U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-K-P-

DATE: JULY 7, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner established [redacted] the new commercial enterprise (the NCE), a company that plans to offer auditing, bookkeeping, payroll, tax preparation, and related services to businesses in Georgia. He is the NCE's sole shareholder, and 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 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, Immigrant Investor Program Office (IPO), denied the petition. The Chief concluded that the Petitioner did not establish he placed his own capital at risk in the NCE. 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. In his appeal, the Petitioner submits a brief and supporting documentation, and states that the Chief erred in concluding he had not made an at-risk investment.

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 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 "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 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).

Furthermore, *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998), states:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to

> carry out the business of the commercial enterprise. This petitioner's de minimis action of signing a lease agreement, without more, is not enough.

Finally, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence required to show the necessary job creation as follows: photocopies of relevant tax records, Forms I-9 (Employment Eligibility Verification), or other similar material for 10 full-time positions for qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite 10 jobs, a petitioner must offer a comprehensive business plan demonstrating the new commercial enterprise's need for not fewer than 10 full-time employees. 8 C.F.R. § 204.6(j)(4)(i)(B). A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

II. ANALYSIS

The Petitioner has not submitted sufficient evidence showing that he made an at-risk investment in the NCE. Specifically, he invested indebtedness, but did not establish by a preponderance of the evidence that his personal assets adequately secured the indebtedness. While he transferred proceeds of a $500,000 loan to the NCE as capital investment, he did not show that his personal assets sufficiently secured the loan. Moreover, he has not documented the lawful source of the collateral he used to secure the loan, or demonstrated that the NCE meets or will meet the employment creation requirements. Accordingly, we will dismiss the appeal.

A. Investment of Capital

As the NCE is within a targeted employment area, the required amount of capital in this case is $500,000.[1] The record shows that on August 6, 2013, the Petitioner borrowed $500,000 from [redacted] The Secured Promissory Note stated that "Gold – 3,250 grams," "Silver – 14,000 grams," and "Diamonds – 40 carats (vvs F-G)" secured the loan. After the Chief issued a notice of intent to deny the petition (NOID), indicating that the Petitioner had not demonstrated he owned these items or that their value sufficiently secured the $500,000 loan, the Petitioner submitted affidavits that he and his father executed, and a July 13, 2015, appraisal report of the security listed in the Secured Promissory Note. The Chief concluded that the evidence did not prove that the

[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 investment area.

[2] In his initial filing, the Petitioner indicated that [redacted] is his fiancée's father. In the statement from the Petitioner's father, he referred to [redacted] as the Petitioner's father-in-law. The Chief incorrectly stated in his decision that the Petitioner obtained the $500,000 loan from "his father."

Petitioner's personal assets adequately secure the $500,000, and consequently, he did not establish that he made an at-risk investment in the NCE.

On appeal, the Petitioner maintains that the Chief erred in requiring him to show his personal assets secured the $500,000. He indicates that he invested cash, not indebtedness, and that the "absence of the fair market value of a security interest in the loan agreement between the [P]etitioner and his lender simply has no relevance where there is no future obligation to be enforced by the [NCE]." We disagree. We find that the Petitioner has contributed indebtedness, and has not shown that his assets adequately secured the indebtedness. Thus, we conclude that he has not made an at-risk investment of at least $500,000 in the NCE.

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

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., a petitioner's promise to pay the 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 $500,000 loan. The relevant regulation, however, does not support the Petitioner's position.

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 a borrower's promise to pay the business. As the immigrant investor 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 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 the discussion in that decision about a loan to the 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 asserts sufficiently secure the loan. *Id.*

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.

In this case, the Petitioner borrowed $500,000 from [redacted] on August 6, 2013 and then transferred these funds to the NCE. 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. The Petitioner has not made this showing.

Additionally, the Petitioner secured the loan with gold, silver, and diamonds. The record lacks documentation showing the value of the collateral in August 2013, when he executed the secured promissory note and transmitted the funds to the NCE. In response to the Chief's NOID, the Petitioner offered an appraisal, indicating that in July 2015, nearly two years after he transferred $500,000 to the NCE, the collateral was worth 29,721,364 Indian rupees (INR),[3] which the Petitioner provided in his NOID response was approximately $466,727.[4]

The Chief correctly concluded that because the value of the collateral was less than $500,000, the Petitioner did not show that the loan was fully secured.[5] Although he offered an appraisal, indicating that in July 2015, the value of the collateral was 29,721,364 INR, the Petitioner has not demonstrated that the value was at least $500,000 at the time the assets were used to secure the loan in August 2013. Consequently, as the record lacks evidence of the collateral's value in August 2013, he has not documented that at the time he executed the Secured Promissory Note and sent the funds to the NCE, the loan was sufficiently secured with his assets worth at least $500,000. In short, the Petitioner has not shown that the collateral adequately secured the loan at the time he executed the Secured Promissory Note and transferred the funds to the NCE in August 2013.

[3] Online resource shows that 29,721,364 INR was approximately $468,376 on July 13, 2015. *See* https://www.oanda.com/currency/converter/, accessed on May 9, 2016, and incorporated into the record of proceedings.

[4] The Chief stated in his decision that 29,721,364 INR was approximately $467,446.

[5] On appeal, the Petitioner also 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 the USCIS's adjudication of a petition for immigrant investor classification under 8 C.F.R. § 204.6.

