U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-M-

DATE: JULY 12, 2019

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: 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 classification. Specifically, the Chief determined that the Petitioner did not document the lawful source of the funds he remitted to [redacted], the NCE, which is associated with a United States Citizenship and Immigration Services (USCIS) designated regional center, [redacted] The Chief subsequently denied two combined motions to reconsider and reopen the matter. On appeal, the Petitioner submits additional evidence and maintains that he has shown eligibility for the benefit sought.

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,[1] as the Petitioner has done in this case. 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).

II. ANALYSIS

In January 2015, the Petitioner remitted $500,000 to the NCE's escrow account as his EB-5 capital.[2] According to page 4 of the October 2014 business plan, the NCE intends "to raise up to $49.5 million of EB-5 capital to make a subordinated debt investment in [redacted]," which will "develop, own, and manage [redacted], a 23-story mixed-use development in [redacted] Massachusetts." As we will explain below, we find that the Petitioner has not established, by a preponderance of the evidence,[3] his eligibility for the classification. Specifically, he has not documented the lawful source of his funds.

To be eligible for the EB-5 classification, a petitioner must establish 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, 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 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.

In this case, the Petitioner alleges that his EB-5 capital derived from a 3,200,000 renminbi (RMB) loan he obtained from [redacted]. He presents a "Maximum-Amount Guarantee Contract" that indicates he used four properties to secure the loan. He claims that three properties are owned by him individually or jointly with his spouse, [redacted], and one property is owned jointly by [redacted] and [redacted].[5]

The Petitioner has not documented the lawful source of the funds he remitted to the NCE as EB-5 capital. First, between December 2014 and January 2015, the statement for the account from which he transferred funds to the NCE reveals that he received multiple deposits with "Transaction Details" noted as "[redacted] . . . ." He then remitted these funds to the NCE as his EB-5 investment, and to the NCE's general partner to cover fees and expenses. The Petitioner, however, has not explained the nature of these funds, or submitted documentation showing that these deposits originated from lawful sources.

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[2] 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). He also remitted $45,000 to the NCE's general partner [redacted] to cover fees and expenses.

[3] 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/policymanual/HTML/PolicyManual.html.

[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).

[5] Some documents in the record refer to [redacted] as [redacted]. According to pages 1 and 2 of the January 2017 letter from the Petitioner's counsel, submitted in response to the Chief's notice of intent to deny the petition, [redacted] is [redacted]'s friend, and he owns 50% of the property, while [redacted] owns the remaining 50%.

Second, the documents for the 3,200,000 RMB loan do not confirm that the Petitioner is authorized to use the proceeds to invest in the NCE. Article 7 of the "Comprehensive Credit Line Contract" states that the 3,200,000 RMB loan proceeds "shall be for the purpose of operation turnover," and that the Petitioner "shall not" use the funds "for adventure and equity investment in the aspect of securities and futures, nor other sectors strictly forbidden by state laws and regulations." (Emphasis in Original). In a January 2017 letter, the Petitioner's counsel claims that "the definition of the operation turnover here in the contract is the generalized concept, which means the loan can be used by the borrower for any purpose and anywhere . . . whenever he lacks funds, and needs the money to make a turnover." Counsel further alleges that "[b]ecause the [P]etitioner lacked cash to invest in the EB-5 immigration project at that time, [he] needed cash to make a turnover, he then chose to borrow the money from" the lender. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Such evidence is lacking in the record before us.

Furthermore, the loan documents do not substantiate counsel's statements. As noted, Article 7 of the "Comprehensive Credit Line Contract" provides that the proceeds "shall be for the purpose of operation turnover." (emphasis in original). Similarly, the loan voucher indicates that the "Loan Usage" is "Operating cycle." In addition, [redacted] (a business) is listed as a guarantor in the "Comprehensive Credit Line Contract" and a warrantor in the "Maximum-Amount Guarantee Contract." References to "operation turnover" and "operating cycle," as well as listing a business in the loan and security documents do not support counsel's position that the Petitioner may lawfully use the proceeds for his personal investment. Neither the "Comprehensive Credit Line Contract" nor the "Maximum-Amount Guarantee Contract" includes provisions that permit the Petitioner to use the funds to make a personal investment in a business in the United States. Ultimately, the permissibility of the Petitioner's use of the loaned funds under the terms of the contract is a matter of foreign law. When relying on foreign law to establish eligibility, the application of foreign law is a question of fact which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Here, the unsupported statements from counsel are insufficient to overcome the conflicting documentation in the record and establish, by a preponderance of the evidence, that the loan documents permitted the Petitioner to use the borrowed funds as his personal EB-5 capital.

Third, assuming *arguendo* that the Petitioner may lawfully use the loan proceeds to invest in the NCE, the record is insufficient to confirm the lawful source of the funds he and [redacted] used to purchase the properties that serve as collateral for the loan. *See Izummi*, 22 I&N Dec. at 195 (noting that a petitioner must show that the funds were his own by "document[ing] the path of the funds"). In a February 2015 statement, the Petitioner claims that he and [redacted] purchased the properties with "[their] after-tax salary incomes accumulated for many years." He further alleges that at the time they purchased the four properties, "[he] worked for [redacted] Certified Public Accountants" while his spouse "worked for [redacted]

The record includes four [redacted]" for the properties. These documents show: (1) on April 6, 2003, [redacted] signed a contract to purchase a property

for 343,539 RMB (Property #1);[6] (2) on September 1, 2003, the Petitioner signed a contract to purchase a property for 420,596 RMB (Property #2);[7] (3) on April 6, 2003, [redacted] signed a contract that lists the Petitioner as a buyer and 343,539 RMB as the property price (Property #3);[8] and (4) on July 6, 2012, the Petitioner signed a contract to purchase a property for 843,812 RMB (Property #4).[9]

While these contracts reveal that the Petitioner and/or [redacted] purchased Properties #1-3 in 2003 for a total of 1,107,674 RMB, the Petitioner has not sufficiently documented that he and [redacted] lawfully accumulated this sum as of 2003. Initially, he offered income certificates that list their income from 2000 onward. These documents provide that between 2000 and 2003, he earned 420,000 RMB, while [redacted] earned 400,000 RMB. The total of these amounts is insufficient to finance their purchases of Properties #1-3.

