U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-Q-

DATE: APR. 18, 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 based on an investment in a new commercial enterprise, [redacted] (the NCE). *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 invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.[1]

The Chief of the Immigrant Investor Program Office denied the petition and subsequent motions to reopen and reconsider, concluding that the Petitioner did not establish that she invested or was in the process of investing her own funds in the NCE. The Petitioner claimed that the source of her investment was a gift from her daughter. The Chief, however, determined that the record was insufficient to support her claim.

On appeal, the Petitioner presents additional documentation to support her argument that she invested gifted funds in the NCE. We issued two notices of intent to dismiss the appeal (NOIDs). In our first NOID, we noted that the Petitioner has not sufficiently explained how her daughter acquired the funds that she later gifted to the Petitioner. The Petitioner responded with supplemental evidence. In our second NOID, we informed the Petitioner that the record, including the NCE's business documents, does not show that she has invested in the NCE. Rather, she has entered into an impermissible debt arrangement, under which the NCE guarantees the return of her investment, as well as a specific rate of return on the investment. The Petitioner has not responded to our second NOID, or challenged our conclusion.

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

[1] In this case, the Petitioner indicates that the requisite amount of qualifying capital is $500,000 because the NCE is in a targeted employment area. *See* 8 C.F.R. § 204.6(f).

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:

> 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.

8 C.F.R. § 204.6(e). 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. We stated in *Izummi* that an immigrant investor "cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can [the investor] be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one." *Id.* at 186. Furthermore, we found that the capital was not at risk because the investment was governed by a redemption agreement that protected against the risk of loss of the capital and, therefore, constituted an impermissible debt arrangement under 8 C.F.R. § 204.6(e). *See Izummi*, 22 I&N Dec. at 185.

II. ANALYSIS

The Petitioner seeks immigrant investor classification based on a claimed investment in the NCE. An April 2014 business plan indicated that the NCE will raise $3,000,000 from six immigrant investors, and use the funds to finance and operate a charter school in North Carolina. The business plan noted that the NCE has: (1) one general partner, [redacted] owning 51.99% of the NCE; (2) one special general partner, [redacted]

owning 0.01% of the NCE;[2] and (3) six limited partners, who, including the Petitioner, are investors seeking immigrant investor classification, each owning 8% of the NCE.

According to pages 4 and 9 of the business plan and section 3.3 of the NCE's Limited Partnership Agreement, the NCE and entered into a development agreement. Under this agreement, the NCE will loan funds to purchase land and construct a charter school. The NCE will then lease the school from and operate it. The business plan stated that the general partner of the NCE "has an option to purchase the school after last EB-5 investor has had their [*sic*] I-829 [Petition by Entrepreneur to Remove Conditions on Permanent Resident Status] adjudicated."

A. Appeal Abandoned

We may summarily dismiss an appeal if the Petitioner does not respond to our NOID. The regulation provides, in pertinent part:

> If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons.

8 C.F.R. § 103.2(b)(13)(i). Our second NOID specifically informed the Petitioner that "[w]e may dismiss your appeal if we do not receive your response to this NOID **within 33 days of the date on the cover letter**. This time period includes 3 days added for service by mail." (Emphasis in original.) To date, more than 33 days have lapsed, and we have yet to receive a response from the Petitioner on issues we discussed in the NOID. As such, we will summarily dismiss the appeal as abandoned pursuant to 8 C.F.R. § 103.2(b)(13).

B. Impermissible Debt Arrangement

In the alternative, as discussed in our second NOID, we find that the Petitioner has not demonstrated that she has invested or is in the process of investing the minimum required capital in the NCE. Instead, the record illustrates that she has entered into an impermissible debt arrangement with the NCE, under which she is guaranteed both the return of her investment and a specific rate of return on the investment. *See Izummi*, 22 I&N Dec. at 183-88. The "Duties & Responsibilities" section on page 12 of the NCE's Confidential Private Offering Memorandum states, in pertinent part:

> [The NCE] is responsible to . . . refinance the school after the last Limited Partner [immigrant investor] has their [*sic*] I-829 adjudicated and refund each Limited Partner's $500,000.

