U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-Z-

DATE: JAN. 26, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks EB-5 classification as an immigrant investor based on an investment in Swal, LP, a new commercial enterprise (NCE).[1] *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a 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 the Petitioner did not establish that the funds she remitted to the NCE qualified as capital under the regulation. Specifically, she did not demonstrate that her personal assets secured the loan, the proceeds of which she forwarded to the NCE.

On appeal, the Petitioner provides a brief and cites one of our unpublished decisions, *Matter of Y-Z-*, ID# 18021, 2016 WL 4730297 (AAO Aug. 25, 2016). She maintains that her mother gifted her the apartment that secured the above referenced loan, and therefore the Chief erred in finding that her assets did not secure the loan.

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

I. LAW

A foreign national may be classified under section 203(b)(5)(A) of the Act as an immigrant investor if he or she invests the requisite amount of qualifying capital in a NCE. The NCE can be any lawful business that engages in for-profit activities. The investor must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j).

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[1] The Petitioner made her investment through a U.S. Citizenship and Immigration Services (USCIS)-designated regional center, [redacted] *See* Departments of Commerce. Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610. Her initial filing indicates that the NCE "will fund the acquisition and development of an assisted living facility in [redacted] Georgia."

The regulatory definition of "capital" at 8 C.F.R. § 204.6(e) includes indebtedness, as well as cash, and provides:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness . . . .

The same regulation also defines "invest" to mean "to contribute capital. 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 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) states, 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 . . . . The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> . . . .
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> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

II. ANALYSIS

A. Petitioner's funds do not meet the definition of "capital" set forth in 8 C.F.R. §204.6(e).

The record indicates that in February 2014, the Petitioner remitted $542,314 to the NCE.[2] Her funds derived from the proceeds of a 6,720,000 Renminbi (RMB)[3] loan she obtained from

[2] The minimum investment amount is $500,000 as the Petitioner has documented that the NCE is principally doing business in a targeted employment area. *See* 8 C.F.R. § 204.6(f).

[3] In February 2014, when the bank distributed the loan proceeds to the Petitioner, 6,720,000 RMB was approximately $1,096,390. *See* Currency Converter, https://www.oanda.com/currency/converter/, accessed on December 6, 2017, and incorporated into the record of proceedings.

[redacted] The Personal Loan Contract and the Mortgage Contract list her as the borrower, and her mother, [redacted] as the guarantor, mortgagor, and pledgor. The accompanying Mortgaged Property List states that her mother's apartment located in [redacted] in [redacted] China, serves as the loan security. The record shows that the Petitioner obtained a bank loan to invest in the NCE, but she did not use her assets to secure the loan. Her former counsel's letter, initially submitted in support of the petition, confirms that "[t]he Petitioner's mother . . . allowed the Petitioner and her sister . . . to obtain a mortgage loan against the value of a property she has owned for a number of years." As explained below, the Petitioner has not established that the funds she remitted to the NCE meet the regulatory definition of "capital." *See* 8 C.F.R. § 204.6(e).

The Petitioner's contribution of loan proceedings in the NCE constitutes her investment of indebtedness. Specifically, the investment of proceeds obtained through a third-party loan, as is the case here, is not simply an investment of cash that needs no further examination. In *Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998), we stated that "indebtedness," including proceeds from a third-party bank loan "that is secured by assets of the enterprise is specifically precluded from the definition of 'capital.'" *See also* 8 C.F.R. § 204.6(e). *Soffici* thus illustrates that when a petitioner's funds are derived from proceeds of a third-party loan, financial contribution of them constitutes an investment of indebtedness, not cash, and the investor must therefore show that his or her personal assets sufficiently secure the loan. *Soffici*, 22 I&N Dec. at 162; *see also* 8 C.F.R. § 204.6(e).

Here, the Petitioner has not shown that her personal assets have secured the 6,720,000 RMB loan. Rather, the documents indicate that her mother's apartment has secured the loan. On appeal and in response to the Chief's notice of intent to deny, the Petitioner submits a Gift Agreement and a Personal Statement, purportedly showing that her mother gifted the apartment to her and her sibling in January 2014. The agreement provides that as of January 2014, the Petitioner's mother will have "no right to deal with the property in any form, such as . . . pledging, mortgaging" or "using [it] to offset debts, etc." This evidence – which the Petitioner offered after the Chief informed her that the loan proceeds did not qualify as capital under 8 C.F.R. § 204.6(e) – contradicts other documents in the record that postdate the January 2014 agreement.

For example, a February 2014 Notarial Certificate certifies the authenticity of a House Ownership Certificate confirming that the Petitioner's mother owns the apartment. The House Ownership Certificate instructs that "[i]f the property is transferred," including through a gift, "the owner should go to the local people's government property registration authority with related cards to apply for registration in time." The record lacks government documents verifying that her mother transferred the property to the Petitioner or her sibling. Similarly, a February 2014 Property Appraisal Report states multiple times that the Petitioner's mother, and no one else, owns the apartment.

