hsiung*, 22 I&N Dec. 201 (Assoc. Comm'r), contrasting those cases as they involved promises to pay the new commercial enterprise. While we agree those cases involved different facts, 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), which includes a discussion about loans to the new commercial enterprise in that case. In addressing the new commercial enterprise's bank loan, after first noting that the borrower, a corporation, was a separate legal entity from the investor, the decision states:

> [E]ven 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. *See also United States v. O'Connor*, 158 F. Supp. 2d 697, 704-05 (E.D. Va. 2001) (noting 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").

Further, the Act and the 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 new commercial enterprise. The regulation and precedent decisions, however, specifically preclude such an arrangement.

Neither USCIS policy nor the FAM requires a different conclusion. As the Petitioner notes on appeal, the definition of capital is broad and includes certain promises to pay the new commercial enterprise. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 4 (May 30, 2013), https://www.uscis.uscis.gov/laws/policy-memoranda. The discussion in this memorandum, however, does not suggest that a Petitioner who invests the proceeds of an unsecured loan has placed her own assets at risk. Next, the FAM provision the Petitioner cites, 9 FAM 402.9-6(B)(c)(1)-(2), relates to nonimmigrant E-2 investors.[4] Notably, the regulation at 8 C.F.R. § 214.2(e)(12) contains the following language when addressing the requisite investment for these nonimmigrants: "Such investment capital must be the investor's unsecured personal business capital or capital secured by

[4] E-2 investors are foreign nationals "entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national." Section 101(a)(15)(E) of the Act, 8 U.S.C. § 1101(a)(15)(E).

personal assets." The regulation at 8 C.F.R. § 204.6, addressing immigrant investors, does not include similar language regarding unsecured capital.[5]

With respect to the requirements for investments of indebtedness, *Hsiung*, 22 I&N Dec. at 203-04, held that assets securing a promissory note must be specifically identified as such and must belong to the investor personally. It further stated that the security interests must be perfected to the extent provided for by the relevant jurisdiction, the assets must be fully amenable to seizure by a U.S. note holder, they must have an adequate fair market value, and the costs of pursuing them must be taken into account. We find these requirements applicable even though that case happened to have involved a promise to pay the new commercial enterprise. Specifically, 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 its own assets as security for a promise to pay itself, the definition must include third-party loans as indebtedness.

In summary, the Petitioner borrowed the funds she invested through an unsecured loan. The regulations, case law, and a federal court decision support the interpretation that the proceeds of a loan constitute indebtedness and must be secured to be at risk. Accordingly, she has not shown that she has placed her own assets at risk.

B. Lawful Source of Funds

With respect to the source of the investment, the regulation at 8 C.F.R. § 204.6(j)(3) provides:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (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 the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or

[5] The FAM does not include similar language when discussing the immigrant investor program at 9 FAM 502.4-5(B)(e)(4).

(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 the petitioner from any court in or outside the United States within the past fifteen years.

The record documents that, in April and May 2012, the Petitioner wired her investment to the NCE's escrow account[6] from a account ending in that she owned jointly with her father. a personal banker at offered three letters discussing the source of the funds in this account. In the most recent one, he acknowledges mistakes in his prior letters,[7] and affirms the information that follows. Specifically, in August 2010 and August 2011, and placed a total of $664,000 into three separate TCDs ending in and In April 2012, they closed the three TCDs and deposited the funds, totaling $666,342.69, in the account ending in On April 6, 2012, and wired an additional $334,657.31 from their account ending in to the one ending in

The bank documents in the record do not trace the path of the $664,000 that and deposited into the three TCD accounts. In his most recent letter, states that the source of the TCD balances are deposits into the account ending in between September 2008 and August 2010.[8] The record contains 2008 and 2010 statements for the account ending in The statement for July through September 2008 corroborates deposits totaling $737,000 into that account. The same document, however, reflects that within days of the deposits, and withdrew a total of $655,500. The July through August 2010 bank statement for the same account lists an August 24, 2010, deposit of $230,000[9] and an August 30, 2010, withdrawal of $220,000. The withdrawal is consistent with the purchase of one of the TCDs on that date. Neither nor other evidence in the record indicates that and deposited any additional funds into the account between August 31, 2010, when it had balance of $63,922.07, and August 8, 2011, the date and opened two TCDs with $444,000. The record does not include the statement for the account ending in covering August 2011. The Petitioner, thus, has not shown the source of the $444,000 deposited into the two TCDs on August 8, 2011.

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[6] The escrow agreement provides for the agent to return the Petitioner's funds if USCIS denies her petition. The record does not confirm that her funds remain in escrow after the Chief's denial.

[7] A January 18, 2014, letter listed the August 30, 2010, deposit into the Time Certificate Deposit account (TCD) ending in as $200,000 rather than $220,000; and the January 3, 2014, letter listed the parents' savings account as ending in 2688 instead of 2638.

[8] also mentions a deposit into account in March 2012; however, that deposit cannot be the source of the TCD accounts opened in August 2010 and August 2011.

[9] The record contains several Applications for Remittance, some of which match deposits into account The dates on these forms, however, do not conform to the Gregorian calendar and the Petitioner does not offer a means of conversion. The forms trace the deposits back to accounts ending in and

IV. CONCLUSION

In summary, the Petitioner has not demonstrated an at-risk investment of her own funds, and has not established that the funds were lawfully obtained. For the reasons discussed above, the Petitioner has not met her burden to establish 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).

ORDER: The appeal is dismissed.

Cite as *Matter of M-N-*, ID# 12077 (AAO Nov. 9, 2016)