U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28838731

Date: DEC. 03, 2024

Appeal of Immigrant Investor Program Office Decision

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) (2018).[1] This employment-based fifth preference (EB-5) classification makes immigrant visas available to noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the U. S. economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish that the Petitioner has invested or is actively in the process of investing the required amount of capital and did not establish the lawful source of the funds that were purportedly invested into the NCE. The Chief also concluded that the Petitioner changed the anticipated source of the funds for the investment and therefore both materially changed the facts of the petition after filing and lacked the present and actual commitment to invest in the NCE. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

A noncitizen may be classified as an immigrant investor if they invest the requisite amount of qualifying capital in an NCE. 8 C.F.R. § 204.6(e) (defining "commercial enterprise"). A noncitizen may invest the required funds directly in an NCE or through a regional center. 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, taken on either directly by the NCE or by one or more separate entities known as the "job

[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed this petition in February 2018, the relevant law then in existence governs this appellate adjudication.

creating entity" (JCE). 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). An investor seeking EB-5 classification must show that their investment will benefit the U. S. economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An NCE may be relied upon by multiple noncitizen investors each seeking EB-5 classification, provided that each investor has invested or is actively in the process of investing the required amount, and that each individual investment results in the creation of at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(g)(1).

A noncitizen must demonstrate that they have placed their own capital at risk in the NCE. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm'r 1998) (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are [their] own"). In addition, the noncitizen must show that their invested capital did 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 evidence such as foreign business and tax records or documentation identifying sources of the capital. *See* 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the path of the funds back to a lawful source.[2] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

The Petitioner filed the instant petition based upon a purported $575,000[3] investment into [redacted] (the NCE), an entity which is associated with the regional center [redacted].[4] Following the issuance of a request for evidence (RFE) and then a notice of intent to deny (NOID), the Chief denied the petition, finding that the Petitioner did not establish that he had placed his capital at risk, did not establish that he had the present and actual commitment to invest, and that he did not establish the lawful source of either the funds he claimed to have invested in the NCE or the source of the non-EB-5 investors' funds. On appeal, the Petitioner submits additional evidence and requests that we reconsider the petition with the additional evidence. As we discuss below, we conclude that the Petitioner has not established error in the Chief's decision on appeal, or eligibility as an immigrant investor pursuant section 203(b)(5) of the Act, and we therefore dismiss the appeal.

The Petitioner asserts that the funds invested into the NCE were obtained as a gift from his mother. Specifically, the Petitioner claims that his mother created a company, along with other founders, in

[2] These requirements "serve a valid government interest; i.e., to confirm that the funds utilized in the [EB-5] program 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, in part, 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).

[3] Because the NCE is located in a targeted employment area, the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2018).

[4] [redacted] is an entity that USCIS previously designated to participate in the EB-5 program as a regional center. A regional center is an economic unit involved with the promotion of economic growth, "including . . . improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (2018).

Mexico in 1981 and that she invested 100,000 Mexican pesos (MXN) for a 10% ownership stake in the company at that time. The Petitioner asserts that his mother's gifted funds were obtained based upon her ownership in, and income derived from, this company.

However, as noted by the Chief, the record lacks evidence regarding the source of the mother's funds, both the funds that were used to invest in the initial formation of the company in 1981 and the funds derived as income from her ownership in the company. Additionally noted by the Chief, the record lacks evidence to establish that the Petitioner's mother was in fact the legal owner of, and therefore had the ability to gift, the funds that were invested in the NCE. Specifically, the record shows that the funds the Petitioner claims to have invested in the NCE were wired directly from the mother's company to the NCE's bank account. Declarations from the Petitioner and his mother, along with a source of funds report prepared by counsel, claim that the funds are "undistributed profits" to which the mother is entitled based upon her ownership in the company. In support of this claim, the Petitioner submitted corporate meeting minutes and contracts regarding shareholder activity of the company, for example documenting the sale of a portion of the ownership in the company to another business and the sale of real estate owned by the company to another entity owned by the Petitioner's parents. The record also contains balance sheets for the company and tax returns.

