U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Z-H-

DATE: DEC. 5, 2019

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.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish, as required, that the funds the Petitioner remitted to [redacted] the NCE, qualified as capital. On appeal and in response to our request for evidence (RFE), the Petitioner submits additional documentation and asserts that the record establishes eligibility for the benefit sought.

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

I. LAW

The applicable regulation provides: "[t]o 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." 8 C.F.R. § 204.6(j)(2). To invest means "to contribute capital." 8 C.F.R. § 204.6(e) (defining "invest"). However, "[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 . . . ." *Id. Matter of Izummi*, 22 I&N Dec. 169, 188 (Assoc. Comm'r 1998), held that entering into a redemption agreement is, in effect, entering into a debt arrangement and is prohibited under 8 C.F.R. § 204.6(e). "For the alien's money truly to be at risk, the alien cannot enter into a partnership knowing that he [or she] already has a willing buyer in a certain number of years, nor can he [or she] be assured that he [or she] will receive a certain price. Otherwise, the arrangement is nothing more than a loan . . . ." *Id.* at 186.

Moreover, in no event may a petitioner enter into such an agreement prior to the end of the two-year period of conditional residence. *Izummi*, 22 I&N Dec. at 186. An investment assumes that risk exists;

thus, the foreign national investor must go into the investment not knowing for sure if he or she will be able to sell his or her interest at all after he or she obtains unconditional permanent resident status, and if he or she is successful in selling the interest, the sale price may be disappointingly low or surprisingly high. *Id.* at 186-87. This way, the investor risks both gain and loss. *Id.* at 187; *see also* 8 C.F.R. § 204.6(j)(2).

II. ANALYSIS

The Petitioner bases his eligibility on a $1,000,000 investment in the NCE. The record includes a business plan submitted with the initial 2015 filing that indicates the NCE was formed to "develop, own, and operate a new [redacted] franchise" restaurant. The Petitioner is the sole Class A Member of the NCE, which is managed by the Class B Member, [redacted]

The Chief found that the Petitioner did not satisfy the capital at risk requirement because he had not invested a qualifying contribution of the required amount of capital. Specifically, she found that the language contained in the NCE's offering memorandum and the operating agreement indicated an impermissible debt arrangement.

The offering memorandum and operating agreement present three options by which the Petitioner may exit the investment. First, according to pages 47-48 of the offering memorandum, after "5 years" or "immediately subsequent to the final adjudication of all [EB 5 investors'] Form I-829 petitions," [redacted] "will make a good faith effort," but is not required, to purchase the Petitioner's and the other Class A member's [redacted] interests within 30 days.

Next, [redacted] may also choose to continue the business operation and if the Petitioner and any other Class A members agree, their investments will remain in the NCE. If this occurs, the Petitioner receives a percentage of the NCE's net cash flow each month and the payments continue until a "purchase option price" based on the "year 5 business value of the EB 5 Investors' shares plus any Unpaid Preferred Return" has been repaid.

Finally, under Article 11.8(C), if the purchase option is not exercised and [redacted] does not want to continue operations, then the Petitioner and any other Class A members will "have the right, but not the obligation" to pursue several alternatives. Specifically included are the rights to "[r]eplace the Manager, require [redacted] to convey all of its Membership Interest upon the payment of $1[,]" and "take control of any and all Reserves for its benefit, including, without limitation and any accrued cash balances of [the NCE] with the intent to either seek a third party sale or refinance the [redacted] permitting the purchase of the buyout of the EB 5 Investors' investment[.]" The Petitioner will also have the right to "cease and wind up all business affairs and operations of the Restaurant, and dissolve [the NCE]" and distribute funds to the Petitioner and the other Class A Members in proportion to each member's "Adjusted Capital Contribution" and "Unpaid Preferred Return" after the NCE's debt and liabilities are paid.

In July 2019, we issued an RFE regarding the ambiguity and the inconsistencies in the organizational documents. We noted that the provision under Article 11.8(C) appears to show that if [redacted] does not exercise the purchase option or choose to continue operations, then it guarantees the Petitioner the

right to take control of the NCE and its finances, explicitly for the purpose of seeking a sale or refinancing of the NCE to effectuate the buyout of his own investment. This option, exercisable by the Petitioner, appears to grant him a right to repayment and altering the nature of the investment into a loan. However, other language in the organizational documents suggests that there may be inconsistencies that call into question whether the redemption provision is, in fact, mandatory. For example, Article 6.3 of the operating agreement restricts the right of members to withdraw or receive any return of their capital contribution. Additionally, Article 7.1, discussing the powers of management of the NCE, limits the authority of the managing member to effect any merger, reorganization, or sale of the company, or effect bankruptcy, dissolution, or voluntary liquidation or windup. This appears to conflict with the right assigned to the Petitioner under Article 11.8(C).

We specifically requested additional information to clarify the legal rights and obligations of the parties as they existed at the time of filing. In addition, we noted that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [USCIS'] requirements." *Izummi*, 22 I&N Dec. at 175; *see also* 8 C.F.R. § 103.2(b)(1). However, *Izummi* states that amendments to organizational documents intended to correct inconsistencies within those documents could be permissible so long as the amendments merely bring the documents into conformity with other evidence submitted at the time the petition was filed. *Id.*, 22 I&N Dec. at 175-76.

In his August 2019 response, the Petitioner clarified that the provisions noted above do not provide mandatory redemption rights and more specifically, the operating agreement included with the initial filing does not guarantee any return of his investment. Considering the record in its totality, the evidence supports the Petitioner's assertion that the organizational documents do not provide him with a contractual right to repayment.

III. CONCLUSION

The Petitioner has established that he made a qualifying investment in the NCE and has demonstrated his eligibility for the immigrant investor classification. 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has been met.

ORDER: The appeal is sustained.

Cite as *Matter of Z-H-*, ID# 1471257 (AAO Dec. 5, 2019)