U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-B-

DATE: JULY 27, 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 based on his financing of a new specialty food market. *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 Immigrant Investor Program Office Chief denied the petition. The Chief concluded that the Petitioner's investment was not at risk due to a redemption provision in the Operating Agreement.

The matter is now before us on appeal. In his appeal, the Petitioner submits additional evidence and maintains that the Chief should have considered the Operating Agreement in the context of statements in the Private Placement Memorandum and the Confidential Private Offering Memorandum (Offering Memorandum).

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).

Permanent Resident Status under this program is conditional; foreign nationals must petition to remove conditions 90 days prior to the second anniversary of obtaining resident status. Section 216(A) of the Act, 8 U.S.C. § 1186b.

The implementing regulation 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.
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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.

With respect to documenting an at-risk investment, 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. . . .

II. ANALYSIS

The Petitioner bases his eligibility on an investment of $1,000,000[1] in the new commercial enterprise (NCE), which does business as According to the Operating Agreement for the NCE, two other foreign nationals also invested $1,000,000 each in the NCE seeking and sought eligibility for the same fifth preference immigrant classification (EB-5). The company is doing business as The documents addressing the Petitioner's ability to

[1] The minimum investment amount is $1,000,000 as the Petitioner has not documented or otherwise indicated that the NCE is principally doing business in a targeted employment area. 8 C.F.R. § 204.6(f).

withdraw from the investment include the Operating Agreement, the Offering Memorandum, and the Subscription Agreement. The Chief concluded that the Operating Agreement contained an impermissible redemption agreement, revealing that the investment was not at risk. On appeal, the Petitioner maintains that the plain language of the Operating Agreement shows that the Petitioner has a permissible preferred share in the NCE and, when read in conjunction with the Offering Memorandum and the Subscription Agreement, does not reflect a right to redeem his capital contribution. For the reasons discussed below, we find that the plain language of the Operating Agreement effectively sets an intended repurchase price for the Petitioner's interest after adjudication of the Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Residence, and that the other agreements do not overcome that language.

A. At-Risk Investment

1. Redemption Agreement

For a petitioner's money to be truly at risk, he or she cannot enter into a business agreement knowing there is a willing buyer in a certain number of years, nor can the partner or member be assured that he or she will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. *Matter of Izummi*, 22 I&N Dec. 169, 186 (Assoc. Comm'r 1998). Accordingly, at issue is whether the terms of the Operating Agreement assure the Petitioner that the NCE intends to return of his full investment.

Article 6.2(a) of the Operating Agreement explains that no member has the right to withdraw or reduce his contribution with the following relevant exceptions:

> (b) Members who are holders of the Class B Interests may demand a return of the capital contributions upon receipt of the approval of the I-829 Petition by Entrepreneur to Remove Conditions by the U.S. Citizenship and Immigration Services. Such Members may not request a distribution under the EB-5 program unless the request for distribution is made after the third, but not later than fifth anniversary after the date of the investment in the company, or the EB-5 Members obtains approval of their I-829 petitions to remove the conditions of permanent residence from the USCIS [U.S. Citizenship and Immigration Services], and provided the distributions meet other conditions provided in this Operating Agreement.
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> In the event of the denial of the I-829 Petition by Entrepreneur to Remove Conditions, at the end of the five-year compliance period, following the USCIS's Request for Evidence in connection with their I-829 petition, the Company intends to refund that member's $1,000,000 subscription amount paid within 120 days if feasible.

The Petitioner's position that *Izummi*, 22 I&N Dec. at 186, permits the above terms is not preponderantly persuasive, nor is it supported. The absence of (1) the words "redeem" and "redemption" in the Operating Agreement and (2) a separate redemption agreement are not determinative. Instead, we look to the actual implications of the included language. The Petitioner does not corroborate his statement that redemption provisions are typically executed in redemption agreements separate from the Operating Agreement. In *Izummi*, the redemption provisions appeared in both the partnership agreement and the investment agreement (also known as a subscription agreement), but the decision did not suggest that only those redemption provisions contained in a stand-alone agreement are problematic. Also, nothing in *Izummi* suggests that the words "redeem" or "redemption" appeared in either the partnership agreement or the investment agreement. As such, we look to the plain meaning of the language in the Operating Agreement.

The Petitioner maintains that while he may "request" a return of his investment, the payment is not guaranteed and the terms of the agreement create no absolute obligation to redeem the Petitioner's interest. Article 6.2(b) allows the Petitioner to "demand" the return of his capital. Black's Law Dictionary defines "demand" as "to claim one's due" or to "require." *Demand*, Black's Law Dictionary (10th ed. 2014). While the provision subsequently uses the word "request," it is apparent that the intent of the parties is to return the full capital account amount, with subparagraph (d) expressly referencing a refund price of the full $1,000,000 should USCIS deny the Form I-829. Accordingly, the Petitioner has a willing buyer in a certain number of years, and has been assured that he will receive a certain price, which *Izummi* precludes. 22 I&N Dec. at 186. Any "risk" that the NCE will not have the funds to repay the full amount is the same as any business creditor incurs. *Id.* at 185. Further, the record does not support the Petitioner's statement that the language created a preferred interest[2] rather than a redemption right. Preferred stock is defined as an interest with a preferential claim to dividends and to company assets upon liquidation. *Preferred stock*, Black's Law Dictionary (10th ed. 2014). The Operating Agreement does discuss preferred interests. For example, Article 8.2 addresses allocations and distributions to capital accounts, referencing a preferred return for Class B members. Article 6.2, however, relates to withdrawals, setting an intended repurchase price rather than a preferred dividend. For the above reasons, the plain language of Article 6.2 constitutes an impermissible redemption agreement.

