U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-W-

DATE: APR. 5, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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. An immigrant investor may invest the required funds directly in a NCE, or through a "regional center."[1] Regional centers apply for designation as such with U.S. Citizenship and Immigration Services (USCIS). Designated regional centers identify and work with NCEs, which in turn are associated with a specific investment project, either taken on directly by the NCE or by one or more separate entities known as the "job creating entity" (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The Chief of the Immigrant Investor Program Office denied the Form I-526, Immigrant Petition by Alien Entrepreneur, concluding that the record did not establish, as required, that the Petitioner had placed her capital at risk in the NCE. Specifically, he determined that she lacked a chance for a gain or a return on her investment.

On appeal, the Petitioner submits additional evidence and asserts that the operative documents, such as the limited partnership agreement, demonstrate that she has a chance for gain or loss based on her investment in the NCE.

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

[1] A regional center is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (defining "regional center").

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.*

In addition, the regulation at 8 C.F.R. § 204.6(j)(2) provides, 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 [immigrant investor] must show actual commitment of the required amount of capital.

Moreover, for the capital to be "at risk" there must be a risk of loss and a chance for gain. If an immigrant investor is guaranteed a return or a rate of return on all or a portion of his or her investment, then the amount of any guaranteed return is not at risk. *See Matter of Izummi*, 22 I&N Dec. 169, 183-88 (Assoc. Comm'r 1998); *see also* 6 *USCIS Policy Manual* G.2(A)(2), https://www.uscis.gov/policymanual.

II. ANALYSIS

The Petitioner invested $500,000[2] in the NCE, which is affiliated with the (regional center). The NCE proposes to loan up to $40,000,000 (EB-5 loan) to the JCE, to finance, construct, and operate a hotel. The Chief found that the list of projected expenses in the limited partnership agreement, combined with the expected loan interest, would not allow for a chance of gain. According to the confidential private offering memorandum, EB-5 investors could receive a 0.05% interest payment upon maturity of the loan, at the option of the general partner who retains "sole and absolute discretion with regard to the return of/on investment." The Chief found the investment terms do not provide the Petitioner with any rights to the NCE's profits, whether derived from the loan interest or otherwise, and the sole opportunity for the Petitioner to generate a return on the investment is if the general partner elects to pay a 0.05% interest payment upon the JCE's loan repayment.[3] He further

[2] The Petitioner indicates the JCE 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).

[3] The EB-5 loan document describes the interest rate of the loan between the NCE and JCE as 1.5% per annum. The partnership agreement defines the annual management fee payable to the general partner equal to the difference between 1.5% of the total loan amount to the JCE and any other expenses incurred by the NCE. Article 6 further delineates ten other expenses, aside from the management fee, that are also the responsibility of the NCE.

determined that a "discretionary chance for return which is unrelated to the investment does not satisfy the regulatory requirement for capital at risk under 8 C.F.R. § 204.6(j)(2)."

The record in its totality demonstrates the Petitioner has not placed her investment at risk for purposes of generating a return on that investment. The regulation at 8 C.F.R. 204.6(j)(2) specifies that the capital needs to be placed at risk and that an investment return needs to be both the *purpose* of the investment and derived from the underlying investment. The NCE intends to loan the pooled capital to the JCE at an interest rate of 1.5% per year. The partnership agreement creates a structure in which, after the NCE receives its annual interest and pays expenses, the general partner is entitled to all residual funds. Because the NCE's intended return on the investment derives exclusively from the 1.5% interest charged on its loan to the JCE, the NCE's obligation to pay 1.5% of the loan amount in expenses and general partner management fees does not allow for any proceeds to be allocated to the limited partners. Therefore, any return payable to the Petitioner is unrelated to the purpose of the underlying investment and is wholly discretionary for the general partner to pay from other unspecified sources.

On appeal, the Petitioner asserts, in part, that the NCE has established its income sources from which to pay a return on the Petitioner's investment and the general partner does not have absolute discretion to make or withhold distributions as the Chief claimed. The Petitioner also provides an updated letter from [redacted] of [redacted] further clarifying the implementation of the partnership agreement and offering memorandum provisions regarding distribution of a return on and of her investment. However, the income sources as described by the Petitioner, such as escrow interest and JCE loan late fees, are not directly related to the purpose of the underlying investment, the NCE's loan to the JCE. Further, while the Petitioner contends that the NCE could also distribute proceeds following a "capital event," including the "refinancing, sale, exchange or other disposition of Partnership property," the operative documents do not establish that the NCE will own such property in the future.

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 Y-W-*, ID# 878700 (AAO Apr. 5, 2018)