U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-Z-

DATE: AUG. 14, 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 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. Foreign nationals may invest in a project associated with a United States 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 Form I-526, Immigrant Petition by Alien Entrepreneur, concluding that the record did not establish, as required, that [redacted] met the regulatory requirements of a new commercial enterprise (NCE), and that it would create the number of required jobs. He also found that the Petitioner had not invested the required minimum amount of capital into the NCE, or was not actively in the process of doing so.

On appeal, the Petitioner submits additional evidence and asserts that DSL qualifies as a NCE , that it will create the requisite number of full-time jobs, and that he has invested the full amount of funds into it.

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

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. 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 immigrant investor may invest the required funds directly in an NCE, as the Petitioner has done in this case. 8 C.F.R. § 204.6(j)(4)(iii).

II. ANALYSIS

In February 2015, the Petitioner filed the instant petition based upon his January 2015 investment into the NCE. In November 2016, the Chief issued a request for evidence (RFE) asking the Petitioner to provide additional evidence of the lawfulness of the funds transferred to the NCE, establish the credibility of the business plan, and demonstrate that it would create the required number of jobs. Additionally, the Chief asked the Petitioner to clarify discrepancies in the age and ownership of the NCE between the record and publicly sourced information.

The Chief subsequently issued a notice of intent to deny (NOID) in July 2017, finding that while the Petitioner's response to the RFE addressed his concerns regarding lawful source of funds, it had not overcome the other issues. He further determined that the Following the Petitioner's response to this NOID, the Chief issued the denial on these same grounds.

A. Misrepresentation of a Material Fact

The Chief found that the Petitioner had "misrepresented his business activity as a new commercial enterprise, and that he had actually entered into some undisclosed business relationship with a pre-existing entity." For reasons discussed below, we find that the Chief erred in determining that a NCE had not been formed. However, based upon evidence submitted on appeal, we agree that the Petitioner materially misrepresented the relationship between [redacted] (referred to hereafter as the NCE) and [redacted] the entity of concern to the Chief.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts.[1] An immigration officer will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. United States*, 345 F.3d 683, 694 (9th Cir., 2003). If a petition includes serious errors and discrepancies, however, and the petitioner fails to resolve those errors and discrepancies after an immigration officer provides an opportunity to rebut or explain, then USCIS will conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In his initial petition, the Petitioner asserted that his investment was into a new commercial enterprise resulting from the creation of a new business. In support of this assertion, he included the NCE's Articles of Incorporation with a filing date of November 2014. He also provided an operating agreement in the record identifying him as the Sole Member of the NCE. The operating

[1] The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

agreement did not mention relationships with other entities. The January 2015 business plan also made no explicit reference to the NCE's purchase of [redacted] though it contained ambiguous language relating to "old customers" identified by the Chief in his NOID. In response to the Chief's NOID,[2] the Petitioner reiterated through counsel that the NCE "was formed as a new entity and a new business" rather than through the acquisition of an existing entity. He also provided an August 2017 business plan that made no mention of the NCE'S acquisition of [redacted] Instead, on page 5 of this business plan, the Petitioner again states that the NCE was registered in December 2014, and that he invested $250,000 into the venture at that time. It does not explain that this investment was the purchase of an existing business.

On appeal, however, the Petitioner submits evidence demonstrating that his assertion that the NCE was a newly created business was not in accord with the facts in existence at the time of filing. Instead, he shows that the NCE had purchased an existing business. In the appellate brief, he explains that in December 2014, he had purchased [redacted] for $250,000 "as an accelerated means of running the business." He provides the stock purchase agreement between the parties, and copies of checks written from the NCE's bank account to [redacted] four shareholders. Each check contains a memo of "stock purchase." The record also includes the NCE's January 2015 bank statement showing the $500,000 deposit and the subsequent debit of these checks.[3] The Petitioner then explains that in November 2015, after filing the petition, the NCE sold this common stock back to the original [redacted] shareholders, and that they "remain separate companies and there is no undisclosed relationship between the two entities."[4]

For reasons discussed below, the NCE's purchase of [redacted] is a material fact, relevant to determining whether it qualifies as a new commercial enterprise and establishing its employment creation requirement. The Petitioner's obfuscation of the true relationship between the entities until after the denial of his petition constitutes material misrepresentation.

