U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8556782

Date: JAN. 22, 2021

Motion on Administrative Appeals 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 on multiple grounds. Subsequently, we dismissed the appeal on two grounds.[1] First, we found that the record did not establish, at the time the Petitioner filed the petition in November 2016, she had invested or was actively in the process of investing, or had actually committed at least $500,000[2] of her own funds in [redacted], the NCE, whose general partner is [redacted] (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.[3] *See* 8 C.F.R. § 204.6(g)(1) (2017); *see also* 8 C.F.R. § 204.6(j)(2); *Matter of Soffici*, 22 I&N Dec. 158, 164-65 n.3 (Assoc. Comm'r 1998). Second, we concluded that the Petitioner did not sufficiently document the lawful source of the funds used to acquire a [redacted] property, the sale proceeds from which she purportedly invested in the NCE. *See* 8 C.F.R. § 204.6(e) (defining "capital"), (j)(3); *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).[4]

The Petitioner now files combined motions to reconsider and reopen the proceeding. In support of the motions, the Petitioner submits a brief but does not present additional evidence. Upon review, we will dismiss the combined motions.

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[1] *See Matter of H-Z-* (AAO Sep. 19, 2019).

[2] The Petitioner states 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) (2017).

[3] 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).

[4] In our prior decision dismissing the appeal, we concluded these issues were dispositive of the matter and did not address the Chief's other grounds of denial, which related to impermissible material changes to the petition and the lack of English translations of foreign language documents that met regulatory requirements under 8 C.F.R. § 103.2(b)(3).

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit. We emphasize, however, that motions in general are disfavored, and that the limitations upon them may be strictly enforced. *See generally INS v. Abudu*, 485 U.S. 94, 107-08 (1988).

In addition, the regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

Moreover, to show eligibility for the EB-5 classification, a petitioner must establish, by a preponderance of the evidence,[5] among other requirements, that, at the time he or she filed the petition, he or she "ha[d] invested or [was] actively in the process of investing the required amount of capital" and "ha[d] placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2) (providing that a petitioner "must show actual commitment of the required amount of capital"); *see also* 8 C.F.R. § 103.2(b)(1) (providing that a petitioner "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication"); *Ho*, 22 I&N Dec. at 210-11; *Soffici*, 22 I&N Dec. at 164-65 n.3 (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his [or her] own").

Furthermore, a petitioner must demonstrate that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e) (defining "capital"). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to establish their lawful source. *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. The record must trace the complete path of the funds back to a lawful source.[6] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

We will dismiss the Petitioner's combined motions because they do not include "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R.

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[5] If a petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the "preponderance of the evidence" standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *see also* 6 USCIS Policy Manual G.2(E), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.

[6] 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).

§ 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will dismiss the motions for the reasons set forth below.

As background, the Petitioner filed the petition on November 28, 2016. She claimed on pages 1 and 2 of the petition that she invested $500,000 in the NCE. She stated that her investment funds derived from the sale of joint marital property in [redacted] China. The record shows that she and her spouse paid RMB 775,070 in 2003 to buy this property and sold it for RMB 3,915,000 in June 2015.

According to pages 6 through 9 of the November 2016 business plan, the NCE sought to raise up to $15,000,000 EB-5 funds from 30 foreign national investors to loan to [redacted], the JCE. The JCE planned to use the EB-5 capital and other funds for "the development, construction and subsequent operation of [redacted]" in [redacted] New York. The project was known as the [redacted]

A. Motion to Reopen

As noted, a motion to reopen "must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). On motion, the Petitioner does not present any additional evidence. Instead, she alleges that we erred in our evaluation of the evidence already in the record. We will dismiss her motion to reopen because the motion filing does not state new facts or include affidavits or other documentary evidence in support of the new facts, as required under 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

Similarly, we will dismiss the Petitioner's motion to reconsider the matter. For the reasons we discuss below, we find that our previous decision is not based on an incorrect application of USCIS or Department of Homeland Security (DHS) law or policy, and that the Petitioner's motion filing has not demonstrated that our prior decision is incorrect based on the evidence before us when we issued the decision. *See* 8 C.F.R. § 103.5(a)(3).