B. At-Risk Investment

Furthermore, the Petitioner has not shown that he has placed at risk the $500,000 he sent to the NCE's account in August 2013. As discussed in *Ho*, to demonstrate that his capital is at risk, the Petitioner "must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise." 22 I&N Dec. at 210. In addition, "de minimis action of signing a lease agreement, without more, is not enough" to show that the funds are at risk. *Id.*

Here, the Petitioner submitted a June 2013 lease agreement, indicating that the NCE entered into a three-year lease, paying $600 a month for an office space. The record lacks additional evidence showing that the NCE has undertaken any other business activity since its formation in 2013. The lease agreement qualifies as a "de minimis action," and is insufficient to demonstrate that the Petitioner has placed at least $500,000 at risk in the NCE. Moreover, as discussed in *Izummi*, "funds in bank accounts can easily be dissipated." 22 I&N Dec. at 192. The Petitioner has not sufficiently shown that the $500,000 will remain in the NCE's account or that it will be used for NCE's business operation.

Finally, the NCE appears to be overcapitalized such that not all of the $500,000 is at risk. According to the business plan, the NCE's startup costs are $155,000, and its income was projected to be $20,000 in 2014, $70,000 in 2015, and $185,000 in 2015. Thus, it appears that the NCE required only a small portion of the $500,000 in its startup stage, and would receive a profit sufficient to cover its expenses as early as the second year of its existence. The Petitioner has not shown if, or explained how, the NCE will use the entire investment capital. As such, the Petitioner has not demonstrated that the $500,000 he provided is sufficiently at risk for purposes of generating a return on the capital. *Izummi*, 22 I&N Dec. at 179; *see also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010). In light of the above, the Petitioner has not established that he has placed, or is in the process of placing, at least $500,000 at risk in the NCE.

C. Lawful Source of Funds

Assuming, arguendo, that the Petitioner had shown the $500,000 loan was adequately secured with the listed collateral – gold, silver, and diamonds – he did not document that he obtained the collateral through lawful means. In response to the Chief's NOID, the Petitioner submitted a statement from his father. According to this statement, he gifted the items to the Petitioner in 2005. He indicated that previously, he had received the gold, silver and diamonds from his parents and that "[o]ur Indian people have a tradition to keep jewelry as family assets and pass those jewelry [sic] to [the] next generation." The record includes no other evidence that demonstrates the Petitioner's father had lawfully obtained the items, or that his family, including the Petitioner's grandparents, had acquired them through lawful means. Without showing how the Petitioner's family had attained the gold, silver and diamonds, the Petitioner has not established the lawful source of the collateral or that the items are his assets that may be used to secure the $500,000 loan. *See Izummi*, 22 I&N Dec. at 195

(finding that without documentation of the complete path of the funds, a petitioner cannot meet his or her burden of demonstrating the funds are his or her own funds).

D. Employment Creation

The Petitioner has not shown that the NCE has met the employment creation requirements. Specifically, as the NCE has not yet created at least 10 full-time positions for qualifying employees, the Petitioner must provide a comprehensive business plan demonstrating the NCE's need for not fewer than 10 qualifying full-time employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). The business plan submitted by the Petitioner as part of his initial filing, does not constitute a comprehensive business plan, and does not credibly show the NCE's need for at least 10 full-time employees.

Section 11 of the business plan provided that the NCE planned to hire 5 full-time employees in 2014, 10 full-time employees in 2015, and 13 full-time employees in 2016. Section 1 of the business plan projected the NCE's revenue to be $250,000 in 2014, $350,000 in 2015, and $500,000 in 2016. The business plan, however, did not explain the significant year-to-year increase in revenue, specifically, an increase of 40 percent between 2014 and 2015, and an increase of 100 percent between 2014 and 2016. Without evidence that the revenue projections are credible, the Petitioner has also not shown that the NCE's forecasted need for additional personnel is reliable or credible.

Moreover, the business plan lacked specific information on positions that the NCE aimed to create. Specifically, the business plan did not include "job descriptions for all positions" or "its personnel's experience." *See Ho*, 22 I&N Dec. at 213. Although the business plan named a number of the NCE's competitors, it did not examine "their relative strengths and weaknesses, [or offer] a comparison of the competition's products and pricing structures . . . ." *Id.* It also did not explain the NCE's pricing structure or strategy. As discussed in *Ho*, to be "'comprehensive,' a business plan must be sufficiently detailed to permit [us] to draw reasonable inferences about the job-creation potential." *Id.* at 212-13. The Petitioner and the business plan's conclusory statements that the NCE will need at least 10 full-time qualifying employees, without offering details on the bases of these conclusions, are not sufficient to demonstrate "the job-creation projections are any more reliable than hopeful speculation." *Id.* at 213. As such, the Petitioner has not established that the NCE has created, or will create, at least 10 full-time positions for qualifying employees.

III. 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 in the NCE. Specifically, he has not shown that his personal assets sufficiently secured the loan, or that the entire investment capital is at risk. In addition, he has not documented that he obtained the loan collateral through lawful means. Finally, he has not demonstrated that the NCE meets or will meet the employment creation requirements.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's 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). Here, the Petitioner has not met that burden. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of S-K-P-*, ID# 16506 (AAO July 7, 2016)