



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF W-R-Z-

DATE: JULY 7, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner, an individual, 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 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. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

The Chief, Immigrant Investment Program Office, denied the petition. The Chief concluded that the Petitioner had not established an investment of the requisite amount of at-risk capital.

The matter is now before us on appeal. In her appeal, the Petitioner submits previously offered items and an excerpt of Mexican law. She maintains that the Chief erred in his analysis of the evidence and interpretation of the regulatory definition of capital.

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. 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) includes the following definitions:

*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.

.....

*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.

Finally, 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:

- (i) Foreign business registration records;

- (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

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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;

(iii) Evidence identifying any other source(s) of capital; or

(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.

## II. ANALYSIS

According to the Form I-526, Immigrant Petition by Alien Entrepreneur, the Petitioner bases her eligibility on an investment in [REDACTED] the new commercial enterprise (the NCE) affiliated with the USCIS-designated regional center [REDACTED]. The Private Placement Memorandum explains that the NCE “has been organized to design, build and operate a new 121 all-suite hotel” in [REDACTED] Texas. In February 2013, the Petitioner transferred \$550,000 to the regional center’s escrow account for the benefit of the NCE.<sup>1</sup> Of these funds, \$125,000 derive from a loan from the Petitioner’s brother. The sole issue the Chief identified is whether this loan is sufficiently secured such that the proceeds of this loan meet the definition of capital. For the reasons discussed below, the record does not show that the Petitioner’s assets sufficiently secured the loan at the time of filing. Also, we find she has not (1) corroborated that the proceeds of the 2008 loan remained available in 2013, (2) offered transactional evidence tracing the path of her funds, (3) documented that her mortgage funds were available for investment purposes, and (4) confirmed that her funds continue to remain in escrow more than two years after she transferred them there.

### A. At-Risk Capital

#### 1. Interpretation of Regulatory Definitions

On appeal, the Petitioner requests that USCIS reconsider its interpretation of “capital” and “indebtedness,” as expressed in a stakeholder engagement. 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 the petitioner’s capital.<sup>2</sup> The IPO Deputy Chief’s remarks aimed to assist stakeholders in understanding the relevant statutory and regulatory requirements of eligibility for the immigrant investor classification. We agree that this is the correct reading.

<sup>1</sup> The minimum investment amount is \$500,000 as the NCE is doing business in a targeted employment area (TEA). 8 C.F.R. § 204.6(f).

<sup>2</sup> See [https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED\\_IPO\\_Deputy\\_Chief\\_Julia\\_Harrisons\\_Remarks.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_IPO_Deputy_Chief_Julia_Harrisons_Remarks.pdf).

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As quoted above, the regulatory definitions of “capital” and “invest” preclude an investment of unsecured indebtedness. Moreover, 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. The Petitioner cites that discussion on appeal. In addressing the new commercial enterprise’s bank loan, however, after first noting that it, 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 a new commercial enterprise. The regulation and precedent decisions, however, specifically preclude such an arrangement.

Also, *Matter of Hsiung*, 22 I&N Dec. 201, 203-04 (Assoc. Comm’r 1998), 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, as the Petitioner notes on appeal, 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.

2. The \$125,000 Loan

Initially, the Petitioner indicated that \$125,000 of her investment constituted funds she borrowed from her brother. The record indicates that in 1995, the Petitioner and her brother, [REDACTED]

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received property as a donation from their father. The Petitioner included an August 2008 joint letter in which she and agreed to the sale of their property, with each receiving \$125,000 as documented by checks dated in September 2008. In October 2008, the Petitioner executed a promise to pay \$125,000 as of October 2015. The promissory note, entitled a “Pagare” on the original, does not list any collateral. In a 2012 declaration, attested to transferring \$125,000 to the Petitioner, although the record does not contain transactional evidence of this transfer, which we will discuss below. She affirmed that both the \$125,000 she received directly from the sale of the property and the \$125,000 loaned to her resided in her account ending in . The earliest statement for this account in the record covers April 2012, showing a beginning balance of \$353,007.88. In January 2013, the Petitioner moved \$350,000 to her account ending in from which she transferred the funds to the regional center’s escrow account in February 2013.

In response to the Chief’s June 2015 request for evidence (RFE), the Petitioner elaborated on her loan arrangement. Specifically, she explained that she repaid on July 30, 2015, which she documented with a certified check. She offered a legal opinion clarifying that under Mexican law, a “Pagare” functions as a personal guarantee for the entire amount. Upon default, a Mexican court recognizing the note will “immediately place a lien on identifiable assets of the Borrower . . . to satisfy the payment obligation under the loan.” On appeal, the Petitioner supplies Book V, Title 1, Chapter 1 of the Special Mercantile Proceedings in Mexico, corroborating the enforceable nature of her “Pagare.” The Petitioner identifies her property at as an example of property that a court could use to satisfy her obligation under the “Pagare.”

