U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-T-

DATE: SEPT. 5, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks EB-5 classification as an immigrant investor based on a $500,000[1] investment in [redacted] a new commercial enterprise (NCE). *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). He made his investment through a U.S. Citizenship and Immigration Services (USCIS)-designated regional center, [redacted].[2] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, Pub. L. No. 102-395, 106 Stat. 1828 (Oct. 6, 1992). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in an 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 Form I-526, Immigrant Petition by Alien Entrepreneur, concluding that the Petitioner did not establish his eligibility. We dismissed the appeal. Specifically, we determined that the Petitioner did not satisfy the job creation requirements or document the lawful source of the funds he remitted to the NCE.

The Petitioner now files a motion to reopen the matter. On motion, he submits additional evidence and maintains that he has established his eligibility for the classification.

Upon review, we will deny the motion.

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[1] 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).

[2] In his appellate brief, the Petitioner acknowledged that in March 2017, the Securities and Exchange Commission filed a complaint against [redacted] and associated individuals and business entities, alleging misappropriation of EB-5 funds. The proceedings remain pending before the U.S. District Court for the Western District of Washington. Our adjudications of his appeal as well as motion to reopen the matter do not rely on allegations specified in the complaint.

I. LAW

A motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

In addition, the regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

II. BACKGROUND

According to the NCE's business plan and other supporting documents, the NCE would pool up to $15,500,000 EB-5 capital from 31 foreign national investors to make loans to the job creating entity (JCE), to construct a 100,000 square foot facility in Washington, to be used for manufacturing, wholesale trade, or distribution. The project was known as The NCE's Limited Liability Agreement indicated that would be "comprised of the proposed building." The agreement explained that the EB-5 funds would be used to "finance and develop the [b]uilding and including, but not limited to, refurbish, remodel, and refinance the existing buildings on site as well as extend/upgrade industrial infrastructure to the site."

In his response to the Chief's notice of intent to deny (NOID) the petition, the Petitioner acknowledged that the NCE did not attract 31 foreign national investors. Instead, he claimed to be one of 20 investors "who pooled their funds to expand the from three to four buildings by improving the park, refinancing buildings 1, 2, and 3, and adding a 100,000 square foot building 4." He also indicated that as of March 2017, the project was "fully complete" and "all jobs were created." On appeal, he maintained that upon the approval of his petition, his "funds [would] move from escrow into the JCE" and would "in fact just be paid from the NCE to the JCE who has already borne all the costs" of the project. On motion, however, he alleges that the NCE did not hold his remittance in an escrow account. Rather, he insists that the NCE had already loaned the funds to the JCE, which had used them to complete the project.[3]

[3] The motion brief includes typographic errors, including referring to the Petitioner as "."

III. ANALYSIS

We will deny the Petitioner's motion to reopen the matter because it lacks "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C); 8 C.F.R. § 103.5(a)(4). Regardless, for the reasons we discuss below, the Petitioner has not shown his eligibility.

A. Job Creation

In our prior decision, we determined that the Petitioner did not satisfy the job creation requirements.[4] Specifically, he did not show that the NCE made his remittance available to the JCE for job creation purposes, the funds qualified as bridge financing, or the business plan credibly illustrated that the amount had created or would create at least 10 full-time jobs for qualifying employees. *See* 8 C.F.R. § 204.6(j)(4); *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998); USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 15-16 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; 6 *USCIS Policy Manual* G.2(D)(1), https://www.uscis.gov/policymanual/HTML/PolicyManual.html; *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

On motion, the Petitioner alleges that the NCE had made his remittance available to the JCE, claiming under section B of his brief that he "did not put her [*sic*] investment into [the NCE's] escrow [account] and instead invested the funds directly into the NCE who spent the funds on the project which is now complete." As supporting evidence, he offers a declaration from his counsel and a letter from the president of [redacted] as well as documents that are already in the record. His counsel declared under penalty of perjury that he "was completely unaware that [the Petitioner] had not used an escrow account," and "had mistakenly stated that his funds were being held in an escrow account when they had in fact already been invested directly into [the NCE]." The president of [redacted] stated that "the project was completed using [the Petitioner's] funds which were loaned from [the NCE] to [the JCE]."

The record, however, does not support the Petitioner's assertions that the NCE had loaned his remittance to the JCE to complete the project. Rather, the Petitioner has submitted multiple documents indicating that the NCE would not accept him as a member or release his remittance from an escrow account to the JCE until USCIS approves his petition. For example, according to page 9 of the NCE's Confidential Program Description Memorandum,[5] "[o]nce the [investor] receives its

[4] We also concluded that the petition was not approvable based on USCIS deference policy or a judicially devised doctrine, such as *res judicata* or equitable estoppel. On motion, the Petitioner has not specifically challenged these findings.

[5] While the Petitioner did not sign the NCE's Confidential Program Description Memorandum, he did sign the Subscription Agreement, page 1 of which provides that he received a number of documents – including the Confidential Program Description Memorandum – for review.

