U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-L-

DATE: OCT. 24, 2017

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 section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference 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 record did not establish, as required, that the Petitioner had placed the necessary capital at risk or that the NCE would create the necessary number of jobs.

On appeal, the Petitioner submits additional materials and asserts that her investment was placed at risk for the benefit of the NCE and that her business plan was sufficiently comprehensive. We subsequently issued a notice of intent to dismiss and request for evidence (NOID/RFE), affording her 87 days in which to respond. More than 87 days have passed and we have not received a response.

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 an NCE. The commercial enterprise can be any lawful business that engages in for-profit activities. 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.

Regarding job creation, a petitioner who has not created the necessary number of jobs must submit a "comprehensive business plan" that demonstrates that due to the nature and projected size of the NCE, the need for not fewer than 10 full-time qualifying employees per EB-5 investor will result within the next two years. 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B). A comprehensive business plan as contemplated by the regulations "should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). *Ho* concludes that "[m]ost importantly, the business plan must be credible." *Id.*

Further, the petition must be accompanied by evidence that the petitioner has 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). Beyond transferring the funds to the NCE's account, a petitioner must document the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. *Ho*, 22 I&N Dec. at 210.

Finally, the invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e) (defining capital). To show the lawful source of the capital, a petitioner must submit, for example, foreign business and tax records or documentation identifying any other source(s) of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds, by themselves, are insufficient. *Ho*, 22 I&N Dec. at 210-11; *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. *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.[1]

II. ANALYSIS

The Petitioner and two co-investors each invested $500,000[2] into the NCE, which proposed to issue a five-year loan to a wholly-owned subsidiary, The loan would finance the development of a European-style coffeehouse and espresso bar. The NCE's general partners are and The latest business plan projected 36 direct jobs, 12 for each of the investors.[3] The Chief noted that, according to the (PPM), page 20, the NCE would pay $500,000 to for various services and determined that the full amount of the $1,500,000 would not be placed at risk with the NCE for purposes of job creation. The Chief acknowledged her subsequent assertion that this payment would be made from profits, but found that, because it postdated the filing of the petition, it was not evidence of eligibility at that time. Finally, the Chief noted discrepancies relating to the use of funds between the PPM and the business plans and concluded that the plans were not sufficiently credible to demonstrate the necessary job creation. On appeal, the Petitioner contends that the $500,000 fee was for important services and negotiated between sophisticated and wealthy parties. She further affirms that the differences in projected costs are to be expected when a "large sized restaurant is to be built up from the scratch."

In our NOID/RFE, we noted that in of this year, due to a complaint from the Securities and Exchange Commission (SEC), a federal judge enjoined the NCE and its management from participating in the offer or sale of EB-5 related securities, placed the NCE's assets in receivership,

[1] These requirements confirm that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (holding that a petitioner had not established the lawful source of her funds because she did not designate the nature of all of her employment or submit five years of tax returns).

[2] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f).

[3] The record contains two plans, the first of which anticipated 37 eventual positions at the NCE.

and froze its bank accounts. *SEC v.* [redacted] 2017). Accordingly, we questioned whether the business plan was still viable. In addition, we expressed reservations about the credibility that the restaurant would accommodate 16 workers at one time as projected. Specifically, we noted that an Application for Determination of "Public Convenience or Necessity" Alcohol Sales for another [redacted] of similar size advised it would have no more than eight employees on site at any one time. Further, we requested any evidence of business activity as of the petition's filing date. Finally, we noted some anomalies in the path of funds invited the Petitioner to document that they eventually reached the NCE or were more likely than not to do so. As we have not received a response to our NOID/RFE, we will make our decision on the record before us. [4]

A. Job Creation

The complaint by the SEC, which alleged ongoing securities violations and potential dissipation, concealment, or transfer of assets resulted in an injunction and asset freeze. The record does not demonstrate that the NCE will be able to create jobs in accordance with the business plan without the ability to transfer funds to effectuate its planned operations. Moreover, given that another [redacted] of comparable size filed an alcohol license application specifying that it had no more than eight employees at the location at any one time, the business plan projection of 16 employees working a single shift is not persuasive. Thus, the record does not demonstrate that the business plan is credible and that the Petitioner's investment is likely to create at least 10 jobs per investor.

B. At-Risk Investment Available to the NCE

The payment of $500,000 in fees by the NCE to the general partner raises the question as to whether those funds will be made available to the entity most responsible for the job creation, the wholly-owned subsidiary. *Izummi*, 22 I&N Dec. at 179. The Petitioner does not credibly affirm that the NCE will pay that amount out of profits. According to the PPM, page 27, the NCE must retain 90 percent of all profits in a segregated investment account for the purpose of refunding the capital to the investors after five years. The pro forma statements in the first business plan reflect that 10 percent of the aggregate net income over the first five years is only $136,743.70. Similarly unpersuasive is the Petitioner's assertion that we should not question the fees charged by Caffe Primo International, Inc., because they were negotiated by sophisticated businessmen and wealthy investors. It is the Petitioner's burden to establish eligibility and a broad request that we not look at the reasonableness of the fees without specifically addressing our concerns will not satisfy that burden.

Moreover, the NCE had not engaged in any meaningful business activity as of the date of filing. The record lacks evidence of business activities at that time, other than the execution of a lease. That *de*

[4] Where a petitioner fails to respond to a NOID or RFE we may deny the benefit request as abandoned, based on the record, or for both reasons. 8 C.F.R. § 103.2(b)(13).

minimis activity is insufficient to demonstrate that any invested funds were at risk. *Ho*, 22 I&N Dec. at 210.

Finally, the record lacks evidence that any of the Petitioner's funds were deposited with the NCE or irrevocably committed to it. The PPM and Subscription Agreement reference an escrow account. The record also contains an Escrow Agreement with the name of the agent blank in the body of the document although the name of a firm, appears at the end. The agreement references an attorney trust account in which the subscriber will deposit funds that the agent shall release to the NCE upon receipt of instructions to do so. As noted in our NOID/RFE, the record shows multiple unexplained transfers of funds back and forth between the Petitioner and the checking accounts.[5]

The transactions between those accounts are not consistent with an escrow or attorney trust account subject to the terms of the Escrow Agreement, which requires the agent to hold the funds until instructed to release them to the NCE. The record does not document that the firm transferred funds to the NCE or an attorney trust account. As the Petitioner has not traced the path of her funds to the NCE or an escrow or attorney trust account obligated to only release those funds to the NCE, she has not placed those funds at risk for the purpose of job creation.

III. CONCLUSION

The Petitioner has not established that the NCE will create the necessary jobs or that she has placed her funds at risk for the purpose of job creation.

ORDER: The appeal is dismissed.

Cite as *Matter of X-L-*, ID# 374121 (AAO Oct. 24, 2017)

[5] On the same day in late January 2015, the Petitioner made three transfers to the checking account ending in totaling $499,922. That same day, the firm transferred $450,000 from the account to another checking account. In February 2015, transferred $325,000 from the account back to the Petitioner. Then, in March 2015, the Petitioner transferred the $325,000 back to who transferred that same amount to another internal checking account.