U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30851252

Date: DEC. 18, 2024

Appeal of 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) (2019).[1] This 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 United States economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Investor Program Office denied the petition, concluding that the record did not establish that the required amount of capital has been made available to the business most closely responsible for job creation, or that the invested capital was obtained through lawful means. The matter is now before us on appeal. 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 withdraw the Chief's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

A noncitizen may be classified as an immigrant investor if they invest the requisite amount of qualifying capital in an NCE. A noncitizen may invest the required funds directly in an NCE or through a regional center, as the Petitioner has done in this case. 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) (2019).

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

[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 (TEA) 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 her petition in December 2015, the relevant law then in existence governs this appellate adjudication.

(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 asserts eligibility based on an investment in [redacted] pursuant to the Immigrant Investor Program.[3] On page 2 of her petition, the Petitioner indicated that she has invested $500,000[4] into [redacted] the new commercial enterprise (NCE). The NCE proposed to pool up to $6,000,000 from up to 12 immigrant investors to finance construction of a mixed-use facility in [redacted] California.

The Chief issued a notice of intent to deny (NOID) the petition, informing the Petitioner that the initial record was insufficient to establish eligibility for the requested benefit. The Chief noted that the Petitioner's business plan and a Confidential Private Placement Memorandum state that the NCE sought a maximum of 12 EB-5 investors to pool $6 million, but U.S. Citizenship and Immigration Services (USCIS) records indicate that there are 17 active EB-5 investors in the NCE. The Chief stated that, based on the additional EB-5 investors and an infusion of additional EB-5 investor funds beyond the planned $6 million, "it appears that $2.5 million of EB-5 investor capital is not being placed at risk for the purpose of generating a return."

In the NOID, the Chief also informed the Petitioner that the record did not establish the lawful source of all invested capital into the NCE in accordance with 8 C.F.R. § 204.6(g)(i). Specifically, the Chief requested additional evidence to document the lawful source of funds gifted to the Petitioner by her father, as well as the complete path of the investment funds that her father transferred to her and that she transferred to the [redacted] Additionally, the Chief requested additional evidence that $7.8 million in developer equity capital, as described in the Petitioner's business plan, was obtained through lawful means, including from non-EB-5 investors in the NCE.

In response to the NOID, the Petitioner provided a personal statement asserting that, at the time she signed the agreement to invest in the NCE, there were fewer than 12 investors and that she did not have information about any other investors. The Petitioner also provided additional evidence to

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[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] *See* Appropriations Act at § 610.

[4] The Petitioner filed her petition in 2015 and asserted that the NCE would be principally doing business within a TEA. Therefore, the requisite amount of capital investment was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).

document the lawful source and complete path of her investment funds, including evidence of father's employment and income, and financial records documenting the transfer of funds.

Following the Petitioner's response, the Chief concluded that the Petitioner did not establish that the EB-5 capital is being made available to the business(es) most closely responsible for job creation. The Chief also concluded that the Petitioner did not establish that $7.8 million in developer equity capital was obtained through lawful means, including from non-EB-5 investors in the NCE. The Chief's decision does not discuss whether the Petitioner has established the lawful source and complete path of her investment funds as gifted by her father.

If a decision will be adverse to a petitioner and is based on derogatory information considered by USCIS and of which the petitioner is unaware, the petitioner must be advised of this fact and offered an opportunity to rebut the information and present information on its behalf before a decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). Here, the Chief identified information in the record that was adverse to the Petitioner in the NOID. The Chief however did not explain the relevance of the derogatory information to the Petitioner's eligibility. Additionally, in her decision, the Chief does not acknowledge the Petitioner's personal statement addressing these issues, nor does the Chief explain why it was not sufficient to establish eligibility. Further, the Chief does not discuss or analyze the Petitioner's NOID response and additional evidence regarding the lawful source and complete path of her investment funds. Therefore, it is unclear whether the Petitioner has established by a preponderance of the evidence that her investment funds were derived from a lawful source or that the path of the funds traces back to a lawful source.

The Chief's decision did not adequately address the evidence submitted with the petition or in response to the NOID. Per 8 C.F.R. §§ 103.3(a)(1)(i), (iii), USCIS must fully explain the specific reasons for a denial so that the affected party has a fair opportunity to contest the decision and the AAO has an opportunity to conduct a meaningful appellate review. *See Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal).

On appeal, the Petitioner submits a brief and additional evidence, including an updated business plan and economic study, evidence of withdrawal of some EB-5 investors, and tax and financial records for the NCE. The Petitioner states on appeal that, although eight EB-5 investors withdrew their petitions, the project reached completion with an additional construction loan that increased the total investment. However, because the Chief's decision lacks a sufficient analysis of the evidence submitted in response to the NOID, we find it appropriate to remand the matter for the Chief to consider the evidence submitted on appeal and to adjudicate in the first instance any additional issues as may be necessary and appropriate. Accordingly, we will withdraw the Chief's decision and remand the matter for further review and entry of a new decision.

ORDER: The Chief's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.