U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 05802820

DATE: SEPT. 24, 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 that she had invested or was in the process of investing at least $500,000[1] in [redacted] the NCE, whose general partner is [redacted] (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.[2] In addition, the Chief determined that the Petitioner did not demonstrate the lawful source of the funds that she allegedly acquired to invest in the NCE; that she made impermissible material changes to her petition; and that the English translations of the foreign language documents in the record did not comport with regulatory requirements. 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

[1] The Petitioner states 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).

[2] 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).

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).

## II. ANALYSIS

The Petitioner indicates that she had invested $500,000 in the NCE. According to pages 6 through 9 of the November 2016 business plan, the NCE seeks to raise up to $15,000,000 EB-5 funds from 30 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds for "the development, construction and subsequent operation of [redacted] in [redacted], New York. Upon construction completion, the project, known as the [redacted] Project, will be a '[redacted] building" with '[redacted] residential units" and '[redacted] retail space."

The record includes a copy of a wire transfer form, dated March 24, 2017, indicating that [redacted] whom the Petitioner has referred to as "an agent," "an exchanger," and "a friend," remitted $500,000 to the Regional Center. In a March 2017 letter, the Regional Center acknowledged the receipt of the funds as the Petitioner's EB-5 investment in the [redacted] Project. The Petitioner has submitted a copy of another check, dated March 27, 2017, showing that the Regional Center issued a check to the NCE, noting "Capital Contribution to LP – [the Petitioner]" on the memo line. As we will explain below, we find that the Petitioner has not established, by a preponderance of the evidence,[3] her eligibility for the classification.

### A. Investment of Funds

To establish eligibility for the EB-5 classification, a petitioner must demonstrate, among other requirements, that he or she "has invested or is actively in the process of investing the required amount" in a NCE that "results in the creation of at least ten full-time positions for qualifying employees." 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j). The regulation explains:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, 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. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital . . . .

[3] If a petitioner submits relevant probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the "preponderance of the evidence" standard of proof *Matter of Chawathe*, 25 T&N Dec. 369, 376 (AAO 2010); *see also 6 USCIS Policy Manual* G.2(E), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

8 C.F.R. § 204.6(j)(2); *see also Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I&N Dec. 158, 164-65 n.3 (Assoc. Comm'r 1998) (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his [or her] own").

In addition, the regulation provides the following relevant definitions:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness . . . .
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> . . .
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> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(e).

The record shows that on March 20, 2017, the Petitioner remitted 3,500,000 Renminbi (RMB) to [redacted]'s [redacted] Bank account ending in 8529, and that on March 24, 2017, [redacted] remitted $500,000 from her [redacted] Bank account ending in 3657 to the Regional Center. Upon reviewing the evidence, the Chief issued a request for evidence (RFE) stating, in part, that the Petitioner had engaged in a currency exchange or swap, but did not present sufficient documents showing the source or path of funds for the 3,500,000 RMB she remitted to [redacted] or the $500,000 [redacted] sent to the Regional Center.

In her RFE response, the Petitioner revealed additional information about the transaction that purportedly involved an advancement of funds and a repayment that occurred months after [redacted] remitted the funds to the Regional Center. Specifically, the Petitioner claimed that after she sent 3,500,000 RMB to [redacted]'s [redacted] Bank account, [redacted] remitted $500,000 to [redacted]'s [redacted] account ending in 3657 and [redacted] then sent the $500,000 from [redacted] to the Regional Center as the Petitioner's EB-5 investment. The Petitioner alleged that [redacted] had advanced the EB-5 capital to her through [redacted]

The Petitioner then claimed that she had repaid [redacted]'s advancement of funds approximately five months after she had allegedly invested in the NCE. She stated that after [redacted] received 3,500,000 RMB from her, [redacted] remitted the sum to a business in China, [redacted],[4] on March 21, 2017. She alleged that subsequent to the filing of her petition on April 13, 2017, [redacted] sent $4,850,000 (equivalent to 33,547,935 RMB according to bank records) to [redacted], a business in the United States. She maintained

[4] According to an organizational chart entitled [redacted]," which the Petitioner offers on appeal, [redacted] is a wholly owned subsidiary of [redacted]

that the transfer included the 3,500,000 RMB she had remitted to [redacted] in March 2017. The Petitioner offered a copy of a check, dated August 28, 2017, indicating that [redacted] issued the $500,000 check to [redacted] with the annotation "eb-5 Repayment for [the Petitioner]" on the memo line.

On appeal, the Petitioner acknowledges that she had engaged in a currency swap with [redacted] but maintains that the transaction establishes her EB-5 eligibility because "[t]he funds were transferred into Regional Center's bank account after reaching Exchanger [redacted] and [redacted]'s bank accounts." We disagree. Rather, based on the documentation in the record, we conclude that the Petitioner has not demonstrated that she had actually committed at least $500,000 of her own funds in the NCE, as required under the regulation. *See* 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j); 8 C.F.R. § 103.2(b)(1); *Soffici*, 22 I&N Dec. at 164-65 n.3.

