U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-Y-

DATE: JUNE 25, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE

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

The Petitioner 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 (EB 5) classification makes immigrant visas available to foreign nationals who make a qualifying equity investment of the requisite amount in a new commercial enterprise (NCE) 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, concluding that the Petitioner made impermissible material changes to her submission in response to his notice of intent to deny (NOID). He issued the NOID on grounds that the Petitioner had not placed capital at risk with the NCE. Specifically, the Chief determined that her investment was not a qualifying one because it included a debt arrangement.

On appeal, the Petitioner asserts she placed her capital at risk with the NCE, so the evidence submitted after her initial filing does not constitute a material change.

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

I. LAW

To qualify for this immigrant investor classification, a petitioner must show: (1) that he or she has invested or is actively in the process of investing capital, (2) in a new commercial enterprise, (3) that creates at least 10 full-time positions for qualifying employees. *See* section 203(b)(5) of the Act. The regulation at 8 C.F.R. § 204.6(e) defines "invest" to mean "to contribute capital." It further provides that "A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the [immigrant investor] and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part...." *Id.*

Additionally, an arrangement under which funds have been contributed in exchange for an equity interest subject to a redemption agreement which provides that the investor may demand a return of some portion of his or her investment funds, including after obtaining conditional permanent resident status, is an impermissible debt arrangement, no different from the risk any business creditor incurs. Such funds do not constitute a qualifying contribution of capital and, because the redemption

provides for a guaranteed return to the immigrant investor, the funds are similarly not at risk. *See Matter of Izummi*, 22 I&N Dec. 169, 178-79 (Assoc. Comm. 1998); *see also* 6 *USCIS Policy Manual* G.2(A)(2), https://www.uscis.gov/policymanual.

II. ANALYSIS

The Petitioner invested $500,000[1] as an equity stake in the NCE, which intends to pool investments from up to four investors to fund development and operations of a new school. The Chief found that the business plan and the operating agreement contained an impermissible debt arrangement, and accordingly that the Petitioner had not placed her funds at risk. We agree. The business plan and operating agreement contain language demonstrating that the NCE must refund the funds from bond sales or income, or else face increasingly significant late fees. The Petitioner triggers the refund when she requests a return of her capital contributions. Therefore, this right to request the refund whenever she desires functions as an impermissible debt agreement because it provides the investor the right to a guaranteed return of some or all of his or her investment. Accordingly, the funds provided under this arrangement do not constitute a qualifying investment, and are similarly not at risk. *Izummi*, 22 I&N Dec. 169, 178-79 (Assoc. Comm. 1998).

A. Capital At Risk

The record in its totality demonstrates the Petitioner has not made a qualifying investment into the NCE, and accordingly that she has not placed her investment at risk for purposes of generating a return on that investment. 8 C.F.R. § 204.6(j)(2). Page 5 of the business plan describes the NCE's proposed exit strategy as the buying back of equity "shares from EB-5 investors in conjunction with [the school's] purchase of the property using state-endorsed tax-exempt bonds in August 2019 (when the purchase option can first be exercised)..." The Petitioner is then able to request that the NCE return her investment as provided for in Section 7 of the operating agreement, Withdrawal; Redemption. Specifically, Section 7.b states that:

> A Member holding Class B Interests may request a return of such Member's Capital Contributions upon the final adjudication of such Member's I-829 Petition by Entrepreneur to Remove Conditions by the USCIS. The Company shall return each such Member's Capital Contributions, plus each Member's accrued but unpaid Preferred Return and Additional Return, in the event the Manager, in his reasonable discretion determines that such payments would not have a detrimental effect on the business of the Company. It is anticipated that such amounts can be paid upon the occurrence of the Member holding Class A Interests successfully securing bond financing to refinance certain debts owed by such Class A Interests holder. The Class

[1] The Petitioner indicates the NCE is located in a targeted employment area (TEA) and the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f). She received a 3 % equity interest in exchange for her investment. After April 2014, the project location no longer qualified as a TEA, so later investors obtained their equity interests in return for a $1,000,000 investment.

> B Interests holders acknowledge that such potential bond financing shall not likely occur until the year 2019 at the earliest. In the event the Member holding Class A Interests is not successful in securing bond financing, the Company will seek to make such redemption, Preferred Return and Additional Return from its Net Cash from Operations or alternative sources of financing. The Company shall make efforts to honor the redemptions and pay the Preferred Return and Additional Return on time.

Section 7.b.iv of the operating agreement further stipulates:

> In the event of the denial of the I-829 Petition by Entrepreneur to Remove Conditions, following the USCIS's Request For Evidence in connection with such Class B Interest holder I-829 petition, the Company shall refund any such Member's ... subscription amount paid within 120 days, plus the Member's Preferred Return and Additional Return accrued to date as well as the corresponding administrative fees after deducting $12,000 per year. If there is any delay, besides the above Preferred Return and Additional Return, the Company shall also pay the Penalty Return to such Class B Interest holder.

Section 9, Allocation and Distributions of the operating agreement specifies that:

> ... commencing on January 1, 2020, another twelve percent (12%) annual return on any of the outstanding balance of the Company to the Members who hold Class B Interests shall also be paid as their Penalty Return if the Company does not redeem such Member's Class B Interests as well as any unpaid Preferred Return and Additional Return prior to December 31, 2019.

In short, the operating agreement gives the Petitioner the right to request a refund of her investment.[2] While couched in terms of putting it at the discretion of the general manager, the operating agreement contains language demonstrating that, upon request, the NCE must refund the funds from bond sales or income by December 31, 2019. In the instance that the NCE does not do so, it must refund her investment and pay additional late fees. Thus, the Petitioner's investment contains an arrangement resulting in the guaranteed return of some or all of her capital. Accordingly, she has not demonstrated that her investment is a qualifying one and that her capital has been placed at risk for the purpose of generating a return on that capital as required at 8 C.F.R. § 204.6(j)(2).

B. Material Change

As the originally submitted documents included with the initial petition do not meet the eligibility requirements, we must also evaluate whether the documents dated after the petition's filing date of May 2015 establish the Petitioner's eligibility for the benefit sought. In response to the Chief's

[2] This language is also summarized on page 38 of the business plan and pages 55 and 56 of the private placement memorandum.

NOID, the Petitioner provided a May 2017 waiver in which she relinquishes her rights under the previously discussed provisions in the business plan and operating agreement. In his subsequent denial, the Chief found that although the waiver addressed his concerns, the new evidence resulted in a material change to the original petition, and therefore it could not be approved under a new set of facts. As explained below, we agree with the Chief's finding.[3]

The Petitioner waived her right to request repayment of her investment, effectively removing the impermissible debt arrangement between herself and the NCE. However, as the document presented a set of facts that were not established at the time the petition was filed, it cannot be approved. "A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

III. CONCLUSION

The Petitioner has not demonstrated that she placed her investment at risk in the NCE for the purpose of generating a return on her capital investment.

ORDER: The appeal is dismissed.

Cite as *Matter of X-Y-*, ID# 1248730 (AAO June 25, 2018)

[3] A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. *See Kungys v. United States*. 485 U.S. 759, 770-72 (1988).