



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

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

MATTER OF A-A-

DATE: AUG. 24, 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 pursuant to the 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 (NCE) 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, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the Petitioner had not demonstrated the lawful source of his investment funds.

On appeal, the Petitioner provides a brief and additional exhibits relating to the loan that he obtained, the proceeds of which he used to invest in the NCE. He asserts that he acquired his investment capital through lawful means.

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

I. LAW

A foreign national may be classified under section 203(b)(5)(A) of the Act as an immigrant investor if he or she invests the requisite amount of qualifying capital in a NCE. The NCE can be any lawful business that engages in for-profit activities. The investor must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees.

An immigrant investor may invest capital within a regional center, which is an economic unit involved with the promotion of economic growth. 8 C.F.R. § 204.6(e) (defining “regional center”); 8 C.F.R. § 204.6(m)(7). The regulatory definition of “capital” includes indebtedness, as well as cash, and it provides:

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 Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital

8 C.F.R. § 204.6(e). 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 The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

....

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

II. ANALYSIS

The Petitioner bases his eligibility on an investment in [REDACTED] (NCE), which is affiliated with the USCIS-designated regional center [REDACTED].¹ The Private Placement Memorandum explains that the NCE is involved in the “development of a luxury, multi-family rental complex” in [REDACTED] Texas. The Chief’s sole basis for denial is that the Petitioner did not demonstrate the lawful source of his capital. Specifically, he did not show that he lawfully used the proceeds of the loan he acquired to invest in the NCE. For the reasons discussed below, we agree with the Chief. Also, we find that the Petitioner has not documented (1) he is personally and primarily liable for the loan, or (2) he has placed at least \$500,000 at risk in the NCE.²

A. Investment of Indebtedness

The Petitioner maintains that he has invested at least \$500,000 of lawfully obtained capital in the NCE. The record shows that he obtained a 190,000,000 Nigerian Naira (NGN) loan from [REDACTED] in February 2015,³ and used a portion of the proceeds to invest in the NCE. He secured the

¹ The regional center was formerly known as the [REDACTED]

² If the NCE is located in a targeted employment area, the required amount of capital is reduced from \$1,000,000 to \$500,000. See 8 C.F.R. § 204.6(f).

³ In February 2015, 190,000,000 NGN was approximately \$945,227. See Currency Converter,

loan with two real properties located in [REDACTED] Nigeria. [REDACTED] a company in which he has a 40 percent interest, owns the first property (Property A), and he owns the second property (Property B). Two companies, [REDACTED] and [REDACTED] which he claims to jointly own with his spouse, guaranteed the loan.

In November 2014, an intermediary company, [REDACTED] transferred \$550,000 to the NCE on the Petitioner's behalf, in advance of [REDACTED] disbursement of the 190,000,000 NGN loan proceeds. The Petitioner partially reimbursed [REDACTED] in March 2015 using a portion of the [REDACTED] loan proceeds.

In this case, the evidence shows that the Petitioner has invested indebtedness in the NCE.⁴ In *Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998), we stated, "indebtedness," including proceeds from a third-party bank loan, "that is secured by assets of the enterprise is specifically precluded from the definition of 'capital.'" See also 8 C.F.R. § 204.6(e) (defining "capital"). *Soffici* thus illustrates that when a petitioner's capital is derived from proceeds of a third-party loan, financial contribution of those funds constitutes an investment of indebtedness, not cash, and the investor must therefore show that his or her personal assets sufficiently secure the loan, and that he or she is personally and primarily liable for the loan. *Soffici*, 22 I&N Dec. at 162; see also 8 C.F.R. § 204.6(e).

1. Use of Loan Proceeds

The record supports the Chief's finding that the Petitioner has not demonstrated his eligibility for the classification. Specifically, he has not shown that he may lawfully use proceeds from the [REDACTED] loan to make a personal investment in the NCE. The December 2014 loan approval letter specifies that the loan purpose was to "finance the completion of five luxury flats on two blocks located at [Property A]." The letter notes that the Petitioner must utilize the funds for the approved purpose. The document also provides that the bank would consider the loan to be in default "if the [Petitioner] fails to utilize the [loan] for the purpose for which it is granted" or "if it is discovered that there was a material misrepresentation of facts by the [Petitioner] with regard to the purpose, utilization of the [loan] and the collateral." A September 2016 letter from [REDACTED] similarly states that the loan is for the completion of the flats. In denying the petition, the Chief concluded that the Petitioner had not established that he was authorized to use the loan proceeds to make an investment in the NCE. We agree.

The regulation at 8 C.F.R. § 204.6(e) provides that a petitioner must show his or her investment funds are lawfully obtained, and that assets "acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital" under the Act. See also 8 C.F.R.

<https://www.oanda.com/currency/converter/>, accessed on August 22, 2017, and incorporated into the record of proceedings.

⁴ Although the Petitioner argued before the Chief that he had invested cash, not indebtedness, in the NCE, he has not advanced the same position on appeal.