Regardless of whether the “Pagare” was enforceable, it remains that it was not sufficiently secured. Specifically, the enforceable nature of the note is a separate question from whether it identified collateral of sufficient value. *Hsiung*, 22 I&N Dec. at 203-04. First, the 2008 note does not identify any specific collateral as required. Second, even assuming a court would place a lien on the Petitioner’s property at she mortgaged that property in February 2013 to obtain another \$232,923 for investment into the NCE. Page 15 of the translated mortgage document characterizes the security as a “first mortgage.” On page two, the Petitioner “declares, expressly and under oath to tell the truth, that the real estate property object of this document is free of any liens.” As such, under the terms of the mortgage, the property was unencumbered by the “Pagare.” Also, the Grounds for Early Termination on page 14 of the translation reflect that the Petitioner defaults if she “mortgages, limits or affects in any legal way the property without any previous authorization from ‘THE LENDER’” or if “the mortgaged property is the subject of repossession, execution or limitation, affectation or encumbrances, by a creditor of ‘THE BORROWER,’ or decreed by any authority.” Accordingly, while the December 2012 appraisal concluded that the Petitioner’s unit, including rental value, had a comparable market value of approximately four times the mortgage amount, it is not apparent that the terms of the mortgage allow the property to secure another debt. Third, the new documents in response to the RFE and on appeal do not establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971); see also *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm’r 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot “consider facts that

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come into being only subsequent to the filing of a petition.”) Accordingly, the Petitioner’s subsequent repayment of the loan does not resolve concerns regarding the security of the “Pagare” at the time of filing. For all of the above reasons, the Petitioner has not shown that she had made an at-risk investment of the \$125,000 in question as of the day of filing.

#### B. Path of Funds

With the exception of the mortgage proceeds, the Petitioner has also not substantiated the complete path of the funds from the source to the NCE. Without such documentation, the Petitioner cannot meet her burden of establishing that the funds are her own funds, an element material to establishing the lawful source of the investment. See *Izummi*, 22 I&N Dec. at 195. First, the record contains the checks issued to her and [REDACTED] for \$125,000 each in 2008. While the October 2008 promissory note indicates that [REDACTED] loaned his \$125,000 to the Petitioner, the record does not contain transactional evidence, such as a check or wire transfer receipt, tracing the movement of these funds into her account. She advised that she placed all \$250,000 into her [REDACTED] account ending in [REDACTED]. As she did not supply statements for that account prior to April 2012, however, she has not substantiated this information or documented that the funds remained in that account. Accordingly, the Petitioner has not met her burden of establishing that the \$353,007.88 in that account in April 2012 represented those funds in addition to the \$100,000 she accumulated while employed. For these reasons, she has not traced the path of the funds she invested.

#### C. 2013 Mortgage

Next, the terms of the Petitioner’s 2013 mortgage raise concerns as to whether the proceeds of that loan were available for investment. The executed document specifies on page 11 of the translation that the borrower is obligated to “use the loan for the acquisition of the mentioned real estate property.” We acknowledge that the Petitioner’s father donated the unit to her in 1994. Given the specific terms of the loan, however, she has not met her burden of establishing that the funds were available to lawfully invest in the NCE. Specifically, the record does not resolve the consequences of using the funds for a different purpose than allowed by the agreement.<sup>3</sup>

#### D. Escrow

Finally, given the terms of the Subscription and Escrow agreements, the Petitioner has not met her burden to show that her funds remain irrevocably committed to the NCE. She transferred her investment into escrow on February 19, 2013, more than two years prior to filing the instant appeal on January 14, 2016. Article 4(c) of the Escrow Agreement reads: “In the event the Investor’s EB-5 petition is denied, or alternatively, has not been approved within two (2) years of the Escrow Agent’s receipt of the Escrowed Amounts from an Investor, the Escrow Agent shall disburse the Investor’s Escrowed Amounts.” The Subscription Agreement allows for some discretion on this point,

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<sup>3</sup> While the terms of the mortgage also require the Petitioner to reside at that address, her foreign address on part 6 of the Form I-526 is a different residence.

providing that if “the second anniversary of the Escrow Agreement date is reached without the I-526 visa petition of the respective EB-5 Investor having been approved by USCIS, then the Company shall have the discretion to, for any reason in its sole and absolute discretion, require the return of the Investor’s Capital Contribution.” The Wiring Instructions for the escrow distributions contain similar language. Even though the above provisions do not mandate the return of an investor’s funds if they remain in escrow for more than two years, it remains that the NCE is now permitted to return the Petitioner’s funds if it so chooses and she has not demonstrated that her investment remains in escrow. As such, the record does not confirm that her funds remain invested in the NCE.

### III. CONCLUSION

In summary, the Chief correctly interpreted the definitions of capital and invest as treating the proceeds of third party loans as indebtedness and requiring those loans to be secured by the Petitioner’s assets. The record supports the Chief’s findings that the “Pagare” was not sufficiently secured at the time of filing. In addition, the Petitioner has not traced the source of the \$250,000 from the sale of property in 2008 and shown that those funds remained available in 2013. Further, she has not resolved whether the funds derived from her mortgage were available for investment. Accordingly, she has not demonstrated the lawful source of her invested funds. Finally, she has not established that her invested funds remain in escrow.

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, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of W-R-Z-*, ID# 17431 (AAO July 7, 2016)