U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20783956

Date: NOV. 05, 2024

Appeal of Immigrant Investor Program Office Decision

Form I-526, Immigrant Petition 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 noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.[1]

The Chief of the Immigrant Investor Program Office denied the petition on three grounds. The Chief concluded that: 1) the Petitioner did not demonstrate that the job creating entity (JCE) is principally doing business in a targeted employment area (TEA); 2) the Petitioner's funds invested into [redacted] the new commercial enterprise (NCE) was not from lawful source; and 3) there was a material change regarding the source of the Petitioner's investment funds. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

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 (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. *Id.*

[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed his petition on December 4, 2017, the relevant law in existence on that date governs this appellate adjudication.

II. ANALYSIS

The Petitioner initially claimed that his investment funds in the NCE originated from distribution of earnings from his business, [redacted] located in Kenya. The Petitioner and his brother each own 50% of [redacted] having contributed KES 100 from their savings at the time of [redacted] incorporation on [redacted] 1990. With the initial filing, the Petitioner submitted a path of funds analysis report from [redacted] a public accounting and advisory services firm. The [redacted] report pointed to [redacted] financial statements showing that the business had retained reserves of KES 136,404,822 as of August 31, 2017, and claimed that "[a]s a 50% owner of the business, [the Petitioner] was entitled to KES 68,202,411 (USD 659,654) of the retained earnings of the business." The report also explained that the Petitioner was allowed to take his portion of [redacted] earnings at the board meeting held on November 6, 2017. In support, the Petitioner submitted a one-page board resolution dated September 28, 2017, signed by both the Petitioner and his brother. The resolution stated that the Petitioner is allowed to "take distribution of earnings from [redacted] for his immigration status" and "transfer USD 550,000.00 as distribution of earnings to his personal account to invest for the EB5 Programme."

Moreover, the Petitioner submitted his bank statements and "Customer Advice" forms from [redacted] showing that $355,316.95 and $170,550 were deposited on November 8, 2017, then later were transferred out on November 13, 2017. There are also [redacted] bank statements from the NCE showing that these amounts were deposited on November 13, 2017. However, the Petitioner did not provide [redacted] bank statements to demonstrate the complete paths of funds.

In the request of evidence (RFE), the Chief asked the Petitioner to resolve various discrepancies in the record and specifically questioned the credibility of the board resolution document. Although the board resolution is dated September 28, 2017, the language in the resolution indicated that the actual board meeting to allow a distribution of [redacted] earnings to the Petitioner "was held on 6th November 2016 under the Business premises." The Chief noted that the financial statements for the period ending on December 31, 2016, show [redacted] profits to be only KES 116,879,847, and that the Petitioner's 50% share of such earnings would be less than the amount invested to the NCE.

In response to the RFE, the Petitioner acknowledged that [redacted] retained earnings for 2016 were "only KES 111,879,847" and changed how he had thus described the source of funds. Instead of the source of funds being a profit distribution from the business earnings as explained in the board resolution, the Petitioner claimed that it was a loan or advance from the business secured by his real estate properties. With the RFE response, the Petitioner offered a two-page document entitled "Minutes of Special General Meeting of [redacted] Held on 16th October, 2017 at the Registered Office." Unlike the earlier board resolution signed by both the Petitioner and his brother, the meeting minutes were signed by the Petitioner and his wife as "Alternate Director."[2] The meeting minutes stated that there was a loan to the Petitioner "up to USD 500,000" and "his property will continue to be held by the company as a guarantee." The Petitioner also offered a letter dated September 2, 2020, from a certified public accountant stating that the Petitioner's personal properties "has been charged/taken by [redacted] as collateral to secure Ksh.30 million" and attached valuation report of

[2] The same meeting minutes designated the Petitioner's wife as the alternate director "in case any of other directors [are] not present" but it is unclear whether the Petitioner's brother assented to this appointment.

these properties. The Petitioner further submitted transcripts of [redacted] bank statements, with two separate bank account numbers, to show the investment funds came from [redacted] business accounts to the Petitioner's account with [redacted], but these bank statements for [redacted] do not contain the actual bank names.

The Chief denied the petition based on the inconsistencies in the Petitioner's claims and documentation regarding the lawful source of funds. The Chief also found the Petitioner's assertion in response to the RFE that his investment funds stemmed from a loan and not from a distribution from [redacted] as initially claimed, constitute a material change. On appeal, the Petitioner does not directly address the credibility issue with the board resolution or meeting minutes but claims that the Chief "unreasonably question[ed]" the lawful source of funds invested in the business. The Petitioner asserts that the labelling of the funds either as "earnings" or "loans" does not matter as long as the Petitioner demonstrated the lawful source of the funds meets the definition of "cash," citing to *Zhang v. USCIS*, 344 F. Supp. 3d 32, 46-52 (D.D.C. 2018), *aff'd*, 978 F.3d 1314 (D.C. Cir. 2020) (noting that "[t]he buyer's source of cash – whether paycheck, gift, or loan – makes no legal or practical difference"). The Petitioner contends he sufficiently documented the lawful activity of [redacted] business from which the Petitioner derived his source of funds invested into the NCE and the line of inquiry should end here.