[4] She transferred approximately half of the loan proceeds to her sibling, [redacted] who is also seeking classification as an immigrant investor.

Moreover, the loan documents from [redacted] executed in February 2014, all verify that the Petitioner's mother owns the apartment. These materials contradict the Petitioner's assertion that she and her sibling became owners of the property in January 2014. The Personal Loan Contract lists the Petitioner's mother as the guarantor, mortgagor, and pledgor of the loan, stating: she "ensure[s] to have the right of ownership or right of disposition of the mortgaged/pleaded property, and ensure[s] that the mortgaged/pledged property does not exist any situations including dispute on ownership, being sealed up and seized etc." The accompanying Mortgage Contract and Mortgage Property List similarly confirm that the Petitioner's mother owns the apartment used to secure the loan. Specifically, under Article 9 of the Mortgage Contract, the Petitioner's mother "declares and promises" that she "enjoys the legal ownership or disposition for the mortgaged property" and "did not conceal any real right for security existed in the mortgaged property to [redacted] up to the signing of the contract" on February 21, 2014.

On appeal, the Petitioner points to her mother's February 24, 2014, letter, which states: "I am now gifting half of the real estate and value to [the Petitioner], so that she may apply for a visa through the EB-5 program." This letter, similar to the January 2014 Gift Agreement referenced above, contradicts other evidence in the record, including the Notarial Certificate, the Property Appraisal Report, the Personal Loan Contract, the Mortgage Contract and the Mortgage Property List. The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As such, the January 2014 agreement and the February 2014 letter present conflicting accounts of the Petitioner's mother's alleged gift, and without corroborating evidence do not suffice to overcome the previously submitted evidence and demonstrate the Petitioner's ownership of the apartment at the time she obtained the 6,720,000 RMB loan.

Additionally, in her appellate brief, the Petitioner implies that her mother has gifted her the loan proceeds. The record, however, does not support this statement, because the bank lent and remitted funds to the Petitioner, not to her mother. The Petitioner has not established that her mother owned those funds such that she could gift them to her.

Finally, our unpublished decision *Y-Z-*, 2016 WL 4730297 at *2, does not support a finding to the contrary. Unpublished agency decisions and legal opinions are not binding, even when they are published in private publications or widely circulated. *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001). Moreover, while the Petitioner asserts on appeal that the facts of *Y-Z-* are "basically identical" and "substantially identical to the facts in this case," they are in fact distinguishable. Specifically, we concluded that the petitioner in *Y-Z-* "jointly own[ed]" the property with her mother that secured the loan. Here, the record is insufficient to demonstrate that the Petitioner owned the apartment, jointly or individually, at the time she obtained the loan.

B. Petitioner's transfer of funds to the NCE does not constitute placing capital at risk as required in 8 C.F.R. §204.6(j)(2).

While the Chief did not discuss this issue in his decision, it appears that the Petitioner has not demonstrated that she has placed at least $500,000 at risk in the NCE. *See* 8 C.F.R. § 204.6(j)(2). 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 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). We stated in *Izummi* that an immigrant investor "cannot enter into a partnership knowing that he [or she] already has a willing buyer in a certain number of years, nor can [the investor] be assured that he [or she] 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.

The documents submitted in this case appear to show that the NCE has guaranteed the Petitioner the return of her investment. For example, page 9 of the Confidential Offering Memorandum indicates that under "a redemption plan," the NCE's general partner "expects [to] redeem [the Petitioner and other investors] by 'buying back' their interests in the [NCE] as soon as legally permissible under EB-5 law . . . ." The document specifies that the Petitioner will receive "[her] interest . . . including principal, any accrued interest, and the investor's share of profits" and references the return as the "redemption payment." Furthermore, Article 15 in the limited partnership agreement appears to give EB-5 investors the right to force the NCE to redeem to their ownership interests. To demonstrate her eligibility for the EB-5 classification, the Petitioner must show that notwithstanding this apparent guaranteed return, she has placed at least $500,000 at risk in the NCE.

III. CONCLUSION

The Petitioner's remittance of the loan proceeds does not constitute her capital investment in the NCE because she did not secure the loan with her personal assets. *See* 8 C.F.R. § 204.6(e), (j)(2). The regulatory definitions of "capital" and "invest" preclude an investment of unsecured indebtedness. 8 C.F.R. § 204.6(e). In addition, it appears that she has not placed the required investment amount at risk in the NCE.

ORDER: The appeal is dismissed.

Cite as *Matter of J-Z-*, ID# 725896 (AAO Jan. 26, 2018)