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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-X-

DATE: JAN. 13, 2017

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 an investment in a new commercial enterprise (the NCE). *See* 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 of the Immigrant Investor Program Office denied the petition. The Chief concluded that the Petitioner did not show she invested or was actively in the process of investing at least $500,000 of her own capital in the NCE.[1] Specifically, the Chief found that the Petitioner did not establish that her one percent ownership interest in a real estate property sufficiently secured a 3,420,000 renminbi (RMB)[2] loan she obtained, the proceeds of which she claimed to have invested in the NCE.

The matter is now before us on appeal. In support of her appeal, the Petitioner submits a brief and additional documentation. She also maintains that the Chief erred in finding she did not invest her own capital in the NCE. She indicates that she owns 1 percent and her son owns 99 percent of the real estate property that she used as the collateral for the 3,420,000 RMB loan. She states that she obtained the loan with her son, who then gifted his portion of the loan proceeds to her.

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

I. LAW

A foreign national investor may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise. 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

[1] 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 Targeted Employment Area (TEA).

[2] According to an online source, 3,420,000 RMB was approximately $558,055 on December 5, 2013, the date the Petitioner received the loan proceeds. *See* https://www.oanda.com/currency/converter/, accessed on September 27, 2016, and incorporated into the record of proceedings.

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:

> (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
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> (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 "invest":

> Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that 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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> . . . .
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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.

In addition, the regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must actually place his or her capital "at risk" for the purpose of generating a return, and that the mere intent to invest is not sufficient. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 5 (May 30, 2013), https://www.uscis.gov/laws/policy-memoranda.

II. ANALYSIS

The Petitioner has not submitted sufficient evidence showing that she made an at-risk investment of at least $500,000 of her own funds in the NCE. Specifically, she invested indebtedness, but did not establish by a preponderance of the evidence that her personal assets adequately secured the indebtedness. While she indicated that she sent proceeds of the 3,420,000 RMB loan to the NCE, she did not demonstrate that her personal assets sufficiently secured the loan. Moreover, she has not

illustrated that she will engage in the management the NCE, or documented the complete path of her investment funds. Accordingly, we will dismiss the appeal.

A. Investment of Loan Proceeds

The business plan indicated that the NCE plans to purchase [redacted] franchise licenses and operate three hair salons in California. The first two salons will be located within a targeted employment area (TEA). The location of the third salon is to be determined. The business plan noted: "only the first two salon locations should be considered for the total investment and the employment of US workers within these two salons." As the Petitioner's investment is in a TEA, the required amount of capital in this case is $500,000. *See* 8 C.F.R. § 204.6(f).

The personal loan contract provided that the Petitioner obtained a 3,420,000 RMB loan from [redacted] The Petitioner stated that she invested the loan proceeds in the NCE. The loan listed the Petitioner as the sole borrower and warrantor. A mortgage contract revealed that she used a real estate property, with an appraised value of 5,594,100 RMB,[3] to secure the loan. The ownership certificate shows the Petitioner owns 1 percent, while her son owns 99 percent, of the real estate property. In light of her limited ownership interest, the Chief concluded that her personal assets did not adequately secure the loan. The Chief thus found that the Petitioner did not place at least $500,000 of her own capital at risk in the NCE.

On appeal, the Petitioner maintains that the Chief erred in finding that her contribution constituted an investment of indebtedness in the NCE. She indicates that she invested cash, not indebtedness, and thus need not show that her personal assets sufficiently secured the 3,420,000 RMB loan. In the alternative, she reasons that she placed at least $500,000 of her own assets at risk because her 1 percent ownership interest in the collateral secured a portion of the loan, while her son gifted her the remaining portion of the loan proceeds, which his 99 percent ownership interest secured. We disagree with both positions.

1. Investment of Indebtedness

The regulatory definition of "capital" includes indebtedness, as well as cash. If the Petitioner invests indebtedness, then she must show that she has adequately secured the indebtedness with her own assets. As the Petitioner's capital is derived from proceeds of a third-party loan, she has invested not cash, but indebtedness. Consequently, she must demonstrate that her personal assets sufficiently secure the third-party loan for the proceeds to meet the regulatory definition of "capital." *See* 8 C.F.R. § 204.6(e).

[3] According to an online source, 5,594,100 RMB was approximately $912,811 on December 5, 2013, the date of the mortgage contract. *See* https://www.oanda.com/currency/converter/, accessed on September 27, 2016, and incorporated into the record of proceedings.

On appeal, the Petitioner maintains that an investment of indebtedness, as contemplated in the regulation, is limited to an investment of a promissory note, i.e., her promise to pay the NCE. She reasons that as she has invested loan proceeds, not a promissory note, she need not show that her assets sufficiently secured the 3,420,000 RMB loan. She further states that before 2014, U.S. Citizenship and Immigration Services (USCIS) accepted contribution of loan proceeds as an investment of cash. The relevant regulation does not, however, support the Petitioner's position.[4]

The regulatory definition of "capital" precludes any indebtedness secured in whole or in part by the assets of a new commercial enterprise. If indebtedness is 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 invest in the business. As the regulation specifically prohibits such an arrangement, the definition of "capital" cannot be limited to the Petitioner's promise to pay the NCE. *See* 8 C.F.R. § 204.6(e).