B. Formation of a New Commercial Enterprise

As mentioned above, the Chief determined that no new commercial enterprise had been formed based upon his belief that the NCE had entered into an undisclosed business relationship with an entity not eligible for a designation.

When a foreign investor purchases a pre-existing company, it is the job creating business that must be examined to determine if a new commercial enterprise has been created. *See Matter of Soffici*, 22

[2] The Chief's RFE did not raise concerns with material misrepresentation by the Petitioner.

[3] These bank statements show a withdrawal of $200,000 paid into a second bank account in the NCE's name. The record includes corresponding bank statements showing this transfer. $49,925.09 remained in the first account after a $74.91 payment for check printing. This accounts for the entire initial investment.

[4] We note that the NCE's sale of [redacted] back to its original shareholders in November 2015 may represent an impermissible material change to the petition. *See Matter of Izummi*, 22 I&N Dec. 169 at 176 (Assoc. Comm'r 1998). The Petitioner must address this issue in any future proceedings. Regardless, for the reasons we discuss in this decision, he has not shown eligibility for the classification.

I&N Dec. 158, 166 (Assoc. Comm'r 1998). The Chief based his determination on information from the DSI website,[5] which relates to a number of affiliated businesses operating under the umbrella. While the website indicates that was formed in 1989, it does not specifically reference incorporation date. However, the articles of incorporation for indicate that the corporation was registered on January 18, 1995,[6] thus satisfying the definition of "new" at 8 C.F.R. § 204.6(e). We therefore withdraw the Chief's finding, as the record establishes the formation of a new commercial enterprise.

C. Investment of Capital

To establish eligibility for this classification, a petitioner must show, among other requirements, that he or she has placed the required amount of capital at risk for the purpose of generating a return. 8 C.F.R. § 204.6(j)(2). Beyond transferring funds to the NCE's account, a petitioner must document the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. *Matter of Ho*, 22 I&N Dec. at 210. *De minimis* actions, such as signing a lease agreement, without more, are insufficient to establish that a petitioner has placed the required amount of capital at risk. *Id.* 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. 8 C.F.R. § 204.6(j)(2).

The Chief, questioning the use of funds, determined that the Petitioner had not or was not in the process of investing the full $500,000 into the NCE, as required.[7] On appeal, the Petitioner asserts that he has invested the required amount of capital into the NCE. As discussed above, the record demonstrates that the Petitioner deposited $500,000 into the NCE's account, and then withdrew $250,000 from the same account for the purchase of [8]

The record also establishes that the NCE moved some of the Petitioner's funds into other accounts for use in operations. On appeal, the Petitioner submits additional evidence of the NCE's business activities, including a leasing agreement for additional warehouse space, bills of lading, shipping invoices, customers' payments for shipping, as well as contracts for additional business lines of credit and logistics software. The record contains sufficient documentation of the NCE's business activities to demonstrate that the Petitioner has placed his capital at risk. 8 C.F.R. § 204.6(j)(2). We therefore withdraw the Chief's finding on this issue.

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[7] The amount of capital necessary to make a qualifying investment in the United States is $1,000,000. When the NCE is located in a targeted employment area, as the Petitioner attests it is here, the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. 8 C.F.R. § 204.6(f).

[8] We note that the record demonstrates that funds received from the sale of back to its original shareholders were deposited into the same account used by the NCE to make the original purchase.

D. Job Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to establish job creation, a petitioner must submit:

> (A) Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.[9]

For a new commercial enterprise not located within a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted. This means that the new commercial enterprise (or its wholly owned subsidiaries) must itself be the employer of the qualifying employees.[10] Additionally, a petitioner who acquires a pre-existing business must show that the investment has created, or at least has a reasonable prospect of creating, 10 full-time positions, in addition to those existing before acquisition. *See Matter of Soffici*, 22 I&N Dec. 158, 167-68. Such a petitioner must, therefore, present evidence concerning the pre-acquisition level of employment, as simply maintaining the pre-acquisition level of employment is not sufficient. *Id.*[11]

