U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-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 Petitioner made impermissible material changes to his submission in response to a notice of intent to deny (NOID). The Chief reopened the matter in response to the Petitioner's motion, then found that the record did not establish, as required, that the Petitioner had placed his capital at risk in the NCE. Specifically, the Chief determined that he lacked a chance for a gain or a return on his investment.

On appeal, the Petitioner submits additional evidence and asserts that the original documents submitted with the petition, such as the limited partnership agreement, establish his eligibility at the time of filing and demonstrate that he has a chance for gain or loss based on his investment in the NCE.

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

I. LAW

[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").

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.*

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.[3] 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

[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] In response to the Chief's first NOID, the Petitioner submitted documents that post-date the filing of the petition, including an amended limited partnership agreement and two riders that altered the confidential private offering memorandum. After initially denying for impermissible material change, the Chief reopened on the Petitioner's motion and did not raise the issue in his subsequent decision. On appeal, the Petitioner cites to the originally submitted documents to establish eligibility at the time of filing. Our decision addresses whether the original documents submitted with the petition meet the eligibility requirements and discusses whether the post-dated documents result in an impermissible material change.

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.[4] He further 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)."

A. Capital at Risk

The record in its totality demonstrates the Petitioner has not placed his 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 his 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.

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 post-dated after the petition's filing date

[4] 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.

of January 2015 establish the Petitioner's eligibility for the benefit sought. The Petitioner provided a June 2015 amended partnership agreement and June 2015 and March 2016 offering memorandum riders, in response to the Chief's first NOID. In the subsequent denial, the Chief found that although the amended organizational documents remedied the deficiencies, 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.[5]

The amended partnership agreement, in conjunction with the offering memorandum riders, the revised management fee paid to the general partner and adjusted rate of return to investors provided the Petitioner with a chance for a return up to 0.5% of his capital contribution. However, as the documents present a set of facts that were not established at the time the petition was filed, the petition cannot be approved based on these new organizational documents. "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 he placed his investment at risk in the NCE for the purpose of generating a return on his capital investment.

ORDER: The appeal is dismissed.

Cite as *Matter of B-W-*, ID# 1126901 (AAO Apr. 5, 2018)

[5] 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).