Precedent exists to examine an investment of third-party loan proceeds as a contribution of indebtedness. Instructive on this issue is *Soffici*, 22 I&N Dec. at 162, which, after first noting that a new commercial enterprise was a separate legal entity from the investor, addresses the enterprise's 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, her contribution of the funds constitutes an investment of indebtedness, not cash, and she must therefore show that her personal assets sufficiently secure the loan. *Id.*; *see also* 8 C.F.R. § 204.6(e) ("indebtedness [must be] secured by assets owned by the [petitioner]").

Furthermore, the Petitioner has not presented legal authority in support of her 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, she could obtain a third-party loan, secure the loan with the NCE's assets, and invest the loan proceeds in the NCE. If we accept her 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.

According to the Petitioner, she borrowed 3,420,000 RMB from [redacted] and, through a number of individuals, sent $500,000 to the NCE. As the Petitioner's investment funds derived from a third-party loan, she invested indebtedness, not cash. To show that the loan proceeds constitute "capital" under 8 C.F.R. § 204.6(e), she must establish that her personal assets adequately

[4] In addition, the Petitioner's unsubstantiated statements on other unrelated cases do not satisfy her burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

secured the indebtedness. The Petitioner has not made this showing. She has not demonstrated that her 1 percent ownership interest in a real estate property, with an appraised value of 5,594,100 RMB, adequately secured the 3,420,000 RMB loan.[5] Accordingly, she has not illustrated that she contributed at least $500,000 of her own personal assets in the NCE.

2. Gift of Loan Proceeds

Alternatively, the Petitioner maintains that the funds she sent to the NCE constituted her personal assets. She explains that her 1 percent ownership interest in the real estate property secured a portion of the 3,420,000 RMB loan, and her son's 99 percent ownership interest in the property secured the remaining portion of the loan. On appeal, she presents a November 2015 statement from her son, indicating that he gifted to his mother his portion of the loan proceeds. She also offers a March 2016 certificate from stating that the Petitioner's son was a "co-borrower of the Personal Loan Contract" that the Petitioner executed.

The record does not demonstrate that the Petitioner's son is a co-borrower of the 3,420,000 RMB loan, or that he could gift any portion of the loan proceeds to the Petitioner. The March 2016 bank certificate stated that under Chinese law, a borrower must be a person "with full civil capacity." The certificate noted that the Petitioner's son was "a person with limited capacity for civil conduct," because he was "a child under year-old in year 2013 [when the Petitioner executed the personal loan contract] and a student without a stable source of income." To enter into a loan contract and be qualified as a borrower, the certificate explained, the Petitioner's son "shall be represented by his agent ad litem or participate with the consent of his agent ad litem."

There is no indication on the loan contract that the Petitioner's son was a borrower of the loan. Page 1 listed the Petitioner as the loan's sole borrower. The signature page of the contract similarly identified the Petitioner as the sole borrower and warrantor, referencing her both as "Party B" and "Party C1." The line for "signature of co-borrower" was blank. Had the Petitioner's son been a co-borrower, the loan contract should have referenced him. Likewise, if an agent ad litem represented the Petitioner's son or consented to his participation in this contract, the document should have named the agent ad litem or noted his or her representation or consent. Instead, the loan contract showed that the Petitioner was the sole borrower, who executed the agreement on her own behalf.

Moreover, other evidence in the record supports a finding that the Petitioner was the lone borrower of the 3,420,000 RMB loan. The bank's "Indebtedness Certificate" listed her as the only borrower. In a December 5, 2013, "Loan Certificate for Application for Immigration," indicated that the Petitioner applied for and was granted the 3,420,000 RMB loan. The document did not reference the Petitioner's son as a co-borrower. The bank record showed that the bank remitted the entire loan proceeds to the Petitioner's account. The Petitioner's "Statement on Source of Fund"

[5] According to Article 94 of the Property Law of China, which the Petitioner submits on appeal: " A [sic] several co-owner [sic] of a commonly owned real property or movable property shall enjoy the ownership of the real property or movable property according to his shares."

provided that she "obtained the mortgage loan of RMB 3,420,000," and made no mention of her son as one of the borrowers. The documentation, thus, does not support a finding that the Petitioner's son was a co-borrower of the loan.

The record includes a mortgage contract, showing that the Petitioner used the real estate property that she owns with her son to secure the personal loan. Unlike the personal loan contract, the mortgage contract listed both the Petitioner and her son as mortgagors. In the signature page, the Petitioner signed on behalf of herself and for her then minor son. While this document illustrated that the Petitioner's son agreed to use his ownership interests to secure the Petitioner's 3,420,000 RMB loan, it did not establish that he was a co-borrower of the loan or entitled to the loan proceeds. As such, the Petitioner has not demonstrated that her son could have gifted any portion of the proceeds to her. Accordingly, the Petitioner's alternative position does not support a finding that she has contributed at least $500,000 of her own assets to the NCE.

