U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9708973

Date: JAN. 22, 2021

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). 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.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that at the time he filed the petition, the Petitioner did not invest or was not in the process of investing at least $1,000,000[1] in [redacted] the NCE. In addition, the Chief determined that the Petitioner did not document the lawful source of the funds he claimed to have invested in the NCE, and that he had made an impermissible material change to the petition. On appeal, the Petitioner submits a brief and maintains that he has shown his eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish, by a preponderance of the evidence, his eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).[2] 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. *See generally* Section 203(b)(5) of the Act; 8 C.F.R. § 204.6 (2018). An immigrant investor may

[1] In general, the amount of capital necessary to make a qualifying investment in the United States is one million United States dollars ($1,000,000). *See* 8 C.F.R. § 204.6(f)(1).

[2] If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, it has satisfied the preponderance of the evidence standard. *Chawathe*, 25 I&N Dec. at 375-76.

invest the required funds directly in an NCE, as the Petitioner claims to have done in this case, or through a regional center.[3]

II. ANALYSIS

The Petitioner filed the petition on May 4, 2018. According to pages 5 and 6 of the petition, his total investment in the NCE, which is an [redacted] printing" business, is $2,000,000.

A. Investment of Capital

To establish eligibility for the EB-5 classification, a petitioner must show, among other requirements, that he or she has invested or is actively in the process of investing the required amount of capital. 8 C.F.R. § 204.6(j)(2). 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. *Id.* 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 NCE. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998). *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). In addition, a petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time he or she filed the petition and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

In this case, the Petitioner has not established, by a preponderance of the evidence, that at the time he filed the petition, he invested or was actively in the process of investing at least $1,000,000 in the NCE. *See* 8 C.F.R. § 204.6(j); 8 C.F.R. § 103.2(b)(1). As noted, pages 5 and 6 of the petition claim that the Petitioner invested $2,000,000 in the NCE, which purportedly comprised of $500,000 he deposited into the NCE's account, and $1,432,000 worth of assets he purchased for the NCE's use.

As noted in the Chief's request for evidence (RFE), in his initial filing, the Petitioner did not submit any evidence to show that in May 2018, when he filed the petition, he had already invested or was actively in the process of investing at least $1,000,000 in the NCE. *See* 8 C.F.R. § 204.6(f)(1), (j)(2); 8 C.F.R. § 103.2(b)(1). The Chief stated that "[n]o bank statements or transaction records were provided to demonstrate that the EB-5 funds were deposited into NCE's account and then used to purchase the necessary equipment for the NCE." In his RFE response, the Petitioner offered a March 2019 memorandum from his attorney, [redacted] claiming that the Petitioner planned to pay $340,000 to purchase a commercial property in Connecticut for the NCE and that the closing date for the transaction was June 20, 2019.

While the Petitioner provided a copy of the "Commercial Real Estate Purchase Contract," the document was executed on March 26, 2019, after he filed the petition. The contract therefore does

[3] The regulation defines a regional center as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e).

not establish the Petitioner's eligibility for the EB-5 classification at the time he filed the petition. *See* 8 C.F.R. § 103.2(b)(1). In addition, the contract specifies that although the Petitioner had deposited $10,000 with the seller, he (as the buyer) may terminate the contract if he could not obtain a mortgage to facilitate the purchase. Indeed, as of the date of the appeal, October 15, 2019, the Petitioner has not presented any documentation confirming that he had purchased the property for the NCE. The Petitioner explains in his appellate brief that the NCE could not purchase the commercial property because it was "awaiting final clearance for environmental reasons." A claim that there is a delay in the NCE's purchase of a property, without any corroborating evidence, does not demonstrate that at the time the Petitioner filed the petition, he had ready invested or was in the process of investing at least $1,000,000 in the NCE.

The Petitioner also alleges that he had invested or was in the process of investing at least $1,000,000 in the NCE, because he had the necessary funds in his foreign accounts ready to invest. Page 4 of his attorney's March 2019 memorandum indicates that the Petitioner "shall place at the disposition of the NCE personal funds in the approximate amount of $1,114,199 from three bank accounts." The Petitioner's March 26, 2019, statement similarly alleges that "[a]ll monies necessary to realize the investment are already in my bank accounts" and that the "funds will be wholly 'at risk," as they [are] all mine without any note, bond, or other debt obligation." The Petitioner made a similar claim in his response to the Chief's notice of intent to deny the petition (NOID) and on appeal, reiterating that he has committed the necessary funds in the NCE because the funds are in his foreign accounts. The regulation states that "[b]ank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise" is relevant evidence to show an investment in the NCE. 8 C.F.R. § 204.6(j)(2)(i). The Petitioner, however, has not pointed to any legal authority that supports his assertion that monies in his foreign accounts confirm he has invested or was in the process of investing in the NCE.

In response to the Chief's RFE, the Petitioner also submitted bank statements for accounts that belong to a business in the United Arab Emirates (UAE), corporate records of the UAE business, and documentation indicating his ownership and intent to sell the business. None of these documents, however, confirms his "actual commitment of the required amount of capital" to the NCE, as required under 8 C.F.R. § 204.6(j)(2). This evidence relates to the Petitioner's attempts to acquire funds to invest in the NCE. At most, it shows his "intent to invest" or "prospective investment arrangement entailing no present commitment," which is insufficient to satisfy the regulatory requirements under 8 C.F.R. § 204.6(j)(2).

