U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06367920

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 the Petitioner did not establish eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not document the lawful source of the funds she remitted to [redacted] the NCE, which is affiliated with [redacted] (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.[1] On appeal, the Petitioner submits additional evidence and maintains that she has shown eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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 or through a regional center. Regional centers apply for designation as such with 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 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).

[1] 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).

In addition, a petitioner must show 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.[2] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

The Petitioner indicates she invested $500,000 in the NCE.[3] According to the June 2016 business plan, the NCE seeks to raise up to $10,500,000 in EB-5 funds from 21 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds to finance the construction, development, and operations of three charter schools located throughout the United States. For the reasons discussed below, we find the Petitioner has not demonstrated, by a preponderance of the evidence, that her invested capital did not derive, directly or indirectly, from unlawful means.

In this case, the Petitioner alleges that her EB-5 capital derived from a 3,450,000 renminbi (RMB) mortgage loan secured by real property owned by the Petitioner. The record indicates the loan proceeds were deposited in the Petitioner's Bank [redacted] account on October 31, 2013. According to the "Transfer Statement" dated November 22, 2013, the Petitioner entered into a private currency swap agreement with seven friends to convert the loan proceeds into USD funds. The initial record at the time of filing indicates the Petitioner remitted the loan proceeds to the separate Bank [redacted] accounts belonging to her seven friends and, in return, the seven friends remitted a total of $556,600 to the Petitioner's [redacted] Bank account. The Petitioner then remitted her investment fund to [redacted]'s[4] escrow account on November 25, 2013. She withdrew from the [redacted] project and received a $520,000 refund on December 16, 2015. The Petitioner then remitted her investment fund to the NCE on July 28, 2015.

The Chief issued a notice of intent to deny (NOID) requesting the Petitioner provide documentary evidence to clarify the apparent inconsistencies in the record regarding the Petitioner's claimed employment and income listed in the present petition and her claimed employment and income listed in a non-immigrant visa application filed with the U.S. Department of State (DOS). The Chief also requested additional evidence regarding the alleged currency swap, specifically noting that "[b]ecause [the] Petitioner's funds were routed through third parties and there is insufficient documentation to demonstrate the legitimacy of the [exchangers]' funds, [the] Petitioner bears the burden of

[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] The Petitioner indicates that the NCE is located in a targeted employment area, and that the required amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2).

[4] [redacted] was the NCE for a separate EB-5 project unrelated to the present petition.

demonstrating that the funds transferred by the third parties to [the] Petitioner's [redacted] account... were obtained through lawful means." The Chief's NOID specifically requested, among other things, documentary evidence demonstrating the third-party exchangers conducted currency exchanges or otherwise swapped currency in a lawful manner.

After reviewing the record in its entirety, the Chief denied the petition finding the Petitioner did not resolve the inconsistencies regarding her employment and salary history and did not demonstrate, by a preponderance of the evidence, that the USD funds remitted from the third-party exchangers derived from lawful sources. On appeal, the Petitioner submits additional evidence concerning the lawful source of her funds that she did not present to the Chief such as additional business records and bank statements. The Petitioner, however, had already been put on notice of the required evidence, was given a reasonable opportunity to provide the evidence, and the evidence was reasonably available to the affected party at the time it was supposed to have been submitted.[5] The Petitioner now offers these documents without explaining why they were not available at the time of the NOID but are now available for submission on appeal. These documents were specifically requested by the Chief and the Petitioner did not indicate that the evidence submitted on appeal was not reasonably available at the time of the NOID. We will therefore review the record without considering the additional evidence submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose").

As discussed above, the Petitioner indicated her EB-5 investment capital derived from a 3,450,000 RMB mortgage loan secured by her own real property. However, as noted by the Chief, the record contains inconsistencies as to the Petitioner's claimed employment and salary history that was used to purchase the above real property. When the record includes inconsistent evidence, "it is incumbent upon the [P]etitioner to resolve the inconsistencies by independent objective evidence" and that "[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). According to the Petitioner's statement, dated December 12, 2013, she worked as a manager at [redacted] from May 1996 to present.[6] The Petitioner claimed to have earned approximately 900,000 RMB from May 1996 to the end of 2005 and that approximately 600,000 RMB of those earnings were used to purchase the real property used to fund her EB-5 investment. The Petitioner also claimed to have earned an additional 1,700,000 RMB in this position from 2006 to the time of filing her I-526 petition. U.S. government records indicate the Petitioner filed a U.S. non-immigrant visa application, under penalty of perjury, on June 5, 2011, whereby the Petitioner claimed her current occupation was a "homemaker" and she had no previous employment history to report which is inconsistent with the Petitioner's claimed employment in her initial I-526 petition.

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[5] *See Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) ("It is not sufficient that the evidence physically existed in the world at large; rather, the evidence must have been reasonably available to the petitioner."). *See also INS v. Doherty*, 502 U.S. 314, 324 (1992) (the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence).

[6] The employment certification letter included in the record indicates [redacted] is a company located in [redacted] China.