B. Management of the NCE

Under the regulation, the Petitioner must engage in the management of the NCE, either through the exercise of day-to-day managerial responsibility or through policy formulation. *See* 8 C.F.R. § 204.6(j)(5). Management of the NCE encompasses more than the Petitioner maintaining a purely passive role in regard to her investment. *Id.*; USCIS Policy Memorandum PM-602-0083, *supra*, at 12.

The record is insufficient to show that the Petitioner is engaging or will engage in the management of the NCE. Page 3 of the NCE's Operating Agreement provided that the Petitioner named [redacted] chief executive officer] and [redacted] . . . as Designated Persons and as non-officer agents and managers of the [NCE]."[6] Page 5 of the same document noted that "Designated Persons shall determine the amount and timing of and recipients of any distribution of the [NCE]'s available cash from operations and cause such distributions to be made."

Page 23 of the business plan confirmed that the Petitioner "will not take an active role in the day-today [sic] management of the three [redacted] hair salons." Instead, "she will meet with the General Manager/Store Operator . . . once a month to discuss the progress of the company and review financial statements." An Employment Agreement showed that as the NCE's agent, [redacted] hired [redacted] as the NCE's general manager.

The business plan explicitly stated that the Petitioner will not exercise day-to-day managerial responsibility. In light of the extensive involvement of [redacted] including its authority to make "final operations decisions" (as noted on page 29 of its "Candidate Packet"), to distribute profits, and the lack of sufficient evidence showing that the Petitioner will manage the NCE through policy formulation, the Petitioner has not met the management requirements.[7] *See* 8 C.F.R. § 204.6(j)(5).

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[6] [redacted] is the entity that arranged this investment opportunity. It has also entered into a management service agreement with the NCE.

[7] On a related issue, the record contains inconsistent evidence on the location of one of the NCE's first two salons. The

C. Lawful Source of Funds

The Petitioner indicated that the NCE received $500,000 of her funds in 2014. She presented a Online printout, verifying an account ending at received a total of $500,000 from her. Other than a handwritten note on the Online printout, stating that the account belonged to the NCE, the document itself does not reveal the identity of the account owner. Without additional corroboration, such as documents from the bank, the Petitioner has not shown that the NCE received her investment.

A petitioner cannot demonstrate the lawful source of funds by submitting only bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Instead, a petitioner must present evidence of the complete path of the funds to meet his or her burden of establishing that the funds are the investor's own. *Izummi*, 22 I&N Dec. at 195.

In this case, the Petitioner has not documented the complete path of her funds. The Petitioner stated that her capital derived from proceeds of a 3,420,000 RMB loan. The bank record showed that she received the proceeds in her account ending in on December 5, 2013. Through a number of individuals, she converted the funds into U.S. dollars and transferred approximately $562,000 to her account ending in She submitted a bank statement for her account indicating that as of March 31, 2014, $458,565.18 remained in the account. On June 11, 2014, she remitted $405,000 from her account to the NCE's escrow account. She stated that the $405,000 was part of her capital investment in the NCE. The Petitioner, however, has not presented bank record for her account ending in showing that between March 31, 2014, and June 11, 2014, at least $405,000 remained in the account. Without additional evidence, such as bank statements for her account, the Petitioner has not documented the complete path of the $405,000 she sent to the NCE's escrow account in June 2014.

Moreover, assuming the NCE owned the account ending in the Petitioner has not demonstrated that the funds in the account derived from the 3,420,000 RMB loan proceeds she received. Specifically, according to the escrow agreement and bank records, the Petitioner remitted $95,000 to the NCE's escrow account ending in and $405,000 to the NCE's escrow account ending in The Online printout for an account ending in which the Petitioner claimed was the NCE's account, did not reflect that the account received the Petitioner's funds from either of the NCE's escrow accounts. Rather, the printout noted that the funds came from the Petitioner through ' ' The Petitioner has not explained the source of the capital she sent to the NCE through or what happened to the funds she remitted to the NCE's escrow accounts.

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business plan stated that the salon location was in California. The submitted lease agreement and associated documents, however, were for a property located at in California. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies with independent objective evidence).

A petitioner cannot demonstrate the lawful source of funds without documenting the complete path of the funds. *See Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. In light of the multiple breaks in the path of funds discussed above, the Petitioner has not established the lawful source of the funds she purportedly remitted to the NCE.

III. CONCLUSION

The Petitioner has not established that she has invested or is in the process of investing at least $500,000 of her own capital in the NCE. Specifically, she has not shown that her personal assets sufficiently secured the 3,420,000 RMB loan. In addition, she has not demonstrated that she will manage the NCE, or documented the complete path of her funds.

The Petitioner has not demonstrated by a preponderance of the evidence that she is eligible for the immigrant investor classification. The burden is on the Petitioner to show 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). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of W-X-*, ID# 48594 (AAO Jan. 13, 2017)