Next, the Offering Memorandum and Subscription Agreement do not suggest a different interpretation. First, Article 21(c) of the Operating Agreement affirms: "This Agreement sets forth the entire agreement of the parties hereto with respect to the subject matter hereof" and characterizes the intent of the Members that "this Agreement shall be the sole source of agreement of the parties." Thus, the Petitioner has not established why the plain language in that agreement is not controlling.

Second, the provisions in the Offering Memorandum that the Petitioner identifies on appeal in the Offering Memorandum do not suggest that the withdrawal terms are other than an agreement to repay the full investment amount if able to do so. For example, on page 17, the memorandum explains in the second paragraph under the distributions heading that "there shall be no obligation to

[2] Preferred interests are expressly permitted at 8 C.F.R. § 204.6(j)(2)(iv).

return to the Investing Members any part of their Capital Contribution." In the prior paragraph, however, the memorandum provides that "there shall be no return of Investing Members' Capital Contribution until the full adjudication of each Member's I-829 petition with the USCIS and then only from available net Cash Flow from Operations." Similarly, under the "Redemptions, Withdrawal, Transfer or Assignment" heading on the same page, the document confirms that there is "no right of redemption or withdrawal from the Company" with the same exceptions allowing such a withdrawal. Again, as with the Operating Agreement, the Offering Memorandum contemplates a return of the full investment amount.

Third, the provisions the Petitioner identifies in the Subscription Agreement, which broadly state that the investor understands the risk of losing the full investment, are not inconsistent with the NCE's expressed intent in the Operating Agreement to repay the full capital investment after the adjudication of the investors' Forms I-829. For example, Section 1.1(d) of the Subscription Agreement affirms that the investor has received the Operating Agreement and evaluated the risks, including those set forth in the Offering Memorandum. Nothing in this statement implies any risk beyond that normally incurred by a business creditor.

Nevertheless, even if the terms of the Offering Memorandum and Subscription Agreement specifically stated that there was no set repurchase price intended, those provisions would contradict the Operating Agreement. The Petitioner must resolve any inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not offered any legal authority suggesting that the general provisions in the Offering Memorandum or Subscription Agreement would take precedence over the specific language in the Operating Agreement, which unambiguously allows the Petitioner to demand the return of his entire investment.

In summary, the plain language of the Operating Agreement, which constitutes the entire agreement between the parties, affords the Petitioner the right to recover the full amount of his capital. At issue is whether this provision creates an impermissible redemption agreement. As stated above, while the Offering Memorandum contains language explaining that the company may not be able to refund the capital invested, the risk that the Petitioner might not receive payment if the Partnership is unable to do so is no different from the risk inherent in an unsecured loan. *Izummi*, 22 I&N Dec. at 184. Accordingly, by a preponderance of the evidence, the withdrawal terms in the Operating Agreement constitute an impermissible redemption agreement.

2. Overcapitalization

While not addressed by the Chief, another element of whether the Petitioner made an at-risk investment involves the projected use of the capital. The Business Plan and Operating Agreement list the following breakdown of the $3,000,000 from the Petitioner and two other investors also seeking the same immigrant classification:

- Security Deposits (Rent, Utilities and Others) $90,000
- Leasehold Improvements $550,000
- Equipment & Fixtures $600,000
- Inventory $200,000
- Pre-Opening Expenses $70,000
- Advertising $40,000
- Working Capital $800,000
- Contingency $650,000

The above breakdown does not indicate that the Petitioner's funds were at risk. Funds invested in a significantly overcapitalized company with insufficient capital expenditures forecasted are not at risk. *See Al Humaid v. Roark*, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010). The breakdown of start-up costs sets aside $1,450,000 of the $3,000,000 for "working capital" and "contingency." These amounts are especially of concern given that Article 6.1(c) of the Operating Agreement allows the managing members to hold or maintain levels of cash from capital accounts or revenues "for costs, expenses or other costs associated with the Company's assets, administration, obligations or operations." Accordingly, the plain language of this provision permits the NCE to set aside funds for the purpose of repaying the capital contributions after adjudication of the Forms I-829. Any money set aside in such accounts would not be available for job creation. *Izummi*, 22 I&N Dec. at 189.

In addition, the timing of the Petitioner's investment further calls into question whether his funds were at risk. While the record does not confirm when the other two EB-5 investors transferred their funds, the Petitioner did not invest until August 2, 2013, over a year after the company executed the lease[3] and began paying utilities.[4] The record does not contain the invoices or receipts for the leasehold improvements and furniture and fixtures that would establish the timing and amount of those costs. The Petitioner has not shown how the funds he invested after costs were incurred and paid are at-risk for the purpose of satisfying those expenditures.

In summary, the Petitioner did not account for the expenditures for almost half of the $3,000,000 investment by him and his two fellow EB-5 investors.[5] Also, he invested after a substantial amount of the identified costs were incurred, and did not offer invoices or receipts confirming the projected leasehold, furniture, and equipment costs and timing. For these reasons, the Petitioner has not documented that the full amount of his August 2, 2013 investment is at risk.

[3] The lease, with an effective date no later than February 1, 2013, required a deposit of $179,666.67 and specified that the monthly rent would be $24,083.33 for the first three months, $34,500 for the next three months, $44,916.67 for the remainder of the year, and $46,265.17 monthly in year two.

[4] The Petitioner submitted a February 2013 gas bill as well as April and May utility and water/sewer bills.

[5] In addition, the NCE has other investors not seeking EB-5 status who contributed a $1,000,000 line of credit that the NCE may have used for some of its start-up expenses.

III. CONCLUSION

The Petitioner has not established that he made an at-risk investment, as required. 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.

ORDER: The appeal is dismissed.

Cite as *Matter of S-B-*, ID# 17590 (AAO July 27, 2016)