At the time of filing, the Petitioner had acquired a pre-existing business to provide the basis for his NCE's operation. He indicated in his appeal brief that he purchased [redacted] "as an accelerated means of running the business." While his January 2015 business plan does not disclose the purchase, it states on page 10 that in the short run, the NCE will focus on "retaining all the old customers, creating great relationship with them, and retain all routine jobs." Furthermore, it states on the same page that beginning in January 2015, the NCE will "hire new operation on a regular base, to take over the current staff's job.... In that case, the company is going to be full of fresh blood while the business is expending [sic]." In light of the evidence provided on appeal regarding the true relationship between the NCE and [redacted] these previously ambiguous statements indicate the NCE's intent to hire

[9] The two-year job creation period described in 8 C.F.R. § 204.6(j)(4)(i)(B) commences six months after the adjudication of the petition. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[10] 8 C.F.R. § 204.6(e). USCIS Policy Memorandum PM-602-0083, *supra*, at 18 ; *6 USCIS Policy Manual, supra*, at G.2(D)(4),

[11] If a petitioner invests into a troubled business, as defined in 8 C.F.R. § 204.6(e), then preserving existing jobs may satisfy the job creation requirement. Here, however, the Petitioner does not claim to have invested in a troubled business.

new personnel to fill already staffed positions as part of its plan to meet the job creation requirement. The business plan predicts creating 12 jobs in total.

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). While he maintains that the NCE and [redacted] are now separate companies, at the time of filing they were not. The January 2015 business plan indicates the NCE intended to replace [redacted] existing staff with "fresh blood," but the record lacks payroll, taxes, and other data to establish how many individuals [redacted] employed at the time of the NCE's purchase. The Petitioner, therefore, has not demonstrated how many full-time positions he must maintain in addition to the ten he must create. Absent that information, we cannot determine that he has met the requirements of 8 C.F.R. § 204.6(j)(4).[12]

On appeal, the Petitioner provides a partial copy of a Form I-9, Employment Eligibility Verification[13], for ten individuals to demonstrate that the NCE already has created at least ten jobs. Only the first page of the form was submitted, and the record lacks payroll, tax documentation, or other evidence to show that they are qualifying employees engaged in full-time employment for the NCE. However, even had such documentation been submitted, the Petitioner would not have established that he has satisfied the job creation requirement.

E. Source of Funds

As an additional matter, while the Chief determined that the Petitioner had established the lawful source of funds used for his investment, we find to the contrary. A petitioner's invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit, for example, foreign business and tax records or documentation identifying any other sources of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195. The record must trace the path of the funds back to a lawful source.[14] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195. Where these records are not available, the petitioner must also demonstrate their lack of availability. *See* 8 C.F.R. §103.2(b)(2)(ii).

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[12] We note that the NCE's sale of [redacted] back to its original shareholders in November 2015 may represent an impermissible material change to the petition. *See Matter of Izummi*, 22 I&N Dec. 169 at 176 (Assoc. Comm'r 1998). The Petitioner must address this issue in any future proceedings. Regardless, for the reasons we discuss in this decision, he has not shown eligibility for the classification.

[13] The Petitioner used the November 14, 2016, version of this form, but only provided the first page, thus failing to reflect the employer's information, attestation, and signature that is found on the second page of the form.

[14] These requirements confirm that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001) (holding that a petitioner had not established the lawful source of her funds because she did not designate the nature of all of her employment or submit five years of tax returns), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

In this case, the Petitioner indicates that the source of his investment into the NCE is a gift from his parents. The Petitioner states that his parents sourced this gift from accumulated savings from earnings. While the record contains income and employment verification for each of his parents, it does not include evidence, such as bank documentation, confirming they gifted these funds from retained earnings.

Additionally, the record lacks translations of the applications to transfer funds to the Petitioner. Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* In this case, only portions of the form are translated. Because the Petitioner did not submit a properly certified English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims. As a result, he has not demonstrated that the funds he transferred to the NCE derived from a lawful source.

III. CONCLUSION

The Petitioner has not demonstrated that his investment is more likely than not to create ten (10) qualifying jobs or the lawful source of his EB-5 funds. Accordingly, he has not established eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-Z-*, ID# 1367856 (AAO Aug. 14, 2018)