U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-H-

DATE: DEC. 19, 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. *See* Immigration and Nationality 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." 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 placed her capital at risk in [redacted] the NCE. Specifically, he determined that she did not demonstrate she would risk suffering a loss on her investment consistent with an equity interest.

On appeal, the Petitioner submits a recent U.S. district court decision addressing the issue before us. She asserts that the provision in the NCE's Limited Partnership Agreement, which allows the general partner, [redacted] to redeem her interest for a specified price, was permissible, and that this arrangement is consistent with an equity investment in the NCE.

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

[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").

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a NCE. To invest means to place capital at risk for the purpose of generating a return on the capital. 8 C.F.R. § 204.6(j)(2). The definition of "invest" excludes debt arrangements between the investor and the NCE. 8 C.F.R. § 204.6(e) (defining "invest"). In addition, the foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees.

An individual seeking classification as an immigrant investor files a Form I-526 petition. If USCIS grants the petition and an application to adjust status, the investor receives conditional permanent resident status. Approaching the end of a two-year period of conditional status, the investor must request that the conditions be removed by filing a Form I-829, Petition by Entrepreneur to Remove Conditions. If USCIS determines that the investor has met all program requirements, it will remove the conditions and grant (unconditional) lawful permanent resident status.

II. ANALYSIS

The NCE proposes to finance the development of a multi-family housing project through the [redacted] EB-5 Regional Center. The NCE's Limited Partnership Agreement, Article 9.1, contains a provision whereby, once an investor becomes an unconditional permanent resident, the general partner may, in its sole discretion, notify that investor of its desire to purchase (i.e. redeem)[2] his or her interest. The cash purchase price is equal to all accrued and unpaid preferred returns and 100 percent of the investor's capital contribution in the NCE. The agreement specifies that "preferred return" is "one half of one percent (0.5%) per annum on the total unreturned Capital Contributions [$500,000]" of an investor.

While the Chief referenced a guaranteed return of capital, he ultimately concluded in his denial of the petition that Article 9.1 was "indicative of a prohibited debt arrangement" and that "each of the investors appears to have entered into his or her investment assured that he or she will be repaid a fixed rate of return and redemption of . . . capital in the buyout option." On appeal, the Petitioner provides a copy of *Doe v. USCIS*, 239 F. Supp. 3d 297 (D.D.C. 2017). In that decision, the U.S. district court found that a similar provision gave a purchasing right to the general partner, not a selling right to the investor, and, thus, "did not guarantee [the investor] anything." *Id.* at 302. Rather, the general partner's option to purchase the investor's interest could "act as a ceiling on the return." *Id.* at 306-07.

[2] While the specific language of this provision is phrased as a purchase of the investor's interest by the general partner, the agreement does not specify that entity would redeem the interest from its own account; rather, presumably it would do so from partnership assets. Even if the general partner did use its own funds, the result for the investor would be the same—a pre-agreed purchase arrangement to effectuate repayment of the investor's interest at an agreed upon time and price.

The case law the Petitioner cites on appeal does not resolve the issue before us. In contrast to the broad precedential authority of a U.S. circuit court decision, we are not bound to follow a published decision of a U. S. district court even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, the issue before the district court was whether a call option constitutes a "guaranteed return."[3] Our concern here is, specifically, whether Article 9.1 constitutes an impermissible "debt arrangement." *See* 8 C.F.R. § 204.6(e). For the reasons discussed below, we find that it does.

The regulatory language at 8 C.F.R. § 204.6(e) broadly prohibits "contributions of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement," allowing us to look beyond the form of any particular transaction and examine its substance in order to determine whether it is, in fact, prohibited. Specifically, the use of the general term "arrangement" in addition to the other regulatory examples reveals that the definition does not only preclude explicit loans where one party has a legal obligation to repay another. Rather, our analysis of the phrase "any other debt arrangement" requires an inquiry beyond just the rights of any one side to the arrangement.

In this case, we start by looking to the language in both the Limited Partnership Agreement and the Confidential Private Offering Memorandum, which the Petitioner presented at the time of filing her petition.[4] Article 9.1 of the partnership agreement provides that at any time on or after the date that a foreign investor's Form I-829 has been adjudicated, the NCE's general partner may, in its sole discretion, notify the investor of its desire to purchase (i.e. redeem) his or her interest. The purchase price will include 100 percent of his or her capital contribution ($500,000) plus all accrued and unpaid preferred returns. Both parties signed this document, agreeing to the arrangement within it. In addition, page 14 of the offering memorandum reiterates that the general partner has the right to purchase each foreign investor's interest after USCIS' adjudication of his or her Form I-829 as part of its exit strategy.[5] A review of the record as a whole reveals an arrangement where, once the conditions on the Petitioner's resident status have been removed, the NCE would likely redeem the Petitioner's original capital contribution and pay him or her a modest "preferred return," similar to an interest payment. Such an arrangement, though not characterized as a loan in the offering

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[3] A call option allows the holder to buy something, especially a security, at a fixed price even if the market rises; it includes the right to require another to sell. *Call Option*, Black's Law Dictionary (10th ed. 2014).

[4] The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

[5] The exit strategy further confirms an intent for the redemption option to remain viable even after a sale of the project, assuring investors that "the acquiring party in any sale transaction involving the Project Company or the Property must agree to assume all of the obligations to the [foreign investors] until such time as all [of them] have received final adjudication of their I-829 Petition."

documents, contains the same elements (principal, interest, repayment period) that one would find in a debt agreement.[6]

The fact that the general partner has the right to purchase or redeem, which the partnership agreement references as a "buyout right," rather than the Petitioner having a right to sell her interest is not determinative. We previously found that a sell option was an impermissible debt arrangement regardless of whether it was enforceable. *Matter of Izummi*, 22 I&N Dec. 169, 184 (Assoc. Comm'r 1998).[7] Considering the partnership agreement and offering memorandum together, we find that the Petitioner did enter into an impermissible debt arrangement with an understanding that the general partner intended to repay the full investment plus preferred returns. This arrangement is not permitted under the broad language at 8 C.F.R. § 204.6(e) (defining "invest").

Finally, the limitation on and subsequent attempts to waive the general partner's buyout right do not change our analysis. The Petitioner notes that the partnership agreement provides that the call option is not available if it would adversely affect the adjudication of the foreign investor's Form I-829. In addition, the general partner has attempted to waive its buyout right. The focus of our inquiry, however, is on the fact the Petitioner entered into such a redemption agreement prior to the end of the conditional residence period, and not the limitations on exercising the option. *See Izummi*, 22 I&N Dec. at 186-87. Any attempt to waive that right after the date of filing would constitute an impermissible material change. *Izummi*, 22 I&N Dec. at 175.[8] Accordingly, these factors do not alter our finding that the Petitioner entered into an impermissible debt arrangement when making her investment.

III. CONCLUSION

The Petitioner has not demonstrated that she has invested in the NCE; rather, she has entered into a debt arrangement with its general partner.

ORDER: The appeal is dismissed.

Cite as *Matter of J-H-*, ID# 548245 (AAO Dec. 19, 2017)

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[6] On a related note, by setting a redemption price, there is no chance that the sales price might be surprisingly high. *Matter of Izummi*, 22 I&N Dec. 169, 186-87 (Assoc. Comm'r 1998).

[7] While that decision involved an agreement whereby the Petitioner had the right to receive the return of all funds contributed, the language of the decision goes beyond those facts, explaining not only that the enforceability of the arrangement is immaterial, but that an investor may not be assured of receiving a certain price. 22 I&N Dec. at 186.

[8] That decision further adopts *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Izummi*, 22 I&N Dec. at 176.