[*sic*] USCIS I-526 approval and the funds are released from Escrow to the [NCE], the [investor] becomes an official Member of the [NCE] and its [*sic*] funds are placed in the pool for [the NCE's] use." In addition, page 14 of the NCE's Limited Liability Company Agreement, which both the Petitioner and [redacted] signed, states: "[t]he capital account of the [investor] in the [NCE] shall not be established nor the [investor]'s interest in the [NCE] legally acknowledged until said [investor] has received approval from USCIS of its [*sic*] I-526 petition." Similarly, the NCE's Subscription Agreement that the Petitioner and [redacted] executed references an "escrow" account, and notes that the investor "shall not be a Member of the [NCE] until the Investor's I-526 approval has been received" and that "[i]n the event the Immigrant Investor does not receive I-526 approval . . . , the Investor's funds less applicable expenses shall be refunded." *The NCE's Subscription Agreement*, 1-2, 6. These documents do not support the Petitioner's claim that the NCE would have accepted him as a member or released his remittance from an escrow account to the JCE to complete the project before USCIS approved his petition.

Moreover, regardless of whether the Petitioner's funds were placed into an escrow account, he does not demonstrate that the NCE loaned the funds to the JCE. While the bank documents confirm that in January 2013, he remitted $501,500 to the NCE, they do not show that the NCE loaned at least $500,000 of the funds to the JCE. The record lacks evidence documenting that capital the JCE received from the NCE came from the Petitioner. On motion, the Petitioner references "[t]he JCE['s] $15.5 million deed of trust in favor of the NCE," but the NCE and the JCE executed the deed in February 2012, nearly one year before the Petitioner's January 2013 remittance. In addition, according to the NCE's business plan, a $15.5 million loan would have required investments from 31 investors. The Petitioner, however, claimed that it only attracted 20 investors. The deed of trust thus does not illustrate what amount, if any, the NCE had loaned to the JCE to complete the project or whether those funds included at least $500,000 of his remittance.

Furthermore, the motion brief states under section B that the NCE has not yet loaned the Petitioner's remittance to the JCE. Specifically, it provides that "the totality of the circumstances here support the conclusion that the loan *will* be made." (Emphasis added.) Similarly, the motion brief indicates that the JCE completed the project without the Petitioner's remittance, noting: "[i]n this case . . . the JCE could afford to bear the costs and get the project completed with only ten investors," excluding the Petitioner.[6] In light of the above, the record, including documentation the Petitioner submits on motion, does not establish that the NCE has made his remittance available to the JCE for job creation purposes, irrespective of whether the funds were ever in an escrow account. *See Izummi*, 22 I&N Dec. at 179.

Additionally, on motion, the Petitioner has not specifically challenged other findings in our previous decision, including his remittance did not qualify as bridge financing and the NCE's business plan, along with documents on job creation projections, did not credibly show that the funds had created or would create at least 10 full-time positions for qualifying employees. *See* USCIS Policy

[6] On appeal, the Petitioner indicated that USCIS approved the petitions of 10 of the NCE's 20 foreign national investors, and that the NCE loaned the capital from these 10 investors to the JCE.

Memorandum PM-602-0083, *supra*, at 15-16; 6 *USCIS Policy Manual*, *supra*, at G.2(D)(1); 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Our reasoning and conclusions as relating to these issues therefore remain unchanged.

B. Lawful Source of Funds

The evidence that the Petitioner offers on motion does not establish the lawful source of the funds he remitted to the NCE in January 2013. *See* 8 C.F.R. § 204.6(e) (defining "capital"); *see also Izummi*, 22 I&N Dec. at 195 (noting that the record must trace the path of the funds back to a lawful source). The Petitioner claimed that his funds derived from stock earnings and employment bonuses. He offered a certificate from an investment firm in China, stating that he earned 3,879,916 Renminbi (RMB) between 2006 and 2010, and an income statement from his former employer, providing that he had received 1,400,000 RMB in bonuses at an unspecific time. As discussed in our decision, however, he had not submitted sufficient documentation, such as bank records, demonstrating his actual receipt of these sums or that he retained the funds in his account(s) until he remitted them from China to the United States, and ultimately to the NCE. In addition, although the record contained a photocopy of his bank passbook, we noted that it was illegible in some sections, and that he had not presented a complete English translation of this foreign language document. *See* 8 C.F.R. § 103.2(b)(3).

On motion, the Petitioner has not offered evidence confirming his actual receipt of investment earnings or bonuses. Instead, he resubmits documents that are already in the record, including the certificate from the investment firm, and the translation summary of his bank passbook that does not reveal all of his banking activities or account balances during the relevant period. The documentation he presents on motion does not address the deficiencies we discussed in our previous decision, and thus is insufficient to overcome our finding.

IV. CONCLUSION

The Petitioner's motion to reopen the matter will be denied because it does not meet the motion filing requirements. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C); 8 C.F.R. § 103.5(a)(4). In addition, the motion will be denied because it does not present documentary evidence of new facts or establish the Petitioner's eligibility for the classification. *See* 8 C.F.R. § 103.5(a)(2).

ORDER: The motion to reopen is denied.

Cite as *Matter of Y-T-*, ID# 1509551 (AAO Sept. 5, 2018)