U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-Z-

DATE: DEC. 10, 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 pursuant to the 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 (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 first issued a notice of intent to deny (NOID) in April of 2017.[1] She then denied the instant petition on the grounds that the Petitioner had not established that her investment will result in the requisite job creation and that the Petitioner's funds were lawfully sourced.

On appeal, the Petitioner provides additional evidence and a brief. She maintains that the record establishes eligibility for the benefit sought, and that the Chief erred by denying the petition. 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 an 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). An immigrant investor may invest the required funds directly in an NCE or through a regional center, as the Petitioner has done in this case. Regional centers apply for designation as such with the United States 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

[1] The Chief issued this NOID on the grounds that the Petitioner had not established that 1) the full amount of capital had been placed with the entity most responsible for job creation; 2) the NCE is principally doing business in a targeted employment area (TEA); 3) job creation would be sufficient to establish eligibility; and 4) the invested capital was derived from lawful sources.

known as the "job 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).

II. ANALYSIS

The Petitioner filed the instant petition based upon a $500,000 investment in the NCE. As described in the business plan, the NCE will pool up to $125,000,000 in EB-5 capital from 250 foreign national investors. These funds will be provided to the job-creating enterprise (JCE), "to construct, develop, and operate a 200 MW wind turbine farm" in California.

A. Job Creation

To demonstrate eligibility for the EB-5 classification, a petitioner must establish that his or her investment has created or will create at least 10 full-time jobs for qualifying employees. See 8 C.F.R. § 204.6(j). The regulation provides that to establish job creation, a petitioner must submit:

Documentation consisting of photocopies of relevant tax records, Form 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

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.

8 C.F.R. § 204.6(j)(4)(i). A comprehensive business plan "should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). *Ho* concludes, "[m]ost importantly, the business plan must be credible." *Id.* The regulation further states that if a petitioner makes an investment through a USCIS-designated regional center, then he or she must submit:

. . . [E]vidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the [EB-5] Program. Such evidence may be demonstrated by reasonable methodologies . . . .

8 C.F.R. § 204.6(j)(4)(iii); *see also* 8 C.F.R. § 204.6(m)(7)(ii).

In this case, the Petitioner has not submitted a comprehensive and credible business plan, demonstrating that the NCE will, more likely than not, create at least 10 full-time positions for each foreign national investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g) (a petitioner must show "each individual investment results in the creation of at least ten full-time positions for qualifying employees"). The Chief identified a number of deficiencies in the business plan,

including timeliness of job creation, lack of necessary permits and licenses, and a failure to demonstrate the acquisition of funding required to complete the project.

On appeal, the Petitioner contends that the Chief erred in concluding that the required jobs would not be created within two to three years. She states that the Chief "concluded that since three years had already passed between the filing of the I-526 form and the adjudication of it and there was the delay in Project progress, the NCE will have no time to satisfy the job creation requirements within the statutory framework of 2-3 years."

We find the Petitioner misstates the Chief's decision, which indicated that the initial phase of the project took approximately three years to complete, rather than the projected three and a half months. The Chief also noted that the record lacked evidence the NCE had acquired the necessary permits and licenses and that the addendum to the business plan did not anticipate construction beginning until late 2019. These factors led the Chief to conclude that the Petitioner had not established that job creation would occur within a reasonable timeframe. The Petitioner has not submitted evidence on appeal to overcome the Chief's finding.

Next, the Petitioner asserts that the Chief improperly based her decision on facts arising after the filing of the petition. She states "[t]here is a well established doctrine of adjudication that the USCIS cannot consider facts that come into being only subsequent to the filing of a petition" and cites to *Matter of Bardouille*, 18 I&N Dec 114 (BIA 1981). We find the Petitioner misinterprets *Bardouille* and find it inapposite here. That case involved a family-based immigrant petition in which the required familial relationship was not established until after the filing of the petition, resulting in the Board of Immigration Appeals finding that the petition could not be approved because eligibility had to be established at the time of filing. *Id.* at 116. Thus, the case holds that a petitioner may not establish eligibility based on facts arising after filing; it does not prevent USCIS from considering that information. Further, we note that regulations mandate that an applicant or petitioner must maintain eligibility from the time of filing through adjudication, requiring USCIS to consider issues that arise post-filing. 8 C.F.R. § 103.2(b)(1). Therefore, we find the Chief's reliance on information that developed subsequent to the filing of the petition is appropriate.

To demonstrate that the business plan complies with *Matter of Ho*, the Petitioner submits new evidence, including a memorandum from the firm that drafted the business plan and three contracts. Although the Petitioner describes it as an "expert opinion letter", the memorandum itself states "[t]he purpose of this memo is to provide an explanation of the work performed by [redacted] in fulfilling its obligation to exercise due care in a professional and competent manner, according to industry standards." While the unidentified author describes the firm's actions and reiterates its belief that the business plan is compliant, the letter does not address any of the concerns identified in the Chief's denial.