But the Petitioner's mother and the company in which she is a shareholder are separate legal entities, and profits retained and owned by the company are not the same as capital personally owned by the Petitioner's mother. *See Matter of Soffici*, 22 I&N Dec. at 162. The record lacks specific evidence to demonstrate that the funds wired from the mother's company to the NCE were the property of the mother. Financial documents which show the profits of the company, without evidence that those profits were distributed to the mother as a shareholder, are insufficient to establish that the mother was the legal owner of those profits or a share of them. *See Matter of Ho*, 22 I&N Dec. at 206 (stating that a petitioner must establish that he is the legal owner of the invested capital, and that financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital). In fact, "undistributed profits," which is how the Petitioner characterizes the funds that he claims his mother has gifted him, typically refers to corporate profits that are retained by a company and remain after dividends have been paid to shareholders.[5] Therefore, the record does not contain evidence demonstrating that the Petitioner's mother had lawful ownership of the undistributed profits of the company in which she had an ownership interest.

Although the evidence in the record helps establish the mother's ownership interest in the company and that the company is actively engaged in business, it does not sufficiently demonstrate the income that the Petitioner's mother has received and accrued over time based upon her position as a shareholder, nor that the specific funds wired to the NCE represent income to which the mother was entitled as a shareholder. In addition, the Petitioner also did not provide evidence as to how his mother obtained the 100,000 MXN used in 1981 to initially invest in the formation of the company, or an explanation as to why this evidence is unavailable, although the Chief requested this evidence specifically in both the RFE and the NOID. Therefore, the record does not establish either the lawful

[5] The Merriam-Webster.com Dictionary defines "undivided profits" as earnings of a business that have been retained instead of being distributed to stockholders or owners or designated as surplus. *Undivided profits*, Merriam-Webster.com, www.merriam-webster.com/legal. Additionally, the U.S. Bureau of Economic Analysis states that undistributed profits are "the portion of corporate profits that remains after taxes and dividends have been paid." Bureau of Economic Analysis, U.S. Dep't of Commerce, *Glossary*, Undistributed Profits, https://www.bea.gov/help/glossary/undistributed-profits.

source of the Petitioner's funds nor the path of the funds from the Petitioner to the NCE. *See* 8 C.F.R. § 204.6(j)(2) and (j)(3); *see also Matter of Izummi*, 22 I&N Dec. at 195. Additionally, a petitioner must show that they placed their own capital at risk, i.e., that they were the legal owner of the invested capital. *Matter of Ho*, 22 I&N Dec. at 206; *see also Matter of Soffici*, 22 I&N Dec. at 165 n.3 (interpreting 8 C.F.R. § 204.6(e) as requiring that a petitioner establish the funds invested are their own). The Petitioner has not done so here. Because the record does not demonstrate that his mother was the legal owner of the funds wired to the NCE, it also does not demonstrate that she possessed the ability to gift those funds to him. Therefore, the Petitioner has not established that he invested the required amount of capital or placed capital at risk. *See* 8 C.F.R. § 204.6(e), 204.6(j)(3).

Moreover, though not discussed by the Chief in their decision, we note that in response to the NOID the Petitioner submitted evidence, including a promissory note and a loan agreement, which purports to show that the funds wired to the NCE from the mother's company were a loan from the company to the mother. This evidence would appear to contradict the Petitioner's claim that the funds wired from the mother's company to the NCE are funds that she was entitled to as a shareholder, and instead would go to show that she received the funds as a loan. However, the loan agreement is not signed by any party—either by the Petitioner's mother or any member of the company's board—and is dated after the date of the wire transfers to the NCE. The documents therefore do not sufficiently establish that the company properly executed a loan of these funds to the mother such that she was the legal owner of the funds. The record therefore does not establish that the Petitioner's mother possessed the ability to gift these funds to the Petitioner, either because she was entitled to the funds as a shareholder or because they were the proceeds of a loan. *See* 8 C.F.R. § 204.6(j)(2) and (j)(3); *see Matter of Ho*, 22 I&N Dec. at 206. Although insufficient to establish the existence of a shareholder loan by a preponderance, the evidence nevertheless contributes to the lack of clarity regarding the source of the purported investment funds. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner acknowledges several of the evidentiary deficiencies in the record that were the basis for the petition's denial and states that he is submitting additional evidence on appeal in response. Specifically, the Petitioner submits a new declaration from his mother, a copy of his mother's 2017 federal tax return from Mexico, and an incomplete translation of the tax return.[6] For several reasons, the Petitioner's evidence on appeal is insufficient to overcome the basis for denial.