Although we acknowledge the Petitioner's loan from his company meets the definition of "cash," the Petitioner is still required to establish the lawful source of the Petitioner's investment. In *Zhang*, the court stated that its "decision does not impact USCIS's ability to investigate whether the petitioner's invested cash loan proceeds were lawfully-acquired" as "the agency may determine whether the loan proceeds were obtained unlawfully or if the cash actually invested did not likely come from the loan itself." *Id.* at 53. The court further concluded that "an investor investing cash loan proceeds must still demonstrate that the proceeds were lawfully acquired." *Id.* Therefore, the Petitioner is required to sufficiently explain or reconcile conflicting and inconsistent information in the record on the issue of lawful source of funds such that we could determine the evidence submitted to be credible or probative.

We agree with the Chief that the Petitioner made an impermissible material change regarding the source of funds. Only after the RFE noted that [redacted] 2016 financial statements did not indicate enough retained earnings to distribute $500,000 to the Petitioner who owns 50% of the business, the Petitioner changed the description of his funds' source to a loan. *See Matter of Izummi*, 22 I&N Dec. at 176 (stating that "a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to [U.S. Citizenship and Immigration Services] requirements"); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (noting that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts). Although the Petitioner minimizes the distinction between "loan" and "distribution of earnings" by characterizing it as "an argument over bookkeeping terminology," it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Petitioner did not merely alter the terminology but materially changed the origin and nature of his investment funds and negated or obscured the facts documented in the evidence, specifically the board resolution letter and [redacted] report.

In addition to the inconsistencies described above, the Chief concluded that the Petitioner did not demonstrate the source of funds used to contribute to [redacted] to start and operate the business back in

1990. Specifically, the Chief stated that the Petitioner has not verified his employment and income when he first made his share of contribution to [redacted] or provide evidence of non-availability of such primary evidence. The Petitioner claims that "preponderance of evidence standard would convince the reasonable person that the Petitioner, based on his education, could raise the start up capital of KES 100 28 years ago" but has not provided the Petitioner's employment and income through corroborating evidence, other than the Petitioner's own affidavit. In the context of unresolved discrepancies in the record, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, the Petitioner contends that adverse credibility determinations must be "tethered to the record," citing to *Matter of Y-I-M*, 27 I&N Dec. 724, 727 (BIA 2019) and that the Chief erred by creating negative inferences when in fact "a reasonable person would find [the Petitioner's] explanation inherently plausible." However, the inconsistencies found by the Chief constitute obvious and apparent observations "tethered" to the record, not mere speculations. Moreover, the court in *Matter of Y-I-M* specifically addresses an adverse credibility determination under section 208(b)(1)(B)(iii) of the Act, related to testimony at a hearing for asylum. Here, the Petitioner has not explained why the standard for that determination related to a different benefit request should be applicable here.

The Petitioner further submits on appeal [redacted] financial statements for 2016, 2017, and 2018, to show that he borrowed funds from [redacted] Although the financial statements ending on December 31, 2017, and December 31, 2018, indicate that the Petitioner had a loan balance of KES 31,023,256 and KES 49,733,155, respectively, the Petitioner has not provided currency exchange documentation establishing the value of these loans in U.S. dollars to verify whether the loan amounts are consistent with the funds invested in the NCE.[3] Therefore, the Petitioner's new evidence does not resolve the deficiencies raised by the Chief or establish that the loans from [redacted] was the source of investment funds.

The Chief also noted the absence of corroborating documentation, such as a loan or security agreement, line items from tax returns, or proof of taxes paid to the Kenyan government. Instead of providing the corroborating documents, the Petitioner asserts that the Chief is preoccupied with "what could have been produced" and criticizes the Chief for not being sensitive to cultural factors as these financial statements, board meetings and resolutions, and the business activities are executed in Kenya and privately held companies like [redacted] handle business dealings informally without proper documentation or recording. However, it is the Petitioner's burden to establish his eligibility for the immigration benefit. To determine whether a petitioner has met his burden under the preponderance standard, we consider the quality (including relevance, probative value, and credibility) of the evidence. *Chawathe*, 25 I&N Dec. at 375-76; *see also Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). As discussed above, we conclude that the evidence lacks material, relevant, or probative value due to unresolved inconsistencies and the Petitioner has not overcome the deficiencies raised by the Chief. Therefore, the petition will remain denied.

[3] It also appears that the loan amounts in these financial statements are less than the claimed investment amount of $500,000. The 2017 loan balance of KES 31,023,256 equals to approximately $297,887 and the 2018 loan balance of KES 49,733,155 equals to approximately $485,511 (U.S. dollar amounts are calculated using the exchange rate for December 31, 2017, and December 31, 2018, at www.oanda.com/currency/converter, accessed on October 28, 2024).

The Chief further determined that the Petitioner has not sufficiently demonstrated the complete path of funds and the transfer of funds from [redacted] banks to the Petitioner's bank was lawful. However, in light of our discussion on the source of funds, we will reserve the path of funds issue and the Petitioner's other appellate arguments on the remaining eligibility issues for future consideration should the need arise. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

As the record does not sufficiently demonstrate that the funds invested by the Petitioner were obtained through lawful means, the Petitioner has not shown by a preponderance of the evidence that he is eligible for the immigrant investor visa classification.

ORDER: The appeal is dismissed.