U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05192448

Date: MAR. 26, 2020

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 September 2015 business plan, the NCE seeks to raise up to $37,500,000 EB-5 funds from 75 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds for the development of a 325,000 square foot [redacted] space for up to 73 tenants located in [redacted] Texas.

In this case, the Petitioner alleges that her EB-5 capital derived from a 4,000,000 renminbi (RMB) gift from her spouse's uncle, [redacted] The record indicates [redacted] obtained the gift funds from the proceeds of a mortgage loan secured by his real property. The mortgage loan proceeds were deposited in his [redacted] Bank account ending in 3717 on April 10, 2017, [redacted] then declared the funds an irrevocable gift to the Petitioner. According to her Explanation on Currency Exchange document, the Petitioner asked her spouse, [redacted] to request the assistance of his friend, [redacted] to conduct a currency exchange. The initial record at the time of filing indicates [redacted] transferred 4,000,000 RMB to [redacted]'s Bank of [redacted] Branch account ending in 6859 on April 10, 2017, and, in return, [redacted] remitted $580,000 from his [redacted] Bank account in the United States to [redacted]'s Bank [redacted] account ending in 3378 on April 24, 2017. [redacted] then remitted the Petitioner's EB-5 investment fund to the NCE.

The Chief issued a request for evidence (RFE) specifically noting that "[b]ecause [the] Petitioner's funds were routed through a third party exchanger, and there is insufficient documentation to demonstrate the legitimacy of the exchanger and the funds in his [redacted] Bank account, [the] Petitioner bears the burden of demonstrating that the funds transferred by [redacted] to [the] Petitioner were obtained through lawful means." The Chief further requested the Petitioner provide any evidence documenting the path of funds, if any, from [redacted]'s Bank [redacted] account in mainland China to [redacted]'s [redacted] Bank account located in [redacted] CA, as well as "sufficient documentary evidence to support claims of the lawful source(s) and claims of the path(s) of how funds arrived in [redacted]'s] [redacted] Bank account. In her RFE response, the Petitioner offered a Statement of Capital Sources and Exchange signed by [redacted] on October 28, 2018, whereby [redacted] stated

[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(t)(2).

the source of the $580,000 he sent to [redacted] derived from the retained earnings of his employment with [redacted] from March 2001 to March 2013 and [redacted] from April 2013 to March 2017. The Petitioner also provided income certificates from [redacted]'s employers as well as business licenses indicating [redacted]'s employers were located in mainland China.

After reviewing the record in its entirety, the Chief observed that "no evidence was provided to demonstrate how the funds from [redacted]'s] income in China, that were used by [him] to assist [the] Petitioner, were transferred from China to Hong Kong."[4] The Chief denied the petition, concluding the record lacked sufficient evidence to demonstrate the source of the funds in [redacted]'s [redacted] Bank account and therefore the Petitioner did not establish the lawful source or path of her EB-5 investment.

On appeal, the Petitioner submits additional evidence concerning the lawful source of her funds that she did not present to the Chief. The Petitioner offers, among other documents, her updated statement indicating [redacted] exchanged his RMB income into USD with the help of [redacted] and [redacted][5], a couple living and working in Canada, as well as bank statements showing transfers between [redacted] and the [redacted] couple.

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.[6] The Petitioner claimed that she was able to obtain [redacted]'s income statements but the [redacted] couple would not provide their documentation due to their concerns about privacy. The Petitioner also provided a statement from her friend, [redacted] who was not involved in the currency exchange but certified she was aware of the exchange between [redacted] and the [redacted] couple. The record indicates the bank records and income documentation were reasonably available at the time the Petitioner was issued the RFE. 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 RFE and NOID. We will therefore review the record without considering the 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 the $500,000 deposited into the NCE derived from a currency swap of funds provided by [redacted] While the Petitioner claims that the funds in [redacted]'s [redacted] Bank account derived from his retained earnings, the record at the time of decision does not sufficiently document the path or the source of these funds. First, the record at the time of

[4] While the Chief indicated [redacted]'s [redacted] Bank account was located in [redacted], evidence the Petitioner provided on appeal clarifies [redacted]'s [redacted] Bank account is actually located in [redacted], CA.

[5] The Petitioner refers to these individuals as the "[redacted] couple."

[6] 13 *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).

decision did not include documentation of the path of [redacted]'s retained earnings or the funds used in the currency exchange. While [redacted] provided documentation of his employment and earning history, the record indicates his place of employment was in China. The Petitioner claims there are currency transfer restrictions in China but did not document how [redacted] exchanged his retained earnings into USD or transferred the earnings to his [redacted] Bank account. The record must trace the path of the funds back to a lawful source.[7] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Here, the Petitioner has not made such a showing.

Second, the record at the time of decision also did not include sufficient documentation of the lawful source of the funds in [redacted]'s [redacted] Bank account. While the Petitioner provided letters from [redacted]'s former employers, the record does not contain evidence such as bank statements showing [redacted] retained his earnings or transferred the earnings to his [redacted] bank account. Evidence of earnings, without additional corroboration demonstrating [redacted] saved his income, is insufficient to establish his retained earnings were the lawful source of the $580,000 he remitted to [redacted] on behalf of the Petitioner. Additionally, the record at the time of decision does not demonstrate the lawful source of the exchanged funds in [redacted]'s [redacted] Bank account. It includes [redacted]'s bank statements from [redacted] Bank showing he had $580,000 of funds and his statement implying he exchanged his retained earnings into USD, however this is not sufficient to show the lawful source of these funds. 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).

On appeal, the Petitioner argues USCIS's request for third party documentation is a mistake of law because "at the time of [the] Petitioner's filing of this petition, the rules regulations, and practices never required her to prove a third-party money exchanger's source of funds used to transfer the Petitioner's investment funds, all while having the funds still be attributed to the Petitioner's own personal use." The Petitioner's argument is not convincing, as at the time of filing her I-526, she was required to show her invested capital did not derive, directly or indirectly, from unlawful sources and that she 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).

The Petitioner also argues requesting evidence of the path of funds from a third party is a mistake of law because similar cases have been approved in the past, and applies an incorrect, heightened standard of proof. These arguments are also not persuasive as the Petitioner did not provide sufficient documentary evidence showing the path of funds into [redacted]'s account with [redacted] Bank. While the Petitioner documented the source of her gift proceeds, the documentation of the path of these funds stopped when they were deposited in [redacted]'s Bank [redacted] Branch account ending in 6859 on April 10, 2017. When USCIS requested the Petitioner provide additional evidence due to this break in the path of funds, the Petitioner provided evidence that [redacted] had $580,000 in his [redacted] Bank account, but did not sufficiently document the path or source of funds in this account. Without additional corroborating evidence confirming the source(s) of the funds [redacted] remitted to [redacted] on behalf of the Petitioner, she has not established that the funds invested in the

[7] 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).

NCE were derived by lawful means. *See* 8 C.F.R. § 204.6(i)(3). Notwithstanding the Petitioner's statements claiming it is unreasonable to request third party financial documentation, it remains her burden to demonstrate her eligibility for the EB-5 classification, which includes establishing the lawful source of her investment with documents that trace the path of the funds back to a lawful source. *See Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. 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 presented sufficient evidence tracing the path of the funds she received from [redacted] to a lawful source. *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. She has therefore not established by a preponderance of the evidence the lawful source of the funds she claims to have invested in 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.