First, our decision, in most cases, is limited to the evidence in the record at the time of the decision. When new evidence is submitted on appeal, we apply the framework provided in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988) to determine whether we will consider the new evidence in our decision. Under this framework, we consider whether the affected party was put on notice of an evidentiary requirement, whether the affected party was given a reasonable opportunity to provide the evidence, and whether the evidence was reasonably available to the affected party at the time it was supposed to have been submitted. *See id.* Here, the Petitioner was put on notice of the evidentiary requirements both through an RFE and then a NOID, was given a reasonable opportunity to provide the evidence through both of these notices, and has not

[6] The Petitioner also submits on appeal a copy of the company's 2017 tax return from Mexico, which was already submitted and in the record.

demonstrated that any of the new evidence was previously unavailable. Under *Matter of Soriano* and *Matter of Obaigbena*, we therefore need not consider the Petitioner's additional evidence submitted for the first time on appeal.

Second, even were we to consider the Petitioner's evidence submitted on appeal, we would conclude that it does not overcome the basis for denial. Although the Petitioner addresses on appeal some of the evidentiary deficiencies identified in the Chief's decision, the Petitioner does not address one of the most critical deficiencies—namely, that the record does not sufficiently establish that the funds wired to the NCE were his own capital to place at risk. The Petitioner does not acknowledge this issue on appeal, does not identify any error in the Chief's findings regarding this issue, and does not submit additional evidence that would overcome this deficiency.

Finally, the evidence submitted on appeal is not sufficiently responsive even to the evidentiary deficiencies that the Petitioner does acknowledge. For example, the new declaration from the Petitioner's mother states that the funds she initially invested to establish the company in 1981 were from "savings and a family inheritance." However, the letter does not provide any further specifics about the source of these initial investment funds nor does the Petitioner submit documentary evidence to support this claim. Additionally, the mother's 2017 federal tax return for Mexico, submitted on appeal, is not accompanied by a full English translation as required by 8 C.F.R. § 103.2(b)(3).[7] Instead of a complete and accurate translation of the information contained in the four page document, the Petitioner submitted a letter from an individual who states that they are fluent in Spanish and English and who provides only select information from the tax return, such as the mother's gross income, income from the company, and total income taxes paid. Finally, although the Petitioner acknowledges on appeal that one of the denial bases is that the record is lacking his own tax returns, those of his mother, and several years of her company's tax returns, this evidence was not submitted, other than the 2017 tax return submitted without a complete translation. The submission of the Petitioner's personal tax returns filed within five years, as well as other evidence identifying any other sources of capital, such as the company's tax returns and the mother's tax returns, are required by 8 C.F.R. § 204.6(j)(3). Even after responding to an RFE, a NOID, and submitting additional evidence on appeal, the record still lacks this documentation or an explanation of why it is unavailable.

The Petitioner has not identified on appeal any specific erroneous conclusions of law or statements of fact related to the Chief's determination that the Petitioner did not establish the lawful source of the funds invested in the NCE or that placed his own capital at risk, as required by 8 C.F.R. § 204.6(e) and § 204.6(j)(3). Instead, the Petitioner simply requests that we accept the newly submitted evidence and reconsider the Chief's decision. For the reasons discussed above, the newly submitted evidence is insufficient to establish error in the Chief's decision and to establish the Petitioner's eligibility.

III. CONCLUSION

The Petitioner has not established, by a preponderance of the evidence, his eligibility for the classification. Specifically, he has not established that he has invested the requisite amount of capital

[7] Any document containing foreign language submitted to USCIS shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3).

and has placed his own capital at risk. *See* 8 C.F.R. § 204.6(e). Additionally, he has not documented the lawful source of his purported EB-5 investment. *See* 8 C.F.R. § 204.6(j)(3); *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

As the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining issues concerning his eligibility.[8] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible). It is the Petitioner's burden to demonstrate his eligibility for the EB-5 classification. *Matter of Chawathe*, 25 I&N Dec. at 375-76. Here, the Petitioner has not made such a showing.

ORDER: The appeal is dismissed.

[8] The Chief's denial also concluded that the Petitioner did not establish eligibility under 8 C.F.R. § 204.6(g)(1) because the record did not demonstrate the lawful source of funds for all the NCE's non-EB-5 investors, and that the Petitioner materially changed the source of his investment funds after the petition's filing and therefore did not establish eligibility at the time of filing based upon *Matter of Izummi*, 22 I&N Dec. 169. We reserve these and other issues not discussed in this decision for future consideration if the need arises.