The Petitioner submits the contracts as evidence that the project is progressing. The first document is a letter agreement between the JCE and [redacted] regarding design engineering, design, and procurement required to connect the project to the power grid. This letter is

unexecuted and thus has little probative value; at best, it shows that required work for the project is still in early development.

In her appeal brief, the Petitioner contends that the other two documents relate to a company named She states that she has submitted a development service agreement with which shows they are committed to providing funding of $10.5 million for the project. She also indicates that a purchase agreement with shows they will provide funding to complete all construction and purchase the equipment. However, the documents do not support the Petitioner's assertions. The development services agreement is between the JCE and and appears to involve the JCE assisting in the development of the , rather than the described in the business plan. Similarly, the purchase agreement is between , and with the JCE party only as a guarantor for indemnification. Contrary to the Petitioner's claim that this document demonstrates funding for the project, the purchase agreement discusses the sale of $5 million worth of assets between the two other entities. The evidence submitted on appeal does not support the Petitioner's claims and is insufficient to overcome the significant issues detracting from the credibility of the business plan.

The activities described in the business plan and resulting job creation are predicated upon the successful completion of the construction of a wind farm within a relevant timeline. In the 2015 business plan initially presented by the Petitioner in 2015, project development was to commence in the first quarter of 2014, with construction to start in the first quarter of 2016, and operations following in the third quarter of 2016. However, the 2017 addendum to this business plan shows a significantly modified construction timeline with construction slated to commence in the fourth quarter of 2019 and operations anticipated in the fourth quarter of 2020. The addendum attributed this delay in the start of construction to "unforeseen site feasibility, regulatory, and permitting requirements in the project scoping and land lease campaign phases of pre-construction which were originally expected to take 3.5 and six months respectively." The 2017 addendum further notes that "[t]here has also been a delay regarding the official permit submission process with .." It states that "the Developer has not acquired a significant portion of the project equipment, and so the development team decided not to submit for a construction permit in 2016, but will do so as the Project has progressed since that time." While the addendum notes that the preliminary surveys and studies have been completed, and the record corroborates this, the significant delays call into question the credibility of the remainder of the timeline and projected completion date.

Further, job creation projections provided in the economic analysis assume the completion of the project, but the Petitioner has not shown that the NCE will have sufficient funds to finish the project. According to the business plan, $416,200,000 project cost and will be funded by $100,000,000 in immigrant investor capital, $25,000,000 in developer equity, and $291,200,000 in joint venture capital. USCIS records indicate that the project has thus far attracted ten investors out of the 200 required to complete the project. Neither the business plan nor the supplemental materials demonstrate how the NCE will be able to complete the project in the proposed timeframe if there is a

shortfall of EB-5 capital. Additionally, the record lacks evidence demonstrating that the joint venture capital comprising almost 70 percent of the project funding has been acquired, such as joint venture agreements or other materials.

On appeal, as discussed above, the Petitioner submits a development services agreement and a purchase agreement which she asserts demonstrate new funding for the project will be provided by [redacted] However, as we note above, these documents do not support this claim. The record therefore does not demonstrate that the project is more likely than not able to acquire the funding necessary for completion as envisioned in the business plan. As the majority of the job creation claimed by the Petitioner is driven by the completion of construction of the wind farm, this casts doubt on the credibility of the job creation estimates. The Petitioner therefore has not demonstrated that her investment into the NCE will result in a sufficient number of jobs such that ten could be allocated to immigrant investors as required by 8 C.F.R. § 204.6(g).

B. Source of Funds

The 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. *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] *Ho*, 22 I&N Dec. at 210-11; *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).

The Petitioner claims her investment is sourced from a gift from her spouse, made from his accumulated employment earnings. The record contains an income certification and tax certificates for her spouse. However, as noted by the Chief, the record does not establish he retained a sufficient amount of income to make such a gift. For example, it lacks documentation such as bank records or other evidence, of the accumulation of funds over time. Furthermore, the Chief noted the Petitioner had not documented the path by which funds moved from her spouse through her to the NCE's escrow account.

On appeal, the Petitioner submits no new evidence to overcome the concerns identified in the underlying decision. Rather, she contends that the Chief erred by applying a higher evidentiary standard, and holds that the documents submitted, including the marriage certificate, the spouse's passport, and the money transfer agreement that recorded the gift, establish the lawful source of the funds the Petitioner transferred to the NCE. However, as noted by the Chief, the evidence in the

[2] These requirements confirm that the funds utilized are not of suspect origin. *See 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).

record does not document the path of the funds from their source to the NCE. Therefore, the Petitioner does not demonstrate the full path of funds used in her investment as required. *See Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.8.

III. CONCLUSION

The Petitioner has not satisfied the job creation requirement or established the lawful source of funds used in her investment. She has therefore not established her eligibility for the classification.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-Z-*, ID# 1779738 (AAO Dec. 10, 2018)