In her attempt to resolve this inconsistency, the Petitioner offered a new personal statement, dated May 29, 2018, whereby she claimed she moved to Canada in 2006 but continued to work for [redacted] remotely and on a part-time basis but was continuously paid for her work until August 2011. The Petitioner claimed she needed her neighbor's teenage daughter to prepare the Petitioner's visa application and the neighbor's daughter listed "homemaker" as the Petitioner's occupation because she thought the Petitioner did not work. While the Petitioner's visa application does indicate a neighbor assisted her with preparing her visa application, the Petitioner's sole statement is not competent objective evidence that would point to where the truth lies. *See id.* The Petitioner also provided her personal tax records from 2007 to January 2017, however these records are not sufficient to resolve the above discrepancies as they do not show the Petitioner's employment and salary history from May 1996 to 2006 when her income was reportedly used to purchase the real property used to fund her EB-5 investment. We have reviewed all the documents in the record and conclude they do not reconcile the inconsistencies in the record.

On appeal, the Petitioner argues USCIS made a mistake of law because it applied an incorrect, heightened standard of proof when relying on inconsistencies and unsupported assertions in the record. First, the Petitioner claims her initial submission as well as the evidence submitted in response to the NOID satisfy the preponderance of the evidence standard but USCIS violated its policy manual by penalizing "filers for innocent mistakes or misunderstandings of evidentiary requirements." USCIS Policy Memorandum PM-602-0163, *Issuance of Certain RFEs and NOIDs; Revisions to the Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter10.5(b)* 2 (July 13, 2018). We disagree. The inconsistencies in the record consisted of discrepancies between the Petitioner's own testimony given in her initial I-526 petition as well as a separate non-immigrant visa application. The discrepancies are material as they relate to whether or not the Petitioner purchased real property using a lawful source of income. As discussed above, while the Petitioner argues her neighbor daughter's assistance with the visa application led to an innocent mistake, she has not provided competent, objective evidence that would point to where the truth lies. *Ho*, 19 I&N Dec. at 582.

Next, the Petitioner argues USCIS misapplied various precedent decisions by questioning the credibility of the Petitioner's statements. The Petitioner claims USCIS misapplies *Matter of Ho* by disregarding "large chunks of solid evidence every time it perceives some 'inconsistency' on a minor part of related evidence" in this case. The Petitioner also argues USCIS improperly relied on irrelevant factors and inadvertent errors when questioning the Petitioner's credibility. *See Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989); *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000). We disagree. The cases cited in the appeal brief involve findings of fact unsupported by the record or the use of speculation and conjecture to attack the credibility of an asylee in removal proceedings. We find them inapposite, as the instant case involves contradictory testimony provided by the Petitioner in two different visa petitions that directly relate to a material aspect of eligibility. As discussed above, the Petitioner did not submit adequate documentary evidence to clarify the inconsistencies regarding her employment and earned income from May 1996 to 2006 which is material to the Petitioner's claim that her EB-5 investment funds derived from lawful sources. 8 C.F.R. § 204.6(j)(3). When given the opportunity to submit additional information, the Petitioner only provided tax records from 2007 to January 2017 which are not relevant to the time period in question. Here, the Petitioner has not provided competent, objective evidence indicating her statements related to her non-immigrant visa application were irrelevant or inadvertent errors.

Additionally, the Petitioner has failed to demonstrate, by a preponderance of the evidence, the path and lawful source of the funds used in the informal currency swap. The Petitioner acknowledges that China restricts currency exchanges to $50,000 per individual per year. In order to circumvent these restrictions, the Petitioner enlisted the help of seven exchangers[7] who agreed to remit USD funds to the Petitioner's [redacted] Bank account. The record indicates the Petitioner remitted her mortgage loan proceeds to these seven individuals residing in China and received $556,600 in return. The Petitioner provided bank statements showing six of these individuals remitted more than the $50,000 per year currency exchange cap imposed by China. The bank statements show the individuals received the Petitioner's RMB funds and various unexplained USD deposits. However, these bank records do not indicate the origin of the USD funds deposited into the exchangers' bank accounts and therefore do not document the complete path of funds. The record must trace the path of the funds back to a lawful source. *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Additionally, the bank statements do not indicate the source of the USD funds or provide evidence that a lawful currency exchange took place. Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Id.* Here, the Petitioner has not sufficiently documented the path or source of the swapped funds which were later remitted to the Petitioner as her EB-5 investment fund.

On appeal, the Petitioner argues requesting the source of funds from a third party is a mistake of law because it applies an incorrect, heightened standard of proof. First, the Petitioner argues the seven exchangers used government-controlled banks to transfer currency to the Petitioner and therefore satisfied the preponderance of the evidence standard. We disagree. The bank statements provided show each exchanger received unexplained USD deposits in their Bank [redacted] accounts. The Petitioner has not provided any evidence indicating these USD deposits were the result of valid currency exchanges or other bank services that may qualify for deference as to the lawful source of funds. As indicated above, bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Id.* A petitioner must show that his or her invested capital did not derive, directly or indirectly, from unlawful means and must submit evidence such as foreign business and tax records or documentation identifying sources of the capital. *See* 8 C.F.R. § 204.6(e) and 8 C.F.R. § 204.6(j)(3). Here, for the reasons discussed, the Petitioner has not made such a showing.

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not documented the lawful source of her EB-5 capital. *See* 8 C.F.R. § 204.6(e), (j)(3); *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Specifically, she did not sufficiently resolve inconsistencies discovered in the record and has not demonstrated, by a preponderance of the evidence, the lawful source or path of the funds used in an informal currency swap.

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.

[7] In her initial petition, the Petitioner referred to these exchangers as friends.

ORDER: The appeal is dismissed.