On motion, the Petitioner alleges, as she did on appeal, that, at the time she filed the petition in November 2016, she had already invested $500,000 in the NCE. As we discussed in our previous decision, the record does not support this assertion. The record, including bank statements, shows the following transactions and events:

	Date	Amount	Transactions/Events
1	Nov. 15, 2016	3,450,000 RMB (Renminbi)	The *Petitioner* remitted funds to [redacted] whom the Petitioner had referred to as "an agent," "an exchanger," and "a friend."
2	Nov. 16, 2016	$500,000	[redacted] remitted funds to [redacted]
3	Nov. 17, 2016	3,450,000 RMB	[redacted] remitted funds to [redacted]

	Date	Amount	Transactions/Events
4	Nov. 21, 2016	$500,000	[redacted] issued a check, payable to the *Regional Center*, noting on the memo line: "EB5 Fund for [the Petitioner]."
5	Nov. 23, 2016	$500,000	The *Regional Center* issued a check payable to the *NCE*, noting on the memo line: "Capital Contribution to LP – [Petitioner]."
6	Nov. 28, 2016	The Petitioner filed the instant petition.	
7	Apr. 11, 2017	$4,850,000	[redacted][7] remitted funds (equivalent to 33,547,935 RMB according to bank records) to [redacted]
8	Aug. 27, 2017	$500,000	[redacted] issued a check, payable to [redacted], noting on the memo line: "eb-5 Repayment for [Petitioner]."

The record shows that, at the time the Petitioner filed the petition, her funds, which were in RMB, were with [redacted] *See* Events #1 and #3 listed in the chart above. The funds – $500,000 – she claimed to have invested in the NCE on November 22, 2016, were derived from [redacted] *See* Events #2, #4 and #5 listed in the chart above. As noted in our previous decision, [redacted] owns the JCE.[8] The record does not demonstrate that [redacted]'s transfer of U.S. dollars that had originated from a company that owns the JCE constituted the Petitioner's investment in the NCE, when her funds in RMB had remained with another company – [redacted] The evidence does not support a finding that at the time she filed the petition, she had actually committed the required amount of capital in the NCE. *See* 8 C.F.R. § 204.6(j)(2); *see also* 8 C.F.R. § 103.2(b)(1). As such, she has not established her eligibility for the classification.

On motion, as well as on appeal, the Petitioner claims that [redacted] had "advanced" funds to her to invest in the NCE. *See* Event #2 listed in the chart above. The Petitioner, however, has not pointed to any legal authority that supports her claim that a remittance of advanced funds, which she did not own, satisfies the requirements that she had actually committed at least $500,000 of her own funds in the NCE. *See* 8 C.F.R. § 204.6(j)(2); *see also* 8 C.F.R. § 103.2(b)(1); *Ho*, 22 I&N Dec. at 210-11; *Soffici*, 22 I&N Dec. at 164-65 n.3 (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his [or her] own").

Furthermore, in our previous decision, we raised additional concerns surrounding the Petitioner and [redacted]'s purported currency swap. For example, the Petitioner has not sufficiently demonstrated that the $4,850,000 [redacted] sent to [redacted] in April 2017 included the 3,450,000 RMB she had transferred to [redacted] in November 2016. *See* Events #1 and #7 listed in the chart above. We noted in our prior decision that [redacted]'s

[7] According to an organizational chart entitled [redacted]' which the Petitioner offered on appeal, [redacted] is a wholly owned subsidiary of [redacted]

[8] According to pages 18-19 of the NCE's November 2016 business plan, the JCE "is owned by [redacted] and that [redacted] "is owned 99% by [redacted] and 1% by [redacted] In addition, the Petitioner states on page 4 of her appellate brief, that [redacted] who manages and owns [redacted] "is also the Principal of the Regional Center."

bank documents indicated that funds from the Petitioner, through [redacted] had been commingled with sums from many other sources, and thus do not adequately confirm that the Petitioner's funds, in their entirety, were part of [redacted]'s $4,850,000 remittance to [redacted]

Moreover, we noted that according to a May 2017 Certificate of Overseas Investment of Enterprise, [redacted], remitted the large sum to [redacted] to engage in overseas investment. On motion, the Petitioner points to a December 2018 letter from an attorney in China, claiming that the [redacted]'s $4,850,000 remittance was "to assist EB-5 investors" and "in compliance with relevant Chinese laws and rules." These statements, however, are inconsistent with the Certificate of Overseas Investment of Enterprise, which specifies that the company must use the funds "to engage in the overseas investment," and inconsistent with the company's 2017 business license, which states that the business scope is "real estate development; property management; real estate information consulting services." *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (noting that "it is incumbent upon the petitioner 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"). The Petitioner has not sufficiently demonstrated that [redacted] may act as a currency exchanger to facilitate her personal investment in the NCE.