In response to the Chief's NOID, the Petitioner submitted a bank letter, noting that the NCE's account balance was $502,825 as of June 25, 2019, the date of the letter. Neither the bank letter nor other evidence in the record reveals when the NCE received the funds, or the source of the funds. Without additional corroboration on these issues, the Petitioner has not demonstrated that he committed these funds to the NCE when he filed the petition in May 2018. *See* 8 C.F.R. § 204.6(j)(2); 8 C.F.R. § 103.2(b)(1).

Moreover, even assuming the Petitioner had transferred the funds to the NCE before he filed the petition, the amount is below the required amount of capital, $1,000,000. *See* 8 C.F.R. § 204.6(f)(1). Additionally, as explained above, the Petitioner's depositing of funds into the NCE's account, without evidence showing that the NCE had actually undertaken business activities, is insufficient to show that

he had invested or was in the process of investing the funds when he filed the petition. As noted in the Chief's denial of the petition, "[t]he evidence in the record fails to establish the actual undertaking of meaningful concrete business activity and, therefore, fails to establish that the required minimum amount of capital has been placed at risk . . . ." Without evidence of business activity, which could include the NCE's use of the funds, there is no assurance that the deposited funds will in fact be used to carry out the business of the NCE. *See Ho*, 22 I&N Dec. at 210. Also, the Petitioner's *de minimis* actions, such as executing the March 2019 "Commercial Real Estate Purchase Contract," are insufficient to establish that he invested or was in the process of investing the required amount of capital. *Id.*

On appeal, the Petitioner asserts that he had "made numerous trips to Connecticut to oversee the installation of the NCE under prudent business conditions." Claims that he had worked towards setting up the NCE, however, do not confirm his commit of funds. In short, the Petitioner has not demonstrated that at the time he filed the petition, he had invested or was actively in the process of investing at least $1,000,000 in the NCE. *See* 8 C.F.R. § 204.6(f)(1), (j)(2).

B. Lawful Source of Funds

To establish eligibility for the EB-5 classification, a petitioner must show, among other requirements, that his or her 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. 206, 210-11 (Assoc. Comm'r 1998); *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.[4] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

According to the Petitioner, his EB-5 funds derived from the sale of his business in the UAE. Page 6 of the March 2019 memorandum states that the Petitioner sold his "shares in the . . . UAE business . . .[for] AED dirhams 5,000,000, the equivalent of approximately USD $1,356,852." He points to the UAE business bank statement as evidence that it received AED dirhams 3,506,102.25 in January 2019, a purported partial payment of the transaction. This bank deposit, however, occurred more than six months after the Petitioner filed the petition in May 2018, and thus, does not demonstrate the lawful source of the funds he allegedly invested or was in the process of investing in the NCE at the time he filed the petition. *See* 8 C.F.R. § 204.6(e); 8 C.F.R. § 103.2(b)(1).

In addition, while the UAE business purportedly received the funds in its account, the Petitioner has not demonstrated that such funds belonged to him or that he could lawfully use the corporate funds to invest in the NCE. A corporation is a separate and distinct legal entity from its owners or stockholders. Its funds thus do not constitute its owners or shareholders' funds. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, Att'y Gen. 1958); *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r

[4] 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).

1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). Thus, the Petitioner cannot claim a portion of the business's capital as his own, despite his ownership of the company.

Furthermore, as discussed in the Chief's denial of the petition, the Petitioner has not "provide[d] any evidence to demonstrate his salary and earnings to be able to establish the business in Dubai [UAE] initially." Without additional evidence of the lawful source of the funds he used to form the UAE business, the sale of which allegedly financed his investment in the NCE, the Petitioner has not established the lawful source of the funds he claimed to have invested or he purportedly was in the process of investing in the NCE when he filed the petition. *See* 8 C.F.R. § 204.6(e); 8 C.F.R. § 103.2(b)(1); *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

C. Impermissible Material Change

In light of our conclusion that the Petitioner has not demonstrated his eligibility for the EB-5 classification, because he has not shown that at the time he filed the petition, he invested or was in the process of investing at least $1,000,000 in the NCE, and that he has not documented the lawful source of his purported EB-5 capital, we will not address the Chief's remining ground for denial. Should the need arise, we will address whether the Petitioner had made an impermissible change to the petition. *See* 6 *USCIS Policy Manual* G.4(C), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-4 (citing *Izummi*, 22 I&N Dec. at 176; 8 C.F.R. § 103.2(b)(1); *Kungys v. United States*, 485 U.S. 759, 770-72 (1988)).

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not demonstrated, by the preponderance of the evidence, that at the time he filed the petition, he invested or was actively in the process of investing at least $1,000,000 in the NCE, as required under 8 C.F.R. § 204.6(f)(1) and (j)(2); and he has not presented sufficient evidence confirming the lawful source of the funds he purportedly invested in the NCE, as required under 8 C.F.R. § 204.6(e) and (j)(3). *See Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. He has therefore not established his eligibility for the EB-5 classification.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.