U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12754387

Date: JUN. 17, 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 he 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 maintains that he 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 he invested $500,000 in the NCE.[3] According to the business plan, the NCE seeks to raise up to $16,500,000 in EB-5 funds from 33 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds to finance the development of a residential complex in [redacted] Georgia. For the reasons discussed below, we find the Petitioner has not demonstrated, by a preponderance of the evidence, that his invested capital did not derive, directly or indirectly, from unlawful means.

In this case, the Petitioner alleges that his EB-5 capital derived from $500,000 in earnings from a business he owns, [redacted][4] According to the Petitioner, he was an independent distributor for [redacted] and received dividends from [redacted] for selling their products through his business. The record indicates the Petitioner deposited checks received from [redacted] in his [redacted] checking account and moved over $600,000 of these funds to his [redacted] money market account in 2015 and 2016. The Petitioner wired his $500,000 investment fund to the NCE's escrow account on May 12, 2016. The Chief issued a request for evidence (RFE) to clarify whether the Petitioner had lawful immigration status or employment authorization while earning income through his business in the United States. In response, the Petitioner indicated that he did not have lawful immigration status or employment authorization in the United States but his investment funds were nevertheless lawful. The Chief denied the petition finding the Petitioner did not sufficiently demonstrate his employment earnings in the United States derived from lawful means when the Petitioner did not have employment authorization from the U.S. government.

The Petitioner has failed to demonstrate, by a preponderance of the evidence, the lawful source of the funds used as his EB-5 investment fund as the Petitioner has not shown that his employment earnings in the United States were lawfully obtained while the Petitioner did not have any valid employment authorization. The Petitioner acknowledged in an affidavit that he did not have authorization to work in the United States. On appeal, the Petitioner contends that his tax returns and non-salary distributions from [redacted] as an independent contractor were appropriately taxed and obtained through his self-

[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 incorporated in 2011 in Georgia.

owned business. The Petitioner argues that 8 C.F.R. § 204.6(e) defines unlawful means as encompassing only criminal activity and since USCIS has not shown that working without authorization is a criminal activity his business earnings derived from lawful means.

We disagree. The regulation at 8 C.F.R. § 204.6(e) states "[a]ssets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act." While the regulation does not specifically define "unlawful means," a plain reading of the regulation indicates criminal activity is an example of unlawful means and not an exhaustive list or sole definition of unlawful means. Here, the Petitioner has admitted to entering the United States without authorization and not having a valid employment authorization from the U.S. government while earning business income. The Petitioner's tax returns in the record indicate he earned business income and paid self-employment taxes in the United States without employment authorization. His tax returns also show there were no other employees at [redacted] and the award letters from [redacted] recognizing the Petitioner for his sales achievements indicate he took more than a passive investor role as the owner of [redacted] Unauthorized self-employment is "unauthorized employment" within the purview of the Immigration and Nationality Act. *Matter of Tong*, 16 I&N Dec. 593, 595 (BIA 1978). Here, the Petitioner has not shown, by a preponderance of the evidence, his self-employment earnings while in the United States without employment authorization were obtained by lawful means.

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 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.

ORDER: The appeal is dismissed.