In our previous decision, we noted additional concerns over the path of the Petitioner's purported investment funds. *See Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. We explained that even if we were to accept [redacted]s advanced funds qualified as the Petitioner's EB-5 capital, which we did not, the Petitioner had not presented sufficient documentation verifying how [redacted] acquired the funds for the advancement. As noted in our prior decision, the company's tax documents did not show it had enough cash to make the $500,000 advancement. While the Petitioner asserted on appeal that the funds for this advancement originated from a shareholder equity contribution t[redacted], we also noted in our decision that she failed to offer sufficient evidence confirming this transaction or how the shareholder obtained the funds to finance the purported contribution. On motion, the Petitioner points to the NCE's business plan as supporting evidence. The business plan, however, does not establish how [redacted] acquired the $500,000 it remitted to [redacted] *See* Event #2 listed in the chart above.

Further, while the Petitioner has submitted evidence relating to the purchase and sale of the [redacted] property, she has not presented documentation sufficient to establish that her spouse retained the proceeds from the sale of this property in an amount sufficient to fund her investment into the NCE. On page 7 of the motion brief, the Petitioner indicates that after the sale of their home her spouse invested portions of the loan proceeds and loaned portions of these funds to others. She argues that she has provided documentation sufficient to show the transfer of these funds and the path of these sale proceeds. The record includes her husband's bank account statements reflecting large deposits in November 2016 which were used, in part, to finance the 3,450,000 RMB he remitted to the Petitioner. It also includes his September 2018 statement alleging these deposits were loan repayments. However, the record lacks sufficient evidence showing the actual source of these funds or that he loaned funds from the house sale and that they were subsequently repaid. As we noted in our decision, without additional corroboration of these loans and their repayment, the record is insufficient to demonstrate that the Petitioner's investment derived from the sale of the couple's property or from a lawful source.

Furthermore, the record does not demonstrate the lawful source of funds that the Petitioner and her spouse used to purchase this property. The Petitioner indicates that she and her husband used a combination of savings, earnings, and a 240,000 RMB loan to purchase this property. As we noted in our previous decision, the record contains inconsistent evidence related to her husband's employment and earnings history which the Petitioner attributed to "inaccurate memories."[9] On motion, the Petitioner again explains that inconsistencies in the record relating to her spouse's employment and earnings history resulted from "inaccurate memories." However, as we stated in our previous decision, "[c]laiming "inaccurate memories," without more, does not constitute "competent objective evidence" that resolves these inconsistencies."[10] Here the Petitioner does not provide additional explanations or evidence on motion reconciling the discrepancies in the record nor does she submit additional evidence demonstrating that the property was purchased using lawfully sourced funds. She therefore has not shown that her EB-5 investment, purportedly financed from the sale of this property, derived from lawfully sourced funds.

On motion, the Petitioner argues that in our prior decision we violated the Administrative Procedure Act by "request[ing evidence] of a third-party's source of funds" and we erred in applying an incorrect, heightened standard of proof. The record does not support this contention. As noted in our previous decision, USCIS requires the Petitioner to document the lawful source and path of the funds she claimed to have invested in the NCE in March 2017. Such requirements are specified in the regulation at 8 C.F.R. § 204.6(e) and (j)(2). *See also* 8 C.F.R. § 103.2(b)(1); *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195; 8 C.F.R. § 204.6(g) (providing that "the source(s) of all capital invested [in the NCE must be] identified and [a petitioner must establish] all invested capital has been derived by lawful means").

For the reasons discussed in this decision dismissing the combined motions, as well as in our decision dismissing the appeal, we conclude that the Petitioner has not satisfied the regulatory requirements or established, by a preponderance of the evidence, her eligibility for the classification. Specifically, she has not demonstrated that, at the time she filed the petition, she, more likely than not, had actually committed to the NCE at least $500,000 of her own funds or that she or her spouse had acquired those funds lawfully. *See* 8 C.F.R. § 204.6(j)(2).

III. CONCLUSION

We will dismiss the Petitioner's combined motions under 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will dismiss her motion to reopen the proceeding because her filing does not state new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. In addition, we will dismiss her motion to reconsider the matter because she has not established that we based our prior decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record at the time of the decision.

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[9] We noted, for example, discrepancies between employment start dates and income statements submitted with the initial appeal and those submitted with the Petitioner's response to the Chief's notice of intent to deny.

[10] *See Ho*, 22 I&N Dec. at 591-520 (holding "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.")

ORDER: The motion to open is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.