



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF Y-L-

DATE: FEB. 7, 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 pursuant to the 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 (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the petition, concluding the Petitioner had not established that the funds used for her investment derived from a lawful source.

On appeal, the Petitioner provides a brief and additional exhibits relating to her capital investment funds which were derived from loan proceeds that she received as a gift from her husband.

Upon de novo review, we will withdraw the Chief's decision and remand this matter to her for further proceedings consistent with the following opinion.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. The foreign national may invest "within a regional center," which is an economic unit involved with the promotion of economic growth. 8 C.F.R. § 204.6(e), (m)(7). A petition based on an investment through a regional center must be accompanied by evidence that the investment will create at least 10 full-time positions for qualifying employees either directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii). The investor may satisfy the employment creation requirements by presenting reasonable methodologies, supported by a comprehensive business plan. 8 C.F.R. § 204.6(j)(4)(i)(B), (iii).

An immigrant investor may invest capital within a regional center, which is an economic unit involved with the promotion of economic growth. 8 C.F.R. § 204.6(e) (defining “regional center”); 8 C.F.R. § 204.6(m)(7). The regulatory definition of “capital” at 8 C.F.R. § 204.6(e) includes indebtedness, as well as cash, and it 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 Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital

Also, 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:

. . . .

- (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

The Petitioner bases her eligibility on an investment of \$500,000¹ in [REDACTED] the NCE, a business that lends funds to a ski resort to improve its snow making capabilities and lodging facilities. She acquired the funds to invest when her spouse, [REDACTED] gifted her the proceeds of a loan he had obtained from his wholly-owned business. The Chief determined that the Petitioner had failed to establish that the funds invested had been obtained by lawful means because [REDACTED] secured the loan with his undistributed profits from his company.

On appeal, the Petitioner submits new evidence, including a letter from a legal scholar, demonstrating the lawfulness of shareholder loans in China. She also submits a letter from an accountant, explaining the concept of undistributed profits.

¹ As the NCE is located in a targeted employment area, the required amount of capital is reduced from \$1,000,000 to \$500,000. See 8 C.F.R. § 204.6(f).

The Chief erred in determining that the Petitioner's funds derived from an unlawful source solely because they originated from a shareholder loan secured by an interest in undistributed profits (which the Petitioner's husband then gifted to her). The definition of capital found in 8 C.F.R. § 204.6(e) contains two distinct elements: one identifying specific and acceptable sources of funding and the other broadly excluding anything acquired directly or indirectly from an unlawful source. The Chief found that the loan obtained by [REDACTED] violates both parts of the definition. We disagree, as the record demonstrates that Chinese law does not prohibit shareholder loans like that obtained by the Petitioner's spouse.

Additionally, the Chief did not address how [REDACTED] gift of the loan proceeds to the Petitioner affected the capital analysis. Under 8 C.F.R. § 204.6(e), indebtedness may qualify as capital, if a petitioner assumes personal and primary liability and does not secure the loan with assets belonging to the NCE. The Chief's analysis focused on the nature of the undistributed profits that [REDACTED] used to guarantee the loan. However, this reasoning is inapposite, as the regulations discuss the use of indebtedness obtained by a petitioner. In the instant case, [REDACTED] did not file the petition; rather, he gifted the funds to his wife for her use, free of any obligations to him or any other entity. The Chief should address whether the donation of borrowed funds between spouses satisfies the regulatory definition of capital.

III. CONCLUSION

For the reasons discussed above, we withdraw the Chief's decision and remand the matter for consideration of whether the Petitioner has shown that the funds she invested derived from a lawful source and qualify as capital. If the Chief determines it appropriate, he may issue a request for evidence or notice of intent to deny containing specific findings that will afford the Petitioner the opportunity to present a meaningful response in order to establish eligibility for the immigration benefit sought.

ORDER: The decision of the Chief is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of Y-L-*, ID# 604766 (AAO Feb. 7, 2018)