[2] Page 9 of the business plan indicated that the special general partner, also known as EB-5 general partner, owns 0.01% of the NCE, while page 8 of the business plan stated that it owns 1%.

We noted in our second NOID that this provision is at odds with others in the Confidential Private Offering Memorandum, the Limited Partnership Agreement, and the business plan, which appear to make the NCE's return of the investment optional, rather than mandatory. For example, "The Project" section on page 10 of the Confidential Private Offering Memorandum, provides:

> [The NCE's general partner] has an option to purchase the School property after the last EB-5 investor has had their [*sic*] I-829 adjudicated . . . . And that the [NCE] must redeem and repurchase the Limited Partners' interest in the [NCE] (for the amount invested plus any unpaid Preferred Returns) whenever the [NCE] refinances its debt or buys the School property, or sells the School.

In our second NOID, we afforded the Petitioner an opportunity to explain and reconcile the inconsistent information in the record regarding whether the NCE is required or has the option to redeem the foreign nationals' investment. As the Petitioner has not responded, she has not demonstrated that the NCE is under no obligation to reimburse her investment funds, as noted on page 12 of its Confidential Private Offering.

Other documents in the record similarly suggest that the Petitioner has entered into an impermissible debt arrangement with the NCE. For example, section 8.2(g) on pages 11-12 of the NCE's Limited Partnership Agreement indicates:

> [The NCE's general partner has all powers and duties to:] Finance or refinance the Project and use the proceeds therefrom to purchase the real property and buildings previously leased by the [NCE], however, no closing of an acquisition of the Project will occur without each Limited Partner's $500,000 Capital Contribution being immediately returned to them [*sic*] and only after their [*sic*] I-829 petition (at [United States Citizenship and Immigration Services]) being first adjudicated.

The record includes additional evidence illustrating that the Petitioner has loaned funds to, rather than invested in, the NCE. Specifically, section 6.1 (a) and (b) of the Limited Partnership Agreement indicates that the NCE's limited partners, including the Petitioner, are not entitled to the NCE's profits or responsible for its losses. Instead, only the general partner and the special general partner share in the profits and losses of the NCE. Under article II and sections 6.5 - 6.7 of the Limited Partnership Agreement, the Petitioner is entitled to a specific rate of return on the investment, which is referenced as "Priority Return" and "Priority Payment." Page 4 of the business plan states that "the NCE will pay the limited partners, if funds are available, a preferred return on their investment, beginning after the EB-5 funds are invested in the project." As we discussed in our second NOID, *Izummi*, 22 I&N Dec. at 183-88, provides that if an investor is guaranteed a specific rate of return or the return of his or her investment, then the capital is not at risk, because in essence, the investor has loaned funds to, rather than invested in, the business. *See* 6 USCIS Policy Manual, *supra*, at G.2(A)(2).

In light of the abovementioned, as well as the Petitioner's lack of a response to our second NOID, we conclude that she has not shown that she has invested or is in the process of investing the minimum amount of required capital in the NCE. Instead, the documentation shows that she has entered into a debt arrangement, under which the NCE guarantees the return of her investment and a specific rate of return on the investment. The Petitioner has not established that the funds she remitted to the NCE are at risk, because she does not have a risk of loss or a chance for gain. *See Izummi*, 22 I&N Dec. at 183-88.[3]

III. CONCLUSION

The appeal will be summarily dismissed because the Petitioner has not responded to our NOID as required under 8 C.F.R. § 103.2(b)(13)(i). In the alternative, she has not demonstrated that she has invested or is in the process of investing the requisite amount of qualifying capital in the NCE. She therefore has not established her eligibility for the immigrant investor classification.

ORDER: The appeal is summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13).

Cite as *Matter of X-Q-*, ID# 92854 (AAO Apr. 18, 2017)

[3] In light of our decision in the case, we will not adjudicate other issues relating to the Petitioner's eligibility, including whether her daughter properly gifted funds to her to investment in the NCE, and if she has demonstrated the lawful source of her daughter's capital.