In this case, the Petitioner claims that the $4,850,000 [redacted] sent to [redacted] in April 2017 included the 3,500,000 RMB she had transferred to [redacted] in March 2017, however the record is insufficient to confirm this allegation. On appeal, she presents several screenshots of a bank's website, purportedly showing [redacted]'s banking activities between November 2016 and June 2017. The screenshots indicate that the funds from the Petitioner, through [redacted], had been commingled with sums from many other sources. This evidence, thus, does not adequately confirm that the Petitioner's funds, in their entirety, were part of [redacted]'s $4,850,000 remittance to [redacted] Additionally, according to a May 2017 Certificate of Overseas Investment of Enterprise, [redacted] remitted the large sum to [redacted] to engage in overseas investment. This document does not support the Petitioner's statement that the purpose of the remittance was to facilitate her personal investment in the NCE.

Furthermore, the record does not establish the Petitioner's ownership of the $500,000 that [redacted] purportedly advanced, through [redacted], to the Petitioner to use as her EB-5 capital. *See Soffici*, 22 I&N Dec. at 164-65 n.3. The Petitioner has not submitted evidence of any contract or other agreement with [redacted] permitting her use of their funds.

Based on the reasons we have discussed above, the Petitioner has not established, by a preponderance of the evidence, she had actually committed at least $500,000 of her own funds in the NCE. 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j)(2); *Soffici*, 22 I&N Dec. at 164-65 n.3.

B. Lawful Source of Funds

Even if we were to accept the advancement from [redacted] as the Petitioner's own EB-5 capital, which we do not, the Petitioner has not presented sufficient documentation verifying how [redacted] acquired the funds for the advancement. On appeal, the Petitioner submits additional evidence concerning the source of the funds [redacted] advanced to [redacted] on behalf of the Petitioner. The Petitioner offers, among other documents, the company's tax returns and a Unit Purchase and Sale Agreement, dated February 6, 2017, indicating [redacted] would receive $800,000 in exchange for a 40% ownership interest in the company.

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.[5] Specifically, the Chief's RFE notice indicated the Petitioner had not demonstrated the source of the funds in [redacted]'s [redacted] Bank account and requested the Petitioner provide documentation of other sources of capital such as corporate, partnership, or other business entity annual reports and/or audited financial statements/records. The Petitioner did not claim that [redacted] was unable to provide the requested documentation at the time the Chief requested. 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. 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").

The record, at the time of the Chief's decision, only included [redacted]'s bank statements for the month of March 2017. The record did not contain evidence demonstrating how [redacted] had obtained the funds to finance the purported advancement to [redacted]. *See* 8 C.F.R. § 204.6(g)(1) (requiring a petitioner to identify all sources of capital invested and demonstrate they have been derived by lawful means); *see also* 8 C.F.R. § 204.6(j)(3)(iii). We therefore conclude the Petitioner has not shown, by a preponderance of the evidence, the lawful source of the funds [redacted] advanced to the NCE as the Petitioner's EB-5 capital investment.

In addition, the Petitioner has not sufficiently documented the lawful source of the $4,850,000 [redacted], remitted to [redacted], which she claims financed her EB-5 investment. To be eligible for the EB-5 classification, a petitioner must establish, among other requirements, that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e) (defining capital). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *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.[6] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

The record before us does not confirm that [redacted], was authorized to act as a currency exchanger for multiple EB-5 investors. The Petitioner alleges that [redacted] was lawfully permitted to exchange and transfer $4,850,000 to [redacted] because it was licensed to conduct such an exchange. On appeal, the Petitioner submits a legal opinion letter from an attorney licensed to practice law in China which states that after reviewing the

[5] *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).

[6] 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).

Certificate of Overseas Investment of Enterprise[7] and the financial transaction records, it is the attorney's opinion that [redacted]s exchange and transfer of $4,850,000 into [redacted] in order to assist EB-5 investors was lawful.

The submitted Certificate of Overseas Investment of Enterprise does not substantiate the claims made in the foreign legal opinion letter. The certificate indicates [redacted], was permitted to make a single foreign investment of $4,850,000 into [redacted] The certificate also indicates that [redacted] would be the final destination for the invested funds. These provisions do not support the Petitioner's assertions that [redacted] was permitted to exchange funds on behalf of multiple EB-5 investors and transmit the $4,850,000 through [redacted]s bank accounts on into the NCE. Here, the record indicates the $4,850,000 was not actually an investment in [redacted] but rather an informal currency exchange for a pool of individuals seeking to invest in the NCE. When relying on foreign law to establish eligibility, the application of foreign law is a question of fact which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Here, the assertions made in the legal opinion letter are not sufficient to overcome the conflicting documentation in the record and establish, by a preponderance of the evidence, that the Certificate of Overseas Investment of Enterprise permitted [redacted], to exchange and transmit the Petitioner's funds through [redacted]

Based on the reasons we have discussed above, the Petitioner has not documented the lawful source of the $500,000 [redacted] remitted to the NCE in March 2017, which she alleges financed her EB-5 investment. *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.

C. Other Issues

In the decision denying the petition, the Chief also concluded that the Petitioner had made impermissible material changes to her petition and had not submitted English translations of foreign language documents that comported with regulatory requirements. In light of our discussion and reasons above in support of our dismissal of the Petitioner's appeal, we will not address these two additional grounds of denial.

## III. CONCLUSION

The Petitioner has not demonstrated, by a preponderance of the evidence that she "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of her own funds in the NCE. 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j)(2); *Soffici*, 22 I&N Dec. at 164-65 n.3. In addition, she has not documented the lawful source of the funds [redacted] remitted to the NCE on behalf of the Petitioner.

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.

[7] Found at RFE Exhibit B3.

**ORDER:** The appeal is dismissed.