When the Chief explained this deficiency in the notice of intent to deny the petition, the Petitioner presented additional income certificates, alleging that he earned 150,000 RMB between 1998 and 1999, and [redacted] earned 360,000 RMB between 1996 and 1999. He and [redacted] have offered a May 2018 statement, claiming that they did not provide information about their earnings before 2000, because they did not realize that their income from 2000 through 2003 was insufficient to finance the purchases, and that "this miscalculation lead [sic] to the result of [them] only providing income certificates beginning from 2000 of which at that time [they] thought was enough to cover [the purchases] and did not provide [their] income certificates from earlier on."

Even if we were to accept this explanation and the Petitioner's statements relating to his and [redacted]s income in and after 1996, he has not submitted sufficient evidence confirming that they had retained enough earnings to finance the four properties. Evidence of earnings, without additional corroboration demonstrating they had saved their income, is insufficient to establish that they had lawfully accumulated adequate funds to purchase the four properties.

Finally, the record includes inconsistent documentation relating to [redacted]'s employment and income, which the Petitioner claims had partially financed the purchases of the properties that he used to secure the 3,200,000 RMB loan. In support of this petition, the Petitioner has offered documents indicating that [redacted] worked for [redacted], and earned 1,960,000 RMB between 1996 and 2013. However, in a separate, nonimmigrant visa

[6] The Petitioner submitted this document under Appendix 3-2 in his initial filing.

[7] The Petitioner submitted this document under Appendix 5-2 in his initial filing. A 2006 ownership registration certificate (Appendix 5-1) shows that the Petitioner and [redacted] jointly own this property.

[8] The Petitioner submitted this document under Appendix 6-2 in his initial filing. We have concerns over the credibility of the [redacted] for Property #3. While the contract lists the Petitioner as the buyer, [redacted] and [redacted] executed the document. In addition, while the Petitioner claims in his February 2015 statement that he purchased the property for 120,000 [redacted] Article IV of the contract provides that "the total price of this commercial housing is [redacted] 343,539." The Petitioner has presented inconsistent information relating to the buyer(s) and price of this property and should address this issue in any future filing providing independent and objective evidence. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

[9] The Petitioner submitted this document under Appendix 7-2 in his initial filing.

application filed in 2015, [redacted] indicated that she had worked for that company between 2000 and 2008, and then worked for another employer between 2008 and2013.

According to their May 2018 statement, in November 2015, [redacted] went to a travel agency for assistance to complete and submit her nonimmigrant visa application. She claims that while she provided her employment information to the travel agency, it did not include her full employment history with [redacted] on her visa application. Her visa application provides that she worked for the company between 2000 and 2008 (not 1996 through 2013), and that she worked for another business between 2008 and 2013. On appeal, the Petitioner offers an undated statement from the general manager of the travel agency, stating that "th[e] mistake was indeed caused by our company's staff's negligence." He also submits a foreign language document that purportedly lists [redacted]s employment,[10] articles about travel agencies making mistakes on customers' visa applications, and documentation relating to her employment with [redacted]

As the record includes inconsistencies relating to [redacted]'s employment history and earnings, "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, 591-92 (BIA 1988). The last page of [redacted]'s visa application included the question, "Did anyone assist you in filling out this application," to which she answered, "No." This information does not support the Petitioner's assertion that the inconsistencies in [redacted]'s employment history were the result of a travel agency's mistake. While the Petitioner has presented documents confirming [redacted]'s employment with [redacted] inconsistencies relating to her date of employment and amount of compensation remain unresolved.

In his attempt to resolve the inconsistencies, the Petitioner alleges that between 2008 and 2013, [redacted] simultaneously held two jobs, one with [redacted], and the other with [redacted] This statement, however, is inconsistent with information he provides in his February 2015 statement, in which he states that when he purchased Property #4 in 2012, [redacted] worked for [redacted] In the February 2015 statement, he does not make any reference to [redacted]s purported second job. He has not resolved inconsistencies relating to Ms. [redacted] employment or income. *See Ho*, 19 I&N Dec. at 591-92.

Based on the reasons stated above, we conclude that the Petitioner has not documented the lawful source of his 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, he has not demonstrated, by a preponderance of the evidence, the complete path of the funds he remitted to the NCE, that he may lawfully use the proceeds from the 3,200,000 RMB loan to invest in the NCE, or, in the alternative, that he and [redacted] had lawfully accumulated funds to purchase the four properties he had used to secure the loan.

[10] The Petitioner has not submitted a full and complete certified English translation for the foreign language document. *See* 8 C.F.R. § 103.2(b)(3) (providing that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English").

III. CONCLUSION

The Petitioner has not documented the lawful source of the capital he remitted to the NCE. 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.

Cite as *Matter of Y-M-*, ID# 2917640 (AAO July 12, 2019)