§ 204.6(j). An examination of a restriction placed on the use of loan proceeds is relevant in determining whether a petitioner has established the lawful source of funds. For example, if an investor obtains a loan from a lawful source, such as a bank, the loan proceeds may nevertheless be unlawful if he or she obtained the loan by improper means, such as fraud and intentional misrepresentation on the loan application. In addition, the presence of a restriction on the use of proceeds may weaken the credibility of the evidence in the record as relating to whether the loan was the actual source of the petitioner's capital investment. These requirements serve a valid government interest: to confirm that the funds utilized are not of suspect origin. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Here, the Petitioner has not sufficiently demonstrated that he may lawfully use the proceeds of the loan to make a personal investment in the NCE. On appeal, he submits evidence of payments he made to [REDACTED] as well as documentation to show that the flats at Property A are being completed. While he may be complying with some provisions of the loan agreement, the issue before us is whether he can lawfully use the proceeds to make an EB-5 investment. To that end, he provides a January 2017 letter from [REDACTED] explaining, "with prior approval from the Bank, the [Petitioner] is at liberty to apply part of the loan for purpose(s) other than those specified in the loan agreement." He maintains that he "could use the loan proceeds to both invest in the NCE and develop the real estate properties." However, he has not presented material to show that he sought and received prior approval from [REDACTED] before using a portion of the proceeds to invest in the NCE. Without additional corroboration, he has not established the lawful source of his EB-5 funds.

2. Loan Collateral

Assuming *arguendo* that the Petitioner could lawfully use the loan proceeds for personal investment purposes, he has nonetheless not established that he is personally and primarily liable for the indebtedness, such that it qualifies as capital under the regulation. See 8 C.F.R. § 204.6(e) (defining "capital"). As discussed, Property A and Property B secured the loan. [REDACTED] owns Property A,⁵ which was valued at 260,000,000 NGN at the time the Petitioner obtained the loan. Though the record reflects that he has a 40 percent interest in the company, and he asserts that he has the legal right to mortgage the property, he has not shown that Property A is in fact his personal assets.

The Petitioner has documented that he personally owns Property B, which he purchased using his earnings. Property B was valued at 239,078,000 NGN at the time he obtained the [REDACTED] loan. He maintains that since the value of Property B exceeded the total loan amount of 190,000,000 NGN we need not consider the use of Property A as collateral in evaluating whether he is personally and primarily liable for the indebtedness. We disagree.

⁵ On appeal, the Petitioner claims to have personally purchased Property A in 1996 or 1997, but has not provided material substantiating his statement. The property assignment for Property A reflects that [REDACTED] owned the property at the time of the loan agreement.

As noted, the regulation provides that for indebtedness to qualify as capital it must be “secured by assets owned by the [foreign] entrepreneur” and the investor must be “personally and primarily liable” for the indebtedness. 8 C.F.R. § 204.6(e). Here, even assuming *arguendo* that the Petitioner has sufficiently secured the loan with his personal assets, Property B, he has not established that he is personally and primarily liable for the indebtedness. As described above, he used two properties as collateral, one of which, Property A, he does not own. In the event of default, [REDACTED] could therefore pursue seizure of Property A to satisfy the loan without proceeding against the Petitioner or his personal assets, Property B. Additionally, because two companies, [REDACTED] and [REDACTED] are guarantors of the loan, [REDACTED] could pursue them rather than the Petitioner. Based on the above, the Petitioner has not sufficiently shown that he is personally and primarily liable for this loan, or that the indebtedness qualifies as capital under the regulation. *Id.*; 8 C.F.R. § 204.6(j)(2)(v); *see also Soffici*, 22 I&N Dec. at 158, 162.

B. Capital Placed at Risk

Moreover, the Petitioner has not sufficiently documented that he has placed at least \$500,000, the minimum required investment amount, at risk in the NCE. *See* 8 C.F.R. § 204.6(f). As noted, in November 2014, an intermediary company, [REDACTED] transferred \$550,000 to the NCE on the Petitioner’s behalf. Per its January 2015 letter, the NCE credited the Petitioner with \$500,000 in investment capital and \$50,000 for an administrative fee. The Petitioner received 190,000,000 NGN loan proceeds from [REDACTED] in February 2015, and reimbursed [REDACTED] with a payment of 104,775,000 NGN in March 2015. However, he has not shown that he fully reimbursed [REDACTED] as 104,775,000 NGN was approximately \$519,774.⁶ The record does not indicate whether the shortfall occurred in his reimbursement to [REDACTED] for the investment capital or the administrative fee. Without additional corroboration, the Petitioner has not sufficiently documented that he has invested at least \$500,000 in the NCE as claimed in the petition.

III. CONCLUSION

The Petitioner has not demonstrated that he is eligible for the immigrant investor classification. Specifically, he has not documented the lawful source of his funds; shown that he is personally and primarily liable for the loan, the proceeds of which he invested in the NCE; or established that he has placed at least \$500,000 at risk in the NCE.

ORDER: The appeal is dismissed.

Cite as *Matter of A-A-*, ID# 476123 (AAO Aug. 24, 2017)

⁶ *See* Currency Converter, <https://www.oanda.com/currency/converter/>, accessed on August 24, 2017, and incorporated into the record of proceedings.